



Graves Act Waiver Pinball!



The Challenge! A Graves Act conviction requires a prison term with a minimum period of parole ineligibility fixed at one-half or 42 months, whichever is greater. N.J.S. 2C:43-6(c). **How to win:** get a waiver and have a Graves Act defendant sentenced to only one-year parole ineligibility or probation under the “interests of justice” standard!

Start! Select No. of Players:



✓ 1 Player (Defendant only) The assignment judge has the “ultimate authority” to decide whether a prosecutor arbitrarily or unconstitutionally discriminated against a person in deciding that the “interests of justice” *did not* warrant a Graves Act waiver under State v. Alvarez, 246 N.J. Super. 137, 147 (App. Div. 1991), and a defendant may move before the assignment judge accordingly.

___ 2 Players (Defendant *and* Prosecutor) A prosecutor may move before the assignment judge for a waiver if she believes the “interests of justice” requires same under N.J.S. 2C:43-6.2, absent previous Graves Act conviction.



How to play?!?! To appear before the assignment judge, a person convicted of a Graves Act offense must make a showing of prosecutorial arbitrariness constituting an unconstitutional discrimination or denial of equal protection constituting a manifest injustice. Alvarez, supra at 148; also State v. Mestapeter, 290 N.J. Super. 56, 65 (App. Div.), cert. den., 146 N.J. 569 (1996)(must show the prosecutor was “arbitrary, capricious, or unduly discriminatory”).

What you need?!?! To make such a showing, a person convicted of a Graves Act offense must “marshal evidence that the prosecutor is treating this [person] different that it treats others persons...similarly situated.” State v. Miller, 321 N.J. Super. 550, 556-557 (Law Div. 1999). I.e., the prosecutor is ignoring the “interests of justice.”

What are the “interests of justice” (“ioj”) in sentencing? This phrase is also used in N.J.S. 2C:44-1f(2), which allows a sentencing judge to downgrade a defendant when she is clearly convinced that the mitigating factors outweigh the aggravating circumstances *and* the “ioj” demands same. The “ioj” demands this when a defendant provides “*compelling reasons*” for a downgrade. State v. Megargel, 143 N.J. 484, 487 (1996).

What are *compelling reasons*? The nature of and the relevant circumstances are the *most important* factors under the “ioj” standard. Id. at 500. Put simply, a defendant must point to mitigation *outside* the applicable statutory mitigating factors. I.e., in State v. Lake, 408 N.J. Super. 313 (App. Div. 2009), a defendant’s downgrade was reversed on appeal b/c the sentencing judge merely recited the statutory mitigating factors as compelling reasons.

Bonus! The Megargel Court said compelling reasons exist when conduct is similar to an offense of a lesser degree, noting the similarities b/t 1st and 2nd degree robbery. Id. at 500-501. In State v. Tanco-Brito, slip. op. (see reverse page), Judge Bariso noted the similarity between 2nd degree unlawful possession of a weapon and the 4th degree regulatory provision violation.

What are compelling reasons in a Graves Act case?

Circumstances surrounding the defendant’s conduct that remove the defendant from the Graves Act for sentencing!

Defendant’s conduct is outside the Act’s intent. The Act applies to people who possess firearms *while* committing crimes and ensures incarceration for those who arm themselves *before* going forth to commit crimes and deters use or possession of firearms *while* committing crimes. State v. Des Marets, 92 N.J. 62, 64, 68, and 73 (1983).

Defendant is not contemplated by AG Guidelines. In State v. Lagares, 127 N.J. 20 (1992), our Supreme Court required the Attorney General (“AG”) to consult with county prosecutors and adopt guidelines to promote uniformity and avoid arbitrary and abusive exercises of discretionary prosecutorial powers.

The “AG Directive to Ensure Uniform Enforcement of the Graves Act” was adopted, emphasizing the Act’s applicability to those in “street gangs” and “organized criminal activity.” Pgs. 3& 12. It requires waivers in cases that “*fall outside the heartland of the legislative policy*” of the Act, requiring waivers unless the aggravating factors predominate or it hinders the prosecution of another. Pgs. 8 & 13. I.e., an “*aberrational*” defendant who has no prior convictions and is unlikely to reoffend deserves leniency under the Act. State v. Mello, 297 N.J. Super. 452, 457-458 (App. Div. 1997)(see reverse page).

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WINNER!!!

Once a prosecutor agrees to one-year parole, the defense is free to speak to probation. State v. Nance, 442 N.J. Super. 268 (App. Div. 2015).

BONUS ROUND!!! When the Legislature upgraded unlawful possession of a weapon from 3rd to 2nd degree, the accompanying statement retained a sentencing judge’s ability to place a defendant on *probation* under a Graves Act waiver notwithstanding the presumption of imprisonment. Statement to Assembly Bill No. 3035 (2006-2007 term), L. 2007, c.284, §1, effective January 13, 2008.

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High Scores!

Successful appeals of a prosecutor's refusal to grant a waiver.

In **State v. Mello**, 297 N.J. Super. 452 (App. Div. 1997), the defendant pointed a handgun at another car on the highway following a road rage incident. At trial he was convicted of N.J.S. 2C:39-5(b) (unlawful possession of a weapon without a permit) and N.J.S. 2C:394a (possession of a weapon for an unlawful purpose), but **acquitted** of N.J.S. 2C:12-1b(4) (aggravated assault by pointing a firearm). The defendant did not challenge the prosecutor's refusal to consent to a Graves waiver prior to sentencing, but the Appellate Division nonetheless remanded the issue back to the trial court for consideration under N.J.S. 2C:43-6.2. The court noted both the defendant's lack of prior convictions and that, although the offense was serious, it "**appeared aberrational**." The court found it "fair to say that, within the constellation of Graves Act cases, this may be one **deserving of some leniency**."

In **State v. Tanco-Brito**, No. A-4218-13T3 (App. Div. March 26, 2015), slip. op., the defendant was working at a car dealership when two men came on the lot and started a verbal argument with the dealership's owner, an elderly man. The argument escalated and the men alleged that the defendant came at them with a handgun. A jury acquitted the defendant of all counts (including N.J.S. 2C:394a (possession of a weapon for an unlawful purpose)) except one count of N.J.S. 2C:39-5(b) (second degree unlawful possession of a weapon without a permit). The defendant was remanded to jail and sought a Graves Act waiver, but it was denied by the prosecutor. The defendant moved for a hearing before the Hudson County assignment judge, arguing that the prosecutor's decision not to grant a waiver was arbitrary and capricious. Assignment Judge Bariso agreed, released the defendant from jail, and subsequently placed the defendant on probation. The Appellate Division upheld the decision and Judge Bariso's reasoning. Judge Bariso had noted that the defendant did not appear to have the intention to commit a crime on the day in question (noting that absent a criminal *mens rea*, his conviction was not unlike a lesser conviction of a firearm regulatory provision) and, what's more, the facts as to who escalated the altercation were disputed. (The jury had been charged on self-defense and defense of others and acquitted the defendants of all counts in which those charges were charged.) What's more, the defendant had no other criminal convictions. The judge found that, in not taking this in account when denying the waiver request, the prosecutor may have treated Tanco-Brito differently than other defendants.

In **State v. Benjamin**, 442 N.J. Super. 258 (App. Div. 2015), the defendant was among two groups that had an argument at a fast food restaurant. Benjamin drew a handgun (later discovered to be unloaded), but did not point it at anyone, and was charged with Graves Act offenses. Counsel filed a motion for a Graves Act waiver, and the prosecutor opposed without providing a basis in writing. Counsel then requested documentation of other Graves Act waiver decisions. Both the prosecutor's and the Attorney General's offices denied the request in writing, noting that no such records existed. Benjamin pled to one count of N.J.S. 2C:394a (second degree possession of a weapon for an unlawful purpose) and was sentenced to a "three with three."¹ On appeal, the court noted that "the very essence of discrimination is disparate treatment." The Attorney General Guidelines were aimed to ensure statewide uniformity in the implementation of Graves Act waivers and required prosecutors to provide reasons for withholding waivers in writing. Here, without knowing what factors the prosecutor considered in denying the request and without information of other Graves Act waivers, Benjamin was "severely disadvantaged" in meeting his Alvarez burden, nor could an "informed judicial determination" be made. It would be inherently unfair to allow the legitimacy of a "blanket denial" of defendant's Graves Act waiver request to stand without judicial scrutiny. The court held that a prosecutor must provide written reasons for withholding consent to a Graves Act waiver in order to promote procedural fairness and ensure meaningful judicial review, as in prosecutorial decisions relating to Pre-Trial Intervention applications. Additionally, on remand, if the prosecutor continued to maintain that no Graves Act waiver records exist, the court held that the trial judge could draw an adverse inference as a result.

Unsuccessful appeals of a prosecutor's refusal to grant a waiver.

In **State v. Watson**, 346 N.J. Super. 521 (App. Div. 2002), certif. den., 176 N.J. 278 (2003), the court denied a Graves waiver made by the defense. Therein, police arrested the defendant outside of a closed restaurant. Id. at 816. There had been a number of burglaries at that restaurant of late. The police found a duffel bag with a firearm, latex gloves, and duct tape. He was convicted of N.J.S. 2C:39-5b (unlawful possession of a weapon without a permit) and N.J.S. 2C:394a (possession of a weapon for an unlawful purpose). The Appellate Division upheld the prosecutor's refusal to seek a Graves waiver because, although the defendant had not used the firearm in a threatening manner, he intended to do so. The prosecutor had not made an arbitrary decision.

In **State v. Miller**, 321 N.J. Super. 550 (Law Div. 1999), the defendant was in his car when he believed two joggers damaged his car. He then exited the car before loading a handgun, pointing it at the joggers, and threatening them. He was convicted of N.J.S. 2C:39-5(b) (unlawful possession of a weapon without a permit), as well as N.J.S. 2C:394a (possession of a weapon for an unlawful purpose) and N.J.S. 2C:12-1b(4) (aggravated assault by pointing a firearm). The prosecutor refused to move for a Graves waiver. In challenging this denial after sentence, the defendant re-highlighted the applicable mitigating factors: his age, his lack of a criminal record, his likeliness to respond to probation. His inability to move beyond an argument based on mitigating factors was like the aforementioned Lakes defendant.² Accordingly, the Appellate Division was unmoved and found that his challenge of the prosecutor's decision was an "attack on the wisdom of the statute." The court noted that the legislature intended to "deter persons from committing crimes with firearms." What's more, the court was troubled that defendant presented no evidence that he was being treated differently than other persons similarly situated.

¹ Benjamin, a 20 year-old, enjoyed mitigating factors 7 (no criminal history), 8 (circumstances unlikely to recur), and 9 (defendant's character/attitude) against a finding of only aggravating factor 9 (need to deter).

² State v. Towey, 114 N.J. 69, 82 (1989) held that the weighing of aggravating and mitigating factors does not play a role in the decision to enhanced sentencing under the Graves Act.