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# CRIMINAL LAW UPDATE

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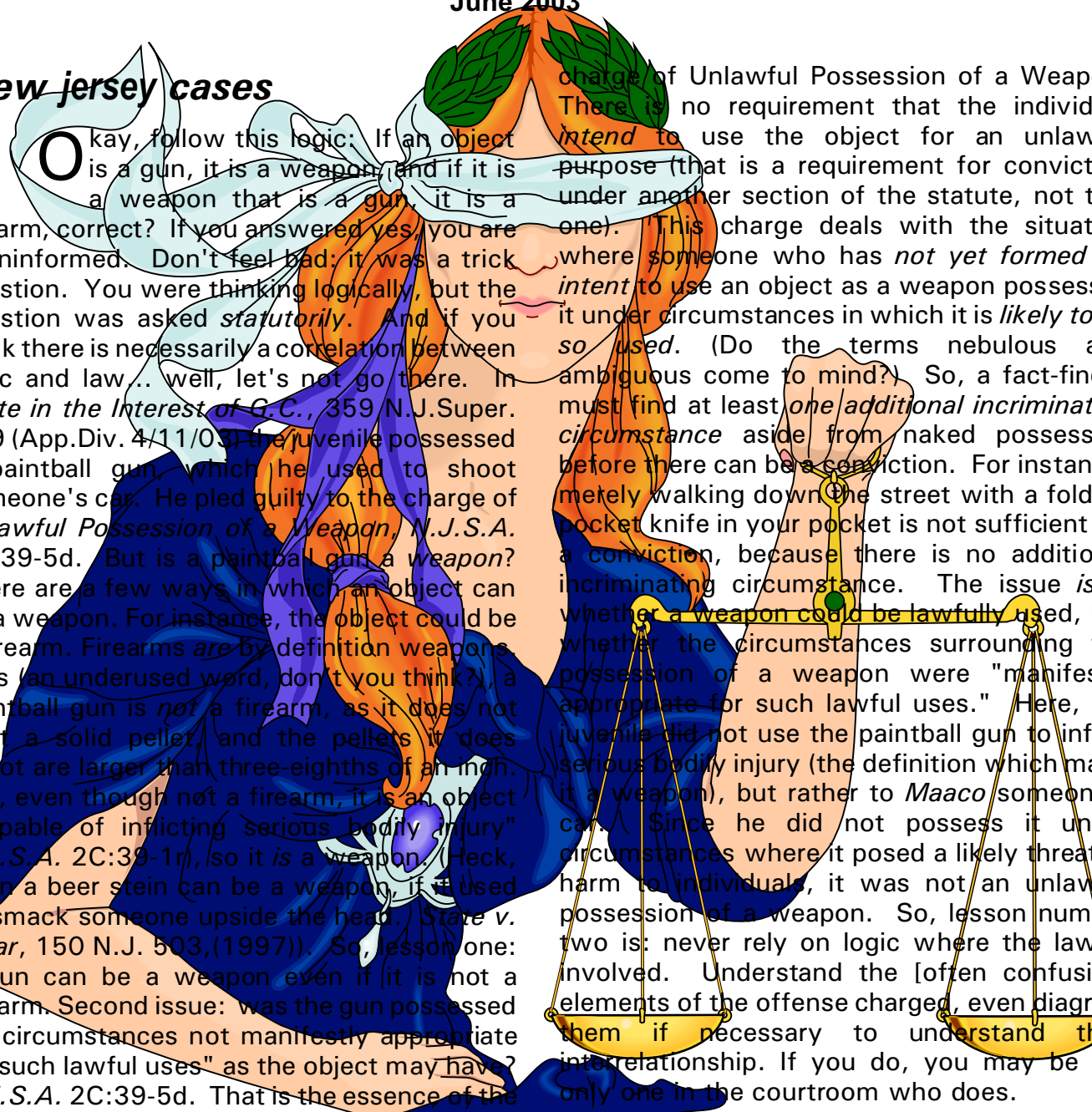
EDITED AND AUTHORED BY JOSEPH P. REM, JR.

ALL COMMENTS AND SUBMISSIONS, 201- 488-9001; FAX 487-8030; E-MAIL JREM@REMZELLER.COM

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## *new jersey cases*

An illustration of a woman with long, wavy hair, wearing a blindfold and holding a pair of golden scales of justice. She is dressed in a blue and white outfit. The background is a light blue and white pattern.

Okay, follow this logic: If an object is a gun, it is a weapon, and if it is a weapon that is a gun, it is a firearm, correct? If you answered yes, you are ...uninformed. Don't feel bad: it was a trick question. You were thinking logically, but the question was asked *statutorily*. And if you think there is necessarily a correlation between logic and law... well, let's not go there. In *State in the Interest of G.C.*, 359 N.J.Super. 399 (App.Div. 4/11/03), the juvenile possessed a paintball gun, which he used to shoot someone's car. He pled guilty to the charge of *Unlawful Possession of a Weapon, N.J.S.A. 2C:39-5d*. But is a paintball gun a *weapon*? There are a few ways in which an object can be a weapon. For instance, the object could be a firearm. Firearms *are* by definition weapons. Alas (an underused word, don't you think?), a paintball gun is *not* a firearm, as it does not emit a solid pellet, and the pellets it does shoot are larger than three-eighths of an inch. But, even though not a firearm, it is an object "capable of inflicting serious bodily injury" (N.J.S.A. 2C:39-1r), so it *is* a weapon. (Heck, even a beer stein can be a weapon, if it used to smack someone upside the head. *State v. Villar*, 150 N.J. 503, (1997)). So, lesson one: a gun can be a weapon even if it is not a firearm. Second issue: was the gun possessed "in circumstances not manifestly appropriate for such lawful uses" as the object may have? N.J.S.A. 2C:39-5d. That is the essence of the

charge of Unlawful Possession of a Weapon. There is no requirement that the individual *intend* to use the object for an unlawful purpose (that is a requirement for conviction under another section of the statute, not this one). This charge deals with the situation where someone who has *not yet formed an intent* to use an object as a weapon possesses it under circumstances in which it is *likely to be so used*. (Do the terms nebulous and ambiguous come to mind?) So, a fact-finder must find at least *one additional incriminating circumstance* aside from naked possession before there can be a conviction. For instance, merely walking down the street with a folding pocket knife in your pocket is not sufficient for a conviction, because there is no additional incriminating circumstance. The issue *isn't* whether a *weapon could be lawfully used*, but whether the circumstances surrounding the possession of a weapon were "manifestly appropriate for such lawful uses." Here, the juvenile did not use the paintball gun to inflict serious bodily injury (the definition which made it a weapon), but rather to *Maaco* someone's car. Since he did not possess it under circumstances where it posed a likely threat of harm to individuals, it was not an unlawful possession of a weapon. So, lesson number two is: never rely on logic where the law is involved. Understand the [often confusing] elements of the offense charged, even diagram them if necessary to understand their interrelationship. If you do, you may be the only one in the courtroom who does.

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## A Publication of the Bergen County Bar Association

The comments contained in this publication are not necessarily those of the Bergen County Bar Association; if you disagree with them, they are not even necessarily those of the author.

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Bergen County has videotaped courtrooms. If you are trying a criminal case in one of those courtrooms, can you play back to the jury favorable portions of testimony in your summation? Yes, with limitations. They cannot be so lengthy as to constitute a "second trial emphasizing only one litigant's side of the case;" they cannot distort or misstate the evidence; the court must be advised no later than the charge conference; there must be a hearing as to admissibility; it may not unduly consume court time, or have the potential to confuse or mislead the jury; and there can be no suggestion in opening statements that this may occur in summation. You cannot play an introductory clip of Warner Wolf saying, *Let's go to the videotape!* (But how cool would that be?) The court must give a specific charge, including an immediate cautionary instruction, that the jury must determine the facts based on all of the evidence, and that extra emphasis should not be placed on the portions of the testimony played during summation. Lastly, absolutely no excerpts from *Judging Amy* may be played, as that constitutes cruel and unusual punishment to jurors. *State v. Muhammad*, 359 N.J.Super. 361 (App.Div. 4/8/03).

It is said that law is the written expression of the social contract between the people and its government. As such, law should reflect the every day reality of the society which it regulates. The practical expression of that can be found in *State v. Walsh* (App.Div. 5/9/03). An 18-year old daughter and her father became involved in an argument regarding finances. The girl's parents were involved in an acrimonious divorce, and what had started out as a discussion on finances with the daughter wound up in an out-of-control scream fest in which the father demanded she read a two-page financial document he had prepared. At one point he attempted to hit the document with a ruler, but hit the daughter by accident causing her to cry. She attempted to wrest the ruler from him, and ultimately ran from the house and hid outside while the father came out, took the car she was driving (but which he owned),

threw some of her personal items out on the ground and drove off. He threatened her the next day that he would not allow her to have her car for graduation the next week. On the advice of the mother's divorce attorney, the daughter signed a criminal complaint for Harassment. The Appellate Division, in a concession to modern family life, took note that a conviction may adversely affect an otherwise good, long-term relationship between the father and the daughter. The opinion noted that courts were never intended to play the role of "supermonitors over modern-day parenting." Whether there was an intent to harass, always the key to defending such charges, should be decided on "common sense and experience." Such arguments, the court noted, occur frequently in many families. Family disputes, even arguments, are a sad but normal fact in most every family. Recognizing that there should be a certain tolerance for such natural occurrences before the "strong arm of the law" is brought to bear upon the parties is a wise, common sense recognition of the practicalities of every day life. Bravo.

## ***abstract thoughts***

Phil Tornetta, municipal prosecutor in Franklin Lakes and one of the prosecutors in Fort Lee (he must like the initials FLMC) notes a common misconception among counsel regarding DMV abstracts. Attorneys try to convince him that a "V" on an abstract is merely a charge, and not a conviction. Wrong. "V" stands for *violation*, and until a driver is convicted by plea or trial, it is not a violation. The flip side is that some judges and prosecutors think that any notation on an abstract as to, let's say, Driving While Intoxicated, represents a prior offense. No, only the "V"'s do; the "O"'s are Orders of Suspension, representing the driver's appearance at court to plead guilty or to go to trial (in DWI's, just another, longer form of guilty plea) and be sentenced. So a *single* DWI will appear *twice* on an abstract: once for the violation date, the other for the sentencing (license suspension) date. Anyone need any more lessons on the ABC's of the DMV?

