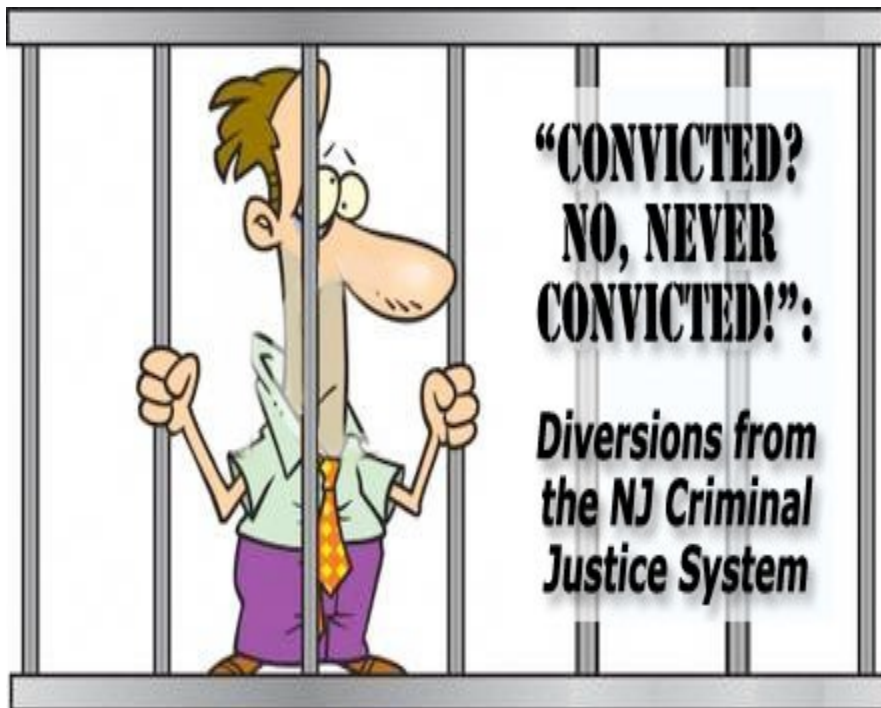


New Jersey Continuing Legal Education Services

Presents:



Lesson Plan

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1. Pre-Trial Intervention – In General

PTI is a diversionary program designed to 'augment the options of prosecutors in disposing of criminal matters ... [and] provide applicants with opportunities to avoid ordinary prosecution by receiving early rehabilitative services or supervision, when such services or supervision can reasonably be expected to deter future criminal behavior by an applicant.'

To gain admission, a defendant must obtain a positive recommendation from the PTI director and the consent of the prosecutor. In making a PTI determination, the prosecutor must evaluate the criteria set forth in *N.J.S.A. 2C:43-12e* and the *Rule 3:28 Guidelines*.. As part of that determination, the prosecutor must 'assess a defendant's 'amenability to correction' and potential 'responsiveness to rehabilitation.'

A defendant generally has a heavy burden when seeking to overcome a prosecutorial denial of his admission into PTI. In order to overturn a prosecutor's rejection, a defendant must clearly and convincingly establish that the prosecutor's decision constitutes a patent and gross abuse of discretion. A patent and gross abuse of discretion is defined as a decision that has gone so wide of the mark sought to be accomplished by PTI that fundamental fairness and justice require judicial intervention. Ordinarily, an abuse of discretion will be manifest if defendant can show that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment." Prosecutors are granted "wide latitude in deciding whom to divert into the PTI program and

whom to prosecute through a traditional trial." We afford the prosecutor's decision great deference. For that reason, the scope of judicial review of a decision to reject a PTI application is severely limited. A trial court can only overturn a prosecutor's decision to deny PTI upon finding a patent and gross abuse of discretion.

a. NJSA 2C:43-12 and 13

b. Rule 3:28 (with Guidelines)

c. Admission and Rejection

State v. Leonardis, 73 N.J. 360 (1977)

State v. Kraft, 265 N.J. Super. 106 (App. Div. 1993)

State v. Nwobu, 139 N.J. 236 (1995)

State v. Watkins, 193 N.J. 507 (2008)

State v. Negran, 178 N.J. 73 (2003)

d. Diversion in another State – State v. McKeon, 385 N.J. Super. 559 (App. Div. 2006)

e. Conditioned on plea to traffic offenses – State v. Mosner, 407 N.J. Super. 40 (App. Div. 2009)

f. Six-month delay for expungement following dismissal – N.J.S.A. 2C:52-6(b)

g. Will serve as a bar to expungement of criminal conviction - N.J.S.A. 2C:52-14(f)

h. Overcoming statutory bar (e.g. prior conditional discharge – State v. Dylag, 267 N.J. Super. 348 (Law Div. 1993))

2. Conditional Discharge (NJSA 2C:36A-1) – In General

a. Qualifications:

- 1. Not previously been convicted of any offense under section 20 of P.L.1970, c. 226 ([C.24:21-20](#)), or a disorderly persons or petty disorderly persons offense defined in chapter 35 or 36 of this title or, subsequent to the effective date of this title, under any law of the United States, this State or any other state relating to marijuana, or stimulant, depressant, or hallucinogenic drugs, is charged with or convicted of any disorderly persons offense or petty disorderly persons offense under chapter 35 or 36 of this title;**
- 2. On Notice to Municipal Prosecutor;**
- 3. The defendant's continued presence in the community, or in a civil treatment center or program, will not pose a danger to the community;**
- 4. That the terms and conditions of supervisory treatment will be adequate to protect the public and will benefit the defendant by serving to correct any dependence on or use of controlled substances which he may manifest;**
- 5. The person has not previously received supervisory treatment under section 27 of P.L.1970, c. 226 ([C.24:21-27](#)), [N.J.S.2C:43-12](#), or the provisions of this chapter.**

b. Multiple Conditional discharges – State v. Gray, 215 N.J. Super. 286 (App. Div. 1987)

c. Will Serve as Future bar to PTI

d. Six-month delay for expungement following dismissal – N.J.S.A. 2C:52-6(b)

e. Will serve as a bar to expungement of criminal conviction - N.J.S.A. 2C:52-14(f)

f. D/I Hardship – State v. Bendix, 396 N.J. Super. 91 (App. Div. 2007).

3. *De Minimis* Applications – N.J.S.A. 2C:2-11

a. Rule #1 – “I did it!” State v. Zarrilli, 216 N.J. Super. 231 (Law Div. 1987)

Rule #2 – Must be filed pre-trial – State v. Zahl, 259 N.J. Super. 372 (Law Div. 1992)

Rule #3 – Oral argument -“He did it...but he [was within customary license] or [did not cause or threaten harm] or [violation is too trivial] or [“I’m sorry, Moe...I was a victim of circumstances” extenuations].

Rule #4 – If Defendant wants to testify, see Rule #1.

b. Applicable statute

The assignment judge may dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

a. Was within a customary license or tolerance, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;

b. Did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction; or

c. Presents such other extenuations that it cannot reasonably be regarded as envisaged by the Legislature in forbidding the offense. The assignment

judge shall not dismiss a prosecution under this section without giving the prosecutor notice and an opportunity to be heard. The prosecutor shall have a right to appeal any such dismissal.

c. Shoplifting – State v. Evans, 340 N.J. Super. 244 (App. Div. 2001)

d.CDS – State v. Wells, 336 N.J. Super. 139 (Law Div. 2000)

e. B-Slap – State v. Downey, 242 N.J. Super. 367 (Law Div. 1988); Bill Clinton Wagging Finger, State v. Cabana, 315 N.J. Super. 84 (Law Div. 1997)

f.Yum, Yum, Three pieces of Gum – State v. Smith, 195 N.J. Super. 468 (App. Div. 1984)

g. Does not apply to Vicious Little Monsters – State v. I.B., 227 N.J. Super. 362 (App. Div. 1988).

4. Municipal Court PTI

a. Preemption of local ordinances – N.J.S.A. 2C:1-5(d)

Notwithstanding any other provision of law, the local governmental units of this State may neither enact nor enforce any ordinance or other local law or regulation conflicting with, or preempted by, any provision of this code or with any policy of this State expressed by this code, whether that policy be expressed by inclusion of a provision in the code or by exclusion of that subject from the code.

**State v. Felder, 329 N.J. Super. 471 (App. Div. 2000)
State v. Crawley, 90 N.J. 241 (1982)**

b. Shoplifting – “My client didn’t steal enough for PTI”

c. Domestic Violence (A time for healing)

d. Bad Checks

e. Especially applicable in cases with grossly disproportionate collateral consequences:

Deportation

Forfeiture of Public Office

Other Loss of employment or professional licensure

f. Administrative Hold based upon:

Voluntary community Service

Drug Counseling

No Contact

Anger Management

Voluntary Restitution (but see In re Friedland, 59 N.J. 209 (1971))

5. Complementary Dispute Resolution

Rule 7:8-1 and Rule 1:40-8

7:8-1. Mediation of Minor Disputes in Municipal Court Actions

If a person seeks to file or has filed a complaint charging an offense that may constitute a minor dispute, the court may issue a notice to the person making the charge and the person charged, requiring their appearance before the court or before a person or program designated by the court and approved by the Assignment Judge pursuant to R. 1:40-8 (Mediation of Minor Disputes in Municipal Court Actions). If on the return date of a summons, it appears to the court that the offense charged may constitute a minor dispute, the court may order the persons involved to participate in mediation in accordance with R. 1:40-8. No referral to mediation shall be made, however, if the complaint involves (1) serious injury, (2) repeated acts of violence between the parties, (3) clearly demonstrated psychological or emotional disability of a party, (4) incidents involving the same persons who are already parties to a Superior Court action between them, (5) matters arising under the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.), (6) a violation of the New Jersey Motor Vehicle Code (Title 39), or (7) matters involving penalty enforcement actions.

1:40-8. Mediation of Minor Disputes in Municipal Court Actions

(a) Referral. A mediation notice may issue pursuant to Rule 7:8-1 requiring the parties to appear at a mediation session to determine whether mediation pursuant to these rules is an appropriate method for resolving the minor dispute. No referral to mediation shall be made if the complaint involves (1) serious injury, (2) repeated acts of violence between the parties, (3) clearly demonstrated psychological or emotional disability of a party, (4) incidents involving the same persons who are already parties to a Superior Court action between them, (5) matters arising under the Prevention of Domestic Violence Act (N.J.S.A. 2C:25-17 et seq.), or (6) a violation of the New Jersey Motor Vehicle Code (Title 39).

(b) Appointment of Mediators. A municipal court mediator shall be appointed by the Assignment Judge who may, either *sua sponte* or on request of the municipal court judge, remove a mediator upon the determination that the individual is unable properly to perform the mediator's functions.

6. Talking your way out of getting indicted"

- a. Rule # 1 "The first to squeal gets the deal"**
- b. Rule #2 - See Rule #1**

7. Domestic Violence Civil Restraints Relief based upon New Jersey

a. Common Law Remedy

b. No FV docket numbers. Should have an FD docket number (if no prior action exists) or an FM docket number if a prior divorce action exists.

c. Entered by Consent and enforced under Rule 1:10-3 by way of motion.

d. Critically important in cases where livelihood of defendant requires use or possession of firearms.

e. 18 USCA 922(g) Federal Gun Control

f. AG Directive from Aug 1995

g. Ethical Issues with unrepresented parties.

8. Alcohol Treatment and Rehabilitation Act – NJSA 26:2B-17

Public Policy – NJSA 26:2B-7

It is the policy of the State of New Jersey that alcoholics and intoxicated persons may not be subjected to criminal prosecution because of their consumption of alcoholic beverages, but rather should be afforded a continuum of treatment in order that they may lead normal lives as productive members of society.

NJSA 26:2B-17

Any person who is arrested for a violation of a municipal ordinance, or for a disorderly persons offense, and who is not also arrested for a misdemeanor, and who the arresting police officer has reasonable cause to believe is intoxicated, may be taken by a police officer directly to an intoxication treatment center or other appropriate facility. To determine whether or not such person is intoxicated, the police officer may request the person to submit to any reasonable test, including, but not limited to, tests of his coordination, coherency of speech, and breath.

When a person who is arrested for a violation of a municipal ordinance, or disorderly persons offense, and who is not also arrested for a misdemeanor, is brought before the court on such charge, the court shall inform him that he is entitled to request a medical examination to determine whether or not he

is an alcoholic if he has been admitted to a facility pursuant to the provisions of the preceding paragraph and has not received a medical examination by a physician. The court shall further inform the defendant of the consequences which follow a determination by a physician that he is an alcoholic who would benefit by treatment. Any request for an examination shall be in writing. If the person makes such request, the proceedings shall be stayed for the period during which the request is under consideration by the court. If the defendant requests an examination, the court shall appoint a physician to conduct the examination at an appropriate location designated by it.

At the end of the commitment period, when the patient is discharged, or when the patient terminates treatment at the facility, whichever first occurs, the director shall report to the court on whether or not the defendant successfully completed the treatment program, together with a statement of the reasons for his conclusion. In reaching his determination of whether or not the defendant successfully completed the treatment program, the director shall consider, but shall not be limited to, whether the defendant cooperated with the administrator and complied with the terms and conditions imposed on him during his commitment. If the report states that the defendant successfully completed the treatment program, the court shall dismiss the charges pending against the defendant.

9. Expungements – (Like It Never Happened)

NJSA 2C:52-27

Unless otherwise provided by law, if an order of expungement is granted, the arrest, conviction and any proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly, except as follows:

a. The fact of an expungement, sealing or similar relief shall be disclosed as provided in section 2C:52-8b.

b. The fact of an expungement of prior charges which were dismissed because of the person's acceptance into and successful completion of a supervisory treatment or other diversion program shall be disclosed by said person to any judge who is determining the propriety of accepting said person into a supervisory treatment or other diversion program for subsequent criminal charges; and

c. Information divulged on expunged records shall be revealed by a petitioner seeking employment within the judicial branch or with a law enforcement or corrections agency and such information shall continue to provide a disability as otherwise provided by law.

**INSTRUCTIONS:
DETERMINING EXPUNGEMENT ELIGIBILITY**

You may use the following form to determine eligibility for an expungement, [N.J.S.A. 2C:52-1, et seq.](#) pursuant to New Jersey law.

1. First determine the nature of the offense the client wishes to expunge. The form allows you four options:

a. Crimes ([N.J.S.A. 2C:1-4\(a\)](#) and [N.J.S.A. 2C:1-4\(d\)](#))

b. Disorderly and Petty Disorderly Persons offenses ([N.J.S.A. 2C:1-4\(b\)](#))

c. Ordinance violations (VCO) ([N.J.S.A. 40:49-5](#))

d. Arrests not resulting in conviction

2. Once you have determined the offense, go to the appropriate section on the form and ask the client the questions listed for that offense type.

3. Record the answers of the client in the blank lines provided in the left hand column.

4. VERIFY THAT THE INFORMATION GIVEN BY THE CLIENT IS FACTUALLY ACCURATE AND CONSISTENT WITH STATE POLICE RECORDS.

5. If all the answers given by the client and recorded in the left hand column match exactly the expected answers for each question as provided, then the client is legally eligible to expunge that offense or offenses. A difference in one answer generally means that the client is not eligible for an expungement.

EXPUNGEMENT ELIGIBILITY SHEET

ALL ANSWERS MUST MATCH TO BE ELIGIBLE CRIMES

**Is the offense excluded under law? (See list below)
(No)**

**Has ten years expired since sentence was completed?
(Yes)**

**Does client have more than one conviction of a crime?
(No)**

**Does the client have more than two DP or PDP
convictions? (No)**

**Has client had previous a criminal or DP
expungement? (No)**

Is there pending criminal/DP/PDP prosecution? (No)

**Is there pending civil litigation involving the case
where the state is a party? (No)**

**Has there been a prior dismissal of other charges
through PTI? (No)**

**(Note: If criminal and DP, only criminal can be
expunged.)**

DISORDERLY AND PETTY DISORDERLY PERSONS

**Has five years expired since sentence was completed?
(Yes)**

**Does client have a prior or subsequent conviction of a
crime anywhere in USA? (No)**

**Does client have more than three DP/PDP
convictions? (No)**

Has client had a previous criminal expungement? (No)

Is there pending criminal/DP/PDP prosecution? (No)

**Is there pending civil litigation involving the case
where the state is a party? (No)**

**Has there been a prior dismissal of other charges
through PTI? (No)**

(Note: Up to three DP or PDP's can be expunged.)

VCO

**Has two years expired since sentence was completed?
(Yes)**

**Does client have a prior or subsequent conviction of a
crime anywhere in USA? (No)**

**Does client have more than two DP or PDP
convictions? (No)**

Is there pending criminal/DP/PDP prosecution? (No)

**Is there pending civil litigation involving the case
where the state is a party? (No)**

**(Note: Can expunge two DP/PDP's with a VCO. Prior
criminal expungement or PTI dismissal not a bar.)**

ARRESTS NOT RESULTING IN CONVICTION

If PTI, has six months gone by since dismissal? (Yes)

If CD, has six months gone by since dismissal? (Yes)

Did the dismissal result from the finding of insanity or diminished capacity? (No)

If dismissal came from a plea agreement, has the underlying conviction been expunged? (Yes)

Is there pending criminal/DP/PDP prosecution? (No)

Is there pending civil litigation involving the case where the state is a party? (No)

(Note: Dismissals as part of a plea agreement cannot be expunged unless the underlying conviction is expunged. Expungement after PTI is a bar to future expungement of convictions, except for a VCO.)

CRIMINAL EXCLUDED OFFENSES

The following old Title 2A and common law offenses:

Murder	Manslaughter	Treason	Anarchy
Kidnapping	Rape	Forcible	Arson
		Sodomy	
Perjury	False	Robbery	Embracery
	Swearing		

Conspiracies or attempts to commit any of above crimes. (Except embracery.)

The following Title 2C crimes are also EXCLUDED:

Criminal Homicide (2C:11-1)	Death by Auto (2C:11-5)
Kidnapping (2C:13-1)	Luring or Enticing (2C:13-6)
Aggravated Sexual Assault (2C:14-2)	Criminal Sexual Contact (2C:14-3a)
Criminal Sexual Contact (2C:14-3b)	Criminal Restraint (2C:13-2)
False Imprisonment (2C:13-3)	Robbery (2C:15-1)
Arson & Related offenses (2C:17-1)	False Swearing (2C:28-2)
Endangering the welfare of a child (2C:24-4b(4))	Perjury (2C:28-1)

Endangering the welfare of a child by engaging in sexual contact (2C:24-4a)

Conspiracies or attempts to commit any of the above crimes.

Distribution or possession with intent to distribute CDS except:

Marijuana under 26 grams or hashish under 6 grams.

Records of conviction for any crime committed by a person holding any public office, position or employment, elective or appointive, under the government of this State of any agency or political subdivision thereof and any conspiracy or attempt to commit such a crime shall not be subject to expungement if the crime such a crime shall not be subject to expungement if the crime involved or touched such office, position or employment.

10. Waiver of Forfeiture of Public Office



NJSA 2C:51-2

A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office , position or employment if:

(1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime;

(2) He is convicted of an offense involving or touching such office, position or employment; or

e. Any forfeiture or disqualification under subsection a., b. or d. which is based upon a conviction of a disorderly persons or petty disorderly persons' offense may be waived by the court upon application of the county prosecutor or the Attorney General and for good cause shown.

MODEL STATEMENT OF REASONS

- 1) TOTALITY OF CIRCUMSTANCES SURROUNDING THE EVENT**
- 2) NATURE OF THE OFFENSE**
- 3) QUALITY OF MORAL TURPITUDE OR DEGREE OF GUILT OR CULPABILITY**
- 4) DUTIES OF EMPLOYEE**
- 5) THE RELATIONSHIP BETWEEN THE OFFENSE AND EMPLOYEE'S DUTIES**
- 6) EMPLOYEE'S LENGTH OF SERVICE**
- 7) THE EMPLOYER'S DESIRES**
- 8) THE NEED AND INTERESTS OF THE VICTIM AND SOCIETY, INCLUDING CONSIDERATION OF THE VICTIM'S DESIRES**
- 9) THE EXTENT TO WHICH THE EMPLOYEE'S OFFENSE CONSTITUTES PART OF A CONTINUING PATTERN OF ANTI-SOCIAL BEHAVIOR**
- 10) THE EMPLOYEE'S PRIOR RECORD OF CONVICTIONS AND DISCIPLINARY INFRACTIONS**
- 11) THE THREAT PRESENTED TO COWORKERS OR THE PUBLIC IF THE EMPLOYEE IS PERMITTED TO RETAIN HIS OR HER POSITION**
- 12) ANY INVOLVEMENT OF THE EMPLOYEE WITH ORGANIZED CRIME**
- 13) WHETHER THE EMPLOYEE HAS BEEN GRANTED WAIVER ON A PRIOR OCCASION**
- 14) THE IMPACT OF WAIVER ON THE EMPLOYMENT STATUS OF CODEFENDANTS**
- 15. WHETHER WAIVER OF FORFEITURE OF OFFICE WOULD UNDERMINE PUBLIC CONFIDENCE IN THE INTEGRITY OF IMPORTANT GOVERNMENTAL FUNCTIONS, INCLUDING BUT NOT LIMITED TO LAW ENFORCEMENT FUNCTIONS**

**16. NATURE AND SCOPE OF COOPERATION WITH PROSECUTING
AUTHORITIES DENIAL OF WAIVER OF FORFEITURE AND
DISQUALIFICATION OF PUBLIC OFFICE**

11. Miscellaneous Scams

**a. Plea to Motor Vehicle Offenses &
Ordinances in lieu of criminal/dp
charges**

**b. Expungement of Dismissed D/P
Offenses companion to DWI**

c. Statutory Immunities

**d. Certificate of Rehabilitation – NJSA
2A:168A-7 and 8 under the
Rehabilitated Convicted Offenders
Act, NJSA 2A:168A-1 et seq. (See
generally Maietta v. New Jersey Racing
Com'n, 93 N.J. 1 (1983)).**

**Civil Penalties in lieu of prosecution
(e.g. insurance fraud, taxes, etc)**