FINAL REPORT

NEW JERSEY'S "NO EARLY RELEASE ACT": ITS IMPACT ON PROSECUTION, SENTENCING, CORRECTIONS, AND VICTIM SATISFACTION

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ABSTRACT

NEW JERSEY'S "NO EARLY RELEASE ACT": ITS IMPACT ON PROSECUTION, SENTENCING, CORRECTIONS, AND VICTIM SATISFACTION

New Jersey's "No Early Release Act"(NERA) is one of several laws passed in various states when federal legislation (the Omnibus Crime Act of 1994, Title II Subtitle A) encouraged states to pass "Truth in Sentencing" laws modeled on the federal sentencing structure. These laws require felons to serve a minimum of 85% of their sentences before becoming eligible for parole. The legislation prohibits the parole board from releasing felons before they serve a minimum of 85% of their sentences as imposed by judges under the New Jersey sentencing guidelines. Unlike the federal law, New Jersey's 85% minimum requirement applies only to offenders convicted of crimes of violence.

This study examined the New Jersey statute's impact on prosecutorial discretion, sentencing, and the correctional system. Also, this study examined the impact on victims' satisfaction with sentences imposed, since, according to the legislative history, "Truth in Sentencing" would serve victims' needs better than the previous system in which serious offenders became eligible for parole after serving 1/3 of their terms and on the average actually served about 50% of their prison terms before being paroled.

We predicted that the law would have little impact either on New Jersey's justice system or on victims' satisfaction with sentences imposed. We also predicted that, within the group of felons sentenced to serve 85% of their sentences with no parole, there would be a significantly higher rate of disciplinary infractions inside the prison because the hope of parole as a reward for good behaviour would be gone. This research confirmed the first two hypotheses but did not confirm the third.

A combination of prosecutorial discretion and the particular characteristics of New Jersey's sentencing structure, in addition to the fact that the law was written so as to apply to a subset of offenders who would have served very long prison terms in any event, produced near homeostasis in the criminal justice system. Prosecutors did not change their charge bargaining practices so as to permit guilty pleas to less serious, non-NERA eligible crimes. However, the system roughly maintained a "going rate" of sentencing by lowering the severity of the typical prison sentence imposed, so that offenders required to serve 85% under NERA would be serving a higher percentage of a lower sentence. Although the average expected time to be served did indeed increase, the change was not drastic. Projected prison populations will not be seriously affected.

However, we hypothesized that even though the severity of sentencing did not increase significantly, the offenders sentenced under the 85% requirement would have less incentive to behave well in prison, since they could not expect parole as a reward for good behaviour until they had already served most of their sentences. We compared the rate of incidents of violence committed by NERA-sentenced prison inmates versus inmates sentenced before NERA.

Inmates sentenced under NERA were less likely to be involved in violent infractions, or any disciplinary infractions generally. Apparently violence in prison is caused primarily by factors unrelated to expectations of future parole.

Finally, the law's supporters said that victims would be much more satisfied with prison sentences imposed if they knew that offenders would not be eligible for parole until 85% of the sentences were served. Before/after measures of victims' satisfaction with sentences and with the various justice system actors found that this did not happen under New Jersey's "Truth in Sentencing" law. In fact, by chance, victims' satisfaction with sentencing declined after passage of the law.

ACKNOWLEDGMENTS

This study involved interviews, surveys, and quantitative analysis of statistical databases. The scope of our questions was wide, so the methods of study had to be diverse in order to dig out answers to the various questions. We were fortunate to have the cooperation of New Jersey's Division of Criminal Justice and the Prosecutors' Association, as well as the statistical staff and group of Criminal Presiding Judges of the Administrative Office of Courts. We were exceptionally fortunate to have the cooperation and support of the Department of Corrections, which gave us full access to their data on sentences and provided an office and computer for us to work on them.

Of course, "government agencies" in the abstract do not do these things. People who work in those agencies do. We extend our sincere thanks personally to Gary Hilton, Chief of Staff of the New Jersey Department of Corrections, for his remarkable professionalism and foresight. We also thank Ron Suswein, Deputy Director of the Division of Criminal Justice and the person who probably knows more about the practice of prosecution in New Jersey – or any jurisdiction, for that matter – than anybody he ever meets. He humored us as the study progressed and helped us design and administer a questionnaire to prosecutors. Finally, Marilyn Slivka and the staff at the Administrative Office of the Courts provided a huge database describing court events in every serious felony prosecution in the entire state over a four year period. Creating this database for us was surely a chore and we appreciate it.

Finally, the imperial "we" used in these acknowledgments refers to two people: Candace McCoy serving as Principal Investigator and Patrick McManimon, Jr., who started as a research assistant in this project but ended up working as a true co-author. Along the way, he used the data and insights he gained from this project to write his doctoral dissertation, which is quoted in this report. Use of the first person plural throughout this report is not simply a convenient writing device. Rather, it reflects the fact that the report presents work and thoughts we have as a team. We thank NIJ for the support to conduct this interesting research.

INTRODUCTION: NEW JERSEY'S "NO EARLY RELEASE ACT"

New Jersey's "No Early Release Act," which requires that offenders charged and convicted of violent crimes serve a minimum of 85% of their sentences before becoming eligible for parole, became law in June, 1997. As one of several "Truth in Sentencing" statutes passed in many states, New Jersey's law is one piece of a broad pattern of local legislative changes enacted in response to the federal Omnibus Crime Act of 1994. It modifies New Jersey's Parole Act and sentencing law and is intended to change the practices of judges in setting sentences and parole officials in granting parole.

Over a decade before, the federal criminal justice system had embraced "truth in sentencing" by implementing the policy of requiring all felons to serve at least 85% of any prison sentence imposed. When the new federal sentencing guidelines went into effect in 1987, each prison sentence imposed under them carried a requirement that at least 85% of any prescribed prison time must actually be served before parole could be granted. The reasons for this given in legislative debates and the text of the law involved accountability to victims and transparency of justice system operations. Lawmakers stated that victims felt cheated and fearful upon hearing that offenders would be released far short of serving the prison sentences that judges imposed. Furthermore, with the near-elimination of the goal of rehabilitation as a rationale for sentencing, there was little need for indeterminate prison terms based on an offender's capacity to overcome criminal tendencies and behavior. Finally, proponents of "truth in sentencing" intended that 85% requirements would increase the severity of criminal sentencing, although in theory the two ideas did not have to be conflated. (Greene 2002) In fact,

the federal system itself had originally instituted its new sentencing guidelines including an 85% time served requirement with the expectation that prison terms would be mostly the same under the new law as they had under the old. (Tonry 1995) Subsequently, the severity of federal sentencing became significantly harsher, but this development can be attributed to sentencing guidelines amendments that increased the punishments in several offense categories and appended mandatory minima sentencing enhancements of five years prison/no parole for any use of a gun or drug dealing or smuggling.

In the federal Omnibus Crime Act of 1994, the model of "truth in sentencing" as carried out by a requirement that all felons serve a minimum of 85% of their prison sentences before being paroled was extended to the states. Although federal legislation could not force this requirement on state and local criminal justice systems, it could encourage them to pass similar legislation. Lacking a stick, the federal lawmakers offered a carrot to state lawmakers: in any state that passed "Truth in Sentencing" legislation, the federal government would appropriate money to build a new state prison. Obviously, the drafters of the federal legislation anticipated that the states would object to Truth in Sentencing because simply applying it to existing sentencing laws would significantly increase the severity of existing laws and require every felon to serve many more months in prison. Already overcrowded prisons would burst. Population projections under Truth in Sentencing laws predicted that many more resources would be necessary to accommodate the requirements of such a law. Acknowledging this problem, the federal legislation offered money to build more prison cells in the future if a state would pass "Truth in Sentencing" now. (Violent Offender Incarceration and Truth in Sentencing Incentive Grants, Title II, Subtitle A of the Violent Crime Control and Law Enforcement Act of 1994.)

New Jersey's "No Early Release Act" (NERA) was introduced in the state Senate as Senate Bill 855 on February 26, 1996. Its lone sponsor was Senate Majority Leader John O. Bennett, of Monmouth County. The bill was a mere seventeen lines, fashioned as a supplement to the "Parole Act of 1979." It required "that any inmate sentenced for a crime of the first or second degree involving violence shall not be eligible for parole until the inmate has served not less than 85% of the court-ordered term of incarceration." It further required the Parole Board to promulgate rules and policies to implement the Act. In Trenton, it was viewed as a parole bill, not a sentencing bill. Interviews with the Office of Legislative Services staff confirmed the fact that this was conceived initially as a revision of the parole system, which had been under study for some time, and not a sentencing law. A companion bill (A-1541, the language of which was similar to SB-855) was introduced in the Assembly (New Jersey's lower house) by Assemblywomen Diane Allan and Assemblyman Carmine DeSopo.

Later, victims' groups began to embrace the SB-855 as a victim's rights law. On April 2, 1996 Senator Bennett called a press conference to tout the merits of his proposed legislation. At that press conference, Karen Wengert and her father, Bill Thomas, the mother and grandfather of Amanda Wengert (a young girl who was murdered by a neighbor) stated their support for passage of the legislation, as did various law enforcement groups. As the founders of the Friends of Amanda Foundation, a group dedicated to protecting children from becoming victims of crime, they were and remain a strong voice in the victims' advocacy community in New Jersey. Citizens of Senator Bennett's district, they are well known and influential members of that community as well as the victims' advocacy community. The Chair of the Senate's Law and Public Safety Committee, Senator Lou Kosco, announced at the press conference that he had scheduled a public hearing on the proposed legislation on April 24, 1996, and Senator Bennett

was appointed as a special, voting member of the committee for this legislation. Two years after passage of the federal Omnibus Crime Act, the move toward "truth in sentencing" had begun in New Jersey.

The public hearing on Senate Bill 855 was conducted on April 24, 1996. This hearing was held during Crime Victims' Rights Week, clearly signaling the merger between "get tough on crime" policies and victim's rights advocates in New Jersey. The witnesses at the public hearing further confirm the strength of this alliance. The list of witnesses included the sponsors of the legislation in both houses of the legislature, a past Attorney General who is an outspoken and respected advocate of "get tough on crime legislation," representatives of the New Jersey Chiefs-of-Police Association and the Fraternal Order of Police, a clinical psychologist from the Adult Treatment and Diagnostic Center (New Jersey's Sex-Offender Prison), several victims/survivors of murder victims, a representative from the Prosecutors' Association, and several private citizens. Letters of support were also on record from a variety of law enforcement organizations and victims' rights groups (both national and state groups).

The testimony during the public hearing illustrates the strong influence of the victims' rights advocates and victims' movement in the political process in New Jersey and their political power with members of the legislature. Both sponsors, Allan and Bennett, as well as the Chair of the Law and Public Safety Committee, Kosco, repeatedly recounted their associations with victims of crime and said that the true purpose of the legislation was to alleviate the pain and suffering of victims of violent crime. Kosco stated in his opening remarks; "I hope that this measure will assist in comforting the many victims and their families whose lives have been destroyed by violent crime." (Transcript of Public Hearing: p. 1-2).

Assemblywomen Allan stated; "I am proud to support the rights of crime victims" (p.3)... "This bill goes beyond 'truth in sentencing.'"(p.3)... "In this bill we can say to crime victims, you're not alone. We stand with you. We stand against excuses." (p.4). Senator Bennett in his testimony stated that, "The bill known as SB855 tells the victims of violent crimes that their loss is our loss, that their pain in our pain, that we will remember the violation of human life, and we hold their attacker accountable." Both sponsors noted that this hearing was conducted as part of National Crime Victims Rights Week. However, Senator Bennett also made reference to the fact that if New Jersey was to receive any of the prison construction funds available from the Federal Government, this legislation must be passed.

The public hearing closed on a telling note. Chairman Kosco made the following statement; " This is just part of a plan, of a long range plan that began three years ago. We are putting this plan together... We started it ...with the Three Strikes legislation. The Bootcamp... to address the problem we are having with our juveniles. . .We are spending the money . . . The plan is a 'get tough on crime' plan now to include 'truth in sentencing' legislation." (p. 50-51). The senators each stated in their closing remarks that this is a clear message from the citizens of New Jersey.

The original wording of the bill had changed. The Act was amended as follows: "This act will take effect immediately, and shall be applicable to any [person sentenced for a crime of the first or second degree involving violence"[1] of the bill. The New Jersey Department of Corrections had warned against an escalating prison population if the bill as amended were to be passed. The department estimated that an additional 5,800 more inmates would be expected to

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[1] Matter underlined denotes the amendment to the legislation.

serve much longer sentences under the current statutes and provisions, incurring enormous costs. The Office of Legislative Services (OLS) noted that the bill's *ex post facto* application would add additional costs not anticipated by the Department of Corrections. Further, the OLS noted that the Department of Corrections was "unable to quantify any deterrent effect to the increased sentence to potential offenders..." Despite the listed concerns, the bill received a favorable disposition from the committee at the first reading.

On May 7, 1996 the Assembly sponsors, Allan and DeSopo, received a letter from the Attorney General's staff cautioning against the passage of the assembly draft. Citing the unfinished work of the Governor's Study Commission on Parole, which had begun its work prior to introduction of the No Early Release Act, it was urged that the legislation be held until this committee completed it work. The letter stated that the Commission had "gathered much information and will be making recommendations for comprehensive reform," apparently a plea to take account of work already underway before plunging ahead with "truth-in-sentencing." What is interesting about the debate is not the in-fighting but the fact that it was viewed not as sentencing legislation nor even victims' rights legislation, but as parole reform, by both the executive and legislative branches of New Jersey government.

The letter from the Attorney General's staff also pointed to several problems that affect later versions of SB855. It was pointed out that the law most likely would increase prison populations. This issue was then under litigation, as county jails were forced by a continuing executive order to absorb the excess state inmates and were challenging this order (in effect for over 20 years) in State Court. The critique also included concerns about post-release supervision of violent inmates; the law as worded would have effectively ended parole supervision when an inmate had served 85% of the sentence, and with accumulated good conduct credits he would be

released without supervision. Finally, applying the law *ex post facto* would be clearly unconstitutional, and there was vagueness in the term "crimes of violence." There was no record of further discussion about these issues by either the Assembly or the Attorney General's office.

The second reading of the bill in the Senate Law and Public Safety Committee occurred 11 months later. There is no record of the reason for the length between the readings in written form, but the OLS staff advised that the legislation was held until recommendations were forthcoming from the Commission studying parole. At the second reading, two notes of interest appear. First, the *ex post facto*- application was removed. Second, the Act had additional sponsors, Senator Kosco (Chair of the Senate Law and Public Safety Committee), and Senator Scott, a member of the committee who faced tightly contested races in the fall.

The third reading of the bill in the Senate closely resembled the legislation as finally enacted. The Assembly had amended it to include strong language that offenders covered by the legislation must serve a term of "supervised mandatory release." Crimes of violence were specifically defined. This had been an important issue for the Governor's staff. They had predicted that the legislation would drive prison populations drastically upward unless it applied only to violent recidivist offenders.[2] Although the final version of the law was not as limited as they would have wanted, the definition was substantially narrowed to eight offense categories. (Covered offenses included all types of homicide and manslaughter, sexual assault, kidnapping, carjacking, aggravated assault, robbery, and any offense in which the offender used or threatened to use a deadly weapon.) This was an important point for the governor's staff, because they did not want New Jersey to experience the dysfunctional results of over-inclusive sentencing reform,

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[2] Confidential conversations with members of the Governor's office public safety team.

as California had with its "three Strikes and You're Out Law."[3] This was the first time that the new law was not referred to as a "revision to the Parole Act of 1979", but clearly its language made it a sentencing law: mandatory sentencing. Interestingly, a search of newspapers throughout the State did not produce any coverage of the legislation during this period, and the victims' organizations were silent as well.

It became clear the law was intended to both amend the sentencing structure and the parole structure of New Jersey. Statutorily, the bill required courts to sentence offenders to terms of 85% if convicted of a target offense defined as a crime of violence. Also, parole was required to establish a system to release those serving sentences for crimes committed prior to the enactment of the law through a risk assessment instrument. Because this did not apply the law retroactively, it avoided the constitutional prohibition of *ex post facto* application. The Act was signed into law July, 1997. (The full text of the bill as passed is included in Appendix A.)

LITERATURE REVIEW: THE EFFECTS OF MANDATORY SENTENCING

Legislation intended to "get tough(er)" on felons is nothing new, of course, and a rich body of evaluation literature predicts the likely outcome of any new legislative innovation intended to achieve that goal. New Jersey's "No Early Release Act" is a form of mandatory minimum sentencing that is unique because it eliminates discretion mostly at the Parole Board stage. (Under the wording of the new law, judges still have discretion about how long the term

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[3] California's Three Strikes Law was very broad and the effect on their jail and prison population was tremendous. County Jails experienced severe crowding and courts were backlogged because offenders refused to plea, fearing a life sentence.

of imprisonment will be; once it is determined, only then does the mandatory 85% provision attach.)

1. Effect of laws abolishing parole on prosecutorial and judicial discretion.

The history of implementation of other mandatory minima laws indicates that judges and prosecutors may exercise their discretion so as to modify the most severe outcomes of the mandatory provisions. On the other hand, implementation studies of reforms in which the prosecutors and judges strove to fulfill the "letter of the law" show that the courts and prisons can become seriously strained.

The implementation of New York's mandatory miminum statute stands as an example of what is likely to happen if all components of the criminal justice system attempt to fulfill the requirements of mandatory sentencing as closely as possible. One of the earliest examples of these laws, the "Rockefeller Drug Laws" in 1973 prescribed severe mandatory prison sentences for narcotics offenses and included a prohibition on plea bargaining. Evaluation demonstrated that arrests, indictment rates, and conviction rates all declined after the laws took effect. Imprisonment rates remained stable, trials in drug cases tripled, and the time to process cases doubled (Joint Commission on New York Drug Law Evaluation, 1978). Clearly, courts were the justice system component that bore the impact of this law. The ban on felony plea bargaining convinced prosecutors to forego felony indictment in cases that could reasonably be reduced to misdemeanor guilty pleas, but all felonies went to trial. Offenders facing mandatories also wanted trials, since they usually decided they had nothing to lose by going to trial, thus forcing the system to meet a more exacting standard of proof and significantly increasing the acquittal rate. "Because the law caused serious court congestion and delays, the legislature was forced to double the amount of money paid for courts and prosecutors." (McCoy, 1993:34) Eventually

the legislature amended the plea bargaining ban the law. However, the smaller pool of offenders who were indeed convicted and sentenced to imprisonment under it received longer sentences then before, and sentences remained very heavy.

New Jersey's "No Early Release Law" contains no ban on plea bargaining, but nevertheless similar considerations as in the New York law may arise, because defendants seeking to avoid the 85% mandatories may press for charge bargains to lesser crimes not covered under the new law. Trial rates may also increase in those cases prosecuted under the law, since defendants have more to lose from a conviction.

The experiences of Michigan and Massachusetts in implementing mandatory sentencing laws may be closer to the response to be expected in New Jersey, because the laws were written much as the "No Early Release" law is -- i.e., that judges in their discretion could set a term of imprisonment that they chose, but at that point a mandatory provision attaches so that a particular amount of the term must be served without the possibility of parole. The Bartley-Fox Amendment (Massachusetts) required a one year mandatory minimum sentence without parole for offenders convicted of carrying unlicensed firearms. Rossman (1979) conducted an evaluation of the law's impact and found significant increases in favorable outcomes for defendants (i.e., dismissals, acquittals, reduction in charges) after the law as compared to before, while appeal rates increased dramatically (up 94%). (Carlson, 1982:8) Judges also strove to maintain the "going rate" of normal case processing, and they did so by convicting offenders of charges that did not carry the mandatory sentencing requirement.

The Michigan Felony Firearms Statute created a new offense of "possession of a firearm while engaged in a felony," specifying a two year mandatory prison term that could not be shortened by parole and had to be served consecutively after the sentence imposed for the

underlying felony. In Michigan, it was prosecutors who stepped in to maintain the going rate. Only 62% of the eligible offenders were charged with the mandatory firearms charge, but in some courts 100% of the cases requiring firearms charges were filed while in others none of the eligibles received the firearms charge (Bynum, 1982:table 4.1). Heumann and Loftin observed a strong tendency in early dismissals of charges other than on the evidentiary merits of the case. Felonious assaults were also reduced to misdemeanor offenses to avoid the mandatory sentencing requirements. Once the charge bargain was complete, judges would sentence offenders to misdemeanor offenses instead of crimes requiring the imposition of the two year mandatory sentence (Heumann and Loftin, 1979).

The most recent permutation of mandatory sentencing is "three strikes and you're out" legislation, in which felons convicted of three crimes are sentenced to prison for life. These laws vary among the states that have adopted them; some permit parole or "good time" credits from the life sentence, while others require it to be served without parole. (Austin and Hardyman, get cite) Evaluations of these laws are now being reported, and a common theme in all is that prosecutors and judges regularly exercise their discretion so as to apply the laws only to those felons deemed most dangerous. Nevertheless, for that group of defendants, trial rates increase drastically in "three strikes" cases, since few defendants willingly plead guilty to a crime that will produce a mandatory life sentence. (Zimring, Hawkins, Kamin 2001)

Tonry (1992:245-246) summarizes the research on mandatory sentencing and succinctly gives the reason that mandatory minimum sentences without possibility of parole are not applied to all eligible offenders: "The severity of penalties . . . has led in many instances to reluctance on the part of prosecutors to prosecute some violations, where penalties seem to be out of line with the seriousness of the offense." He also points out that judges will strive to circumvent the worst

excesses of mandatory minima, if prosecutors do not, also as a mechanism to avoid the harsh penalties that seem disproportionate to the severity of the offense or the character of the offender. If the experiences of the states discussed above are any indication, judges and prosecutors might also blunt the laws' impact so as to avoid overload on the court system. We expected to observe a similar response in New Jersey, and we did.

2. Effect of laws abolishing parole on correctional management

The new law removes discretion from the Parole Board completely in cases that judges designate "eighty-five percenters." The sentencing innovation most closely equivalent to New Jersey's proposed "No Early Release Act" is the federal Sentencing Reform Act of 1984 (Public Law 98-473; 98 Stat. 1937) -- commonly called "the federal guidelines sentencing law." In all the debate about the wisdom of guidelines sentencing and its many facets, the fact that the law virtually abolished parole is often overlooked. The law abolished parole but permitted an inmate to be released after serving 85% of his sentence if he had earned sufficient "good time" in prison.

Evaluation of the federal guidelines experiment, however, has produced deeply contested results. Without commenting on the vigorous debate about the substantive justice of the guidelines themselves, it is sufficient to note that prison populations have almost doubled since the 1984 law took effect, and that parole has not been reintroduced in some altered form. (McDonald and Carlson, 1992). This occurred despite the fact that the comprehensive sentencing reform had actually shortened average sentences for many crimes, expecting that with the abolition of parole the normal sentences would have stayed about the same, but that the procedural benefits of "truth in sentencing" would take hold.

The United States Sentencing Commission and many other commentators have attributed

the tremendous rise in prison time served to mandatory minima requirements for drug and gun offenses, not to the guidelines. A 1991 Commission report titled "Mandatory Minimum Penalties in the Federal Criminal Justice System" stated that mandatory minima laws shift discretion from judges to prosecutors and result in higher trial rates and lengthened case processing time. It also found that both judges and lawyers commonly circumvented the mandatories (Tonry,1992:254). Among the findings in that study, investigators found: 1. prosecutors often did not file charges that carried mandatory minima, even when the evidence supported such filings, 2. declining to charge mandatory minima was often used as an incentive to induce guilty pleas, 3. when not involved in plea bargaining, mandatories increased trial rates and case processing time, 4. judges often imposed sentences less severe than applicable mandatory provisions would require (U.S. Sentencing Commission, 1991:53-58).

These pathologies could perhaps be attributed solely to the federal system's mandatory minima laws covering drug and gun offenses, and not to the system's virtual abolition of parole. The fact remains, though, that the federal system experienced a leap in prison admission rates and length of average sentences (U.S. Sentencing Commission, 1991b; Rhodes, 1992.) New Jersey already has mandatory minima laws covering gun and drug offenses, and when it adopted the new "Truth in Sentencing" law it nearly abolished parole, too -- at least for Class I and many Class II offenders. Unlike Congress, however, the New Jersey legislature did not simultaneously adjust downward the length of prison terms judges may impose for serious crimes, so as to account for the fact that violent felons will serve 85% of the sentences, so that the sentence lengths expected to be served before and after passage of sentencing reform would be about the same. All these indicators predict a significant increase in the amount of time violent felons will spend in prison after the law has passed.

The addition of longer sentences without the ability of earning commutation credits in already crowded institutions may lead to increases in institutional management problems in the form of increased disciplinary violations and the possibility of increased violence. Prison overcrowding affects the quality and conditions of institutional life. Although the public has little interest in the "suffering" of inmates, there are tremendous policy implications to operating a crowded prison system. Therefore, it is important to analyze any increases in prison rule infractions in general and violent rule infractions in particular resulting from the requirement to serve 85% of a lengthy prison term. Discipline inside prison presents unique problems, and although serious crimes are committed, they are difficult to prosecute for a variety of reasons (Von Hirsch and Hanrahan, 1979:41-42). Parole boards are instrumental in assisting in prison management by utilizing institutional disciplinary records as the primary criterion for granting parole. The curtailment of parole discretion to reward good behavior may increase serious violations among the target population of class I and II violent felons.

Certainly overcrowding itself is associated with institutional infractions and violence among prisoners. Crowding is a leading determinant in inmate rule infractions. Population density in prisons (Megargee, 1976) and jails (McManimon, 1994) correlates with violent rule infractions. "Reducing the level of crowding within prisons may well reduce the incidence of violence." (Walkey and Gilmore, 1981:338). As prisons become more crowded, incidents of inmate-on-inmate assaults without weapons increased unabated (Gaes and McGuire, 1985) and there was an increase in inmate to staff assaults (without weapons) as well. Overcrowding is also a significant causal factor of prison riots (American Correctional Association, 1992; Brasewell, Dillingham, and Montgomery, 1985).

It is clear that prison populations are directly affected by the use of mandatory minimum sentencing and abolition of parole. Of course the crowding in New Jersey prisons would not be worsened if the federal government were to give money to build a new prison, as the federal legislation contemplates.

3. Effect of new sentencing laws on victims' satisfaction with sentencing

"Truth in sentencing" is a relatively new type of victim-oriented legislation. It assumes that victims will be more satisfied with the sentences given their assailants -- and thus, we hope, will be able to recover better from their victimizations -- if they can be assured that the offender will be imprisoned for exactly the amount of time the judge announces. Advocates of "truth in sentencing" laws claim that the victim's certain knowledge that the offender will not be quickly released and find the victim again, and the simple courtesy of being told exactly what the system will and will not do, will increase victim satisfaction with sentences.

This claim does not necessarily rely on retributive reasoning or demands for harsh sentences, although the effect of most of these laws would be to increase prison terms significantly. Rather, it rests on the intuition that being treated fairly and honorably is as important a determinant of satisfaction as the actual outcome. Well-established psychological research on court procedures supports this notion. Tyler (1988:1) found that procedural justice was more important to people who had contact with the criminal justice system than was substantive outcome. Barrett-Howard and Tyler (1986), and Fry and Leventhal (1979) found victims were more satisfied when they perceived that court procedures were consistent over time and among persons. In these studies, victims expressed their satisfaction in terms of those aspects of procedure least linked to outcomes -- "ethicality, honesty, and the effort to be fair." (Tyler, 1988:128).

Surely the victims' movement's emphasis on programs to prevent "secondary victimization" is linked to a recognition of the importance of procedural fairness. A victim deserves to participate in the public decisionmaking about an event that so profoundly influenced him, this reasoning holds, and that participation cannot be allowed actually to harm the victim even more. Research has demonstrated that victim frustration with the criminal justice system springs more from a lack of involvement and standing in the decisionmaking process than from injustice in outcome (Welling, 1988). Some laws can address this problem; victim impact statements and allocution at sentencing, for instance, explicitly acknowledge "individual dignity" (Henderson, 1985:1005) and may aid in the healing process. Yet evaluation of victims' assistance programs that aim to involve the victim more fully in court hearings has found that victim satisfaction under these programs does not necessarily increase much (Goldstein, 1982; Sebba, 1982). Satisfaction levels probably vary depending on the type of program, its efficiency, and a host of factors having to do with the community from which the victim comes. Generally, failing programs provide little participation beyond a superficial level and are not viewed by judges and prosecutors as important (Kelly, 1984:17-18). Presumably, programs that can provide more victim participation and regard from the court and prosecutors will prompt higher satisfaction levels.

Moreover, the link between victim satisfaction and punitiveness is by no means proven. In general, victims of crimes are no more punitive than the general public (Boers and Sessar, 1990). Victims in Erez's studies (Erez, 1989, 1990) rarely requested the court to impose the maximum sentence. Only about one third requested incarceration, and only about one third of the victims viewed harsher sentences as a way to improve victim relations. However, research by the same author and her colleague separated the punitiveness issue from the question of

victim satisfaction and found that victim satisfaction was highly correlated with satisfaction in the sentence, whatever that requested sentence was (Erez and Tontodonato, 1992:407). Contrary to Tyler's assertion that fair procedure is more important to litigants than substantive outcome, these authors found that -- in criminal procedure, at least -- victims' overall satisfaction with the criminal justice system was best predicted by the actual outcome: sentence imposed. Interestingly, their research found that victims of crimes against persons were more satisfied with sentencing outcome than were victims of property offenses. Victims who were unhappy with the disposition and who believed the sentence was too lenient were dissatisfied regardless of the quality of service they received by the various criminal justice agents. (Erez and Tontodonato, 1992:412)

These ambiguous findings in the previous research warrant further study into the relationship of sentencing and victim satisfaction with the criminal justice system. "Truth in Sentencing" legislation certainly has a manifest goal of increasing victim satisfaction, and insofar as there is some connection between punitiveness and satisfaction, the latent goal would be to increase significantly the severity of sentencing for violent offenders. To our knowledge, there has never been a study of victim satisfaction with sentencing conducted with a before/after methodology, testing the effect of a law expected to increase victim satisfaction with sentencing. This study did that.

RESEARCH QUESTIONS, DATA, AND METHODOLOGY

The research questions that emerge from careful consideration of the "No Early Release Act" fall into the same categories as did the overview of relevant literature on similar innovations. Accordingly, we studied the Act's impact on: 1. prosecution, 2. courts and judicial discretion, 3. correctional management, and 4. victims. For ease of presentation, each research question in each of these categories is set out below with a corresponding description of the data and methods we used in testing it. This simply saves the reader the trouble of flipping back and forth between the research questions section and the data list for each question. (Data sources are printed in *italics.*)

Prosecution

o Charging Practices

Research Question 1. Did prosecutors charge a greater proportion of offenders at offense levels not covered by the law's "violent offender" definitions after the Act took effect?

** *Interviews with prosecutors and observations concerning charging, plea negotiation, and sentencing recommendation practices. Survey of prosecutors statewide about charging practices.*

o Charge Bargaining

Research Question 2. As part of plea agreements, did prosecutors agree to reduce charges from those covered by the Act to offenses not covered by the Act, and if so, under what conditions?

** *Interviews and observations at local prosecutors' offices concerning charging, plea negotiation, and guilty pleas. Survey of prosecutors statewide about charging practices.*

o Sentence Bargaining

Research Question 3. Did typical sentences agreed upon in plea agreements, and which judges imposed in accordance with those agreements, change so as to maintain the "going rate" of punishment that was normal before the No Early Release Act took effect?

** *Interviews with prosecutors and judges, and observations concerning charging, plea negotiation, and sentencing recommendation practices. Survey of judges statewide about sentencing practices.*

Courts

o Effect on Sentencing

Research Question 4. Did sentences judges impose on violent felons covered by the law change significantly after the Act took effect? If so, how?

** *Department of Corrections Automated Information Management System (AIMS) database, covering all types of felony offenses before and after the new law takes effect statewide and by a sample of counties of commitment, including data elements on:*

* *sentence lengths*
**expected parole release dates*

** *Results of written questionnaire to judges*

Research Question 5. Did trial rates increase significantly for those offenses covered by the act?

** *Administrative Office of the Courts PROMIS data, before and after the new law takes effect, on:*

* *guilty plea rates v. trial rates*

Corrections

Research Question 6. Did the volume and seriousness of rule infractions inside correctional institutions increase significantly after the Act passed? If so, is this attributable to inmates' perceptions that their good behavior will have little influence on eventual parole release dates? If so, what was the management response?

** *Department of Corrections Automated Information Management System (AIMS) database, covering inmates' records before and after the new law takes effect statewide, including data elements on:*

* *volume and severity of disciplinary infractions inside correctional facilities, and their dispositions*

Victims

Research Question 7. Did victims' satisfaction with sentences announced and imposed on violent offenders increase significantly after the Act took effect?

** *Results of short written survey of victims of violent crime, ranking on a scale of 1 - 5 their satisfaction with sentences imposed, in three representative counties. Comparison of results before No Early Release Act was implemented versus after, using t-tests of statistical significance.*

NEW JERSEY'S PROSECUTORIAL AND SENTENCING STRUCTURE

In order to determine the effects of a new law on any particular state's criminal justice system, it is first essential to understand the type of prosecutorial and sentencing structure that the state employs. Compared to other states, New Jersey has a unique system for the administration of justice, because all local prosecutors are appointed and supervised centrally from the Attorney General's office and judges sentence under a broad determinate guidelines system.

1. Prosecutorial Practices

Unlike other states where the county prosecutors are elected to office, New Jersey's Governor appoints county prosecutors to five-year terms.[1] County prosecutors are vested with

[1] NJSA 2A: 158-1

the same powers and duties as the state's attorney general,[2] and are an extension of the attorney general's office. This system, which dates from colonial times in which the English monarch appointed the prosecutor for the colony of New Jersey, was extended in 1970. In 1970 the Criminal Justice Act was passed by the New Jersey legislature to combat organized crime.[3] Not only were county prosecutors to be appointed by the governor, their practices and policies were now to be supervised by the Attorney General. The law says:

> " ... it is hereby declared to be public policy of the State to encourage cooperation among law enforcement officers and to provide for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State, in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State."[4]

The 1970 Act gave supervision powers over county prosecutors to the Attorney General:

> "The Attorney General shall consult with and advise the several prosecutors in matters relating to the duties of their office and shall maintain a general supervision over said county prosecutors with a view to obtaining effective and uniform enforcement of the criminal laws throughout the State. He may conduct periodic evaluations of each county prosecutor's office...".[5]

The Criminal Justice Act of 1970 is an important component of the "No Early Release Act's" enforcement and plays a critical role in its implementation throughout the State. Unlike previous research that demonstrates a likelihood that prosecutors would circumvent application of mandatory penalties to maintain the "going rate" (Rossman, 1979; Bynum, 1982; Carlson, 1982; Turner, et al., 1995) and that application of a state law is likely to vary significantly depending on the policies and practices of local county prosecutors, (Eisenstein, Fleming and Nardulli 1992; McCoy 1993) prosecutors in New Jersey do not have such discretionary latitude.

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[2] NJSA 2A: 158-5.
[3] NJSA 52: 17B-98.
[4] Ibid.
[5] NJSA 52: 17B-103.

Exercising this supervisory power, the Attorney General issued a "Directive for Enforcing the 'No Early Release Act'" on April 24, 1998. The directive recognizes that the overwhelming majority of criminal convictions in the State result from negotiated agreements between the prosecutor and the defense, rather than pursuant to a trial. The directive attempts to balance the processing of criminal cases with the expressed intent of the legislature and the governor, i.e. that "violent offenders" serve a sentence not less than 85% of the term imposed by the court. In that spirit, the directive instructs the prosecutors to:

> " make certain that the plea presented to the court reflects the seriousness of the defendant's offense behavior and does not undermine the purpose of the No Early Release Act or this directive."[6]

The directive outlines the process that prosecutors must take at each step of the disposition process to ensure the achievement of that goal. The instructions are summarized below and the full text of the Directive is available in appendix **B**.

The "No Early Release Act" was designed to respond to the concerns of crime victims and therefore the appropriateness of victims' input into the decision process is highlighted in the directive. Victims' interests and the benefit of sparing them the stress of a trial are explicitly stated in the state's "Victims' Bill of Rights"[7] and prosecutors were directed to include victim consultation at various stages of the criminal process. Another statute in effect at the time that the No Early Release Act was passed is New Jersey's "Graves Act," requiring a mandatory three-year prison term to be applied to any person using a gun in the commission of a felony.

The following is a review of the major provisions of the directive to county prosecutors for enforcing the No Early Release Act, which was sent on April 24, 1998.

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[6] Attorney General Directive, No Early Release Act, pg.2.
[7] NJSA 52:4B-36.

A. Pre-Indictment Dispositions.

Prosecutors are traditionally afforded wide latitude in selecting and pursuing criminal charges, especially at this stage of the criminal process before a grand jury has even indicted the case. The most important factor noted under the prosecutorial guidelines at this stage of the process is the factual proofs that would be available for a trial. The strength of the evidence and the possibility of acquittal remain the most significant factors. However, prosecutors are instructed to consider the interests of the victim and prosecutors are told to consult with and take into consideration the interests of the victim in determining whether to seek an indictment," or to downgrade (i.e. reduce the severity of) the original charge, and each victim must be given an opportunity to write an impact statement and to comment on any proposed pre-indictment disposition. Any decision to dismiss a charge must be reported to the Assignment Judge of the County and if the charge would have been subject to the No Early Release Act, the prosecutor must state that in writing and say that it was dismissed in accordance with the Attorney General's policy directive.

The "No Early Release Act" requires that prosecutors must establish by a preponderance of the evidence that the offender used or threatened to use a deadly weapon or caused the death or serious bodily injury of the victim to be eligible for the 85% provisions of the Act. At the arraignment hearing (pre-indictment stage,) prosecutors must notify the defendant and the Court of the offenders eligibility for the 85% provision. Also, the prosecutor is required to notify the defendant that he/she is subject to a term of supervised release (previously parole) as set forth in the Act. Prosecutors are instructed to either complete this process through the use of a plea form, colloquy in open court, or through the expressed provision of the written plea offer to the defendant. This change is consistent with the expressed intent of the legislation and represents a

major addition to the criminal procedures of plea agreements at the pre-indictment stage.

B. Negotiated Dismissal or Downgrading of Post-Indictment Charges.

County prosecutors are prohibited from dismissing or downgrading a charge subject to the enhanced punishment of the "No Early Release Act" unless there is insufficient evidence to warrant a conviction or imposition of the enhanced penalty, to protect the interests of the victim(s), or such an agreement is essential to elicit the offender's assistance and cooperation with other prosecutions. Although prosecutorial discretion is possible under the above conditions, the directive severely limits the previous wide latitude prosecutors had in making charge bargains in offenses covered by the No Early Release Act. If a plea agreement is reached, at or before the hearing in which the guilty plea will be made, the assistant prosecutor handling the case must advise the court in writing that the offense facts made the case subject to the No Early Release Act. Significantly, the directive specifically says that "the county prosecutor...shall have no authority to waive imposition of enhanced sentence required by the Act."

Thus, although prosecutors retain their discretion to plea bargain and agree to negotiated guilty plea settlements that would result in the Act not applying to the case, they have to state reasons for it, and they do not have the authority to agree to disregard the operation of the Act altogether. The sentencing judge would be made aware of all the facts of the case and the fact that NERA is at issue. This system can be characterized as "bounded prosecutorial discretion" in which judicial discretion still plays a part. It is therefore unlike other mandatory sentencing laws in which the judge's role is so limited as to be non-existent, and in which prosecutors' discretion in dismissing or reducing charges is virtually unreviewable by the court. (In short, New Jersey did not promulgate a Truth-in-Sentencing law that would operate like many Three

Strikes laws do.)

C. Sentence Recommendations.

Prosecutorial discretion is not restricted in terms of the established sentence ranges under Title 2C (New Jersey Code of Criminal Justice) for offenses covered by the Act. In fact, the No Early Release Act did not alter the existing ranges for sentences, prosecutors remain free to agree to sentences within the established statutory provisions. But prosecutors are prohibited from waiving the 85% provisions of the Act, so an offender must serve 85% of whatever sentence the court imposes if the crime is one covered by the "No Early Release Act."

The established sentencing provisions are determined under New Jersey's sentencing guidelines. In subsection J of the Attorney General's directive to county prosecutors, the operation of the No Early Release Act on sentences imposed under the state's sentencing guidelines is further considered. The directive states that NERA "provides unambiguously that in any case where the statute applies, the court 'shall fix a minimum term of 85% *of the sentence* during which the defendant shall not be eligible for parole." (Quoting NERA, emphasis added in the directive.) So the 85% requirement would apply to the total prison sentence imposed under the sentencing guidelines, including years added due to aggravating factors (an "extended term") or mandatory prison terms (for using a gun, for instance, under the Graves Act.)

New Jersey law permits an offender charged and convicted of a crime of the first or second degree to be sentenced for an offense one degree below that of the conviction, if the interest of justice so requires.[8] Under these unusual circumstances, prosecutors are prohibited from agreeing to apply the usual sentencing structure to reduced charges and are mandated to

[8] NJSA 2c:44-1F(2).

ensure the 85% provisions of the Act are applied also to the reduced sentence. In discussions with a member of the Attorney Generals' staff, we confirmed that this caveat applies to the provisions listed above (Negotiated Dismissal and Downgrading of Post-Indictment Charges).

Thus, New Jersey retained an established system of sentence bargaining, under which prosecutors and defenders would agree to recommend to the sentencing judge a particular prison term of years under the established sentencing guidelines, but prosecutors had no authority to prevent the 85% requirement from attaching to any sentence thus imposed.

D. Overcoming the Presumption of Imprisonment.

The "No Early Release Act" does not explicitly require that defendants convicted of offenses covered by the Act be sentenced to a prison custodial term. However, the offenses subject to the Act's provisions do carry a statutory presumption of imprisonment under NJSA 2C: 44-1d. Prosecutors are instructed:

"This presumption of imprisonment can be overcome, but only where there are truly exceptional circumstances and where a court explicitly finds on the record not only that imprisonment would be a serious injustice, but also that such an injustice overrides the need to deter others."[9]

Prosecutors are told not to agree to a non-custodial sentence except under the most exceptional circumstances, which would be reviewed both by the judge in the case and the enhanced provisions of the "No Early Release Act" as soon after conviction as possible if the facts and evidence so warrant.

Finally, the Attorney General's directive addresses uniform interpretation and requires all prosecutors with questions regarding the implementation or applicability of the "No Early

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[9] Attorney General directive, No Early Release Act, pg.9.

Release Act" or the directive to address inquiries to the Director of the Division of Criminal Justice, a position established in the Criminal Justice Act of 1970.

2. The Sentencing Structure in New Jersey

New Jersey's sentencing structure is a hybrid determinate model. By this we mean that it is not indeterminate, but nevertheless it does retain ranges of possible prison terms that may be imposed upon conviction. These ranges are narrow compared to traditional indeterminate sentences, which could often range from probation to decades of imprisonment possible for a conviction. Under the New Jersey law, a typical range of prison terms permissible for sentencing a violent first-degree felony would be 10–20 years and a second degree felony 5 - 10 years. Judges have discretion to sentence within that range, relying on any aggravating and/or mitigating factors proven. The sentencing structure is "hybrid" because it is not entirely indeterminate, yet it retains some judicial discretion to sentence from among a range of possible prison terms, and it also has some mandatory sentencing requirements (three years mandatory prison time for use of a gun, for instance.) This sentencing structure is not guidelines sentencing as that term is usually understood, i.e. based on a grid that first takes account of the severity of the crime and the prior record, and then factors in other case and offender characteristics. It is somewhat confusing to criminal justicians from outside the state when New Jersey criminal court professionals refer to this system as "guidelines" and often seem to believe it closely resembles guidelines grid systems such as Minnesota's or the federal system's. The sentencing structure has no appeal feature and judicial departures outside the guidelines range need not be justified in writing. Probably, the sentencing law that most closely resembles it is California's Determinate Sentencing Law.

As in any professional workplace, commonly-used words have developed to describe procedures and issues that everyone in the workgroup must work with daily. References to "ordinary terms", "mandatory terms," "extended terms", "reduced terms", and "presumptive sentences" are common. "Ordinary terms" specify the range of sentences permitted under the statutes. Sentence length is based on the category of offense:

1. Murder,
2. First Degree Crimes,
3. Second Degree Crimes,
4. Third Degree Crimes,
5. Fourth Degree Crimes, and
6. Misdemeanors.

The ordinary term of imprisonment for murder is 30 years to life. First degree crimes have an ordinary term between 10 years and 20 years, second degree crimes are sentenced to terms of 5 years to 10 years, third degree offenses are sentenced to terms ranging between 3 years and 5 years. Fourth degree offenses receive a prison term not to exceed 18 months. Misdemeanor terms are sentenced to a term of less than 18 months.

When a judge decides the amount of prison time to which an offender will be sentenced, the judge is presumed to start at about the midpoint of the "ordinary term." "Presumptive sentencing" sets forth the sentence to be imposed unless the preponderance of the aggravating and mitigating factors weighs in favor of a higher or lower term of imprisonment. Presumptive sentences are as follows:

A. Aggravated Manslaughter or kidnapping (first degree) __ 20 years,
B. All other first degree crimes__ 15 years,
C. Second degree crimes__ 7 years,

D. Third degree crimes__ 4 years,
5. Fourth degree crimes__ 9 months.

In essence, the presumptive term represents the midpoint of the ranges proscribed for offenses under "ordinary terms."

"Mandatory sentences" are minimum terms affixed by the court that cannot exceed one-half of the imposed sentence. During this mandatory term the offender is not eligible for parole. Offenders are required to serve the entire mandatory sentence without benefit of commutation (good time) credit. New Jersey law requires mandatory prison sentences for some categories of offenders such as drug dealers.

"Extended terms" are imposed when a serious aggravating factor has been proven. They are permitted in specific situations including the following:

1. Persistent offenders are persons 21 years or older, convicted of a first, second or third degree crime, who have previously been convicted on at least two separate occasions of two different offenses.
2. Professional criminal is a person who committed the crime as part of an ongoing criminal activity with at least two additional persons, and devotes his/her life to criminal activity as a major source of livelihood. Instant offense must be a crime of the first, second, or third degree.
3. A person who commits a crime in return for some pecuniary value unrelated to the proceeds of the offense(s). Instant offense must be a crime of the first, second or third degree.
4. Second offender with a firearm.
5. Offender committed a hate crime.

Extended terms generally double the sentencing ranges of ordinary terms.

Finally, "reduced terms" take two forms. First, when mitigating factors outweigh the aggravating factors, the court may sentence the offender to a term of imprisonment below the presumptive sentence, including not affixing a mandatory term of imprisonment. Second, "in the case of convictions for crimes of the first and second degree where the court is clearly convinced that the mitigating factors substantially outweigh the aggravating factors, and where the interest

of justice demands, the court may sentence the defendant to a term appropriate to a crime one degree lower than that of the crime for which he was convicted."

One interesting addition to the New Jersey Code of Criminal Justice is the "presumptive terms" for extended sentences. The statutes provides that for the crimes of aggravated manslaughter, first degree kidnapping, or aggravated sexual assault, the presumptive term for an "extended term" is the maximum term allowable, life imprisonment. For crimes of the first degree, other than the above the presumptive term is 50 years, which is more than the traditional doubling of the sentence for extended terms, or the midpoint applied to other forms of presumptive sentences. For crimes of the third and fourth degree, the midpoint of the extended range is the presumptive sentence, similar to the presumptive scheme for ordinary terms.

The following example illustrates how New Jersey's voluntary guidelines sentencing law works, and the discretion permitted under the system:

An offender is convicted of robbery, a second degree offense. The "ordinary term" has a range of 5 years to 10 years. The presumptive term is 7 years. The offender would be eligible for parole after serving 33% of the sentences imposed, or 2 years and 4 months. Or, because it was an offense of the second degree, the judge may sentence the offender to a reduced term appropriate to an offense of the third degree, which carries a presumptive term of 4 years. In that event, if the court did not affix a mandatory sentence, the offender could be eligible for parole release at 1 year and 3 months. But if the aggravating factors outweigh the mitigating factors, the judge may impose an "extended term" of imprisonment. That term would be double the presumptive term of 7 years, so as to total 14 years. As an alternative, affixing a "mandatory term" to the extended term would require the offender to serve a maximum prison sentence of 7 years before parole eligibility. Without the mandatory term the offender would be eligible for parole on the extended term at 4 years and 7 months. Of course there are any combination of options available to the judge within the extremes illustrated in this example.

As this example makes clear, New Jersey's sentencing structure includes reduction of the prison term in the discretion of the Parole Board. As is typical in most states, an inmate may be paroled after serving 33% of the prison sentence imposed. In addition, there are also two types

of good time credits awarded by the Department of Corrections. Work Credits reduce an offender's sentence by one day for every five days in work status. However, if an inmate is assigned to minimum custody status, the inmate earns an additional 3 days monthly for the first year, and five days per month for the second and subsequent years. Work credits are awarded to inmates who are assigned prison jobs or assignments.

In all, administrative actions reduce sentences by a maximum of 21 days per month (for sentences of 30 years or more). The median sentence reduction is 15 days per month. These administrative actions are in addition to the statutory parole eligibility requirements that inmates must serve 33% of the imposed sentence before parole eligibility.

Using the example of the offender convicted of robbery, the sentence served for a presumptive and ordinary terms could be as little as 1 year and 7 month for a seven year sentence. For the reduced term, the offender could serve as little as 10 months. However, violent offenders do indeed serve longer percentages of their sentences than other offenders. The latest published figures for the mean sentence served by violent offenders in New Jersey is 47%. It was against this statutory background that the New Jersey Legislature enacted the provisions of the No Early Release Act. If violent offenders generally served almost half of the prison sentences imposed prior to passage of the law, the NERA would require them to serve 85%, thus representing an additional 35% in prison time served.

NERA's IMPACT ON PROSECUTION

As outlined previously, New Jersey has a unique structure relating to prosecutors. Unlike the situation in the majority of states, New Jersey's Attorney General has a supervisory role over county prosecutors. As a result, the researchers initially had to seek approval from the office of the Attorney General to conduct the research. A questionnaire was developed (attached as appendix C) addressing prosecutorial practices for offenses targeted by the "No Early Release Act" (NERA) and offenses not subject to the law's provisions for the periods prior to and after the effective date of the law. The questionnaire was approved by the Attorney General's office and subsequently discussed at the Prosecutors' Association meeting. The results of that discussion were that prosecutors were free to either participate in the survey or refrain from participation. There were no changes made to the survey.

Individual county prosecutors and their assistant prosecutors were then free to participate or refrain from participation in a study. Although this method of distribution has its flaws since local prosecutors may wonder whether the survey is truly independent of their supervisory office in Trenton, it is definitely preferable to sending the surveys "cold" and having them ignored. The survey was pre-tested by administering it with a Chief Assistant Prosecutor from a suburban-urban county, and some revisions were made before it was mailed out to every county in the state. The Division of Criminal Justice, of the Office of the Attorney General, had sent a separate letter to each prosecutor's office telling them that the survey was coming, that the Division had approved it, and that they were free to answer it or not. The mailing was arranged so that individual counties could not be identified. The return envelopes were marked to track the counties responding, but individual confidentiality was maintained throughout the process.

The questionnaire was a combination of closed-ended and opened-ended questions regarding the practices at the pre-indictment stage, post-indictment-pre-trial stage, and sentencing stage of the process. County prosecutors were asked to have their trial and grand jury attorneys complete questionnaires and return them to the researchers in self-addressed stamped envelopes provided. The closed-end questions were constructed on a linear scale to address practices for all offenses prior to and after the effective date of the law. The questionnaires were sent out during a time period that encompassed prosecution both of violent offenses subject to NERA and those not subject to the Act (violent crimes committed prior to the Act). The period was sufficiently close to the pre-NERA period so as to reduce the possibility of telescoping effects.

New Jersey has 21 counties consisting of urban, suburban, and rural areas of the state. The response rate was 57% of all counties surveyed -- i .e. at least one prosecutor from a county listed as a respondent had returned a survey -- and the mix of responses was demographically representative of the state. Most counties provided more than one response and the total number of responses was 50.

The analyses were descriptive. Prosecutors indicated on a 4-point Likert scale the frequency with which certain outcomes were likely at each stage of the prosecutorial process. (For instance, "how likely is it that you would reduce a charge from a felony to a misdemeanor in violent offense categories pre-indictment? Never = 1, seldom = 2, sometimes = 3, often = 4.) Frequencies of these responses were computed in each category to investigate the likelihood of changing charges pre-indictment, the likelihood of charge and sentencing bargaining for offenses both covered and not covered by the Act, and sentencing recommendation and bargaining practices.

To test whether there had been significant changes in prosecutorial practices before and after the passage of NERA at the various stages of the adjudication process, paired sample t-tests were employed This was the most appropriate test because it tests the null hypothesis that the means of two variables (pre and post NERA practices) are equal, and the two variables result from a quasi-experiment in which the same subject (prosecutor's office) is observed before and after an intervention (NERA).

To further explore the factors that were most important to prosecutors in making determinations of how to proceed at different stages of the judicial process, open-ended questions provided the respondents an opportunity to explain their decisions. The responses to those questions are also included in the Data Analysis section below.

Finally, we conducted interviews with some prosecutors who agreed to speak with us after we called them. Because this was not a random sample, we have no way of knowing whether the responses were representative of prosecutorial practices statewide. The interviews provided explanations from prosecutors on how their offices implemented the requirements of the "No Early Release Act," including notification of application of the Act's provisions, changes in plea negotiations, and sentencing changes noted in the data analysis. Prosecutors who agreed to be interviewed were extremely candid and cooperative in this process, and all referred to the Attorney General directive to some extent when explaining how they handled NERA cases. The responses were used to interpret the statistical and survey data.

Plea Bargaining and Sentencing Practices Before and After Passage of the NERA

The hypothesis was that prosecutors would maintain the "going rate" of sentences for offenses covered by the Act. The research questions posed were designed to test this hypothesis. The first research question posed was: ***Did prosecutors charge a greater proportion of offenders at offense levels not covered by the law's " violent offender" definitions after the law took effect?***

Charging practices within prosecutors' offices were examined using both closed and opened-ended questions. The results are presented both for individual counties and the State in total. Respondents were asked: *Is it common practice to change charges subject to the "No Early Release Act" originally booked before presenting a case to the Grand Jury? How common is it?* Table 1 contains the frequencies and means for the State and individual counties.

Table 1. Frequencies: How common is the practice of changing charges subject to the "No Early Release Act" before presentation to the Grand Jury?

State/County (Mean)	Never*	Not Very Common*	Common*	Very Common*
County A (1.0)	0	5	0	0
County B (2.0)	0	0	1	0
County C (0.0)	1	0	0	0
County D (.43)	4	3	0	0
County E (1.0)	0	7	0	0
County F (.75)	1	3	0	0
County G (.28)	5	2	0	0
County H (.67)	2	4	0	0
County I (Did not respond)	0	0	0	0
County J (0.0)	1	0	0	0
County K (.67)	1	2	0	0
County L (0.0)	4	0	0	0
State (.6)	19	26	1	0

*** Values for responses: 0=never; 1=not very common; 2=common; 3=very common.**

The results presented in Table 1 clearly indicate that the likelihood of prosecutors to change charges originally booked before presentation to the Grand Jury is rare. Only one respondent indicated that it was common to change charges.

However, when we asked prosecutors to answer the same question when thinking of particular offenses, the picture changed slightly. There was some variation in the frequencies presented indicating that, in some offenses, charges are more likely to be reduced than in others offenses. Also, the research question stated above examines the indictment practices of prosecutors for violent offenses covered by the Act and offenses not covered by the Act, before and after the effective date of the law. The hypothesis was that prosecutors would maintain the "going rate" by charging a greater proportion of NERA (No Early Release Act) offenses at reduced levels.

Paired-Samples T Tests were conducted on all violent offenses covered by the "No Early Release Act" to test this hypothesis. This procedure tests the null hypothesis that the data are a sample from a population in which the means of two variables are equal. Prosecutors were asked how likely they were to change the charges initially booked before presenting the case to the Grand Jury, both prior to and after the implementation of the No Early Release Act, for the following offenses covered by the Act: Aggravated Manslaughter, Manslaughter, Aggravated Assault, Kidnapping, Aggravated Sexual Assault, Sexual Assault, Robbery, and Carjacking. Table 2 contains a summary of the paired-samples T test for these offenses.

Table 2. A. Paired Samples T Test: Likelihood of Changing Charges for NERA Offenses Before and After the Law's Implementation, by county

Offense	County A Diff Means	Sig	County B Diff Means	Sig	County C Diff Means	Sig	County D Diff Means	Sig	County E Diff Means	Sig	County F Diff Means	Sig
Agg. Man.	0.0	--	0.0	--	0.0	--	0.0	--	0.0	--	0.667	0.423
Man.	0.0	--	0.0	--	0.0	--	0.0	--	0.0	--	0.667	0.423
Aggravated Assault	0.20	0.374	0.0	--	0.0	--	0.286	0.172	0.0	--	0.667	0.423
Kidnapping	-0.2	0.374	0.0	--	0.0	--	0.149	0.356	0.0	--	1.0	0.225
Agg. Sexual Assault	-0.2	0.374	0.0	--	0.0	--	0.167	0.363	0.0	--	1.0	0.225
Sexual Assault	-1.0	0.353	0.0	--	0.0	--	-2.0	.03*	-2.71	0.0*	-0.5	0.5
Robbery	0.2	0.374	0.0	--	0.0	--	0.143	0.356	0.0	--	1.3	0.184
Carjacking	-0.2	0.374	0.0	--	0.0	--	0.0	--	0.0	--	1.0	0.5

-- denotes the T Test was not completed because there was no difference in the means.
* significant at the .05 level.

Table 2. continued

Offense	County G Diff Means	Sig	County H Diff Means	Sig	County I Diff Means	Sig	County J Diff Means	Sig	County K Diff Means	Sig	County L Diff Means	Sig
Agg. Man.	0.167	0.363	0.0	--	###	###	0.0	--	0.0	--	0.0	--
Man.	-0.167	0.363	0.143	0.356	###	###	0.0	--	0.0	--	0.0	--
Aggravated Assault	0.20	0.374	0.0	--	###	###	0.0	--	-0.33	0.423	-0.750	0.391
Kidnapping	-0.167	0.363	0.0	--	###	###	0.0	--	0.0	--	-0.750	0.391
Agg. Sexual Assault	-0.143	0.356	0.167	0.363	###	###	0.0	--	0.0	--	-0.250	0.718
Sexual Assault	-1.29	0.078	-1.80	0.2*	###	###	0.0	--	-1.67	0.130	-1.5	0.01*
Robbery	-0.143	0.356	0.143	0.356	###	###	0.0	--	0.0	--	-0.50	0.391
Carjacking	-0.143	0.356	0.167	0.363	###	###	0.0	--	0.0	--	-1.50	0.215

County I did not respond for action prior to the enactment of the "No Early Release Act" therefore, comparisons were not possible.
-- denotes the T Test was not completed because there was no difference in the means.
* significant at the .05 level.

Table 2.B. Paired Samples T Test: Likelihood of Changing Charges for NERA Offenses Before and After the Law's Implementation, STATEWIDE

Offense	Statewide Diff Means	Sig
Agg. Man.	0.023	0.710
Man.	0.465	.486
Aggravated Assault	0.0	--
Kidnapping	-0.023	0.812
Agg. Sexual Assault	0.046	0.599
Sexual Assault	0.023	0.80
Robbery	-0.089	0.323
Carjacking	-0.116	0.342

-- denotes the T Test was not completed because there was no difference in the means.
*** significant at the .05 level.**

Table 2 shows the difference in the means for all offenses covered by the "No Early Release Act" and the 2 tailed t test of significance for the paired samples. The t test could not be computed for offenses that showed no difference in the means between practices before and after the implementation of the Act. One county, County I, did not respond to the question about charging practices prior to the law, so the test could not be computed for that county. Negative values in the difference of means column (diff. means) indicates that charges were more likely to be reduced **prior** to the enactment of the Act. Positive values reflect a greater likelihood of reduced charges **after** the law's effective date. The data indicate that in general charge reduction and dismissal pre-indictment was about the same both before and after NERA took effect. There were some small movement in the direction of more dismissals after NERA in some counties, and some slight indication that there were fewer dismissals in others. These fluctuations were not statistically significant in most offense categories. However, there was a significant

difference reported in charge bargaining practices post-NERA in sexual assault cases. In all counties reporting, the values of the compared means was negative, indicating that charge reduction was more common before the law's effective date. Charging practices for aggravated manslaughter and manslaughter seemed the least affected by the law's enactment.

The results of the "paired samples t test" for the hypothesis that prosecutors would be more likely to change charging practices so as to maintain the "going rate" could not be substantiated. In fact, Sexual Assault offenses in four of the responding counties (Counties D, E, H, and L) indicates that in those counties prosecutors had been more likely to reduce charges preindictment before the Act went into effect. These counties were a mix of urban, suburban and rural. Therefore, the null hypothesis could not be rejected depending on demographic characteristics of the county. Apparently the prosecutors followed the Attorney General's directive to apply NERA stringently at the pre-indictment stage for violent felonies.

The survey questionnaire also asked the prosecutors about the importance of various factors that might influence the decision to reduce charges originally booked before presenting the case to the Grand Jury, both before and after the enactment of the "No Early Release Act." The question was posed to explore the idea that the factors mentioned in the Attorney General's directive (victims' wishes, etc.) were the factors that most influenced prosecutorial decisions, compared to other ideas. We asked for rankings on the important of the following factors: use of a weapon, victim vulnerability, age of the victim, amount of physical injury, age of offender, offender's prior record, and the offender's refusal of the prosecutor's first offer to settle the case. The most important factor was use of a weapon. All respondents reported this to be "somewhat important" to "important" in their determination to change charges. (Average mean for all counties 2.9). Physical Injury was also an important factor (2.8), as was the vulnerability of the

victim (2.3). The factors having little importance were offender age (.99) and refusal of the prosecutor's first offer (0.69). Age of Victim (1.85) and prior record of the offender (1.75) were somewhat important factors in determining whether to change charges initially booked prior to presentation to the Grand Jury.

Did the importance of these factors in prosecutors' decisionmaking prior to indictment change under NERA? T-tests determine any significant differences between the the values reported prior to and after NERA became effective. The results are reported in Table 3.

Table 3.A. Paired Samples T Test: Differences in means for Factors related to Charging of Offenses presented to Grand Jury, Before and After NERA, by county

Factor	County A		County B		County C		County D		County E		County F	
	Diff Means	Sig	Diff Means	Sig	Diff Means	Sig	Diff Means	Sig	Diff Means	Sig	Diff Means	Sig
Use of Weapon	0.0	–	0.0	–	0.0	–	0.0	–	0.0	–	0.50	0.391
Victim Vulnerability	0.20	0.374	0.0	–	0.0	–	0.0	–	0.0	–	-0.25	0.391
Victim's Age	0.0	–	0.0	–	0.0	–	0.0	–	0.0	–	0.0	–
Injury	0.0	–	0.0	–	0.0	–	0.0	–	0.0	–	0.0	–
Offender's Age	0.0	–	0.0	–	0.0	–	0.0	–	0.0	–	-0.25	0.391
Prior Record	0.0	–	0.0	–	0.0	–	0.0	–	0.0	–	0.0	–
Refusal of First Offer	0.0	–	0.0	–	0.0	–	0.0	–	0.0	–	0.25	0.391

Table 3.A. (continued)

Factor	County G Diff Means	Sig	County H Diff Means	Sig	County I Diff Means	Sig	County J Diff Means	Sig	County K Diff Means	Sig	County L Diff Means	Sig
Use of Weapon	0.571	0.231	-0.143	0.356	###	###	0.0	--	0.0	--	0.0	--
Victim Vulnerability	0.0	--	-0.333	0.363	###	###	0.0	--	0.0	--	0.0	--
Victim's Age	0.0	--	-0.50	0.203	###	###	0.0	--	-0.333	0.423	0.0	--
Injury	0.0	--	-0.143	0.356	###	###	0.0	--	0.0	--	0.250	0.391
Offender's Age	0.0	--	0.0	--	###	###	0.0	--	0.667	0.423	0.0	--
Prior Record	0.0	--	0.167	0.363	###	###	0.0	--	0.0	--	0.0	--
Refusal of First Offer	0	--	0.167	0.363	###	###	0.0	--	0.0	--	-0.250	0.39

County I did not respond about actions prior to the enactment of the "No Early Release Act" therefore, comparisons were not possible.

Table 3.B. Paired Samples T Test: Differences in means for Factors related to Charging of Offenses presented to Grand Jury, Before and After NERA, STATEWIDE

Factor	Statewide Diff Means	Sig
Use of Weapon	0.044	0.688
Victim Vulnerability	-0.444	0.420
Victim's Age	-0.09	0.103
Injury	0.0	--
Offender's Age	0.022	0.743
Prior Record	0.022	0.323
Refusal of First Offer	0.022	0.570

-- denotes the T Test was not completed because there was no difference in the means.
* significant at the .05 level.

The results of the paired samples t test as recorded in table 3 indicate there was no significant changes in the weight of these factors in influencing the charging practices of prosecutors. The changes were in the direction expected because the law's intent was to more severely punish offenders convicted of violent offenses. Use of weapon was slightly more of a factor in several counties in not reducing charges originally booked, which would be consistent with the law's intent. One reason there was not more of a change is that use of weapons was the strongest factor in determining charging practices prior to passage of the Act, so it would not have been expected to change much under the new law.

Prosecutors were asked an opened-ended question regarding other factors that affected their decisions to change charges originally booked prior to presentation to the Grand Jury. Not surprisingly, prosecutors were more concerned about the basic elements of the case: likelihood of conviction, quality of the evidence, and the availability of witnesses and victims to testify. Further, prosecutors were asked; "Since the enactment of the "No Early Release Act," has your use of any of the factors listed above (use of weapon, etc) changed? If so, how?" Several interesting responses addressed the law's impact on the system. First, prosecutors believed that because of the 85% requirement, offenders were less likely to accept pleas for NERA offenses. They believed it was important to examine the evidence more closely under NERA so as to ensure a strong case for conviction, because offenders would be less likely to plead guilty to a weak case for a NERA-covered offense. Second, in spite of the fact that refusal of first offer for a negotiated disposition was not statistically significant in the analysis, prosecutors did state that refusal of an offer at the pre-indictment stage would result in no further consideration at later stages of the process. Finally, there was unanimity that NERA cases would be discussed with senior trial attorneys in greater depth before the Grand Jury presentment. The "No Early Release

Act" did have some effect on the processing of cases within the prosecutors' offices, but the charging practices may have become internally more controlled, rather than procedurally different.

This was confirmed in the answers to a final question related to charging practice for offenses covered by the Act; "Since the enactment of NERA, have there been any other changes in your charging practices? If so, what are they?" The procedural changes appeared to entail processing time issues, caseload management, and speedy disposition issues as well as procedural concerns. Most prosecutors cited more strict scrutiny of evidence and provability as key changes. Also – and here is a major finding that will be explored in the sentencing data -- prosecutors said they are accepting pleas at the lower maximum end of the permissible sentence range to expedite disposition. This change most likely is due to the 85% minimum sentencing requirement of the Act. This pattern was observed in statistics about average sentence lengths, and probably explained why dire predictions about offenders refusing to plead guilty under the Act were not borne out in practice: offenders still received a perceived "benefit" for their guilty pleas, even though the actual time to be served lengthened.

Finally, case screening for covered offenses was intensified. Those cases that are "borderline" may not be charged under the Act at all, whereas before they would be charged and reduced or dismissed if the evidence was not shown to be strong enough. This again is a case processing issue related to the anticipated reluctance of offenders to plead to a covered offense knowing that they face an 85% minimum sentence, but it also is an illustration of how a prosecutorial system can move from "inflated" charging to a system of charging only what prosecutors predict can probably be proven beyond a reasonable doubt at trial.

The processing time and caseload issues are clearly a concern of the prosecutors and assistant prosecutors. The "No Early Release Act" did not include additional funding for increased staff and judges. Counties were left to implement the law's provisions with the same level of personnel. As previous research indicates, the informal workgroups will strive to maintain a workload consistent with their resources. One way of doing this would be to adjust the amount of resources spent on offenses not covered by new legislation and spend more on offenses covered. Therefore, we examined changes in charging practices for offenses not covered by the Act. County prosecutors were asked how likely they were to change the charges initially booked before presenting them to the Grand Jury both prior to and after the effective date of the "No Early Release Act." The hypothesis was that, to maintain the current workload, prosecutors were likely to alter their charging practices for offenses **not** covered by the Act after its implementation. The results of those analyses are contained in table 4.

Table 4.A. Paired Samples T Test: Likelihood of Changing Charges for Non-NERA Offenses Before and After the Law's Implementation, by county

Offense	County A Diff Means	Sig	County B Diff Means	Sig	County C Diff Means	Sig	County D Diff Means	Sig	County E Diff Means	Sig	County F Diff Means	Sig
Burglary	-0.40	0.18	###	###	0.0	--	-0.143	0.356	0.0	--	0.0	--
Assault	0.0	--	###	###	0.0	--	-0.143	0.356	0.0	--	0.0	--
Theft	-0.40	0.18	###	###	0.0	--	0.0	--	0.0	--	0.0	--
Drug Distribution	-0.200	0.374	###	###	0.0	--	0.0	--	0.0	--	0.0	--
School Zone Drug Offenses	-0.20	0.374	###	###	0.0	--	0.0	--	0.0	--	0.0	--
Drug Possession	-0.2	0.374	###	###	0.0	--	0.0	--	0.0	--	0.0	--

-- denotes the T Test was not completed because there was no difference in the means.
County I did not respond for action prior to the enactment of the "No Early Release Act" therefore, comparisons were not possible

Table 4. continued

Offense	County G Diff Means	Sig	County H Diff Means	Sig	County I Diff Means	Sig	County J Diff Means	Sig	County K Diff Means	Sig	County L Diff Means	Sig
Burglary	0.0	--	0.0	--	###	###	0.0	--	0.0	--	0.0	--
Assault	0.0	--	0.0	--	###	###	0.0	--	0.0	--	0.0	--
Theft	0.0	--	0.0	--	###	###	0.0	--	0.0	--	0.0	--
Drug Distribution	0.0	--	0.0	--	###	###	0.0	--	0.0	--	0.0	--
School Zone Drug Offenses	0.0	--	0.0	--	###	###	0.0	--	0.0	--	0.0	--
Drug Possession	0.0	--	0.0	--	###	###	0.0	--	0.0	--	0.0	--

County I did not respond for action prior to the enactment of the "No Early Release Act" therefore, comparisons were not possible.
-- denotes the T Test was not completed because there was no difference in the means.
* significant at the .05 level.

Table 4.B. Likelihood of Changing Charges for Non-NERA Offenses Before and After the Law's Implementation, STATEWIDE

Offense	Statewide Diff Means	Sig
Burglary	-0.07	0.08
Assault	-0.23	0.323
Theft	-0.47	0.16
Drug Distribution	-0.24	0.323
School Zone Drug Offenses	-0.24	0.323
Drug Possession	-0.24	0.323

-- denotes the T Test was not completed because there was no difference in the means.
*** significant at the .05 level.**

The results of the paired samples t test indicate virtually no changes in the charging practices for the majority of counties in offenses not covered by NERA. Only County A did prosecutors alter their charging practices and the negative values in the difference of means indicates that prosecutors there were less likely to change charges after the implementation of the act. This finding is in the opposite direction of the hypothesis. The analysis clearly does not permit the rejection of the null and we conclude that, based on this survey responses, there were no changes in the charging practices for offenses not covered by the Act.

The conclusions were surprising because the principle of hydraulic discretion would predict some change in charging practices for offenses not covered by the Act, if, as was indicated in the analysis for NERA offenses, more time would be spent on cases covered by the Act. But the changes in charging practices for offenses covered by the Act might have been sufficient to maintain the level of effort and resources – i.e., a higher level of proof would be used for NERA cases, with other cases with more ambiguous proof not even charged at the higher (NERA)

levels initially. This would save the time and effort of taking cases through the grand jury and later dropping them or reducing them due to evidentiary problems.

Open ended questions were again asked of the prosecutors regarding factors that were important to charging practices, for offenses not covered by NERA. Consistent with the findings for NERA offenses, prosecutors listed strength of the evidence, likelihood of conviction, and other procedural factors. However, for the offenses not covered by the Act, several other issues were noted as important to changes in charges presented to the Grand Jury. These factors involved the defendant and the victim. Victim interest, willingness to cooperate, request of the victim to reduce charges to municipal (misdemeanor offense) and victim's culpability in the offense, as well as an offender's willingness for treatment and to make restitution were important factors. Note especially here that taking these factors into account carefully would be consistent with the prosecutorial guidelines on NERA issued by the Division of Criminal Justice under the Attorney General.

One factor that could influence decisions both pre- and post-indictment would be victim input. B ecause the "No Early Release Act" was touted as a Victims' Rights piece of legislation, which the Attorney General's guidelines echoed, the survey also asked the prosecutors "how influential are the victim's feelings and wishes in charge reduction policies for offenses covered by the 'No Early Release Act'?" Prosecutors reported that the feelings and wishes of the victims in their charge reduction practices were important. A summary of the respondents are shown in the following frequency chart:

Not important..... ...1
Not very important..... 4
Somewhat important.....19
Important..... .17
Very Important.....7

Although it is a bit surprising that the frequencies were not higher for the categories of "important" and "very important," considering the victims' rights aspect of the original legislation, nevertheless prosecutors did say they would give substantial weight to the wishes and feeling of the victims. But it is interesting to ponder the rhetorical direction of the "victims' rights" aspects of such legislation. Although the legislators who passed the law equated the interests of victims with the harshest sentences possible, prosecutors in their interpretations of victims' interests saw them as a factor in reducing charge severity if victims wished it.

Finally, prosecutors seemed more concerned with search and seizure requirements and possible suppression issues after the enactment of the law. The apparent inconsistencies with the direction of the findings may be explained by the fact that cases for non-NERA offenses can be reduced to municipal court cases. Prosecutorial discretion may be exercised in this fashion without changing charging practices at the Grand Jury Level.

In sum, the prosecutors were not likely to make changes to their practices of reducing or dismissing charges pre-indictment, either for offenses covered by the "No Early Release Act" or offenses not covered by the Act after its effective date. However, they were more careful to charge initially at a level that the evidence predicted could be proven at trial. The Attorney General guidelines on prosecuting NERA cases were followed regarding charging, which had the effect of tightening evidentiary scrutiny.

Of course, we offer this interpretation with a caveat because the data on which it is based were gathered from the prosecutors themselves on a survey. Possibly, the prosecutors perceived this research as scrutiny associated with the Division of Criminal Justice, and simply told us what they thought their supervisors wanted to hear. There is no way to test this possibility, but it

might explain the remarkable uniformity of answers and compliance with the law. We cannot know whether it shows that the Attorney General's directive and supervision worked or whether the prosecutors knew what to tell their bosses even if their actions were different.[10]

We did supplement the written surveys with personal interviews of several prosecutors in four counties, however, and expected that what might not be recorded on surveys would emerge in face-to-face interviews. We discussed charging pre-indictment, the factors involved in determining whether the crime fell under NERA, the conditions under which charges would be reduced ("downgraded") or dismissed, and sentence bargaining. The interview answers confirmed the survey results.

There was one other matter related to prosecutorial practices that was of concern: how NERA eligibility was established before the judges. If an offense fell under NERA, how would the court decide to attach the mandatory 85% provision? Conceivably, it could simply be ignored, in violation of the law, and the case could be sentenced under pre-NERA standards. As previous research indicates, prosecutors used wide discretion in the application of NERA's provisions. There was unanimous agreement on the fact that prosecutors have it within their power to prosecute these cases as NERA or non-NERA offenses.

The prosecutors in all four counties said that there were office guidelines to be followed to establish NERA eligibility initially, but none indicated that an offense that fell in a NERA category would not be "pushed" as a NERA case. To establish NERA eligibility, they said, the prosecutor would determine that the case fit in the offense categories covered by NERA. (Here

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[10]Statistics on charges made, reduced, dismissed, etc. over time were made available from the state Administrative Office of the Courts and are reported in a separate part of this project.

is where the charge bargaining down to non-NERA offenses would occur.) Notification of NERA eligibility was then usually given at the pre-indictment stage of the process. Formal plea offers, which must be written in all felony cases, contained the stipulation that NERA was or was not applicable in this case. If the plea offer was refused, defendants and the court had nevertheless been notified of the NERA application. If no offer had been made, a notification would be made after trial upon conviction and openly stated in court at the sentencing hearing.

But post -indictment practices differed between counties. Prosecutors who felt they had sufficient evidence to convict under the statutes said they would not change their positions regarding NERA applicability. However, when the proofs were weak, plea offers were amended to remove the NERA eligibility from the sentencing recommendation contained in the original plea offer. A bargain could be achieved at that point if the defendant agreed to plead to a non-85% sentence. This might violate the letter of the law, it seemed, because the plea could be to an offense level that NERA covered.

Counties differed somewhat in typical responses at this stage of case processing. One county notified the defendant of the NERA eligibility, but would agree to allow the defense attorney to argue its appropriateness at sentencing as part of the negotiated agreement. Judges were free to impose either the 85% requirement or to sentence under previous law. This seemed to violate the spirit, if not the intent, of the Attorney General's guidelines. What was clear is that prosecutors did use discretion in applying the 85% provisions of the law, but nevertheless were in compliance with the requirement of establishing NERA eligibility.

Sentence Bargaining

The final research question examines the actual sentencing practices of prosecutors. ***Did prosecutors change sentencing recommendations made to the court following plea bargaining, both for convictions covered by the Act and those not covered by the Act?*** Discretion in sentencing recommendations was expected and this hypothesis is supported by prior literature.

We expected changes in sentence bargaining because NERA and the Attorney General's directive provided some "wiggle room" to strain towards maintaining homeostasis in sentencing. Prosecutors retained discretion to make sentencing recommendations as part of a guilty plea agreement to be presented to the court. Prior to NERA, the typical sentencing expectation was that a felon would serve about half the prison term imposed. After, the expectation was 85%. By reducing the usual sentencing recommendation to a lower end of the presumptive range, and then computing the 85% on that lower prison term, prosecutors could give offenders incentive to plead guilty and judges to accept the sentencing change.

To test this hypothesis a paired samples t test was conducted and the results are recorded in table 5.

Table 5. A. Likelihood of Recommending a Reduced Sentence in Exchange for a Guilty Plea for the Following Offenses Before and After NERA's Implementation, by County

Offense	County A Diff Means	Sig	County B Diff Means	Sig	County C Diff Means	Sig	County D Diff Means	Sig	County E Diff Means	Sig	County F Diff Means	Sig
Agg. Man.	0.75	0.215	###	###	3.0	^^	0.714	0.22	1.43	.016*	-0.50	0.50
Man.	0.5	0.495	###	###	3.0	^^	0.571	0.321	-0.29	0.57	-0.50	0.50
Aggravated Assault	0.5	0.391	###	###	3.0	^^	0.286	0.457	-0.29	0.57	-1.5	0.50
Kidnapping	1.0	0.092	###	###	3.0	^^	0.714	0.182	-0.29	0.57	1.0	^^
Agg. Sexual Assault	0.25	0.718	###	###	3.0	^^	0.333	0.465	-0.29	0.57	-1.5	0.21
Sexual Assault	0.25	0.718	###	###	3.0	^^	0.50	0.203	-0.29	0.57	-1.5	0.21
Robbery	0.75	0.215	###	###	3.0	^^	0.429	0.20	-0.29	0.57	1.0	^^
Carjacking	0.667	0.184	###	###	3.0	^^	0.429	0.20	-0.29	0.57	-2.0	^^
Burglary	0.667	0.184	###	###	3.0	^^	0.286	0.457	-0.29	0.57	1.0	^^
Assault	0.0	--	###	###	3.0	^^	0.286	0.172	-0.29	0.57	-1.0	^^
Theft	0.0	--	###	###	3.0	^^	0.143	0.604	-0.43	0.357	-2.0	^^
Drug Distribution	0.667	0.184	###	###	3.0	^^	0.286	0.457	-0.29	0.57	-1.0	^^
School Zone Drug Offenses	1.0	0.225	###	###	3.0	^^	0.143	0.604	-0.43	0.356	-1.0	^^
Drug Possession	-0.33	0.423	###	###	3.0	^^	0.143	0.766	-0.43	0.357	-1.0	^^

Table 5.A. continued

Offense	County G Diff Means	Sig	County H Diff Means	Sig	County I Diff Means	Sig	County J Diff Means	Sig	County K Diff Means	Sig	County L Diff Means	Sig
Agg. Man.	1.14	0.08	1.13	0.08	2.0	^^	0.0	--	-1.0	0.50	0.750	0.444
Man.	1.14	0.08	1.13	0.08	2.0	^^	0.0	--	-1.0	0.50	0.750	0.444
Aggravated Assault	0.86	0.045	1.14	.015*	3.0	^^	2.0	^^	-1.0	0.50	-0.25	0.809
Kidnapping	1.143	0.08	1.29	.049*	2.0	^^	2.0	^^	-1.0	0.50	0.0	1.0
Agg. Sexual Assault	1.0	0.111	1.29	.049*	3.0	^^	2.0	^^	-1.0	0.50	0.25	0.789
Sexual Assault	1.0	0.111	0.86	.045*	1.0	^^	2.0	^^	-1.0	0.50	0.25	0.789
Robbery	1.0	0.111	0.88	.021*	1.0	^^	2.0	^^	-0.50	0.795	-0.25	0.809
Carjacking	1.143	0.08	1.42	.035*	2.0	^^	2.0	^^	-1.0	0.50	0.0	1.0
Burglary	0.52	0.103	0.86	.045*	0.0	^^	2.0	^^	0.0	1.0	0.0	1.0
Assault	0.571	0.103	0.714	0.140	0.0	^^	2.0	^^	-1.0	0.50	0.0	1.0
Theft	0.43	0.289	0.714	0.140	-1.0	^^	2.0	^^	-1.50	0.50	-0.33	0.826
Drug Distribution	0.714	0.094	1.14	0.084	1.0	^^	2.0	^^	-0.50	0.795	0.67	0.529
School Zone Drug Offense	0.714	.047*	1.57	.033*	2.0	^^	0.0	--	-1.0	0.50	1.0	0.478
Drug Possession	0.286	0.356	0.86	0.225	1.0	^^	2.0	^^	-1.0	0.50	-0.33	0.826

County I did not respond about prior to the enactment of the "No Early Release Act" therefore, comparisons were not possible.

Table 5.B. Likelihood of Recommending a Reduced Sentence in Exchange for a Guilty Plea for the Following Offenses Before and After NERA's Implementation, STATEWIDE

Offense	State-Wide	
	Diff Means	Sig
Agg. Man.	0.91	0.00*
Man.	0.59	.011*
Aggravated Assault	0.42	0.057
Kidnapping	0.67	004*
Agg. Sexual Assault	0.50	.037*
Sexual Assault	0.405	0.058
Robbery	0.49	.018*
Carjacking	0.59	.017*
Burglary	0.40	0.055
Assault	0.23	0.221
Theft	0.05	0.803
Drug Distribution	0.525	.013*
Drug Possession	0.175	0.426

-- denotes the T Test was not completed because there was no difference in the means.
* significant at the .05 level.

The results reported in table 5 show that in most counties, lower sentencing recommendations were likely after NERA took effect. Furthermore, there was variation between the counties. Prosecutors in counties E and K were more likely to recommend reduced sentences for guilty pleas before the enactment of the "No Early Release Act." This is contrary to both the legislative intent of the Act as well as the directive from the State Attorney General regarding implementation of the law. Although the differences in the means were not statistically significant County K had substantial differences in the direction opposite of what was anticipated. County E also had a statistically significant difference in the means for the offense

of Aggravated Manslaughter after the law took effect. It is likely that this office adhered to the Attorney General's directive to the letter for this most serious offense covered by the Act, but the reasons for strict compliance are not clear.

County H's policies regarding reduced sentence recommendations in exchange for guilty pleas showed the most significant change. Aggravated Assault, Kidnapping, Aggravated Sexual Assault, Sexual Assault, Robbery and Carjacking had changes in the direction anticipated. Prosecutors in this county said they were more likely to recommend reduced sentences after the law took effect. Also, offenses not covered by the Act, burglary and school zone drug offenses, were more likely to have reduced sentence recommendations after the implementation of the Act. This is possibly related to the need for this urban county to maintain a constant workload. County G also had statistically significant differences in the mean for sentence reduction for school zone drug offenses. This is a large suburban county and it is most likely a result of workload issues as well.

The state-wide totals show statistically significant changes in sentence recommendations for six of the eight NERA offense categories. Only Aggravated Assault and Sexual Assault were not statistically significant, but the changes were in the anticipated direction (more likely to occur after the law's implementation). These results support the hypothesis that reduced sentence recommendations would increase after the enactment of the "No Early Release Act." Though the county by county analyses varied, the overall results supported the hypothesis.

Concerns about how victims' feelings were accommodated at the sentencing stage as well as the charge bargaining stage were at issue in this research. We asked about the degree of influence that victims' feelings had on the decision to recommend a reduced sentence in exchange for a guilty plea. Prosecutors were asked to rank how important various factors were

in the decision to reduce a sentence in exchange for a guilty plea, and victims' input was one of the factors. The results were somewhat surprising when considering the fact that the stated legislative intent of NERA was to increase sentence severity in the name of victims' needs. But prosecutors reported that victims' wishes were considered very carefully as an influential factor to recommend reduced sentences in exchange for guilty pleas to NERA offenses.

NERA's IMPACT ON SENTENCING

If the prosecutors who answered these surveys are to be believed, charge bargaining did not increase significantly as a way to maintain a "going rate" under NERA. However, this does not mean that the system simply applied the law wholesale as written. Instead, prosecutors used their discretion in arranging sentence bargains that judges would then approve. It was possible under the new law and under the Attorney General's directive to agree to lower prison terms than before, with the understanding that once the 85% requirement attached under the new law, the total prison time to be served would still be longer than under the previous law.

This was indeed what occurred, according to statistical data collected from the Department of Corrections Admissions Data Bases for calendar years 1998 and 1999 (January through June) for offenses eligible for sentencing under NERA. (In 1998 it was likely that offenses would be disproportionately sentenced under previous statutes because of case processing delay, so many pre-NERA cases were concluded then. The "No Early Release Act" went into effect in July, 1997, and delays of 12 months reaching disposition in these very serious

cases was not unusual.) For 1999, the case distribution should reflect the full effects of the "No Early Release Act."

Table 6 contains the mean sentences for NERA eligible offenses for 1998 and the number of cases for both offenses sentenced under previous statutes and the NERA statute, and the ordinary and presumptive sentences for each offense category.

Table 6: Sentences for 1998 Admissions to New Jersey Department of Corrections For Crimes Eligible for NERA Sentencing Requirements And New Jersey Sentencing Guidelines (in months) For Each Offense

Offense	Ordinary Term (Presumptive Sentence) in months	NERA Cases		Non-NERA Cases	
		N	Mean Sentence	N	Mean Sentence
Aggravated Manslaughter	120-360 (240)	15	194.4	126	249.1
Manslaughter	120-240 (180)	6	102	63	96.8
Aggravated Sexual Assault	120-240 (180)	2	150	119	154
Sexual Assault	60-120 (84)	8	63	222	69
Armed Robbery	120-240 (180)	69	139	700	163
Aggravated Assault	60-120 (84)	45	77	970	62
Kidnapping	120-360 (240)	NC	NC	NC	NC

The data indicate that offenders sentenced under the NERA statute received a shorter maximum sentence than those sentenced under existing statutes, with the exception of the offense of aggravated assault. These data support the hypothesis that prosecutors would strive to maintain the "going rate." However, the data also demonstrated that sentences for these violent

offenses were below the presumptive length in all cases except non- NERA aggravated manslaughter convictions. One must keep in mind that for NERA convictions, the actual sentence length does appear to be increased significantly as the offenders must serve 85% of the sentence (under New Jersey Good Time Provisions offenders will "max" out after completion of the 85% requirement) as compared to an average term of 50% of the maximum sentence for offenders sentenced under previously existing statutes. Table 7 contains similar data for 1999. Again, only offenders sentenced under previous statutes for aggravated manslaughter, and kidnapping, had sentences above the presumptive sentences for each category of offense. Aggravated Assault in NERA cases was also sentenced at a higher level than non-NERA aggravated assault cases.

Table 7: Sentences for 1999 Admissions to New Jersey Department of Corrections For Crimes Eligible for NERA Sentencing Requirements and New Jersey Sentencing Guidelines (in months) For Each Offense

Offense	Ordinary Term (Presumptive Sentence) in months	NERA Cases 1999		Non-NERA Cases	
		N	Mean Sentence	N	Mean Sentence
Aggravated Manslaughter	120-360 (240)	46	218	37	297
Manslaughter	120-240 (180)	27	100	11	147
Aggravated Sexual Assault	120-240 (180)	22	134	68	144
Sexual Assault	60-120 (84)	20	65	107	78
Armed Robbery	120-240 (180)	112	140	129	175
Aggravated Assault	60-120 (84)	109	70	315	56
Kidnapping	120-360 (240)	3	364	1	600

These data indicate that prosecutors, judges, and defenders agreed in typical cases that sentences should be set at the lower end of the presumptive range, with the understanding that the 85% requirement would apply. The result would be longer sentences than had been normal before passage of the NERA, but not as drastic as adding the entire 35%[11] as apparently contemplated in the new law.

When comparing the data on sentence length between the two years, there is an interesting trend that further supports the "going rate" hypothesis. Table 8 contains data comparing the maximum sentence length for NERA sentenced offenders. With the exception of aggravated manslaughter and a mild increase in manslaughter sentences, all other NERA offenses show a decrease in mean sentence length from 1998 to 1999. This indicates that the courtroom workgroup was becoming more knowledgeable about the effects of the 85% provisions and how expecatations for a guilty plea and the "going rate" could be maintained, at least to a degree.

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[11]Recall that most violent felons served approximately 50% of their prison terms before the NERA was passed. If the sentencing system had stayed the same but added on more prison time without parole until these sentences reached 85%, they would have increased by about 35% over the previous norm.

Table 8: Comparison of NERA Sentencing for Years 1998 and 1999 And Differences in Mean Sentences in Months

Offense	Ordinary Term (Presumptive Sentence) in months	NERA Cases 1999		NERA Cases 1998		Diff. in Mean Sent. 1999-1998
		N	Mean Sentence	N	Mean Sentence	
Aggravated Manslaughter	120-360 (240)	46	218	15	194	24
Manslaughter	120-240 (180)	27	100	6	102	-2
Aggravated Sexual Assault	120-240 (180)	22	134	2	150	-16
Sexual Assault	60-120 (84)	20	65	8	63	2
Armed Robbery	120-240 (180)	112	140	69	139	1
Aggravated Assault	60-120 (84)	109	70	45	77	-7
Kidnapping	120-360 (240)	3	480	0	0	NC

Inferences from the data are that prosecutors are aware that the 85% requirement equates with longer periods of incarceration for NERA sentenced offenses and therefore, they strive to maintain the previous going rate although New Jersey law requires that sentences below the presumptive must result from the mitigating factors of the offense significantly outweighing the aggravating factors. Prosecutorial discretion in sentences can explain this apparent conflict. Also, certainly, the fact that defense attorneys have to demonstrate to their clients that they will receive a lowered sentence in return for a guilty plea is at play here. The practice of recommending sentences at the lowest end of the sentencing range in return for a guilty plea to an 85%-carrying offense probably explains why trial rates did not increase significantly after NERA was passed. (Ritter 1999)

These findings are consistent both with the assumption that the system will strive to maintain a going rate of sentencing under a new law that requires drastic changes, and also with the assumption that county prosecutors in New Jersey follow the directives and prosecutorial guidelines set out by their supervisors in the state Attorney General's office. The directive on compliance with NERA had permitted this type of sentence bargain. Interviews with prosecutors in four counties further explained the survey and statistical data's findings. The prosecutors who agreed to an interview might not be representative of the state, of course. They might be the ones who perceive themselves to be most clearly in compliance with the Attorney General's directive and willing to demonstrate it. But the interviews did clear up some nagging questions raised by the quantitative data.

In interviews in which we asked prosecutors to explain sentence bargaining under NERA, prosecutors admitted that sentencing at the lower end of the presumptive range was a practical issue of negotiation and that it had become typical. The 85% provision significantly increased the actual prison sentence. Defendants were aware of this. In order to achieve a plea bargain, prosecutors felt they had to offer something in exchange for the guilty plea. Most stated that they would prefer a conviction on a violent offense and a lower term of imprisonment. Lower terms, defined as below the presumptive sentence, were accomplished in two ways. First, the plea would be to a term within the established range for the offense. Second, New Jersey law allows a person convicted of a crime to be sentenced one degree lower, if the interest of justice would be served; the Attorney General guidelines reiterated the appropriateness of this use of discretion. Prosecutors would allow the defendant to plead to a first degree crime, but be sentenced to a second degree offense at the presumptive range. This allowed them to concentrate on those offenses that would be tried, and not bog down the system.

Prosecutors also stated that plea offers for co-defendants were likely to be lower in exchange for cooperation of the primary defendant. This occurred most often when the evidence could not support a conviction without the cooperation of the co-defendant. If the proofs were strong, prosecutors were less likely to consider this option.

Also, judges were free to sentence offenders to terms of imprisonment outside the boundaries of NERA if they felt the circumstances of the offense did not meet the necessary mandates of the "No Early Release Act." The actual sentencing function remains the domain of the judge and the law does allow judges to find that the sentence should not include the 85% provision of no parole eligibility.

Although the intent of the legislation, the Attorney General's guidelines, and the responses to the questionnaires all indicate that there is little room for interpretation and application of the "No Early Release Act," prosecutors are exercising some degree of discretion in both charging and sentencing practices. Although they are less likely to reduce or dismiss cases pre-indictment if the cases are covered by NERA, they are less likely to charge the crime as a violent felony at all unless the evidence is strong. They are also willing to agree to lower sentences to which the NERA requirements will attach, which lowers the potential severity of punishment but still produces sentences harsher than before the law went into effect. Furthermore, in a substantial proportion of cases, judges exercise their discretion to take the case out of the NERA category altogether and sentence it at one severity level lower, "in the interests of justice." This is scarcely a remarkable finding, given the difficulties of proof and the necessities of guilty plea discussions, and it is completely consistent with conventional wisdom about how a court system processes felony cases when a new law requires changes.

In sum, the effect of the New Jersey "No Early Release Act" on prosecutorial discretion was negligible, which is not surprising since the law was not written to address it. The effect of the discretion on sentencing outcomes, however, was significant. Overall sentencing severity increased in all offenses covered by the Act, as the sponsors of the legislation said they intended, but not so much as to upset the well-established patterns of adjudication and not as much as the law apparently contemplated. The sharp impact that could possibly have been felt under this "Truth in Sentencing" law was blunted by a system of prosecutorial discretion that was controlled through guidelines and central supervision and that followed the law while still taking into account "going rates" and the evidentiary strength of individual cases.

NERA'S IMPACT ON CORRECTIONS

New sentencing legislation is rarely passed taking into account a thorough examination of its probable impact on the agencies responsible to implement it. The management of correctional agencies is affected by most, if not all, criminal sentencing enhancement laws. In the case of the No Early Release Act, two interconnected issues posed potential problems for the management of the New Jersey Department of Corrections: increased prison populations and increased levels of disciplinary infractions, especially violent infractions.

For almost a quarter of a century, the New Jersey Department of Corrections labored under an executive order declaring a state of emergency with regard to its prison population. This order mandated that county jail facilities would house the excess state inmate population. These numbers grew to over 4,000 in 1997 (Department of Corrections Population Report,

1998). The state Supreme Court ruled that the emergency order had been in effect too long and ordered the state to remove state inmates from all county jails upon the request of the county. This order further exacerbated the concerns over population control and the effects of the No Early Release Act.

The New Jersey Department of Corrections (1996) completed an analysis of the probable effects of the No Early Release Act on prison population. Table 9 is a comparison of prison population increases under the existing law and under the No Early Release Act. These estimates are for an 18 year period beginning 1996 through 2013. The Department of Corrections estimated that the impact of the No Early Release Act over the 18 year period would be an additional 4,112 beds, to take account of longer prison terms for the same number of offenders.

Table 9 Comparison of total beds required, by offense, NERA offenses

Offense	Beds Needed Under Current Law		Beds Needed Under NERA	Impact of NERA
Manslaughter	149		319	169
Sexual Assault	218		488	270
Assault	770		1466	696
Agg. Manslaughter	1084		1960	876
Agg. Sex. Assault	708		1444	736
Armed Robbery	1550		2845	1295
Kidnapping	100		170	70
Total	**4579**		**8692**	**4112**

The Department of Corrections completed a fiscal analysis in this same report. They estimated that the capital costs would be in excess of $390,000,000 and the operating costs ($26,000/inmate) would be approximately $107,000,000. The total cost of the No Early Release Act would be approximately $497,000,000. This represents an annual mean increase of

$27,000,000. These figures were based on the cost of operating maximum security facilities because the offenses covered by the Act were violent offenses. Most inmates sentenced for violent offenses are classified to maximum security institutions initially under DOC's classification procedures.

The above costs are prohibitive, especially in a time of fiscal restraint. The Violent Offender/Truth-in-Sentencing legislation passed by Congress provided for funding for additional prison space to states that would pass a Truth in Sentencing law. NERA was designed to meet those requirements. However, examination of records (i.e. funds disbursed from the federal budet under TIS grants) produced no evidence of such funding to the State of New Jersey, and examination of the Department of Corrections budgets (1996-1999) produced no evidence of such funding. Phone calls to state officials produced no useful information, either, since nobody had heard of any funds being sent from the federal government under Truth in Sentencing disbursements.

The importance of the second management issues takes on added salience given the above figures. If inmates sentenced under the No Early Release Act, with no real hope of parole, are more likely to incur more disciplinary infractions, the increase in maximum security facilities will be needed. If no increase is shown, then the projected costs could be reduced significantly.

The study took advantage of the fact that the implementation of the law set up a natural experimental design between the violent offender groups.[12] The treatment group consists of violent inmates sentenced under the provisions of NERA. The violent offender control group was a sample of inmates drawn from the population of inmates sentenced to the Department of

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[12]A full explanation of these matters is found in a doctoral dissertation that was supported by this study (McManimon 2000).

Corrections during 1998 for the same crimes as NERA offenders who did not have the 85% mandatory minimum attached. A second control group was chosen from the non-violent offenders (those not sentenced for crimes covered by NERA).

The samples were drawn from the Department of Corrections inmate management computer system (OPSIS). This database contains records on all newly admitted inmates including the sentencing data. The experimental group (NERA sentenced inmates) numbered 162. The violent offender control group, selected using a stratified random sample selection technique totaled 152. These inmates were stratified by offense type and by race, county of commitment, and age. The non-violent control group was also selected from the 1998 admissions period using a stratified random sample to approximate the overall non-violent population within the Department of Corrections. That sub-sample consisted of 174 inmates. All inmates in the total sample of 488 were male inmates, because there were not a sufficient number of female inmates sentenced under NERA (6).

The year 1998 was chosen to address two problems of temporal order. First, the temporal pattern of rule violations in general, and violent rule violations specifically, suggest the pattern is a function of time: the longer one stays in prison the more likely it is that he/she would receive a violation report. (Ellis, et al., 1974) Cao et al. (1997) suggest that previous research has completed cross sectional research without controlling for when an inmate is admitted to the system. Second, previous studies have arbitrarily set their observation period at one year. Offenders in these studies must be in prison for at least one year but many have been incarcerated for longer periods of time. This current study takes advantage of the fact that infractions are higher at the start of the prison sentence and peak within six to nine months of incarceration. Thereafter, infraction rates decline (Toch and Adams, 1989). This research uses

the most active time period to measure the dependant variables. In this study, because all inmates were admitted during the same year and disciplinary infractions are counted only for the first twelve months of incarceration, the temporal order issues are eliminated.

To begin, we asked the research question: are inmates sentenced for violent crimes more likely to be violent in prison than are inmates not sentenced for violent offenses?" To test this hypothesis, a chi-square test comparing violent and non-violent inmate groups on the dependent variable, violent incidents (dichotomized yes/no) was conducted and the results appear in table 10. For the dependent variable, violent incidents in prison (dichotomized as yes/no), the chi-square test's Pearson statistic clearly supports the null hypothesis that there is no difference between violent and non-violent offenders' likelihood of committing violent acts of misconduct while in prison.

Table 10. Crosstabulation: Crime of violence by Violent Incident

Variable	**Violent Incident**		**Row Totals**
Crime of Violence	NO	YES	
Yes	240	68	308 63.9
No	143	31	174 36.1
Column Total	383 79.5	99 20.5	482 100.0

chi-square	Value	DF	Significance
Pearson	1.23739	1	.27
Continuity Correction	.99003	1	.32
Likelihood Ratio	1.25739	1	.26
Linear by Linear Association	1.23482	1	.27

Table 11 contains the results of a one-way analysis of variance testing the relationship between number of violent incidents and being incarcerated for a crime of violence. The results confirm that there is no difference between violent and non-violent inmates and their likelihood to commit violent prison infractions.

Table 11. Analysis of Variance Number of Violent Incidents by Crime of Violence

Source	DF	Sum of Squares	Mean Squares	F-Ratio	F. Probability
Between Groups	1	.8964	.8964	1.82	.18
Within Groups	480	236.0828	.4918		
Total	481	236.9793			

We asked a second research question: **Does the type of sentence imposed significantly affect the likelihood of violence in prison?** The question addresses the research hypothesis, **no hope of parole increases the likelihood of an inmate's involvement in prison violence.** This is the most direct measure of the effects of NERA on prison inmate behavior.

There are 308 violent inmates in the sample. The violent inmate sub-sample is comprised of 156 inmates sentenced under the NERA statute and 152 sentenced under previous statutes. Table 12 contains the results of the one-way analysis of variance test.

Table 12. Analysis of Variance: Participation in Violent Incidents by NERA (yes/no)

Source	DF	Sum of Squares	Mean Squares	F-Ratio	F. Probability
Between Groups	1	.3846	.3846	2.2374	.14
Within Groups	306	52.6024	.1719		
Total	307	52.9870			

The table demonstrates that there is no difference between violent inmates' likelihood to be involved in violent misconduct in prison. On its own, the fact that an inmate was sentenced under NERA and thus would serve 85% of his/her sentence, without hope of parole even as a reward for good behavior in prision, did not affect the likelihood of prison violence by itself.

Table 13 contains the results of the one-way analysis of variance measuring the variability between violent inmates on the number of violent rule infractions. Again there is little variability between the two groups, so the null hypothesis that NERA inmates would be more violent than their counterparts was not rejected.

Table 13. Analysis of Variance Number of Violent Incidents by NERA (yes/no)

Source	DF	Sum of Squares	Mean Squares	F-Ratio	F. Probability
Between Groups	1	.17426	.1742	.3063	.58
Within Groups	306	174.0466	.5688		
Total	307	174.2208			

Table 14 shows the results of the chi-square test of independence. The question answered by this data is, by knowing that an inmate is sentenced under the "No Early Release Act's" provisions tell us anything about his likelihood of committing a violent act in prison? The results indicate there is insufficient evidence to reject the null hypothesis that there is no difference between NERA and non-NERA sentenced inmates on their likelihood of committing acts of violence in prison.

Table 14. Crosstabulations: NERA (yes/no) by Violent Incident (yes/no)

Variable	Violent Incident		Row Totals
NERA Sentenced	NO	YES	
Yes	127	29	156 50.6
No	113	39	152 49.4
Column Total	240 77.9	68 22.1	308 100.0

	Value	DF	Significance
chi-square			
Pearson	2.23568	1	.13
Continuity Correction	1.84371	1	.17
Likelihood Ratio	2.24112	1	.13
Linear by Linear Association	1.23482	1	.27

Finally, we conducted two multiple regression analyses, one OLS and the second a logistic regression analysis. Both models represented the most efficient models using a list of variables previously shown to affect prison violence. Table 15 shows that the relationship of being sentenced for a NERA offense and being involved in violence in prison is inverse and statistically significant. Inmates sentenced under NERA have fewer violent infractions than both the violent and non-violent control groups. This is a counterintuitive finding.

Table 15. Stepwise OLS Regression: Most Efficient Model

Variable	B	SE B	T	Significance
Age	-.007721	.003610	-2.139	.033
Facility Type	.287141	.074317	3.864	.0001
Gang membership	.468310	.126192	3.711	.0002
Inmate Custody Status	.213432	.027096	7.877	.000
NERA	-.189582	.065287	-2.904	.039
Constant	.275080	.149192	1.844	.0658

Table 16 contains the results of a logistic regression analysis. The findings show that NERA sentenced inmate are 33% less likely to be involved in violent disciplinary infractions than are the control groups. Our analyses clearly demonstrate that the having no hope of parole does not increase the likelihood of inmate violence, in fact the consistency of the findings to the contrary are important for the management of correctional institutions both in New Jersey and throughout the country.

Table 16. Logistic Regression Explaining Violent Misconduct

Variable	B	Odds	SIG
Age	-.034	.97	.118
County Type	.017	1.01	.942
Race	-.141	.868	.454
Gang Membership	.995	2.70	.05
Marital Status	-.849	.427	.117
Previous NJ Incarcerations	.103	1.11	.71
Offense Degree	.41	1.51	.16
Substance Abuse	-.123	.884	.275
Rime of Violence	-.788	.455	.08
Institutional Security Level	.048	1.05	.83
Facility Type	1.01	2.75	.005
Inmate Custody Status	1.10	3.00	.000
NERA	-1.31	.270	.009
Maximum Sentence	-.003	.997	.29
Minimum Sentence	.003	1.0	.52
Constant	-.828	------	.52
Beginning –2LL	489.50959		
-2Log Likelihood	370.457		
Model Improvement	119.053		

This finding should add to our understanding of the function of parole – i.e., that it may be critical as a means of re-integrating offenders into the community after serving prison time, but that its supposed influence on prompting inmates' good behavior in prison because they hope to receive the reward of parole is probably overshadowed by other factors that are more influential in encouraging good behavior while serving prison time.

The management response to the population problems was predictable, in light of the fact that prison construction was not an option in the State of New Jersey. The department sought additional contracts for community treatment facilities. New Jersey relies primarily on private vendors to provide community alternatives. Second, counties were used to resolve the crowding issue again, this time through the use of contracts for service on a voluntary basis.

This research demonstrates the need for correctional managers to reevaluate the classification process. Departments may find that inmates convicted of violent offenses do not necessarily require maximum security housing. This will drive down costs both in construction of new facilities or cell houses in existing institutions, and in the operation costs for staff required to supervise inmates. Less restrictive facilities (below maximum security) are less costly to build and operate.

NERA's IMPACT ON CRIME VICTIMS

Most impact studies of criminal sentencing and/or prosecution reforms concentrate on understanding and explaining legislation's effects on the justice system itself. From a management standpoint and also that of a public who deserves to know whether the laws passed in its name is working very well, this is an appropriate primary goal. Criminal justice reforms

passed in order to support victims, however, should also be evaluated on how well they achieved that goal. Of course, a cynic would say that the purpose of the No Early Release Act was not to help victims, but to get the money for prison construction promised by the federal government to any state that would pass "Truth in Sentencing" legislation. The same cynic would say that the purpose of "Truth in Sentencing" legislation, moreover, was to keep felons in prison longer – pure incapacitation, and insofar as victims wanted felons to stay in prison longer, their wishes would have been served.

But it is by no means an established fact that all victims want felons to stay in prison longer or that the method by which Truth-in-Sentencing can achieve that – announcing that a felon will serve a full 85% of the prison term before being released – will necessarily increase their satisfaction with the sentence imposed any more than a lower parole time would. We set out to study whether victims of violent crime in New Jersey were any more satisfied with sentences imposed when the court assured them that the offender would serve 85% of the prisoin term than they had been when the offender would have been eligible for parole after serving a third of the prison term imposed. If we are to take legislators' claims seriously, then victims should have been more satisfied with sentences imposed under the No Early Release Act.[13]

The statewide victims-witness office selected three counties that were already giving surveys to each of their clients/ victims at the end of each case, and these became our study sites. They included one urban, one suburban, and one rural county. The counties selected for study were already using a mostly-uniform instrument to elicit feedback from crime victims. In each

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[13]We published the following text on victims' satisfaction with sentencing has in a book chapter. (McCoy and McManimon 2001) In that chapter, we also report the results of this survey on the question of the correlation between victims' satisfaction with sentences imposed and their ratings of the performance of the various justice professionals involved in their cases.

of the three counties, at the end of sentencing in each case the victim is given a survey asking about his or her experiences and feelings regarding the case. Each victim received the survey in a packet whose cover page is the most important document at issue here: the judge' sentencing order. The sentence the judge imposed is written out, and, if the victim attends the sentencing hearing, he or she also hears it announced in open court. Prior to enactment of the No Early Release Act, the document would state the sentence and also the date that the offender would become eligible to be considered for parole. After passage of the No Early Release Act, the document states the sentence and also the fact that the offender is required to serve a mandatory sentence of 85% of the term imposed before becoming eligible for parole, also with the date that would be. (Obviously, the time until release from prison would be considerably less in the pre-NERA group.) Included with the judge' order was the survey, which asked victims many questions about their levels of satisfaction with various agencies of the justice system that handled the case (i.e. police, prosecutors, judge, victims/witnesses office). The survey also gathered data about personal characteristics of the victims, such as age, race, and sex, and also offense-related data, such as type of crime committed. We added questions about whether a weapon had been used and a five-point ordinal scale rating of the victims' overall satisfaction with the sentence imposed on the offender

Given that this survey was an accepted and normal part of existing victim/witness court procedure and that it is distributed to every victim of a felony, we had expected a fairly robust response rate, but we were disappointed. Only about 1% of these surveys were returned to the Victims/Witnesses Advocacy Offices, a rate that has apparently never been any higher since the surveys were first instituted. We met with managers in all three counties and determined that the response rate was so low partly because, in each county, the survey is distributed without a

postage-paid envelope for return. We helped the offices to redesign their distribution so as to make it more attractive to return the surveys, and the response rate increased to about 5%. This was still exceedingly low, and we further determined that virtually no surveys were being returned from victims in the urban county. Further investigation led us to the conclusion that the heavily Hispanic population in that county were not returning the surveys, and indeed never had, because they are in English.

Thus, the sample that returned the survey is drawn almost exclusively from two counties, one suburban and one rural. The respondents were almost 85% Caucasian, although the suburban county has a populous African-American community, which accounts for most of the 15% of the sample labeled non-white.

The study's timeframe was long enough to complete a "before" and "after" study. The "No Early Release Act" was enacted in July, 1997 and initial data collection began in April, 1998. Because of the time between indictment and disposition in serious felony cases in New Jersey, it was possible to gather "before" data for the study. Most felons sentenced in April, 1998 and for several months thereafter had committed their crimes before the NERA took effect. We gathered questionnaires from victims of those crimes and continued in the same way when the courts finally began sentencing felons who had committed their crimes under the new law. Also, responses from victims of crimes both covered (violent felonies) and not covered (less serious felonies) were gathered.

Thus, we had data from four groups of victims: victims of serious felons sentenced before the Act, victims of serious felons sentenced after the Act, and victims of non-serious felonies sentenced before the Act and after the Act. We included victims of non-serious felonies that would not have been included under this legislation at any time so as to test whether victim

satisfaction with sentences imposed depends significantly on the seriousness of the crime and not on the sentence, and whether any observed higher satisfaction after NERA was passed also was observed in non-NERA cases, which would indicate some other reason for the increased satisfaction at that time.

The data include 118 cases, 48 of them sentenced before the No Early Release Act was passed and 70 of them sentenced after. 85% of the respondents were white and 15% were non-white. The ages of the victim respondents were nearly normally distributed, with a bit of overrepresentation from the range of 45-64 years old. There were 118 victims/respondents. The types of crime they experienced were:

non-violent felony = 44
assault = 33
sexual assault = 13
robbery = 10
homicide, relative of the victim = 18

To test the first research question, we asked respondents how satisfied they were with the sentence imposed. We asked them to rank their satisfaction level on an ordinal scare from "not at all satisfied to "very satisfied." Because of the small size of our sample, we constructed the dependent variable satisfaction with sentence" expressed binomially, as "satisfied yes" versus satisfied no." We then applied a chi-square test of significance to test whether there was a statistically significant difference in satisfaction between the to groups (not satisfied/satisfied) depending on the independent variable sentenced before the No Early Release Act applied" versus "sentenced under the No Early Release Act."

We first tested whether there was any statistically significant difference in levels of satisfaction with sentencing before and after the Act among all felony victims. Table 17 shows

the distribution of these cases in terms of satisfaction levels expressed, among the two "before" and "after" groups. The number of victims satisfied with the sentences are almost identical before and after passage of the law. However, strangely, of those respondents giving the lowest ranking (**not** satisfied with the sentence announced by the court,) the number is higher **after** passage of the Act. The number of cases is too small to make any strong conclusions from this.

Table 17

Victims' Satisfaction with Sentences Imposed

Before versus After the "No Early Release Act"

	Before NERA	After NERA	
	satisfied with sentence	Not satisfied with sentence	1430 Row total: 44
	satisfied with sentence	Not satisfied with sentence	
	34	40	Row total: 74
Column total	48	70	N = 118

Applying chi square tests, the value of Pearson's R was 2.28, with a significance level of .131, which does not approach statistical significance. Perhaps the most unusual finding, however, is not seen in the tests of significance, but simply in the direction of the data's values. Although approximately the same number of people was satisfied with the sentence imposed both before and after application of the No Early Release Act, the number <u>not</u> satisfied doubled from 14 to 30. We cannot make too much of this, since the number of respondents returning

their questionnaires after the Act took effect was higher and thus the pool of available subjects who were possibly dissatisfied had expanded along with the overall response rate. Note, too, that for this test we grouped the victims into two groups: whether the crime had been committed while the Act was in effect or not. Thus, these two groups included victims of both serious and non-serious felonies. We discuss separately, below, the question of whether satisfaction with sentences imposed was related to whether the crime was serious or non-serious.

In sum, it is clear that there was no trend toward greater satisfaction with sentences imposed under the No Early Release "truth in sentencing" law. In fact, by chance the opposite was true, and thus these statistical tests were actually applied to data running in the direction opposite of what had been expected. Legislators who pass laws requiring harsher sentencing because they believe that victims will feel better about these punishments are apparently operating under a mistaken notion of what victims feel and want.

But not all these respondents were victims of crimes that had been covered by the NERA or would have been had it been in effect. Perhaps there is a difference in satisfaction with sentencing depending on how serious the crime was. We analyzed only the two groups of victims of serious felonies actually covered specifically by the Act -- that is, offenses specifically listed in the Act. There were 74 such cases: 35 from before the No Early Release Act was passed, and 39 from after. We applied the same statistical tests to see whether sentencing satisfaction had significantly increased when victims knew the offenders would serve 85% of their sentences before being eligible for parole. There was no significant association. (Using Pearson s test, significance .119.) Furthermore, the direction of the data was the same as in the overall population of felony cases: almost twice as many people were dissatisfied with the sentence after the Act passed (10 dissatisfied before NERA, 18 after.) Since the two groups

before/after were about the same size, it seems that the observed direction of the data is confirmed: not only did sentencing satisfaction fail to improve under the New Early Release Act, but for some reason victims were more likely to be dissatisfied when their assailants were sentenced under the Act. We do not attribute this drop in victim satisfaction to anything related to the law; rather, it seems to indicate that the Truth in Sentencing law is simply irrelevant to what victims think about the punishment offenders receive, and that something else is affecting victims feelings about sentencing.

Thus, *we conclude that victims of serious felony crimes are generally not more satisfied with sentencing when parole is curtailed.* This conclusion is drawn from a self-selected sample of victims who were mostly white suburbanites, and it might change if respondents were ethnically diverse and/or from urban areas. However, other research (Borg, 1998) indicates that the findings would only become stronger because victims who are ethnic minorities are generally less inclined to support severe sentencing than are white suburbanites.

CONCLUSIONS

In this examination of what happened when a state passed a narrow Truth in Sentencing law, we chose to look at aspects of implementation that are not common in sentencing impact studies. Most evaluators want to know whether sentencing got harsher, whether this had an impact on prison populations, and perhaps whether this affected the crime rate. Those are completely appropriate questions to be asked, especially by governmental officials who must deal with the consequences, intended and unintended, of new legislation. But we went further

and asked related questions that are often not covered in the literature: how did prosecutorial discretion affect the sentencing procedures under this new law? What was the effect of charge bargaining and sentence bargaining on prison terms imposed? If offenders have little hope of getting parole, are they less deterred from committing violent acts while serving time in prison? Taking at face value political statements that this type of legislation is passed in to respond to victims' needs, are victims any more satisfied with sentences when they know the offenders will serve 85% of the prison terms imposed?

The answers to each of these questions was the opposite of what conventional wisdom would predict:

- Prosecutors: in a state in which prosecutors are appointed and supervised by the Attorney General's office, charge bargaining did not undermine the impact of the law significantly. Charge bargaining practices were about the same before and after the law passed. Sentence bargaining, as permitted by the Attorney General and as approved by sentencing judges, did indeed occur and had the effect of lowering the average sentence imposed after the law passed; however, when the requirement of serving 85% instead of the previously normal 50% of prison term was added, sentences indeed became longer. They just were not as long as the legislation might have allowed and contemplated. Scholarly literature predicts that the system would have maintained a "going rate" more closely.
- Courts. Despite the fact that typical prison sentences became longer and defendants had much more to lose by being convicted, guilty plea rates stayed about the same. Trial rates did not increase. This is the opposite of predictions by prosecutors and defense attorneys alike when NERA was passed.

- Corrections. The volume and seriousness of rule infractions inside correctional institutions committed by offenders required to serve 85% of their sentences – and who thus had little incentive to behave well in hopes of gaining parole – did not increase significantly after the Act passed. In fact, for unexplained reasons, offenders serving 85% sentences had fewer disciplinary infractions.
- Victims. Victims' satisfaction with sentences announced and imposed on violent offenders did not increase significantly after the Act took effect. In fact, by chance, the levels of satisfaction with sentences imposed declined after passage of the Act.
- Money. To date, we have not found evidence that the federal government paid New Jersey any funds for prison construction, although that was the incentive offered to states to pass Truth in Sentencing legislation favored by the federal Congress. Perhaps this inaction is due to the fact that New Jersey's law was very narrowly written, applying only to violent offenders who would have already been serving lengthy prison sentences under laws in effect prior to passage of the No Early Release Act. The Act did increase the amount of time served by these felons, but not as much as an "85%" statistic seems to contemplate, and only in that comparatively small group of felons who committed the most serious violent crimes.

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APPENDICES

Appendix A – text of No Early Release Act

Appendix B – Attorney General's Directive for Enforcing the No Early Release Act, and addendum

Chapter 71 Laws of N.J. 1997
Approved 6/12/97

[Fourth Reprint]

SENATE, No. 855

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 26, 1996

By Senators BENNETT, KOSCO, Scott, Casey, McGreevey, Sacco, LaRossa, Matheussen, Assemblywoman Allen, Assemblymen DeSopo, Gregg, Assemblywoman Crecco, Assemblymen Blee, LeFevre, Gibson, Malone, Cottrell, Rocco, Bodine, Assemblywoman J. Smith, Assemblyman Bucco, Assemblywoman Heck, Assemblymen Asselta, Roma, Azzolina, Assemblywoman Wright, Assemblymen Garrett, Arnone, O'Toole, Dalton, Holzapfel and Assemblywoman Farragher

AN ACT concerning prison sentencing and supplementing P.L.1979, c.441.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. This act shall be known and may be cited as the "No Early Release Act."

2. a. [3][Notwithstanding any commutation credits allowed for good behavior and credits earned for diligent application to work and other institutional assignments, or any other provision of law to the contrary, an inmate sentenced] A court imposing a sentence of incarceration[3] for a crime of the first or second degree [3][involving violence to the custody of the Department of Corrections][3] [4]shall fix a minimum term of 85% of the sentence during which the defendant[4] shall not be eligible for parole [4][until the inmate has served not less than 85 percent of the court-ordered term of incarceration][4] [3]if the crime is a violent crime as defined in subsection d. of this section[3].

b. The provisions of subsection a. of this section shall not [3]be construed or applied to[3] reduce the time that must be served before

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.
Matter enclosed in superscript numerals has been adopted as follows:
[1] Senate SLP committee amendments adopted May 2, 1996.
[2] Assembly ALP committee amendments adopted February 3, 1997.
[3] Assembly AAP committee amendments adopted March 3, 1997.

eligibility for parole by an inmate sentenced to a mandatory minimum period of incarceration.

c. [3][The Parole Board shall promulgate rules and regulations necessary to carry out the purposes this act pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).] Notwithstanding any other provision of law to the contrary and in addition to any other sentence imposed, a court imposing a minimum period of parole ineligibility of 85 percent of the sentence pursuant to this section shall also, unless the court imposes a sentence of lifetime parole supervision pursuant to P.L. , c. (C.)(now pending before the Legislature as Senate Bill No. 524 SCS), impose a five-year term of parole supervision if the defendant is being sentenced for a crime of the first degree, or a three-year term of parole supervision if the defendant is being sentenced for a crime of the second degree. The term of parole supervision shall commence upon the completion of the sentence of incarceration imposed by the court pursuant to subsection a. of this section unless the defendant is serving a sentence of incarceration for another crime at the time he completes the sentence of incarceration imposed pursuant to subsection a., in which case the term of parole supervision shall commence immediately upon the defendant's release from incarceration. During the term of parole supervision the defendant shall remain in release status in the community in the legal custody of the Commissioner of the Department of Corrections and shall be supervised by the Bureau of Parole of the Department of Corrections as if on parole and shall be subject to the provisions and conditions of section 3 of P.L. , c. (C.)(now pending before the Legislature as this bill).

d. For the purposes of this section, "violent crime" means any crime in which the actor causes death, causes serious bodily injury as defined in subsection b. of N.J.S.2C:11-1, or uses or threatens the immediate use of a deadly weapon. "Violent crime" also includes any aggravated sexual assault or sexual assault in which the actor uses, or threatens the immediate use of, physical force.

For the purposes of this section, "deadly weapon" means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury.

e. A court shall not impose sentence pursuant to this section unless the ground therefor has been established at a hearing after the conviction of the defendant and on written notice to him of the ground proposed. The defendant shall have the right to hear and controvert the evidence against him and to offer evidence upon the issue.[3]

[3]3. a. A person who has been sentenced to a term of parole supervision and is on release status in the community pursuant to

section 2 of P.L. , c. (C.)(now pending before the Legislature as this bill) shall, during the term of parole supervision, remain on release status in the community, in the legal custody of the Commissioner of the Department of Corrections, and shall be supervised by the Bureau of Parole of the Department of Corrections as if on parole, and shall be subject to the provisions and conditions set by the appropriate board panel. The appropriate board panel shall have the authority, in accordance with the procedures and standards set forth in sections 15 through 21 of P.L.1979, c.441 (C.30:4-123.59 through 30:4-123.65), to revoke the person's release status and return the person to custody for the remainder of the term or until it is determined, in accordance with regulations adopted by the board, that the person is again eligible for release consideration pursuant to section 9 of P.L.1979, c.441 (C.30:4-123.53).

b. The Parole Board shall promulgate rules and regulations necessary to carry out the purposes of this act pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.).[3]

[3][3.] 4.[3] This act shall take effect immediately [1][1] and shall be applicable to any person sentenced for a crime of the first or second degree involving violence who becomes eligible for parole after the effective date[1][2].

Requires persons convicted of certain crimes to serve at least 85% of the term of incarceration.

C-1
5-12-98

STATE OF NEW JERSEY
DEPARTMENT OF LAW AND PUBLIC SAFETY

DIVISION OF CRIMINAL JUSTICE

MEMORANDUM

VIA FACSIMILE AND REGULAR MAIL

TO: All County Prosecutors

FROM: Paul H. Zoubek, Director
Division of Criminal Justice

DATE: April 24, 1998

SUBJECT: *Attorney General Directive for Enforcing the "No Early Release Act."*

Pursuant to the discussion at the last meeting of the Prosecutors' Association, attached please find a copy of the Attorney General Directive for Enforcing the "No Early Release" Act. This Directive takes effect immediately and applies to the prosecution of all violent crimes that were committed on or after the effective of the Act, June 9, 1997.

PHZ:RS:kb
attch.
c w/attch: Peter Verniero, Attorney General
David C. Hespe, First Assistant Attorney General
Debra L. Stone, Deputy Director, Operations Bureau, DCJ
Ronald Susswein, Deputy Director, Policy Bureau, DCJ

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State of New Jersey
DEPARTMENT OF LAW AND PUBLIC SAFETY
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CHRISTINE TODD WHITMAN
Governor

PETER VERNIERO
Attorney General

ATTORNEY GENERAL DIRECTIVE FOR ENFORCING THE "NO EARLY RELEASE" ACT

On June 9, 1997, Governor Christine Todd Whitman signed into law the "No Early Release Act," P.L. 1997, c.117. That law, codified at N.J.S.A. 2C:43-7.2 and N.J.S.A. 30:4-123.51b, provides that a person convicted of a first or second-degree offense that constitutes a "violent crime" as defined in the Act must serve a minimum of 85% of any custodial sentence imposed by the court before becoming eligible for parole. The Act further requires these defendants to serve a fixed period of parole supervision following their release from prison.

A violent crime is defined in the Act as any crime in which the actor causes death, causes serious bodily injury (as defined in subsection b of N.J.S.A. 2C:11-1), or uses or threatens the immediate use of a deadly weapon. The term violent crime also includes any aggravated sexual assault or sexual assault in which the actor uses or threatens the immediate use of physical force. The term "deadly weapon" is defined as any firearm or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

The Criminal Justice Act of 1970, N.J.S.A. 52:17B-98 et seq., provides that the Attorney General, as the chief law enforcement of the state, is responsible to ensure the uniform and efficient enforcement of the criminal laws. This Directive is hereby issued to the county prosecutors and to the Director of the Division of Criminal Justice to ensure that the No Early Release Act is enforced uniformly and in accordance with the clearly expressed intention of the Legislature and the Governor.

In implementing the No Early Release Act, it must be recognized that the overwhelming majority of criminal convictions in New Jersey are obtained pursuant to a negotiated agreement between the prosecution and the defense, rather than pursuant to a guilty verdict returned by a jury or by a judge sitting as the trier of fact. Many if not most negotiated dispositions involve a motion by the prosecutor to dismiss or downgrade one or more pending charges in consideration for the defendant's retraxit guilty plea on a remaining count or counts.

In order to maintain public confidence in the administration of justice, it is essential that prosecutors in the course of negotiating dispositions not inadvertently undermine or circumvent the clear policy recently established by the Legislature and the Governor to ensure that a defendant who commits a first or second-degree violent crime, as that term is defined in the new law, serves not less than 85% of the custodial sentence imposed by the court. It is especially noteworthy that the Legislature in adopting the No Early Release Act chose not to include an exception to the 85% parole ineligibility sentencing scheme, thus distinguishing the new law from the Graves' Act, which now includes an express exemption provision that is set forth at N.J.S.A. 2C:43-6.2. This demonstrates that the Legislature clearly intended that all persons who are convicted of first and second-degree crimes that are subject to the provisions of the No Early Release Act be required to serve not less than 85% of their custodial sentence before becoming eligible for parole. See also the Supreme Court's April 27, 1981 Plea Bargaining Memorandum, reprinted after N.J.S.A. 2C:43-6 (1995 West Ed.) (specifying procedures to be used by the courts "to assure that the recently passed mandatory three-year prison term [the Grave's Act] is strictly enforced in accordance with the Legislature's intent").

Accordingly, it is the responsibility of a prosecutor in negotiating and structuring a plea agreement to make certain that the plea offer presented to the court reflects the seriousness of the defendant's offense behavior and does not undermine the purposes of the No Early Release Act or this Directive. A county prosecutor is expected to disclose fully and accurately to the court all facts and circumstances pertaining to the defendant's actual conduct so that the court can properly discharge its responsibilities and appropriately determine whether the proposed disposition of the case is in accordance with the policies established in this Directive and the requirements of the No Early Release Act.

A. *Pre-Indictment Dispositions and Consultation With Victims.*

Prosecutors have traditionally and appropriately been afforded a wide latitude of discretion in selecting and pursuing criminal charges. Prosecutors must consider the proofs that would be available for trial and the possibility of an acquittal. Prosecutors must also decide on a case-by-case basis, for example, whether the degree of injury caused by a defendant constitutes serious, significant or merely bodily injury as those terms are defined in N.J.S.A. 2C:11-1, whether the case is best prosecuted as an aggravated assault as compared to a simple assault, or whether the conduct constitutes aggravated sexual assault as compared to sexual assault.

Prosecutors must continue to have the flexibility to exercise reasoned charging discretion. Prosecutors must also be able to take into account the legitimate interests and expectations of crime victims, including the degree of trauma that a victim would experience in the event that the case were to result in a jury trial. The No Early Release Act, after all, was designed to respond to the legitimate concerns of crime victims, many of whom expressed frustration upon learning that their assailants would actually serve only a fraction of the sentence imposed by the court. It is therefore entirely appropriate that prosecutors, in deciding whether to initiate or pursue a given charge or to dismiss or downgrade a charge, consider the interests of the victim and the benefit in sparing the victim from the stress and ordeal of a public trial. See N.J.S.A. 52:4B-36 (the Victims' Bill of Rights).

Prosecutors have historically been afforded an especially wide latitude of discretion with respect to matters that have not yet been heard and acted upon by a grand jury. Pursuant to the Rules of Court, a prosecutor cannot unilaterally dismiss an indictment. Rather, an indictment or any count thereof may be dismissed only by a court upon motion of the prosecuting attorney. R. 3:25-1b. In contrast, a pre-indictment complaint may be administratively dismissed by the prosecutor without presentation to a grand jury, in which event no court order is necessary, although the prosecutor is required by court rule to report the dismissal and the basis therefor to the Assignment Judge. R. 3:25-1a.

In many counties, pre-indictment screening and disposition programs have been established to ensure the prompt, efficient, and appropriate handling of cases that can be justly disposed without having to present the matter to a grand jury. Although these centralized pre-indictment programs tend generally to involve less serious offenses that

would not in any event be subject to the provisions of the No Early Release Act, the fact remains that many cases, including serious ones, are resolved before indictment.

For the foregoing reasons, and consistent with the Legislature's intention that certain violent offenders serve 85% of their custodial sentence, a county prosecutor, or the Director of the Division of Criminal Justice in cases handled by the state, should consult with and take into consideration the interests of the victim in determining whether to seek an indictment for an offense that would be subject to the provisions of the No Early Release Act, and pursuant to N.J.S.A. 52:4B-36(m), the victim shall be afforded the opportunity to submit a written statement about the impact of the crime and to comment on any proposed pre-indictment disposition.

If the pre-indictment disposition involves the dismissal of a complaint, the prosecutor or Director shall comply with the requirements of R. 3:25-1a., and in reporting the basis of the dismissal to the Assignment Judge, the prosecutor or Director shall represent in writing that the offense charged in the complaint may have been subject to the provisions of the No Early Release Act and was dismissed in accordance with the policies established in this Attorney General Directive.

B. Notice to the Court and Defendant at Plea Hearing of Applicability of the No Early Release Act.

The assistant prosecutor or deputy or assistant attorney general handling the matter shall advise the court in writing at or before the time a plea is entered whether the facts and circumstances of the case are such that the defendant is subject to the provisions of the No Early Release Act (e.g., that during the course of the offense the defendant used or threatened to use a deadly weapon). See also § I, infra., discussing the procedures for establishing the grounds for imposing an enhanced sentence under the No Early Release Act. The failure to provide written notice to the defendant of the applicability of the provisions of the No Early Release Act shall not be deemed to be a waiver of the Act, and except as may otherwise be expressly provided in this Directive, the county prosecutor or Director of the Division of Criminal Justice shall have no authority to waive imposition of enhanced sentence required by the Act.

At the plea hearing, the defendant must be fully apprised of the consequences of his or her plea and of the mandatory nature of the 85% parole ineligibility term. See generally State v. Kovack, 91 N.J. 476 (1982) and State v. Bailey, 226 N.J. Super. 559 (App. Div. 1988). In addition, the defendant should be advised that he or she will be

subject to a fixed period of parole supervision after serving 85% of the custodial sentence, and that during such period of parole supervision, parole may be revoked upon a violation thereof and the defendant returned to prison to serve all or any portion of the remaining period of supervision, notwithstanding that the initial maximum term of imprisonment has expired. In effect, the Legislature, by adoption of the No Early Release Act, has established a new maximum term of custodial confinement representing the sum of the initial maximum term of imprisonment *and* the fixed period of supervision.

This intended deviation from the regular sentencing provisions of the New Jersey Code of Criminal Justice was recommended in the Report of the Study Commission on Parole (1996), and is patterned after the sanctioning system used in federal courts. The federal Sentencing Reform Act requires a defendant to serve not less than 85% of the initial sentence of imprisonment imposed by the court, which is then followed by a separate and distinct term of supervised release (the functional equivalent of parole). Throughout the term of supervised release, the defendant is subject to revocation and the imposition of a new sentence of imprisonment that cannot exceed the term of supervised release imposed at the original sentencing proceeding. See 18 U.S.C. § 3583.

This notification on the record can be accomplished (1) by means of an appropriate plea form, (2) by means of the colloquy in open court at the time of the plea and sentencing hearings, and/or (3) by means of an express provision of the written plea offer tendered by the prosecutor to the defendant pursuant to R. 3:9-1b. Nothing in this Directive shall be construed to require a defendant to waive the right to contest or appeal the state's position that the defendant upon a revocation of parole can be returned to prison notwithstanding that the original term of imprisonment imposed by the court has expired.

C. *Negotiated Dismissal or Downgrading of Post-Indictment Charges*.

A county prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall not agree as part of a negotiated disposition to dismiss or to downgrade to a third or fourth-degree crime a count or counts of an indictment that would be subject to enhanced punishment pursuant to the No Early Release Act unless:

1. The prosecutor represents on the record that there is insufficient evidence to warrant a first or second-degree conviction, or that the possibility of acquittal is so

great that dismissal or downgrading to a third or fourth-degree crime is warranted in the interests of justice; or

2. The prosecutor represents on the record that there is insufficient evidence to establish by a preponderance of the evidence the grounds for imposition of enhanced punishment pursuant to the No Early Release Act; or,

3. A plea is being entered by the defendant to an offense that is subject to the provisions of the No Early Release Act; or,

4. The prosecutor represents on the record that the disposition is necessary to protect the interests of a victim and that the victim has been consulted; or,

5. The prosecutor represents on the record, either in camera or in open court, that the plea agreement is essential to assure defendant's cooperation with the prosecution, provided that the defendant's promise to provide cooperation is put in writing and spells out the reasonable expectations and obligations of both the defendant and the state in sufficient detail so that those expectations and agreed-upon responsibilities are clearly understood and can be reviewed upon request by the Division of Criminal Justice and enforced by a court if necessary.

D. Conspiracy and Accomplice Liability.

The inchoate offense of conspiracy, as defined in N.J.S.A. 2C:5-2, does not appear to fall within the definition of a "violent crime" within the meaning of the No Early Release Act, notwithstanding that the object of the conspiracy is to commit a violent crime. The essence of a conspiracy offense is the illegal agreement, not the completed act. State v. LaFera, 35 N.J. 75, 86 (1961); State v. Salentre, 275 N.J. Super. 410, 423 (App. Div. 1994), certif. denied 138 N.J. 269 (1994). See also State v. Soltys, 270 N.J. Super. 182, 189 (App. Div. 1994) (a conspiratorial agreement to cause or attempt to cause serious bodily injury constitutes neither a "bodily injury" nor a "threat" thereof), and State v. Connell, 208 N.J. Super. 688 (App. Div. 1986) (conspiracy is not a Graves' Act offense).

Notwithstanding the foregoing, a person who is an accomplice to a *completed* violent crime is subject to imposition of enhanced punishment pursuant to the No Early Release Act, even though the accomplice did not personally use or threaten the immediate use of a weapon or cause serious bodily injury. See N.J.S.A. 2C:2-6

(explaining when a person is liable for the conduct of another). The No Early Release Act should be interpreted in the same manner as the Graves' Act, which has been construed to permit convictions and enhanced sentencing on the grounds of accomplice liability. See State v. White, 98 N.J. 122, 131 (1984); State v. Camacho, ___ N.J. ___ (Mar. 25, 1998) (slip op. at 18).

Accordingly, a county prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall not permit a defendant to plead guilty to a conspiracy charge in exchange for the prosecutor's agreement to dismiss a count charging a defendant as an accomplice to a completed substantive offense that would constitute a violent crime under the No Early Release Act, where the prosecutor can establish by a preponderance of the evidence at the sentencing hearing that the accomplice knew or had reason to know before the crime was committed that his partner would use or threaten the immediate use of a firearm, cause serious bodily injury, or otherwise engage in conduct that would make the offense a violent crime within the meaning of the No Early Release Act, or where the prosecutor can establish by a preponderance of the evidence that the defendant had the purpose to promote or facilitate the substantive violent crime. In any case where the defendant had such prior knowledge or shared such purpose, the prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall only dispose of the case in accordance with the requirements of the No Early Release Act and §§ A or C of this Directive.

E. *Multiple Counts Involving Multiple Victims*.

Nothing in this Directive shall be construed to limit the authority of a county prosecutor or the Director of the Division of Criminal Justice to dismiss, downgrade, or to refrain from charging an offense involving one or more victims where the defendant has agreed to plead guilty to an offense involving another victim or victims where the defendant as a result of such guilty plea will be subject to the provisions of the No Early Release Act.

F. *Specific Sentence Recommendations*.

Nothing in this Directive shall be construed to limit the authority of a county prosecutor or the Director of the Division of Criminal Justice to agree as part of a negotiated disposition to a maximum custodial sentence to be imposed by the court within the range of sentences authorized by law, provided, however, that a prosecutor

shall have no authority to waive or reduce the minimum term of parole ineligibility (i.e., 85% of the custodial sentence ultimately imposed by the court) required by the No Early Release Act.

G. *Sentencing Downgrades*.

N.J.S.A. 2C:44-1f(2) authorizes a court in limited circumstances to sentence a person convicted of a first or second-degree crime to a custodial term appropriate to an offense one degree lower if the court is clearly convinced that the mitigating factors substantially outweigh the aggravating factors. A court may exercise this option only where the "interest of justice" so requires. In State v. Megargel, 143 N.J. 484 (1996), the New Jersey Supreme Court recently held:

> Furthermore, in those cases in which the Legislature has acted to provide an enhanced penalty for conviction of a particular offense, the downgrade of that offense requires more compelling reasons than the downgrade of an offense for which the Legislature has not attached an enhanced penalty. By its description of the sentence, the Legislature has indicated that an enhanced sentence was contemplated for this crime.
> [143 N.J. at 502.]

Furthermore, it is clear under present law that when a person convicted of a second-degree crime is sentenced pursuant to N.J.S.A. 2C:44-1f(2) to a term appropriate to a third-degree crime, the presumption of imprisonment that applies to persons convicted of second-degree crimes remains intact. See State v. O'Connor, 105 N.J. 399 (1987). Applying this principle in the context of the No Early Release Act, a defendant convicted of a first or second-degree violent crime who is sentenced pursuant to N.J.S.A. 2C:44-1f(2) must remain subject to the requirement that he or she serve 85% of the sentence imposed by the court before becoming eligible for parole.

In the event that a defendant subject to the No Early Release Act is sentenced pursuant to N.J.S.A. 2C:44-1f(2), the assistant prosecutor or deputy or assistant attorney general shall take steps to ensure that the defendant is ordered by the court to serve not less that 85% of the total sentence imposed before becoming eligible for parole. If for any reason the court does not impose the 85% term of parole ineligibility, the prosecutor shall appeal the sentence.

Nothing in this section shall be construed to preclude a prosecutor from agreeing as part of a negotiated disposition that the defendant be sentenced pursuant to N.J.S.A. 2C:44-1f(2) where the circumstances of the case so warrant.

H. *Overcoming the Presumption of Imprisonment and Application for an Exception to the Graves' Act.*

The No Early Release Act does not mandate that defendants be sentenced to terms of imprisonment. Rather, it requires that when a court does impose a term of imprisonment pursuant to other provisions of the New Jersey Code of Criminal Justice, a defendant who was convicted of a violent crime must remain ineligible for release on parole until he or she has served at least 85% of the custodial sentence imposed by the court.

The No Early Release Act applies only to persons convicted of first and second-degree crimes for which there is a statutory "presumption of imprisonment" set forth at N.J.S.A. 2C:44-1d. This presumption of imprisonment can be overcome, but only where there are truly exceptional circumstances and where a court explicitly finds on the record not only that imprisonment would be a serious injustice, but also that such injustice overrides the need to deter others. See State v. Jabbour, 118 N.J. 1 (1990). It is expected that prosecutors would not agree to a negotiated disposition that provides that a person subject to the No Early Release Act would be sentenced to a noncustodial term except in truly extraordinary cases. So too, it is expected that prosecutors would rarely if ever agree to refrain from exercising the right to appeal a court's decision to impose a probationary sentence or county jail term in a case where the presumption of imprisonment applies, especially where the defendant is subject to enhanced punishment pursuant to the No Early Release Act.

Where the Graves' Act applies, that is, where a firearm was used or possessed during the course of committing certain offenses (see N.J.S.A. 2C:43-6c), the prosecutor shall not agree to a noncustodial sentence except pursuant to the provisions of N.J.S.A. 2C:43-6.2.

I. *Procedures For Establishing the Grounds for Enhanced Sentence.*

It is not necessary for a prosecutor to file an application for enhanced punishment to trigger the 85% minimum term of parole ineligibility under the No Early Release Act. Compare State v. Latimore, 197 N.J. Super. 197 (App. Div. 1984), certif. denied 101

N.J. 328 (1984) (application by prosecutor is not required for imposition of a mandatory extended term pursuant to N.J.S.A. 2C:44-3d). The statute nonetheless requires that notice be provided to the defendant. See also State v. Martin, 110 N.J. 10 (1988).

In cases that will be disposed pursuant to a guilty plea, the prosecutor shall provide the defendant and the court with written notice at or before the plea hearing of the state's intention to establish at the time of sentence that the defendant must be sentenced pursuant to the No Early Release Act to serve not less than 85% of the custodial sentence imposed before becoming eligible for parole.

In cases resulting in a trial verdict, the prosecutor shall immediately following the return of the guilty verdict, or as soon as practicable thereafter, provide written notice to the defendant and the court that the state intends to establish at the time of sentence that the defendant must be sentenced pursuant to the No Early Release Act to serve not less than 85% of the custodial sentence imposed before becoming eligible for parole.

The written notice provided to the defendant and the court pursuant to this section shall set forth the ground(s) for imposing enhanced punishment pursuant to the No Early Release Act. The failure to provide written notice shall not be deemed to be a waiver of the Act, and except as may otherwise be expressly provided in this Directive, the county prosecutor or Director of the Division of Criminal Justice shall have no authority to waive imposition of enhanced sentence required by the No Early Release Act.

In many cases, the material elements of the crime for which the defendant was convicted will automatically establish that he or she is subject to enhanced punishment pursuant to the No Early Release Act. But cf. State v. Palmer, 211 N.J. Super. 349 (App. Div. 1986), where the court commented on the "scant" record before it, and noted that in deciding whether to apply the Graves' Act, the trial court cannot rely solely on the jury's verdict where it is at least theoretically possible that the verdict was not based upon a finding that the defendant had used a firearm.

In cases where the material elements of the underlying offense do not automatically establish the grounds for imposing enhanced punishment pursuant to the No Early Release Act, it shall be the responsibility of the county prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, to establish the grounds for enhanced punishment. Because the finding is to be made at sentencing by a judge rather than at trial by a jury, it is assumed that the prosecutor bears the

burden of proof by a preponderance of the evidence. Furthermore, although the No Early Release Act does not expressly require a court to take judicial notice of facts that were adduced at trial or a plea hearing, cf. N.J.S.A. 2C:43-6, Evid. R. 201b(4) generally provides for judicial notice with respect to "records of the court in which the action is pending."

A prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall seek imposition of enhanced punishment pursuant to the No Early Release Act if evidence presented at trial or that can be presented at the sentencing hearing, including but not limited to statements by victims or witnesses, demonstrates by a preponderance of the evidence that the defendant used or threatened the immediate use of a weapon, notwithstanding that the weapon was not recovered by police.

J. *Relationship to Extended Terms*.

The No Early Release Act provides unambiguously that in any case where the statute applies, the court "shall fix a minimum term of 85% *of the sentence* during which the defendant shall not be eligible for parole." (emphasis added) Thus, the 85% period of parole ineligibility would be determined based upon the total custodial sentence, whether an ordinary term or an extended term, imposed on the conviction for the first or second-degree violent crime. It would clearly contravene the Legislature's intention in adopting the No Early Release Act to permit a violent offender subject to an extended term to serve only a fraction of the sentence imposed by the court before becoming eligible for release on parole.

Accordingly, a county prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall seek imposition of enhanced punishment pursuant to the No Early Release Act in addition to and not in lieu of any other extended term or enhanced sentencing provision of Title 2C that may be applicable. In the event that a defendant is sentenced to an extended term or other form of enhanced punishment pursuant to any provision of the New Jersey Code of Criminal Justice and is also subject to the No Early Release Act, the prosecutor shall take steps to ensure that the defendant serves not less than 85% of the extended term or enhanced punishment imposed by the court before becoming eligible for parole. Nothing in this Directive shall be construed to require a prosecutor to apply for an extended term of imprisonment.

K. Juveniles Waived to Adult Court.

Juveniles who are waived to adult court pursuant to N.J.S.A. 2A:4A-26 are subject to the provisions of the No Early Release Act and these cases shall be handled in accordance with the provisions of this Directive.

L. Effect of Life Sentence.

Where a defendant subject to the No Early Release Act is sentenced to a life term, other than one that provides for life imprisonment without possibility of parole, see e.g., N.J.S.A. 2C:11-3b(2) and 2C:43-7.1, the prosecutor in the course of plea negotiations and litigation shall proceed as if the defendant were to be sentenced to a custodial term of 75 years and must thus remain ineligible for parole for a term of 63.75 years (85% of 75 years).

M. Required Appeals and Notification of Adverse Rulings to Division of Criminal Justice.

If a court for any reason does not impose an 85% minimum term of parole ineligibility upon a defendant who is subject to the No Early Release Act in accordance with the provisions of this Directive, the county prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall appeal the court's decision and, where necessary, shall seek to stay the imposition of sentence in order to permit the appeal. In addition, the county prosecutor shall immediately notify the Division of Criminal Justice of any such adverse ruling.

N. Uniform Interpretation.

Any questions concerning the implementation or applicability of the No Early Release Act or concerning this Directive shall be addressed by a county prosecutor to the Director of the Division of Criminal Justice or his designee.

O. Effective Date.

This Directive shall take effect immediately and shall remain in force until such time as it may be amended or superseded by the Attorney General and shall apply to all

first and second-degree crimes that constitute "violent crimes" as defined in the No Early Release Act that were committed on or after the effective date of the Act, June 9, 1997.

Dated: April 24, 1998

Peter Verniero
Attorney General

Rec'd 9/21

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ATTORNEY GENERAL SUPPLEMENTAL DIRECTIVE FOR ENFORCING THE NO EARLY RELEASE ACT IN SEXUAL ASSAULT CASES

I. Introduction

This Attorney General Directive revises and supplements two prior directives issued concerning the enforcement of the No Early Release Act, N.J.S.A. 2C:43-7.2. The Appellate Division recently raised substantial questions concerning applications of those prior directives in State v. Thomas, 322 N.J.Super. 512 (App. Div. 1999). Specifically, the issue has arisen as to the meaning of the term "physical force" as a modifier of sexual assaults subject to No Early Release Act sentencing. Because the Appellate Decision incorrectly decided Thomas, the State is petitioning for certification to the Supreme Court. During the pendency of those proceedings, and until a superseding directive is issued, prosecutors are hereby directed in their disposition of sexual assault cases to (1) distinguish the holding of Thomas in every case where that may done in good faith, (2) put before the sentencing court in every case any evidence of physical force, including the movement of the body parts or removal or rearrangement of clothing of a nonassenting victim, and (3) in cases where Thomas is indistinguishable, to argue that Thomas is incorrectly decided and should not be followed, thus preserving the issue for appellate review.

II. History of the Application of the No Early Release Act to Sexual Assaults

In 1997, the No Early Release Act (NERA) was enacted, requiring defendants to serve 85% of their sentences when convicted of a violent crime. A violent crime is defined as any crime in which the actor causes death or serious bodily injury or uses or threatens the immediate use of a deadly weapon. N.J.S.A. 2C:43-7.2d. With regard to sexual offenses, NERA includes within the definition of "violent crimes" any aggravated sexual assault or sexual assault "in which the actor uses, or threatens the immediate use of, physical force." Id. Pursuant to the Criminal Justice Act of 1970, N.J.S.A. 52:17B-98 et seq., on April 24, 1998, the Attorney General's Office issued

a directive on the enforcement of the NERA statute. On August 31, 1998, a supplemental directive was issued by the Attorney General's Office regarding the application of NERA to sexual assaults. This directive instructed that NERA would apply to any case "where the act of sexual contact or penetration was accomplished without the affirmative and freely-given permission of the victim."

The Attorney General's directive was based upon the definition of "physical force," as that phrase is used in N.J.S.A. 2C:14-2c(1), by the Supreme Court. See, State in the Interest of M.T.S., 129 N.J. 422, 449 (1992). The Court held that, because sexual assault is an inherently violent crime, any sexual assault that was not committed with the victim's freely given assent was committed with physical force, which consists of the mere act of penetration:

> Notwithstanding the stereotype of rape as a violent attack by a stranger, the vast majority of sexual assaults are perpetrated by someone known to the victim. Acquaintance Rape, supra, at 10. One respected study indicates that more than half of all rapes are committed by male relatives, current or former husbands, boyfriends or lovers. Diana Russell, The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females, 7 Victimology 81 (1982). Similarly, contrary to common myths, perpetrators generally do not use guns or knives and victims generally do not suffer external bruises or cuts. Acquaintance Rape, supra, at 10. Although this more realistic and accurate view of rape only recently has achieved widespread public circulation, it was a central concern of the proponents of reform in the 1970s. Id. at 18.
>
> The insight into rape as an assaultive crime is consistent with our evolving understanding of the wrong inherent in forced sexual intimacy. It is one that was appreciated by the Legislature when it reformed the rape laws, reflecting an emerging awareness that the definition of rape should correspond fully with the experiences and perspectives of rape victims. Although reformers focused primarily on the problems associated with convicting defendants accused of violent rape, the recognition that forced sexual intercourse often takes place between persons who know each other and often involves little or no violence comports with the understanding of the sexual assault law that was embraced

> by the Legislature. Any other interpretation of the law, particularly one that defined force in relation to the resistance or protest of the victim, would directly undermine the goals sought to be achieved by its reform. [Id. at 446-47].
>
> In the context of a sexual penetration not involving unusual or added "physical force," the inclusion of "permission" as an aspect of "physical force" effectively subsumes and obviates any defense based on consent. See N.J.S.A. 2C:2-10c(3). The definition of "permission" serves to define the "consent" that otherwise might allow a defendant to avoid criminal liability. ***Because "physical force" as an element of sexual assault in this context requires the absence of affirmative and freely-given permission, the "consent" necessary to negate such "physical force" under a defense based on consent would require the presence of such affirmative and freely-given permission. Any lesser form of consent would render the sexual penetration unlawful and cannot constitute a defense.*** [Id. at 449; emphasis added].

III. Analysis of State v. Thomas

In State v. Thomas, 322 N.J.Super. 512 (App. Div. 1999), a panel of the Appellate Division rejected the Supreme Court's definition of "physical force," and ruled that to come within the provisions of NERA, the physical force that was used or threatened had to be independent from the sexual contact or penetration needed to commit the sexual offense. Id. at 10. The opinion did not apply the well-settled principle of statutory construction that statutes *in pari materia* should be read harmoniously. That principle is applicable because the Legislature used the same term in N.J.S.A. 2C:43-7.2 that it employed in N.J.S.A. 2C:14-2, and which the Supreme Court had interpreted five years prior to the adoption of the No Early Release Act.[1]

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[1] "Other statutes dealing with the same subject matter as the one being construed - commonly referred to as statutes in pari materia - comprise [a] form of extrinsic aid useful in deciding questions of interpretation." 2B Norman Singer, Sutherland Statutory Construction § 51.01 (5th ed.). "When a legislature enacts a provision, it has available all the provisions relating to the same subject matter whether in the same statute or in a separate act. Experience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency." Id. at p. 118. Moreover, "It is assumed

That is, the Legislature having used a term found in the sexual assault statute in the context of identifying specific types of sexual assaults, the term should be deemed to have the same meaning in both statutes.

The Appellate Division's attempt to distinguish M.T.S., which defined the term "physical force," is unsupported and self-contradictory. The Appellate Division held that M.T.S. is inapposite because that case involved penetration. 322 N.J. Super. at 515-16. But the court then quoted with approval the trial court's opinion, which used the terms sexual contact and sexual penetration in conjunction, and stated that there must be force "independent of an act of penetration or contact...." Id. at 520-21.

Additionally, the Appellate Division, like the trial court, assumed that the use of the term "physical force" in the No Early Release Act was intended to exclude some number of sexual assaults and aggravated sexual assaults from the act's application, and that, if "physical force" were given the same meaning as in M.T.S., the result would be to render the term "surplusage" in N.J.S.A. 2C:43-7.2 because every sexual assault involves either sexual contact or penetration, and every contact or penetration involves physical force as defined in M.T.S. The error in the Appellate Division's opinion is patent.

For many of the crimes included within the ambit of NERA, every instance of that crime is included. For example, every homicide committed in violation of N.J.S.A. 2C:11-3, -4, or -5 plainly is included within NERA's definition of violent crimes. With respect to sexual assault, the Legislature when it enacted the penal code recognized that such crimes were inherently violent acts when not committed with the victim's assent. State in the Interest of M.T.S., supra.

It is not true that every sexual assault involves physical force. Physical force is an element of sexual assault as defined in paragraphs (5) and (6) of N.J.S.A. 2C:14-2a, and paragraph (1) of 2C:14-2b. The remaining seven paragraphs of those two subsections do not contain as an element the use of physical force, but for the most part are based upon an act of sexual penetration or contact with a person who, for reasons of age or relationship to the actor, is not capable of giving a legally valid

should be (c)

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that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter ... the new provision is presumed in accord with the legislative policy embodied in those prior statutes." Id., § 51.02. "Unless the context indicates otherwise, words or phrases in a provision that were used in a prior act pertaining to the same subject matter will be construed in the same sense. It has been said that 'the need for uniformity becomes more imperative where the same word or term is used in different statutory sections that are similar in purpose and content...or where...a word is used more than once in the same section.'" Id. at p. 122.

consent to the act of penetration of contact. Thus, the element of physical force, as defined in M.T.S., need not be present for those crimes, since the act may have been committed with the victim's affirmative assent. As the Supreme Court noted in M.T.S., those sexual assaults committed with victim's "affirmative and freely-given permission" do not involve physical force. Therefore, even if it were true that some significant category of sexual assaults must be excluded from NERA (which is dubious, given the list of crimes that have no such excluded category of cases), NERA's definition of violent crime certainly does not include every case where there is sexual penetration or contact.

Moreover, the Appellate Division's opinion deprecates the Supreme Court's findings with respect to the legislative intent in enacting N.J.S.A. 2C:14-2. As noted, the Legislature has recognized that rape is inherently an assaultive crime. Particularly with respect to sexual assaults committed against children, the requirement that the State demonstrate force beyond the act of contact or penetration places an appalling burden upon victims. It requires that courts inquire into whether a young victim physically resisted, and thereby compounds the trauma that the very young will experience by reinforcing outmoded attitudes. The most vulnerable in our society do not physically resist because such resistance is impossible or futile, and to believe that the Legislature did not intend to protect our children is utterly implausible. "Any other interpretation of the law, particularly one that defined force in relation to the resistance or protest of the victim, would directly undermine the goals sought to be achieved by its reform." State in the Interest of M.T.S., 129 N.J. at 447.

IV. Prosecutors' Obligations to Enforce the No Early Release Act

Because of the fundamental errors in the Appellate Division opinion, and because it cannot be reconciled with the Supreme Court's opinion in M.T.S., the State is filing a petition for certification in Thomas. Nevertheless, in light of Thomas, the Attorney General's supplemental directive of August 31, 1998, requires supplementation.

In order to maintain public confidence in the administration of justice, it is essential that prosecutors in the course of negotiating dispositions not inadvertently undermine or circumvent the clear policy of the Legislature and the Governor to ensure that every defendant who commits a sexual assault involving physical force, as that term is defined by the applicable law, serves not less than 85% of the custodial sentence imposed by the court. Prosecutors should (1) distinguish the Thomas opinion in every case that involves physical force as defined herein, and (2) if no physical force was used in the commission of the crime, or if there is no agreement by the court and defendant that there was physical force as defined in the Thomas opinion, argue that Thomas was incorrectly decided and preserve the issue for appellate review.

For purposes of implementing the Attorney General's NERA directive, physical force should be construed to mean any act that overcomes the inertial state of the victim or the victim's clothing. See, e.g., Webster's Third International Dictionary, Unabridged, "force: 3b. strength or power of any degree that is exercised without justification or contrary to law upon a person or thing." The term should be construed to include the rearranging or removal of clothing, the moving of a victim's body, including the victim's arms or legs so as to accomplish the act of sexual contact or penetration, holding the victim down or otherwise restraining the victim, as well as any act (or threat) to strike or otherwise injure the victim. The term should not be construed to require a demonstration that the actor inflicted bodily injury. The defendant should be advised on the record during the guilty plea that such evidence will be presented to the trial court at the sentencing hearing pursuant to N.J.S.A. 2C:43-7.2e.

Accordingly, it is the responsibility of a prosecutor in negotiating and structuring a plea agreement to make certain that the plea offer presented to the court reflects the seriousness of the defendant's offense behavior and does not undermine the purposes of the No Early Release Act or this directive. A county prosecutor is expected to disclose fully and accurately to the court all facts and circumstances pertaining to the defendant's actual conduct so that the court can properly discharge its responsibilities and appropriately determine whether the proposed disposition of the case is in accordance with the policies established in this directive and the requirements of the No Early Release Act.

In the rare case in which there is no evidence of physical force other than the act of sexual contact or penetration, but the victim did not affirmatively assent to the act, so that physical force as defined in M.T.S. is present but the holding in Thomas cannot be distinguished, prosecutors should argue that Thomas is incorrectly decided and should not be followed, recognizing that the Law Division will be bound by the Thomas opinion but preserving the issue for appeal since adherence to that opinion will result in the imposition of an illegal sentence.[2]

If the trial court follows the Thomas opinion and declines to impose a NERA sentence in a case involving sexual penetration or sexual contact to which the victim

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[2] The Thomas opinion is vague concerning the amount of physical force independent of the act of penetration or contact that must be present in order for the crime to be a violent crime as defined in NERA. In cases where there is physical force as defined in this directive, but the defendant disputes whether there is sufficient independent physical force to meet the Thomas standard, prosecutors must put on the record all evidence of physical force, argue that it is sufficient to require that the defendant be ordered to serve 85% of the custodial sentence imposed, and further preserve the issue of the validity of the Thomas holding, as set forth in this directive.

did not give affirmative assent, a notice of appeal to correct the illegal sentence should be filed.

This Supplemental Directive is effective immediately and shall control the disposition of every case to which the No Early Release Act is applicable, and shall remain in effect pending disposition of the State's petition for certification in State v. Thomas. In all other respects, the Attorney General's Directive for enforcing the No Early Release Act dated April 24, 1998, and August 31, 1998, continue in full force and effect.

DATED: 9-21-99

JOHN J. FARMER JR.
ATTORNEY GENERAL