SUPREME COURT OF NEW JERSEY
DOCKET NOS.: 59,900 / 59,172

	CRIMINAL ACTION
STATE OF NEW JERSEY, Plaintiff-Appellant, v. **JASON MEYER,** Defendant-Respondent.	ON LEAVE TO APPEAL GRANTED TO THE STATE FROM THE APPELLATE DIVISION'S JANUARY 26, 2006 INTERLOCUTORY ORDER DENYING LEAVE TO APPEAL THE TRIAL COURT'S NOVEMBER 4, 2005 ORDER DECLARING DEFENDANT ELIGIBLE FOR DRUG COURT Sat Below: Hon. Lorraine C. Parker, P.J.A.D. Hon. Jane Grall, J.A.D.

BRIEF AND APPENDIX OF *AMICUS CURIAE* THE NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE

NEW JERSEY INSTITUTE FOR SOCIAL JUSTICE
Craig R. Levine, Esq.
John W. Bartlett, Esq.
60 Park Place, Suite 511
Newark, New Jersey 07102-5504
(973) 624-9400 ext. 29

LOWENSTEIN SANDLER PC
Attorneys at Law
Jody T. Walker, Esq.
65 Livingston Avenue
Roseland, New Jersey 07068-1791
(973) 597-2500
Co-counsel for Amicus Curiae *The New Jersey Institute for Social Justice*

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Amicus curiae the New Jersey Institute for Social Justice respectfully submits this brief in support of the position that a defendant not subject to the presumption of imprisonment under N.J.S.A. 2C:44-1d or a mandatory minimum sentence under N.J.S.A. 2C:35-7 may be sentenced to drug court supervision as a condition of ordinary probation pursuant to N.J.S.A. 2C:45-1.

INTEREST OF AMICUS CURIAE

The New Jersey Institute for Social Justice ("NJISJ" or "the Institute") is a Newark-based non-partisan research and advocacy organization dedicated to the advancement of New Jersey's urban areas and residents. NJISJ advances its agenda through policy-related research and analysis, development and implementation of model programs, advocacy efforts, operational partnerships with government, and public education. Established six years ago by Alan Lowenstein, co-founder of the law firm Lowenstein Sandler PC, the Institute is committed to challenging barriers that prevent urban areas and residents from reaching their full potential. The Institute focuses primarily on expanding economic opportunity, promoting regional equity, and encouraging criminal and juvenile justice reform.

NJISJ has provided its expertise to the New Jersey appellate courts on several occasions. By way of example, we note that the Institute appeared as *amicus* in the cases State in the Interest of S.S., 130 N.J. 20 (2005) (per curiam); New

Jerseyans for a Death Penalty Moratorium v. New Jersey Department of Corrections, 185 N.J. 173 (2005); Associates Home Equity Serv., Inc. v. Troup, 343 N.J. Super. 254 (App. Div. 2001); In re Adoption of the 2003 Low Income Hous. Tax Credit Qualified Allocation Plan, 369 N.J. Super. 2 (App. Div. 2004); and N.J. State Conf.-NAACP v. Harvey, 381 N.J. Super. 155 (App. Div. 2005), *certif. denied*, 186 N.J. 363 (2006).

The Institute's interest in the case at hand, State v. Meyer, grows from its multi-faceted commitment to the area of prisoner reentry. In 2003, the Institute convened the New Jersey Reentry Roundtable. Co-Chaired by former Public Advocate and Public Defender Stanley Van Ness and former Attorney General John Farmer, Jr., the Roundtable presented five day-long seminars attended by public officials (the Attorney General, the Commissioner of the Department of Corrections, the Executive Director of the Juvenile Justice Commission, the Chairman of the New Jersey Parole Board, representatives of the Governor's Office, and others), scholars, policy researchers, leading national practitioners, representatives of the philanthropic sector, advocates, and ex-offenders. Based on original research commissioned as part of the effort and on the presentations and discussions had at the seminars, the members of the Roundtable issued a final report, *Coming Home for Good*. The essence of the Roundtable's conclusions was that unless New Jersey enacts a

series of coordinated policy changes aimed at reintegrating ex-offenders into society far more successfully, our state will face a crisis severely affecting the safety of the public, the ability of the workforce to meet the needs of a 21st century economy, the integration of families, the multigenerational nature of much crime and dependency, the viability of many particularly urban neighborhoods and communities, the public health, and (by no means least) the state budget.

As important as the need for effective prisoner re-entry is our state's need to maximize its use of tools that reduce recidivism and improve offender outcomes without incarceration whenever possible. The Legislature recognized this need when it provided for drug rehabilitation as an alternative to incarceration as part of the Comprehensive Drug Reform Act of 1987 ("CDRA"). See infra at Point I. So did the Attorney General in 1996 when he recommended that the Legislature amend CDRA to expand opportunities for non-violent drug-addicted defendants to enter and remain in drug courts and similar rehabilitative programs, and so did the judiciary of this state when it created, nurtured, and with the Legislature's support expanded drug court programs to all 15 vicinages in 2001. See infra at Point I. Drug courts respond to the need of many drug-dependent criminal defendants for intensely supervised treatment that enables them to overcome their addictions and thereby

frequently to avoid further criminal activity. Empirical data from New Jersey and nation-wide indicate that drug courts accomplish this goal for many defendants and in doing so reduce or avoid a host of criminal justice, corrections, and societal costs. See infra at Point III.

For all these reasons, the New Jersey Institute for Social Justice is deeply interested in this case and grateful for the opportunity to bring an informed, research-based perspective to bear on the issues before this Court.

PRELIMINARY STATEMENT

In State v. Matthews, 378 N.J. Super. 396 (App. Div.), *certif. denied*, 185 N.J. 596 (2005), the Appellate Division held that all defendants who seek drug treatment and rehabilitation through the drug court program must meet the standards set forth in N.J.S.A. 2C:35-14. For the reasons described below, *amicus* NJSIJ submits, in so holding, the appellate Division erred. In short, the express language and legislative history of N.J.S.A. 2C:35-14 make clear that the statute applies only to drug-dependent defendents who are not eligible for ordinary probation under N.J.S.A. 2C:45-1, and that defendants not subject to a presumption of imprisonment under N.J.S.A. 2C:44-1d or to a mandatory minimum prison term under N.J.S.A. 2C:35-7 may, consistent with standard sentencing procedures, be sentenced to ordinary probation – and to drug court as a condition thereof. To the extent that the Appellate Division's opinion in Matthews broadens the scope of N.J.S.A. 2C:35-14 and renders the statute applicable to all defendants who seek to enter drug court treatment, regardless of whether they are eligible for sentencing and drug rehabilitation under N.J.S.A. 2C:45-1, it is in error and this Court should disapprove it.[1]

[1] The motion of defendant Stanley Matthews for reconsideration of this Court's denial of certification in State v. Matthews is currently pending before the Court. See Notice of Motion for Reconsideration of the Petition for Certification Nunc Pro Tunc,

To the extent that participants in New Jersey's Drug Court program are defendants not subject to a presumption of imprisonment or a mandatory prison sentence, the Appellate Division's decision in Matthews has the potential effect of significantly reducing the number of defendants eligible to enter drug court treatment. Specifically, should this Court agree with the Appellate Division's decision in Matthews, non-violent, third degree offenders such as Jason Meyer could be found eligible for ordinary probation on the condition that they submit to drug treatment pursuant to N.J.S.A. 2C:45-1b(3), yet ineligible for clinically appropriate drug court treatment based on the exclusions set forth in N.J.S.A. 2C:35-14. Such a result runs counter to the public policy the Legislature enunciated when it determined to make special probation available to defendants who had been, before the enactment of N.J.S.A. 2C:35-14, ineligible for probation. Before Matthews, the participants in New Jersey's drug court program – which has been empirically proven to successfully reduce criminal recidivism rates and reduce imprisonment costs – fell into three categories: those presumptively prison-bound pursuant to N.J.S.A. 2C:44-1d; those subject to a mandatory prison term pursuant to N.J.S.A. 2C:35-7;

Docket No. 58,557, filed June 5, 2006. If the Court should grant this motion, *amicus curiae* urges this Court to reverse the Appellate Division's decision in State v. Matthews for the reasons set forth herein.

and those eligible for ordinary probation under N.J.S.A. 2C:45-1.

The Institute respectfully submits that the plain language of the N.J.S.A. 2C:45-14, its legislative history, and the various agency interpretations and legal commentary lead to the following conclusions:

(1) The restrictions of N.J.S.A. 2C:35-14 are not applicable to every offender who may be in need of and eligible for drug treatment. Rather, N.J.S.A. 2C:35-14 makes drug court available as part of a "special probation" regime designed specifically for non-violent, drug-dependent defendants who are otherwise ineligible for probation because they have been convicted of or adjudicated delinquent for offenses that carry a presumption of imprisonment pursuant to N.J.S.A. 2C:44-1d or a mandatory minimum sentence of incarceration pursuant to N.J.S.A. 2C:35-7;

(2) "Special probation," pursuant to N.J.S.A. 2C:35-14, is one avenue to drug court, but it is not the only avenue to drug court. The Matthews court erred in applying the restrictions and exclusions contained in N.J.S.A. 2C:35-14 to those applicants to drug court who are not facing the presumption of imprisonment or a mandatory prison term and who may therefore be eligible for ordinary probation under N.J.S.A. 2C:45-1;

(3) The Prosecutor's contention that a court must first look to the conditions and exclusions in N.J.S.A. 2C:35-14 before sentencing *any* individual to drug court is erroneous and inconsistent with established sentencing procedures; and

(4) When the Legislature amended N.J.S.A. 2C:35-14 in 1999 and N.J.S.A. 2B:2-1 in 2001, it did so with the aim of expanding, and expanding access to, the drug court program statewide, because the data showed that drug courts in New Jersey, as well as similar programs in jurisdictions around the country, reduce recidivism, enhance public safety, promote family and neighborhood well-being, and reduce the costs of imprisonment, even for defendants who are mandatorily or presumptively prison-bound.

To ensure access to the drug courts for all appropriate defendants, as the Legislature intended, this Court should disapprove[2] the Appellate Division's opinion in State v. Matthews and hold that the restrictions set forth in that statute apply only to defendants adjudicated for violating N.J.S.A. 2C:35-7 or for crimes that carry a presumption of imprisonment.

[2] See n. 1, supra.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Institute adopts the Counter-Statement of Procedural History and the Counter-Statement of Facts set forth in the Defendant's Brief, except to add that the Association of Criminal Defense Lawyers of New Jersey ("ACDL") moved for leave to appear as *amicus curiae* on November 27, 2006, which motion was unopposed; that the Institute moved for leave to appear as *amicus curiae* on December 18, 2006, which motion was opposed by the Prosecutor in a letter brief filed on January 5, 2007; that ACDL's motion was granted, limited to the filing of a brief, on December 21, 2006; and that the Institute's motion was granted, limited to the filing of a brief, on January 11, 2007.

ARGUMENT

The plain language of N.J.S.A. 2C:35-14 and 2C:45-1, the two statutes at issue in this appeal, and the legislative history of these statutes, lead inescapably to the conclusion that N.J.S.A. 2C:35-14 applies only to defendants who are clinically qualified for drug court and who are facing either: (1) the presumption of imprisonment pursuant to N.J.S.A. 2C:44-1d, or (2) a mandatory minimum prison sentence pursuant to N.J.S.A. 2C:35-7. To the extent that the Appellate Division's opinion in State v. Matthews, 378 N.J. Super. 396 (App. Div.), *certif. denied*, 185 N.J. 596 (2005), holds otherwise, it is in error and this Court should disapprove it. Significantly, N.J.S.A. 2C:35-14 neither explicitly nor implicitly limits the courts' power under N.J.S.A. 2C:45-1 to sentence a defendant to probation on condition that he participate in and complete drug treatment, including, if appropriate, treatment via the drug court program. Rather, by its enactment of N.J.S.A. 2C:35-14, the Legislature intended to expand the categories of defendants eligible for drug treatment on probation by making it available to certain defendants previously ineligible for it, namely those defendants mandatorily or presumptively prison-bound and ineligible for probation under N.J.S.A. 2C:45-1, but rendered eligible under the strict terms of N.J.S.A. 2C:35-14.[3]

[3] A defendant facing the presumption of imprisonment or a mandatory prison sentence is automatically excluded from drug rehabilitation pursuant to N.J.S.A. 2C:35-14 if he or she (1) is convicted of or adjudicated delinquent for a crime of the first degree; (2) is convicted of or adjudicated delinquent for a crime of the first or second degree enumerated in the No Early

POINT I

THE LEGISLATURE ENACTED AND AMENDED N.J.S.A. 2C:35-14 TO CREATE AN ALTERNATIVE TO IMPRISONMENT FOR DRUG-DEPENDENT NON-VIOLENT DEFENDANTS WHO ARE ADJUDICATED FOR CRIMES THAT CARRY A PRESUMPTION OF IMPRISONMENT UNDER N.J.S.A. 2C:44-1D OR A MANDATORY PRISON SENTENCE UNDER N.J.S.A. 2C:35-7.

a. The plain language of N.J.S.A. 2C:35-14 makes clear that "special probation" is an alternative to imprisonment.

The clearest indication of a statute's meaning is in its plain language. National Waste Recycling Inc. v. Middlesex Cty. Improvement Auth., 150 N.J. 209, 223 (1997). If the statute is clear and unambiguous on its face and allows for only one interpretation, the courts should "delve no deeper than the Act's literal terms," and should infer the Legislature's intent from the statute's plain meaning. State v. Butler, 89 N.J. 220, 226 (1982); see also State v. Churchdale Leasing, 115 N.J. 83, 101 (1988); O'Connell v. State, 171 N.J. 484, 488 (2002); ("when

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Release Act, N.J.S.A. 2C:43-7.2d; (3) is convicted of or adjudicated delinquent for any crime carrying a mandatory minimum period of incarceration, except a school-zone violation pursuant to N.J.S.A. 2C:35-7; (4) is convicted of or adjudicated delinquent for an offense that involved the distribution of, or conspiracy or attempt to distribute, a controlled dangerous substance to a juvenile on or near school property; (5) possessed a firearm at the time of any pending criminal charge; (6) has been previously convicted on two or more separate occasions of crimes of the first, second or third degree, other than crimes defined in N.J.S.A. 2C:35-10; or (7) has ever been convicted or adjudicated delinquent for, or faces a pending charge of, murder, aggravated assault, aggravated sexual assault or sexual assault, or a similar crime. N.J.S.A. 2C:35-14a, b.

a statute is clear on its face, a court need not look beyond the statutory terms to determine the legislative intent").

Here, the Legislature declared in plain language that N.J.S.A. 2C:35-14 is a sentencing alternative for non-violent drug-dependent defendants who are ineligible for ordinary probation under N.J.S.A. 2C:45-1. The statute opens as follows:

> a. Notwithstanding the presumption of incarceration pursuant to the provisions of subsection d. of N.J.S. 2C:44-1, and except as provided in subsection c of this section, whenever a drug or alcohol dependent person is convicted of or adjudicated delinquent for an offense, other than one described in subsection b. of this section, the court, upon notice to the prosecutor, may, on motion of the person, or on the court's own motion, place the person on special probation, which shall be a term of five years . . .

N.J.S.A. 2C:35-14(a) (emphasis added). In other words, the statute's opening provision specifically states that, at sentencing, a court may, despite the application of the presumption of imprisonment, place a defendant on "special probation" for a mandatory term of five years. The statute also states that a court may sentence a defendant to "special probation" if he or she is adjudicated for a crime pursuant to N.J.S.A. 2C:35-7, which otherwise carries a mandatory term of imprisonment. N.J.S.A. 2C:35-14b(3). Under the New Jersey Criminal Code's sentencing provisions, neither a defendant subject to a presumption of imprisonment pursuant to N.J.S.A. 2C:44-1d nor a defendant convicted of or adjudicated delinquent

for a violation of N.J.S.A. 2C:35-7 is potentially eligible for ordinary probation under N.J.S.A. 2C:45-1.

In State v. Matthews, the Appellate Division held that a defendant who had pled guilty to several third degree offenses was ineligible for drug court treatment because his prior convictions triggered the possibility of prosecutorial objection under N.J.S.A. 2C:35-14c, and the prosecutor had in fact so objected. 378 N.J. Super at 404. But Matthews' third degree convictions did not subject him to the presumption of imprisonment. See State v. Powell, 218 N.J. Super. 444, 451 (App. Div. 1987) (a repeat offender adjudicated for a third degree offense is not subject to the presumption of imprisonment) (citing State v. Hodge, 95 N.J. 369, 374 (1984)); State v. Pineda, 227 N.J. Super. 245, 250-251 (App. Div. 1998), *aff'd.*, 119 N.J. 621 (1990) (defendant with previous convictions does not qualify for presumption of non-imprisonment, but "[t]hat does not mean . . . that he is subject to a presumption of imprisonment"). Because neither the presumption of imprisonment nor a mandatory minimum sentence applied, the trial court had discretion, within the bounds of such aggravating and mitigating circumstances as it may have found, to sentence Matthews to probation pursuant to N.J.S.A. 2C:45-1 (and, if warranted, to drug court supervision as a condition thereof). See N.J.S.A. 2C:44-1d; see generally infra at Point II. Thus, *amicus* the Institute submits that the Appellate Division erred when it held in Matthews that a defendant who is not subject to the presumption of imprisonment may nevertheless be found

ineligible for drug court pursuant to the exclusionary provisions of N.J.S.A. 2C:35-14.

Contrary to Matthews, N.J.S.A. 2C:35-14 contains no provision limiting the courts' power under N.J.S.A. 2C:45-1 to sentence defendants who are not subject to a presumption of imprisonment or a mandatory prison sentence to ordinary probation on the condition that they enter and remain in the drug court program. Likewise, N.J.S.A. 2C:45-1 contains no provision making ordinary probation subject to the restrictions contained in N.J.S.A. 2C:35-14. These omissions, together with the plain language of N.J.S.A. 2C:35-14, lead to the conclusion that the Legislature intended "special probation" to be nothing more or less than a sentencing alternative for non-violent drug-dependent defendants who, because they are subject to the presumption of imprisonment or a mandatory minimum prison sentence under N.J.S.A. 2C:35-7, are ineligible for drug treatment on probation under N.J.S.A. 2C:45-1. The fact that N.J.S.A. 2C:45-1, the ordinary probation statute, has continued without amendment, side-by-side with N.J.S.A. 2C:35-14, the "special probation" statute, indicates that the Legislature has elected to establish and maintain both these routes to drug court treatment, each applicable to a different group of offenders. See State v. Wean, 86 N.J. Super. 283, 288-290 (App. Div. 1964) (court must assume Legislature had rational purpose of selecting statutory language; choice of different language in the statutes demonstrates difference in purpose); see also Brewer v. Porch, 53 N.J. 167, 174 (1969) (absent information

suggesting otherwise, court must presume that the Legislature is thoroughly conversant with its own enactments). In sum, the plain language of N.J.S.A. 2C:35-14 tells us that the statute applies only to mandatorily or presumptively prison-bound, non-violent drug-dependent defendants who are ineligible for ordinary probation.

b. The legislative history of N.J.S.A. 2C:35-14 also makes clear that the Legislature enacted and amended that statute to create an alternative to presumptive or mandatory imprisonment for non-violent, drug-dependent offenders.

The legislative history also supports the conclusion that the Legislature enacted N.J.S.A. 2C:35-14 as an alternative to imprisonment for certain non-violent drug-dependent offenders not otherwise eligible to avoid incarceration. "[N]o tenet of statutory construction is more firmly settled than the rule of interpretation that the court should bring the operation of the statute within the apparent intention of the legislature . . . and, as between two possible constructions of it, adopt the interpretation which effectuates rather than defeats the legislative purpose." Leonard v. Werger, 21 N.J. 539, 543 (1956) (citing Sperry v. Hutchinson Co. v. Margetts, 15 N.J. 203 (1954); State Department of Civil Service v. Clark, 15 N.J. 334 (1954)). In construing a statute, the Legislature's intent is controlling, and a court must enforce the statute with such intent and not with some unexpressed intent. Wean, 86 N.J.

Super. at 289 (citing Dacunzo v. Edgye, 19 N.J. 443, 451 (1955); Hoffman v. Hock, 8 N.J. 397, 409 (1952)). Extrinsic aid may be used to interpret language beyond that expressly written in the statute, and "[c]ourts may freely . . . refer to legislative history and contemporaneous construction for whatever aid they may furnish in ascertaining the true intent of the legislation." New Jersey Pharmaceutical Ass'n v. Furman, 33 N.J. 121, 130 (1960); National Waste Recycling v. Middlesex County Improvement Auth., 150 N.J. 209, 225 (1997).

Here, the legislative history, legal commentary, and agency interpretations are all consistent that N.J.S.A. 2C:35-14 was enacted in 1987 to create an alternative to imprisonment for certain non-violent drug-dependent defendants who are adjudicated for crimes carrying a presumption of imprisonment or a mandatory prison term. The following historical perspective is instructive in this regard. In 1979, the New Jersey Legislature undertook final passage of the re-structured Code of Criminal Justice. Under the prior New Jersey sentencing statutes, courts had broad discretion to impose sentences ranging from probation or fines to long prison terms. State v. Roth, 95 N.J. 334, 354 (1984). By contrast, the re-structured Code limited judicial discretion and implemented specific terms of imprisonment for each category of offense. Id. It was in this context that the Legislature, reacting to an increase in

drug-related crime in the early to mid-1980's, enacted the Comprehensive Drug Reform Act of 1987 ("the CDRA"), including N.J.S.A. 2C:35-14, which created an alternative to imprisonment for certain non-violent drug-dependent offenders. In State v. Soricelli, 156 N.J. 525, 535-536 (1999), this Court discussed at length the legislative history of N.J.S.A. 2C:35-14; we cite to that discussion below.

> The Drug Reform Act, which first authorized residential treatment for certain drug offenders, was precipitated by a comprehensive evaluation of the problem of drug use and distribution throughout the State issued by Governor Thomas Kean in October 1986, and entitled *Blueprint for a Drug-Free New Jersey (Blueprint).* That report acknowledged that "there is a gross deficiency in the number of treatment facilities available in New Jersey to drug abusers," noting that "there are currently less [than] 700 beds available for long-term treatment for both adults and adolescents in New Jersey." *Blueprint*, supra at 19-20. The report stated: "The current dearth of residential and out-patient treatment facilities in New Jersey cannot be allowed to continue." *Id.* at 20.
>
> The report also addressed the likelihood that the Governor's proposed initiatives for harsher punishment for drug offenders would exacerbate the State's problem of prison overcrowding, observing that "[w]e cannot insist upon the strict enforcement of new drug laws without providing the means by which violators can be punished and rehabilitated." *Id.* at 30. Among the alternatives proposed for alleviating prison overcrowding and housing drug offenders was the establishment of intensively supervised

residential treatment centers. *Id.* at 28-30.

Six months later the Legislature enacted and the Governor signed the Drug Reform Act, described as an act that "makes sweeping revision of New Jersey's drug laws, creates several new offenses, and adopts a number of innovative provisions designed not only to target the most dangerous offenders, but also to provide meaningful rehabilitative opportunities for certain other offenders." Assembly Judiciary Committee Commentary to the Comprehensive Drug Reform Act, November 23, 1987 (Reform Act Commentary). The Reform Act Commentary also emphasized that among the most significant "highlights" of the Drug Reform Act was a provision to:

> [a]uthorize the rehabilitation of certain drug dependent persons convicted of specific offenses during a five-year period of probation. Such rehabilitation includes mandatory periodic urinalysis and a minimum of six months confinement to a residential treatment facility. This provision would also establish strict revocation procedures to ensure compliance with the program and the safety of the community.

[Reform Act Commentary, *supra*, at 3.]

The Reform Act Commentary also includes a detailed summary of N.J.S.A. 2C:35-14, the provision that authorizes residential treatment for certain drug offenders:

> This section provides for rehabilitative treatment <u>as an alternative to incarceration</u> in appropriate cases. A defendant's eligibility for admission into a rehabilitation program under this section, and the standards

governing his or her continued participation in such a program, are carefully prescribed.

Specifically, a person who has been convicted of a first degree offense is ineligible for admission into a rehabilitative program. A person convicted of N.J.S.A. 2C:35-7 or 2C:35-6 is also ineligible for rehabilitative treatment under this section unless the prosecutor joins in the defendant's application for admission. In such cases, the court would have no discretion to admit the defendant into a rehabilitation program over the prosecutor's objection. Similarly, any person convicted of a drug distribution offense who had previously been convicted of a distribution offense would not be eligible for rehabilitative treatment unless the prosecutor joins in application.

While probation under current law may be imposed for any length of time not to exceed five years, probation under this section can only be imposed for a fixed, five year term. As a condition of probation, and in addition to any other conditions which may be imposed by the court, the section mandates that the defendant enter a drug rehabilitation program approved for such purposes by the court. As part of this program, the defendant must submit to periodic urine testing for drug use throughout the five year probationary period. Such procedures will ensure that a defendant placed on probation under this section will not be

> able to conceal continued drug usage . . .

156 N.J. at 535-536 (quoting *Assembly Judiciary Committee Commentary to the Comprehensive Drug Reform Act*, November 23, 1987) (emphasis added). This legislative history illustrates several points: (1) when the Legislature enacted the CDRA, it was aware that the imposition of presumptive and mandatory prison sentences required under the Code would lead to the overcrowding of New Jersey's prisons; (2) the Legislature realized that prison alone was not sufficient to treat drug-addicted defendants; and (3) the Legislature recognized that while "under [then] current law" it had made probation available for some defendants, it should also make provision for less costly and more effective drug rehabilitation for certain non-violent drug-dependent defendants facing presumptive or mandatory prison sentences. In light of these concerns, the Legislature enacted N.J.S.A. 2C:35-14 as an "alternative to incarceration in certain cases." Id. at 535. The stringent conditions that accompanied probation under N.J.S.A. 2C:35-14 – a mandatory six-month stay at a residential treatment facility, and a minimum five-year probation sentence – support the conclusion that the statute was aimed at more serious offenders adjudicated for crimes that carry a presumption of imprisonment

or a mandatory prison sentence, and not at less serious offenders already eligible for regular probation under the Code.

Although N.J.S.A. 2C:35-14 provided for probation on the condition of drug treatment, the legislative history does not reveal any concurrent legislative intent to amend N.J.S.A. 2C:45-1, the ordinary probation statute. In fact, the CDRA's commentary includes language expressly distinguishing probation under N.J.S.A. 2C:45-1 from probation under N.J.S.A. 2C:35-14: "while probation under current law may be imposed for any length of time, probation under this section can only be imposed for a fixed, five year term." Soricelli, 156 N.J. at 536 (quoting Reform Act Commentary). Given the Legislature's express recognition that N.J.S.A. 2C:35-14 differed from ordinary probation, it is clear that the Legislature was fully aware that the courts had discretion to sentence certain defendants to probation on the condition of drug treatment – including intensive inpatient treatment – under N.J.S.A. 2C:45-1. See Brewer, 53 N.J. at 174 (1969) (absent information suggesting otherwise, court must presume that the Legislature is thoroughly conversant with its own enactments). Thus, the conclusion is inescapable that when the Legislature enacted N.J.S.A. 2C:35-14 in 1987, it did so to create a sentencing alternative for defendants subject to the presumption of imprisonment or a mandatory prison sentence who would otherwise be ineligible for

drug treatment pursuant to N.J.S.A. 2C:45-1, and not as an amendment to or a supplemental requirement for defendants eligible for probation under N.J.S.A. 2C:45-1.

In 1995, nearly a decade after the Legislature's enactment of N.J.S.A. 2C:35-14, New Jersey courts began applying for and receiving federal planning grants for pilot drug courts, intensively supervised drug treatment programs geared primarily towards treating presumptively prison-bound drug-dependent individuals.[4] New Jersey Judiciary, *Drug Courts, A Plan for Statewide Implementation* (December 2000) (Aa18).[5] Around the same time, Governor Whitman issued her 1996 report, *Governor's Drug Enforcement, Education and Awareness Program* ("the Governor's Report"). In her report, Governor Whitman declared, "We must work to free up prison space for violent, dangerous offenders," and "find a way to stop the revolving door of justice which too often allows addicts to return to the street

[4] Although the pilot drug court programs focused initially on treating prison-bound offenders (and thereby reducing the costs of incarceration), on the recommendation of the New Jersey Judiciary, the drug court program shifted its focus to include both prison-bound and non-prison bound defendants. See Drug Court Manual (Da66).

[5] This document and others provided in *amicus*' appendix are in the public domain, as indicated in the table of contents. The Court may take judicial notice of these documents and their contents pursuant to N.J.R.E. 201(b)(3). See, e.g., State v. Jones, 179 N.J. 377, 406 (2004); Hollinger v. Shopper's Paradise of N.J., 134 N.J. Super. 328, 334 (Law Div. 1975), aff'd 142 N.J. Super. 356 (App. Div. 1976). They are provided herewith for the Court's convenience.

before we have had a chance to address the underlying substance abuse problem." Governor's Report (Aa5-Aa6). Like Governor Kean before her, Governor Whitman called for an alternative to imprisonment for certain non-violent drug-dependent offenders. Referring to drug court programs in New Jersey and other states, Governor Whitman called for an evaluation of "all the existing drug court programs in New Jersey and other jurisdictions," to "determine how best to support drug treatment referral programs involving persons who are in the criminal and juvenile justice systems." Governor's Report (Aa7).

Later that year, in response to the Governor's Report, then New Jersey Attorney General Peter Verniero recommended that N.J.S.A. 2C:35-14 be amended to facilitate the drug court program. *Report to the Governor by the Attorney General on the Need to Update the Comprehensive Drug Reform Act of 1987* (1996) (Da79-Da82). The Attorney General noted:

> N.J.S.A. 2C:35-14, which authorizes a court in certain cases to impose a term of residential drug treatment in lieu of an otherwise mandatory term of imprisonment, may have been well-intentioned and enlightened by the standards of 1987, [but] was drafted at a time when there was comparatively little information about the efficacy of treatment and about how to improve the chances of rehabilitation.
>
> This rehabilitation sentencing feature is only rarely used, in part because the statute imposes barriers for courts, prosecutors, and addicts. Therefore, this

> report proposes a series of specific amendments to 2C:35-14 in order to facilitate the work of new drug courts, while at all times paying special attention to the overriding goal of protecting the public

(Da79-Da80) (citation omitted).

Specifically, Attorney General Verniero recommended that: (1) N.J.S.A. 2C:35-14 be amended to allow New Jersey courts to sentence defendants to drug treatment, even if the defendants did not make the initial application; (2) the factual findings a court must make in order to sentence a defendant under N.J.S.A. 2C:35-14 be specifically set forth in the statute; (3) prosecutors continue to be able to veto treatment in lieu of prison in certain cases; (4) the Legislature retain the requirement that certain offenders be subject to a minimum nonwaivable term of six months in a residential treatment facility; (5) probation officers and treatment providers be required to make reports to the court regarding each defendant's progress; (6) courts be given the discretion not to revoke the defendant's special probation in the event of a second failure; and (7) courts be given the discretion, instead of automatic revocation of probation, to impose a brief period of incarceration, followed by the defendant's return to the treatment program. Attorney General's Report (Da80-Da82). Notably, the Attorney General did not recommend that N.J.S.A.

2C:35-14 be amended to establish it as the sole avenue to drug court. Nor did he recommend any changes to N.J.S.A. 2C:45-1, the ordinary probation statute. Instead, the Attorney General's apparent goal in recommending amendments to N.J.S.A. 2C:35-14 was to broaden drug court eligibility by allowing defendants facing the presumption of imprisonment or a mandatory term of imprisonment to undergo drug rehabilitation through the drug court program.

Consistent with the Attorney General's recommendations, the Legislature amended N.J.S.A. 2C:35-14 in 1999 to provide for "special probation." See Senate Law and Public Safety Committee Statement to Senate, No. 1253 with Senate Committee Amendments, (January 25, 1999) (Aa8-Aa9). Although the Legislature implemented all of the Attorney General's recommendations, it made no mention of the drug court program in the text of the statute or in its committee statements. See id.

It was not until 2001 that the Legislature focused specifically on the drug court program; that year, it enacted N.J.S.A. 2B:2-1, which provided the additional judicial resources necessary to implement the drug court program statewide. The Legislature based its action on the recommendations of the New Jersey Judiciary ("the Judiciary"), which had issued in 2000 a report titled *Drug Courts: A Plan for Statewide Implementation* ("the Judiciary Report"). The

Judiciary Report noted the success of drug courts in New Jersey and other jurisdictions, and recommended extending the program statewide. (Aa11-Aa21) Of particular relevance to the issues now before this Court, in its report the Judiciary noted that New Jersey's drug court program should target both prison-bound and non-prison bound defendants:

> New Jersey's comprehensive drug court model targets nonviolent substance abusing defendants and includes a balance of offenders who are otherwise prison-bound along with offenders facing less restrictive criminal supervision. By law, drug court cases diverted from prison terms participate in drug court for five years. Non-prison-bound drug court cases typically remain under drug court supervision for three years.

Judiciary Report (Aa20). (emphasis added).

The Judiciary Report also contained a table noting the two different types of drug court cases – "Prison Bound Case[s]" and "Probation Case[s]" – and comparing the cost of each type of case with the cost of its non-drug-court alternative. (Aa20). The Judiciary Report table specifically noted that the prison-bound cases "require a minimum of six months inpatient treatment" – a clear reference to N.J.S.A. 2C:35-14. Id. (Aa20). The table illustrated three important points: first, that the data confirmed that drug court was more cost-effective than imprisonment; second, that the Judiciary applied N.J.S.A. 2C:35-14, with its mandatory five-year sentence and six-month

inpatient residential treatment requirement, only to "prison-bound cases"; and third, that the Judiciary did not apply the strict mandates of N.J.S.A. 2C:35-14 to defendants eligible for ordinary probation – the "probation cases." Moreover, the Judiciary had apparently determined that the special probation statute did not supersede the courts' power to sentence non-prison-bound defendants to drug court pursuant to N.J.S.A. 2C:45-1, the ordinary probation statute.

In sum, the Judiciary Report, the plain language of the statute and the legislative history make clear that "special probation" is not synonymous with "drug court." "Special probation" is instead an avenue to drug court for prison-bound, non-violent drug-dependent defendants. "Special probation" does not apply to every drug court candidate, and the Judiciary, by expressly noting that drug court treated also "probation cases," never intended for the statute's restrictive and exclusionary terms to apply to defendants eligible for probation pursuant to N.J.S.A. 2C:45-1. To the extent that the Prosecutor and the Appellate Division in Matthews conflate "special probation" with drug court, they err, and this Court should clarify that the exclusionary and restrictive terms set forth in N.J.S.A. 2C:35-14 do not apply to all drug court candidates.

In the present case, Jason Meyer is subject neither to a presumption of imprisonment nor to a mandatory minimum sentence.

He was charged with the third-degree crime of distributing or attempting to distribute an imitation of a controlled dangerous substance (N.J.S.A. 2C:35-11a) and with the fourth-degree crimes of shoplifting (N.J.S.A. 2C:20-11b(1)) and resisting arrest (N.J.S.A. 2C:29-2a). (Da1, 2, 43). Because these were not his first criminal convictions, see Pa5-14, the presumption of non-imprisonment in N.J.S.A. 2C:44-1e does not apply to him. However, he is also not subject to the presumption of imprisonment, see Powell, 218 N.J. Super. at 451, nor did his charges carry a mandatory minimum period of incarceration such as that contained in N.J.S.A. 2C:35-7. Therefore, *amicus* submits, the trial court had discretion, within the bounds of such aggravating and mitigating factors as it may have found, to sentence Meyer to probation pursuant to N.J.S.A. 2C:45-1 – and, if warranted, to drug court supervision as a condition thereof. In arguing otherwise, the Prosecutor errs, and to the extent that Matthews holds otherwise, it too is in error.

c. Because precedent made it extremely difficult to overcome the presumption of imprisonment applicable to certain crimes under the Criminal Code, the Legislature enacted N.J.S.A. 2C:35-14 to make drug treatment more readily available to appropriate defendants facing the presumption of imprisonment or a mandatory sentence.

A review of the case law describing the very high standard for rebutting the presumption of imprisonment demonstrates why the Legislature enacted N.J.S.A. 2C:35-14 to make non-prison

drug rehabilitation available to certain presumptively or mandatorily prison-bound, drug-dependent offenders.

Before 1987, when N.J.S.A. 2C:35-14 was first enacted, the ability of the court to sentence a presumptively prison-bound, non-violent drug-dependent defendant to residential drug rehabilitation was restricted to cases where the court found specifically that imprisonment would constitute "a serious injustice." Soricelli, 156 N.J. at 533; see N.J.S.A. 2C:44-1d. Because showing the exceptional circumstances required to meet the "serious injustice" standard was extremely difficult, very few drug-dependent defendants who had been convicted of a crime that carried a presumption of imprisonment could be sentenced to probation. See id. at 532-533 (noting that the "serious injustice" standard is "satisfied only in truly extraordinary and exceptional circumstances," and that the Court had "regularly declined to find circumstances sufficient to constitute 'serious injustice' that would overcome the presumption of imprisonment"). Moreover, under New Jersey case law, drug dependency and rehabilitation were generally not considered mitigating factors sufficient to rebut the presumption of imprisonment. Id. at 535 ("our precedents heretofore have not recognized the goal of rehabilitation as a factor to be emphasized in determining whether the serious injustice standard for overcoming presumptive prison sentences is satisfied"); State v. Rivera, 124 N.J. 122, 126 (1991) (drug dependency is not a mitigating factor in probation determination); State v. Ghertle, 114 N.J. 385, 390 (1989) (drug

dependency is not a mitigating factor in determining parole eligibility); State v. Setzer, 268 N.J. Super. 553, 568 (App. Div. 1993) ("the [Criminal] Code thus does not condone leniency even where the commission of the offense may be related to the offender's drug or alcohol addiction").[6]

Thus, given the very high standard a defendant would have to meet to rebut the presumption of imprisonment, if the Legislature determined that it was appropriate to broaden the opportunity for drug rehabilitation to defendants who faced the presumption of imprisonment, the Legislature had to enact a specific provision so directing. It did so by enacting N.J.S.A. 2C:35-14. At the same time, the Legislature saw fit to keep intact the court's authority under N.J.S.A. 2C:45-1 to sentence to ordinary probation defendants whose convictions do not rise to a level implicating the presumption of imprisonment.

In sum, the Legislature enacted N.J.S.A. 2C:35-14 to extend drug treatment on probation to defendants who did not qualify for probation under N.J.S.A. 2C:45-1. It in no sense follows that by enacting N.J.S.A. 2C:35-14, the Legislature intended to eliminate the courts' authority under N.J.S.A. 2C:45-1 to sentence non-violent offenders convicted of less serious crimes

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[6] The present case does not raise, and this Court need not reach, the question of whether a defendant who is subject to the presumption of incarceration under N.J.S.A. 2C:44-1d but for whom a sentencing court concludes incarceration would result in "serious injustice," may be referred to drug court supervision pursuant to N.J.S.A. 2C:45-1 (the presumption, as a jurisprudential matter, having been eliminated) or only pursuant to N.J.S.A. 2C:35-14.

(those not carrying the presumption of imprisonment or a mandatory sentence) to ordinary probation including, as a condition thereof, participation in the drug court program.

POINT II

THIS COURT SHOULD REJECT THE PROSECUTION'S ERRONEOUS CONTENTIONS THAT: (1) A COURT MUST FIRST LOOK TO THE CONDITIONS AND EXCLUSIONS SET FORTH IN N.J.S.A. 2C:35-14 BEFORE SENTENCING A DEFENDANT ELIGIBLE FOR PROBATION UNDER ANY OTHER STATUTE; AND (2) THE PROSECUTOR IS THE GATEKEEPER IN *ALL* DRUG COURT CASES.

The Prosecutor, relying on Matthews, argues that a court is required to look first to the conditions and exclusions set forth in N.J.S.A. 2C:35-14 before sentencing *any* defendant to drug court, regardless of whether the defendant is eligible for probation under any other statute: "in accordance with the procedure set forth in State v. Matthews, supra, the Judge was required to have considered the N.J.S.A. 2C:35-14 statutory disqualifiers first, before he or she could have considered a sentence under any other statute." Pb9.[7] Based on this Court's clear and unambiguous precedents, this argument is in error and is inconsistent with established sentencing procedures.

Contrary to the Prosecutor's argument, in a case involving a defendant convicted of an offense that does not carry a mandatory minimum prison term, the court must first turn to N.J.S.A. 2C:44-1d to determine whether the presumption of imprisonment applies. See State v. Roth, 95 N.J. 334, 383 (1984). If the conviction is not for a first or second degree

[7] "Pb" refers to the prosecutor's Letter in Lieu of Brief on Behalf of the State of New Jersey, dated December 22, 2005 and filed in the Appellate Division.

offense or a second or subsequent offense of automobile theft, then the presumption of imprisonment does not apply, and the court must turn next to N.J.S.A. 2C:44-1(e) to determine whether the presumption of non-imprisonment applies. See State v. Baylass, 114 N.J. 169, 173 (1988). If the defendant is a repeat offender charged with a third or fourth degree crime, then neither presumption applies, and the court must weigh the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1(a) and (b) to determine whether to impose a term of imprisonment or probation. Id. (citing Powell, 218 N.J. Super. at 451). If the mitigating factors outweigh the aggravating factors, the court may sentence the defendant to probation, "and attach such reasonable conditions as it deems necessary to insure that he will lead a law-abiding life or is likely to assist him in doing so." Id. at 174 (quoting N.J.S.A. 2C:45-1a). If the aggravating factors outweigh the mitigating factors, the court must sentence the defendant to a prison term within the ranges provided in N.J.S.A 2C:43-6. See State v. Natale, 184 N.J. 458, 487 (2005) (eliminating, on Sixth Amendment grounds, consideration of the presumptive sentences in N.J.S.A. 2C:44-1f from the sentencing process). Either way, neither the presumption of imprisonment nor the presumption of non-imprisonment applies.

This Court has never held that under the Criminal Code the sentencing procedure discussed above does not apply in cases involving drug-dependent defendants. Thus, consistent with this Court's precedents cited above, in all cases, including those where the defendant is drug-dependent, a sentencing court must first look to N.J.S.A. 2C:44-1d to determine whether the defendant is subject to the presumption of imprisonment, the presumption of non-imprisonment, or neither presumption. If the defendant is subject to an unrebutted presumption of non-imprisonment, the court need not weigh mitigating and aggravating factors, nor need it consider the applicability of any exclusionary factor set forth in N.J.S.A. 2C:35-14. Rather, it may turn to N.J.S.A. 2C:45-1 to sentence the defendant to probation. In issuing a sentence of probation, the court may set reasonable conditions, including that the defendant enter and complete drug court treatment. See N.J.S.A. 2C:45-1b(3). If the defendant is subject to neither presumption, the court must weigh the mitigating and aggravating factors to determine whether a sentence of imprisonment or of probation is appropriate. If the factors weigh in favor of probation, the Court must then turn to N.J.S.A. 2C:45-1, and may sentence the defendant to probation on the condition of drug court treatment pursuant to that statute.

If the defendant is subject to the presumption of imprisonment pursuant to N.J.S.A. 2C:44-1d, or to a mandatory minimum prison sentence pursuant to N.J.S.A. 2C:35-7, the court may not sentence the defendants to probation under N.J.S.A. 2C:45-1. In those cases, on application by the defendant or on its own motion, the court may turn to N.J.S.A. 2C:35:14, which permits the court to sentence such defendants to "special probation" pursuant to the conditions set forth therein. As the Prosecutor here and the Appellate Division in Matthews both correctly note, some of the conditions set forth in N.J.S.A. 2C:35-14(a) function as *per se* disqualifiers for "special probation." See, e.g., Matthews, 378 N.J. Super. at 399-400; Pb8-9. However, these *per se* disqualifiers apply only in those cases where the defendant is facing presumptive or mandatory prison terms and is therefore ineligible for ordinary probation pursuant to N.J.S.A. 2C:45-1. Thus, in imposing sentence, a court must apply the conditions set forth in N.J.S.A. 2C:35-14 only after it has determined that the defendant is subject to a presumption of imprisonment pursuant to N.J.S.A. 2C:44-1d, or to a mandatory prison term pursuant to N.J.S.A. 2C:35-7.

Based on its own precedents, this Court should specifically reject the Prosecutor's contention that, in imposing sentence on non-violent drug-addicted defendants, the court must first look to the conditions and exclusions set forth in N.J.S.A. 2C:35-14

to determine whether the defendant is eligible for drug court. This Court should make clear that the proper sentencing procedure requires in the first instance determinations of which presumption, if either, applies under N.J.S.A. 2C:44-1, and of whether a mandatory term of imprisonment under N.J.S.A. 2C:35-7 applies. If a mandatory sentence or the presumption of imprisonment applies, then the court may consider the defendant's eligibility for "special probation" under N.J.S.A. 2C:35-14. If not, the court must determine the appropriateness of a probationary sentence under N.J.S.A. 2C:44-1 (and of various conditions thereto under N.J.S.A. 2C:45-1) without regard to N.J.S.A. 2C:35-14. A court sentencing a defendant to ordinary probation under 2C:45-1 may include, among the myriad possible conditions of that sentence, that the defendant enter and remain under the supervision of the drug court program.

Consistent with the contention (erroneous) that the court must first turn to N.J.S.A. 2C:35-14 when imposing sentence on a drug-addicted defendant, the Prosecutor also argues that he "functions as a gatekeeper" to the drug court and as a "legal screener" of all drug court applications. Pb10-11. The Prosecutor notes that N.J.S.A. 2C:35-14 and the Drug Court Manual "recogniz[e] the gatekeeper function of the prosecutor in this context." Pb10. This argument lacks support in the statutes. While N.J.S.A. 2C:35-14(c) gives the prosecutor the

right to object to a sentence of "special probation" for certain defendants, nothing in that or any other statute gives the prosecutor the same veto power in non-2C:35-14 drug court cases. The suggestion that the prosecutor serves as a "gatekeeper" to the drug court program in all cases is in error and should be rejected.

POINT III

BECAUSE DRUG COURTS HAVE BEEN EMPIRICALLY SHOWN TO REDUCE RECIDIVISM, ENHANCE PUBLIC SAFETY, PROMOTE FAMILY AND NEIGHBORHOOD WELL-BEING, AND REDUCE THE COSTS OF IMPRISONMENT, AND CONSISTENT WITH THE LEGISLATURE'S INTENT, THE COURT SHOULD INTERPRET THE STATUTES AT ISSUE SO AS TO MAKE THE DRUG COURT PROGRAM AVAILABLE TO THE MAXIMUM NUMBER OF ELIGIBLE DEFENDANTS.

As the Public Defender and *amicus curiae* the Association of Criminal Defense Lawyers of New Jersey note in their respective briefs, drug courts, both nationally and in New Jersey, are very successful programs that have been empirically proven to treat drug addiction, reduce recidivism rates, enhance public safety, promote family and neighborhood well-being, and reduce the costs of imprisonment. The evidence demonstrating the efficacy of drug courts, including but not limited to evidence available in 1999 and 2001, offers a convincing indication that the Legislature intended to broaden access to drug rehabilitation programs like drug court when it amended N.J.S.A. 2C:35-14 to facilitate access to drug treatment for defendants facing presumptive and mandatory prison sentences and amended N.J.S.A. 2B:2-1 to create statewide access to drug court. Surely the Legislature never intended to deny non-violent, non-prison-bound, third- and fourth-degree offenders like Jason Meyer access to drug court treatment.

Comment: Or "amended"?

Drug courts now exist in all 50 states and are considered a "best practice" by, among others, the Conference of Criminal Presiding Judges of New Jersey. A recent U.S. Government

Accountability Office ("GAO") report found that, upon completion of drug court programs, the participants had recidivism rates that were, in some cases, 20 percent lower than comparison group members. GAO Report to Congressional Committees, *Adult Drug Courts: Evidence Indicates Recidivism Reductions and Mixed Results for Other Outcomes* (February 2005) (Aa40). With respect to family well-being, a 2005 national survey revealed that, over the course of a year, a total of 460 drug free babies were reported to have been born to active female drug court participants. C. Huddleston et al., *A National Report Card on Drug Courts and Other Problem Solving Court Programs in the United States* (May 2005) (Aa52). This number does not include drug-free children born to program graduates. Id. Moreover, drug courts cost taxpayers significantly less that than imprisonment: a recent cost-benefit evaluation of a drug court program by the National Institute of Justice found a cost savings of $1,442 per drug court participant as compared to the "business as usual" approach of incarceration, parole, and/or ordinary probation. National Institute of Justice, *Special Report: Drug Courts: The Second Decade* (June 2006) (Aa57). In New Jersey, the 2000 Judiciary Report found that the cost of processing an offender through the first year of drug court, including six months of inpatient treatment, was about half the cost of housing an inmate in state prison for one year: $17,266 in drug court costs (including treatment) versus $34,318 for incarceration. Judiciary Report (Aa20). Across large offender

populations like New Jersey's, those savings can add up to millions of dollars per year.

Like drug courts across the country, New Jersey's drug courts have also been successful in reducing recidivism rates, saving taxpayers' money, and promoting family well-being. In 2000, before the program had been expanded state-wide, the Judiciary examined New Jersey's pilot drug court programs and found that already:

- More than 1,200 defendants had entered New Jersey's pilot drug court programs;
- 67 to 79 percent of participants remained in the program at the time of the study;
- the drug courts had reduced jail/prison costs by diverting jail-bed dollars into treatment services;
- participants stayed in treatment longer and reported fewer relapses than defendants in other criminal justice programs;
- families had been re-built and babies born drug-free to parents who were formerly severely drug-dependent;
- by partnering the intensive supervision concept with the drug court process, participant compliance with court orders and treatment improved; and
- greater cooperation and resource sharing among various agencies and institutions resulted in reduced systems costs and improved public safety.

Judiciary Report (Aa18). Based on the success of the pilot drug courts, the New Jersey Judiciary recommended that drug courts be implemented statewide. To date, over 475 participants have successfully graduated from the drug court program. Participants in New Jersey's drug court program have markedly low recidivism rates: within three years of graduating from the drug court program, only 14 percent of drug court graduates were re-arrested for new, indictable crimes. New Jersey Judiciary, *Overview of the Adult Drug Court Program: Presentation to the New Jersey Commission to Review Criminal Sentencing* (Feb. 15, 2006) ("Overview of Adult Drug Court Program") (Aa63). By comparison, Bureau of Justice Statistics ("BJS") data from 15 states, including New Jersey, reveal that the post-*prison* recidivism rate for offenders released in 1994 was 67.5 percent after three years. Lanagan, Patrick A. and David J. Levin, *Recidivism of Prisoners Released in 1994* (Bureau of Justice Statistics Special Report NCJ 193427) (2002) (Aa64).[8]

New Jersey's drug court programs also costs less than traditional imprisonment. New Jersey, which has the highest proportion of persons imprisoned for drug offenses in the country, spends close to $35,000 to imprison an adult male for the first year. Judiciary Report (Aa20). By contrast, the first-year costs for treating a drug dependent individual in New

[8] The power of this comparison is substantial, but should not be over-estimated. The BJS recidivism data included some offenders who would not have been eligible for drug court under either ordinary or special probation, such as those who had committed violent crimes.

Jersey's drug courts are barely half that amount, depending upon the scope of treatment. Id.

There is also significant evidence that New Jersey's Drug Court program has played a role in keeping families intact: since October 18, 2004, forty-nine babies were born drug-free to previously drug-addicted mothers, and fifty-two drug court participants have regained custody of their minor children, some of whom had been in the foster care system. Statement of Carol Venditto, Statewide Drug Court Manager, NJ Judiciary (October 18, 2004) (Da100). Employment is a major factor in family stability and well-being; 74 percent of Drug Court participants were employed while in Drug Court, and 92 percent were employed upon graduation. Id. (Aa62).

The evidence demonstrates that New Jersey's drug courts, during the pilot phase and the subsequent statewide implementation, have had a significant positive impact on the lives of drug-dependent offenders, their families, and their communities. Given these successes, it would belie both logic and history to conclude that the Legislature intended to reduce the number of non-violent drug-dependent defendants eligible for the drug court program by denying defendants eligible for ordinary probation pursuant to N.J.S.A. 2C:45-1 access to drug court treatment based on the conditions set forth in N.J.S.A. 2C:35-14.

But the Appellate Division's decision in Matthews suggests precisely that.[9] Common sense indicates that a substantial proportion of defendants in New Jersey fall into the same category as Jason Meyer. Meyer has never committed a crime serious enough to warrant a prison sentence, nor is he now subject to a presumption of imprisonment or a mandatory minimum for the third- and fourth-degree offenses at bar. He is, simply put, an addict and a candidate for ordinary probation under N.J.S.A. 2C:45-1. Yet because of his prior convictions, the

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[9] *Amicus* respectfully suggests that the Court's consideration herein might usefully be informed by data, if available, regarding the systemic impact of the Matthews decision. For example, depending on the intricacies of the relevant information system(s), data showing the proportions of participants referred to the drug court as a condition of ordinary probation under N.J.S.A. 2C:45-1 and of special probation under N.J.S.A 2C:25-14, respectively, may be available from the Criminal Practice Division of the Administrative Office of the Courts ("AOC"). Data may also be available regarding any change(s) in drug court referral and/or acceptance patterns since the Matthews decision. Particularly in criminal cases – by their nature individual, not class-action – it may be less likely that either party has both the opportunity and incentive to present to the trial court information regarding the potential systemic impact of doctrinal rulings. This Court has in the past seen fit to consider AOC data deemed relevant to the questions before it. See, e.g., State v. Loftin, 157 N.J. 253 (1999) (relying on AOC data in a proportionality review of defendant's death sentence); State v. Megargel, 143 N.J. 484, 514 (1996) (Stein, J. dissenting) (citing "statistics compiled by the Administrative Office of the Courts," describing trends in sentencing departures under N.J.S.A. 44-1f(2) that were contained in a "Memorandum from Criminal Practice Division"); State v. DiFriso, 142 N.J. 148 (1995) (deferring to the AOC's "expertise" in proportionality review of defendant's death sentence); State v. Des Martes, 92 N.J. 62 (1983) (noting that "AOC data . . . showed that 59% of Graves Act offenders were under the age of 26").

approach advocated by the Prosecutor here and endorsed the Matthews court closes the doors of drug court to him. He is faced with what the Public Defender called the "bizzare consequence" of Matthews: He is not subject to imprisonment, but under Matthews' erroneous reading of the statutes he cannot be sentenced to drug court treatment as a condition of the ordinary probation to which he was properly sentenced under N.J.S.A. 2C:44-1. See Db3. More important, he is joined in this conundrum by perhaps hundreds or thousands of other similarly-situated non-violent drug-addicted offenders whom treatment providers concluded were clinically eligible for drug court supervision but who may be rejected from participation in drug court if Matthews is read to say that *all* defendants must satisfy the criteria of N.J.S.A. 2C:35-14 to receive treatment.

The particular terms of N.J.S.A. 2C:35-14 – in particular, its mandatory five-year term and often mandated 6-month period of inpatient treatment – also raise concerns of resource scarcity. If more defendants are required to remain in residential treatment for longer terms, even when clinical evaluators may have recommended shorter terms, the turnover of residential treatment beds will begin to decrease. At the risk of engaging in too-elementary mathematics, for every defendant required to spend six months in residential treatment because he was sentenced pursuant to N.J.S.A. 2C:35-14, three individuals whose clinical diagnosis indicates that a two-month inpatient treatment program would serve their needs are denied a bed. In effect, Matthews could strain the infrastructure of residential

treatment, with ripple effects that could touch other offenders waiting in county jails for their drug court treatment program to commence, offenders sentenced to drug treatment (but not drug court supervision) under ordinary probation, and members of the general public who receive publicly-funded drug treatment. As a matter of public policy, such an outcome should be avoided, provided the treatment needs of individual defendants and the interests of public safety can be adequately served.

CONCLUSION

For the foregoing reasons, *amicus* the New Jersey Institute for Social Justice respectfully requests that this Court disapprove the Appellate Division's holding in Matthews and hold that the conditions set forth in N.J.S.A. 2C:35-14 apply only to defendants subject to the presumption of imprisonment pursuant to N.J.S.A. 2C:35-14 or a mandatory prison sentence pursuant to N.J.S.A. 2C:35-7. This Court should further hold, consistent with the Legislature's plain intent, that a court may sentence a defendant like Jason Meyer to drug court treatment as a condition of ordinary probation pursuant to N.J.S.A. 2C:45-1.

Respectfully submitted,

The New Jersey Institute for Social Justice

By: _____
Craig R. Levine, Esq.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes

Miscellaneous