

---

---

# CRIMINAL LAW UPDATE

---

---

EDITED AND AUTHORED BY JOSEPH P. REM, JR.

ALL COMMENTS AND SUBMISSIONS, 201-488-1234; FAX 487-8030; E-MAIL JREM@REMZELLER.COM

---

May 2005

## cases

**T**he real-time consequences of the *App Early Release Act*, N.J.S.A. 2C:43-7.2, have, since its original adoption, resulted in substantial sentencing disparity. Some judges take into account the 85% parole disqualifier, and others do not. Some judges think they should; others believe they cannot. The Appellate Division has now made it clear that they can, and they should. Thus, it is appropriate to consider *real-time consequences* in determining the base term that should be imposed under all circumstances. And well it should be appropriate. On, let's say, a 14-year flat sentence, a defendant might do 4 years. With NERA imposed on that same sentence, he will do 12 years. If the court believes the defendant should actually be behind bars for maybe 6 years, he would have to mete out a 7-year NERA sentence. (*State v. Marinez*, 373 N.J.Super. 49, (App. Div., June 16, 2004)). Technicalities aside, the sentence should, above all, be fair. An overly lengthy sentence crushes, not punishes.

**K**idnapping is a crime of the first degree, unless the victim was released unharmed. (*State v. Sherman* (367 N.J.Super. 324, 3/4/04)). The Appellate Division made virtually all kidnappings per se first degree offenses by holding that the Post-Traumatic Stress Disorder (PTSD) suffered by the kidnapped child qualified as *harm* under this statute. Well, what kidnap victim doesn't suffer

emotional harm and stress? Did a kidnap victim ever testify, "It was fun! I had never been tied up before. I got to ride around in the trunk of a car, and wear a blindfold." Isn't that why kidnapping is graded as our second highest level offense (5-10 years)? When harm (defined now as including PTSD) is inflicted, there is a special sentencing range of 15-30 years. PTSD may be more than stress and flashbacks, but since it, or a close cousin of it, is always going to be present, isn't it really double counting this aggravating factor? And is the trial going to be turned into a battle of psychologists? In personal injury cases, psychologists routinely take the stand and argue over the existence of PTSD. Is the court going to force the alleged victim to undergo psychological examinations in order to allow the defense expert to testify as to whether PTSD is present? The court did rule that the "released unharmed" factor that makes it a second degree offense is an *element* of the offense, not merely a sentencing factor to be decided by the judge. Given the application of NERA (85% parole ineligibility) to kidnapping offenses, the "harm element" difference between a first and second degree sentence may be all the difference in the world.

**T**he Attorney General finally got around to promulgating guidelines for the prosecution of DWI offenses on January 24th. By statute, the guidelines were mandated to have been promulgated no later than last Fall but, hey,

---

## 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.*

---

it's the Attorney General's Office. It reads like a DWI prosecution infomercial (and where is Suzanne Somers when you really need her?). Importantly, the guidelines do not alter the currently existing "Guidelines for Operation of Plea Agreements" as set forth by the New Jersey Supreme Court in the Appendix to Part VII in the New Jersey Court Rules. In other words, if a municipal prosecutor does not feel that he/she can prove a case beyond a reasonable doubt, the prosecutor can and should move to dismiss the case. If a defendant is willing to plead guilty to a DWI, the prosecutor can still dismiss the Refusal charge. "Nothing contained in these limitations shall prohibit the judge from considering the plea agreement as to the collateral charges arising out of the same factual transaction connected with [the DWI]." (Guideline 4, Municipal Court Guidelines). A particularly interesting statement in the A.G. Guidelines regards the Standard Statement read under the mandate of the Implied Consent Law. The standard statement is the extraordinarily confusing, utterly sleep-inducing amalgamation of statutory citations, rights and obligations applicable to the allegedly intoxicated. If an older form is used, which lists the incorrect penalties (i.e six month license loss) then the sentence should be limited to that. The Guidelines also note that although defendants have the right to an independent blood test, under "John's Law", the police can detain that person and prevent any meaningful independent blood alcohol testing until they find a person who will accept responsibility for the arrestee's conduct. The Guidelines quote the language of *State v. Greeley* for the proposition that this law strikes "a proper balance between the right to an independent BAC test and the continuing duty of the police to safeguard the public." Depriving individuals, who may be from out-of-state or just not have anyone in New Jersey to call, from obtaining potentially highly exculpatory information that may lead to their acquittal, certainly strikes the proper balance between a star chamber proceeding and the rights afforded detainees in Guantanamo Bay, but not due process and fair play as New Jersey has always (formerly) defined those right.

*Caveat:* the Supreme Court's guidelines are currently being revised, and may change position on some of these issues, particularly dismissal of a first offense Refusal charge.

### ***interesting...or maybe not***

**T**hirty-five years ago, at a karate exhibition, I saw a man break a very thick board with a single chop of his hand. He later explained that the secret to accomplishing this feat was paradoxically *not* to attempt to break the board, but rather to move your hand and arm from its upraised position to a position at rest at your side. If you accomplished that, in the process the board would be broken. The zen of trial strategy should be no different. Do not attempt to win the case; attempt only to zealously prosecute or defend it. Do not chase the outcome; instead, take all necessary steps to allow the outcome to come to *you*. The concomitant reduction in your stress level will allow for clearer thinking and bolder strategies. *"The superior man makes the difficulty to be overcome his first interest; success only comes later."* Confucius (551-479? BC).

**L**OS ANGELES, California (AP) (March 24, 2005)-- District Attorney Steve Cooley says Robert Blake was "guilty as sin" and the jurors who acquitted him of murder were "incredibly stupid." *Hey, dude, it's California! And thanks for the faith in our system!*

**F**rom an article in a local Shopper: "On April 4, as a result of investigating a motor vehicle accident, a Mahwah woman was arrested for DWI, Refusal to Submit to a **Breast Test**, and Leaving the Scene of an Accident." *Duh, why do you think she was arrested?*

**I**f you are not nervous, even terrified, going into trial, then you have not tried enough cases. But remember: *Bravery is the capacity to perform properly even when scared half to death.*

