

To: New Jersey Law Revision Commission
From: Rachael Segal, Legislative Law Clerk
Re: Sentencing of Graves Act Offenders - N.J.S. 2C:43–6.2 – (*State v. Nance*)
Date: July 9, 2018

MEMORANDUM

Executive Summary

In *State v. Nance*,¹ the New Jersey Supreme Court considered whether a sentencing court has discretion to sentence a defendant convicted of a Graves Act offense to probation without the prosecutor’s consent or the assignment judge’s approval, if either N.J.S. 2C:44–1(d) or section 6 suggests that a Graves Act waiver exempts a defendant convicted of a first or second-degree offense from the presumption of incarceration, and whether defendants in these consolidated cases were eligible for resentencing.

Background

The Graves Act² “imposes a mandatory minimum term of incarceration on an offender ‘who uses or possesses a firearm while committing, attempting to commit, or fleeing after the commission of certain designated crimes.’”³ An amendment, section 6.2, “authorizes a prosecutor to move before the assignment judge for a waiver of the Graves Act’s mandatory minimum terms of incarceration for certain first-time offenders”⁴ and “empowers the assignment judge⁵ . . . to ‘place the defendant on probation ... or reduce to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole.’”⁶ A 2008 Directive regarding the application of section 6.2 was intended to “ensure statewide uniformity in the

¹ *State v. Nance*, 228 N.J. 378 (2017).

² N.J.S. 2C:43–6(c).

³ *Nance*, 228 N.J. at 385 (quoting *State v. Robinson*, 217 N.J. 594, 607 (2014) (quoting *State v. Stewart*, 96 N.J. 596, 601 (1984))); *State v. Des Marets*, 92 N.J. 62, 68 (1983) (“Enacted in 1981 as ‘a direct response to a substantial increase in violent crime in New Jersey,’ the Graves Act is intended “to ensure incarceration for those who arm themselves before going forth to commit crimes.”); *Id.* at 64 n1 (“As amended, the statute applies to a defendant who is convicted of one of the offenses enumerated in the statute “who, while in the course of committing or attempting to commit the crime, including the immediate flight therefrom, used or was in possession of a firearm as defined in [N.J.S.A.] 2C:39–1(f).”).

⁴ *Nance*, 228 N.J. at 385; and see Cannel, *New Jersey Criminal Code Annotated*, comment 1 on N.J.S. 2C:43–6.2 (2017) (Section 6.2 “was originally proposed as part of an amendment to [N.J.S.A.] 2C:43–6[c] which would, overall, have increased mandatory minimum terms,” but the “amendment increasing terms was not enacted.”); and see *Senate Law, Pub. Safety & Def. Comm., Statement to S. No. 827* (1988); see also *Assembly Judiciary Comm., Statement to S. No. 827* (1988) (It was enacted to authorize “the reduction of sentence for a person convicted of a first offense under the Graves Act if the prosecutor makes a motion before the assignment judge stating that the interests of justice would not be served by the imposition of the mandatory minimum term under the Graves Act.”)

⁵ *Nance*, 228 N.J. at 385 (noting the assignment judge may delegate his or her authority to the presiding judge of the Criminal Part and “permits a sentencing judge to refer a case to the assignment judge for a waiver of the Graves Act penalties”).

⁶ *Id.* at 385.

enforcement of the Graves Act, and to provide reasonable incentives for guilty defendants to accept responsibility by pleading guilty in a timely manner so as to maximize deterrence by ensuring the swift imposition of punishment.”⁷

In three separate cases, defendants Nance, Willis–Bolton, and Williams reached plea agreements with the State, where “the State agreed to recommend a sentence of incarceration with a one-year period of parole ineligibility.”⁸ In each case, the assignment judge approved a Graves Act waiver under section 6.2, and each “defendant was sentenced to a term of incarceration with a one-year period of parole ineligibility rather than a probationary term.”⁹ The defendants each appealed, and their appeals were consolidated.¹⁰ The Appellate Division vacated the sentences and remanded, holding that sentencing judges have “the authority to choose between the alternative sentences permitted by section 6.2 and that, because the sentencing judges in these cases improperly concluded that they lacked the discretion to diverge from the sentence recommended by the State in accordance with the plea agreement, defendants should be resentenced.”¹¹ The New Jersey Supreme Court granted the State’s petitions in the consolidated cases.¹²

The State argued that the Appellate Division undermined the established procedural framework for Graves Act waivers when it concluded that a sentencing court has discretion to sentence a defendant to probation without the prosecutor’s consent or the assignment judge’s approval.¹³ The State contended that counsel and judges have operated on the assumption that there is a presumption against probationary sentences in Graves Act cases, and noted that the Legislature has not amended section 6.2 to eliminate that presumption.¹⁴ The State asserted that the presumption of incarceration prescribed by N.J.S. 2C:44–1(d), which was not addressed by the Appellate Division, governs the sentencing of Willis–Bolton and Williams because they were convicted of second-degree crimes.¹⁵

Defendants argued that a prosecutor does not have to recommend a probationary term for a first-time Graves Act offender in order for the sentencing court to impose such a term,¹⁶ suggesting instead that section 6.2 grants a sentencing judge expansive discretion when sentencing

⁷ *Nance*, 228 N.J. at 392 (citing Attorney General, *Directive to Ensure Uniform Enforcement of the “Graves Act”* (Oct. 23, 2008, as corrected Nov. 25, 2008) (Directive) at 4 (instructing prosecutors to “tender an initial standardized plea offer pursuant to [section 6.2] that will in typical cases result in the defendant serving a State Prison term of one year without possibility of parole” and charging prosecutors to apply a “strict presumption” against a probationary sentence. Also instructing “prosecutors to seek a stay of, and appeal, a defendant’s sentence if a court rejects the prosecutor’s recommendation by waiving or reducing a mandatory minimum term or imposing a probationary term.”)

⁸ *Id.* at 385.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Nance*, 228 N.J. at 385; and see *State v. Nance*, 442 N.J. Super. 268, 270 (App. Div. 2015).

¹² *Nance*, 228 N.J. at 389.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

such an offender.¹⁷ Defendant Willis–Bolton also argued that the presumption of incarceration in N.J.S. 2C:44–1(d) does not supersede section 6.2’s mandate that, if a waiver is granted, the sentencing court must sentence a first-time Graves Act offender to either incarceration with a one-year parole disqualifier or to a probationary sentence.¹⁸

The Supreme Court determined that the “plain language of section 6.2 reveals a clear legislative intent that the assignment judge, not the sentencing judge,¹⁹ has the statutory authority to make such a determination”²⁰ of “plac[ing] the defendant on probation pursuant to [N.J.S.A. 2C:43–2(b)(2)] or reduc[ing] to one year the mandatory minimum term of imprisonment during which the defendant will be ineligible for parole.”²¹ The Court found that “nothing in the statute suggests that the assignment judge or designee must accept the prosecutor’s recommendation.”²²

The Court next looked at an additional issue that was not addressed by the Appellate Division, specifically the role of the presumption of incarceration prescribed by N.J.S. 2C:44–1(d) in the assignment judge’s sentencing determination under section 6.2 for a first-degree or second-degree Graves Act offender²³

N.J.S. 2C:44–1(d) provides that the “court shall deal with a person who has been convicted of a crime of the first or second degree ... by imposing a sentence of imprisonment unless, having regard to the character and condition of the defendant, it is of the opinion that his imprisonment would be a serious injustice which overrides the need to deter such conduct by others.”²⁴ As the Court explained, since the “serious injustice” exception applies only in “truly extraordinary and unanticipated circumstances”, N.J.S. 2C:44–1(d) “imposes a high standard that must be overcome before a first or second-degree offender may be sentenced to a non-custodial term.”²⁵ Suggesting that the related statutes should be read *in pari materia*, the Court construed section 6.2 and N.J.S. 2C:44–1(d) in a manner that harmonizes the two components of the Code’s sentencing scheme.²⁶

The Court determined that “[n]othing in either provision suggests that a Graves Act waiver exempts a defendant convicted of a first or second-degree offense from the presumption of

¹⁷ *Id.*

¹⁸ *Nance*, 228 N.J. at 398.

¹⁹ *Id.* at 395 (“Nor does section 6.2 permit the sentencing court to choose between the statutory alternatives; the authority to elect one of the two sentences set forth in section 6.2 is clearly vested in the assignment judge.”); and see N.J.S. 2C:43–6.2.

²⁰ *Nance*, 228 N.J. at 394; N.J.S. 2C:43–6.2.

²¹ *Nance*, 228 N.J. at 394; N.J.S. 2C:43–6.2.

²² *Nance*, 228 N.J. at 394.

²³ *Id.* at 395.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; and see *Id.* (citing *Nw. Bergen Cty. Utils. Auth. v. Donovan*, 226 N.J. 432, 444 (2016) (quoting *Saint Peter’s Univ. Hosp. v. Lacy*, 185 N.J. 1, 15 (2005) (internal quotation marks omitted)) (“When, as here, two related statutes are relevant to the disposition of a matter, they “should be read *in pari materia* and construed together as a unitary and harmonious whole.”)

incarceration.”²⁷ N.J.S. 2C:44–1(d) governs the sentencing of any “person who has been convicted of a crime of the first or second degree.”²⁸ Since “one of the two alternative sentences permitted under section 6.2 . . . constitutes a “sentence of imprisonment” within the meaning of N.J.S. 2C:44–1(d), an assignment judge or designee may comply with both of the relevant statutory provision sat the same time²⁹ “[b]y considering the standard of *N.J.S.A. 2C:44–1(d)* in deciding between the probationary and custodial sentences authorized by section 6.2.”³⁰

The Court reversed the Appellate Panel’s ruling that “sentencing judges have the discretion to elect one of the two alternative sentences set forth in section 6.2” and determined that only assignment judges have this discretion.³¹ Additionally, the Court found that “the assignment judge or designee must consider the presumption of incarceration prescribed by N.J.S. 2C:44–1(d) when he or she chooses between the probationary and one-year mandatory minimum sentences envisioned by section 6.2.”³²

Conclusion

Staff seeks authorization to conduct additional research and outreach regarding this issue in order to determine whether amending N.J.S. 2C:43–6.2 in some limited way could aid in the interpretation of the provision and potentially obviate the need for additional litigation regarding the issue addressed in *State v. Nance*.

²⁷ *Id.* at 396.

²⁸ *Id.* (“with no exception for defendants who are granted a Graves Act waiver.”); and see N.J.S. 2C:44–1(d).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 385; and see N.J.S. 2C:43–6.2.

³² *Nance*, 228 N.J. at 386.