LESSER INCLUDED OFFENSES

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INTRODUCTION

In 1968, the New Jersey Legislature called for a special commission to revise the state's criminal code[1], and set forth both the goals and purposes of the commission.[2] The Criminal Law Revision Commission ("Commission") was aware of the contemporary crisis regarding a general lack of respect for the law.[3] Their final product became the

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[1] See L. 1968, c. 281, § 4, N.J.S. 1:19-4 (repealed 1978) (cited in 1 REPORT AND PENAL CODE, infra note 3 at v). "It shall be the duty of the commission to study and review the statutory law pertaining to crimes . . . and prepare a revision or revisions thereof for enactment by the Legislature." Id.

[2] Id. The purpose of this revision was, "to modernize the criminal law of this State so as to embody principles representing the best in modern statutory law, to eliminate inconsistencies, ambiguities, outmoded and conflicting, overlapping and redundant provisions and to revise and codify the law in a logical, clear, and concise manner." Id.

[3] The commentary states:

> We are in an era of rising crime rates and we must be sure that we are using the law enforcement facilities available as effectively as possible. This includes both confining law to a proper sphere of activity and assuring ourselves that persons appropriately subject to a criminal sanction will not escape because of a poorly defined crime. We are in the midst of a crisis with regard to respect for law. We must be sure our criminal statutes do not add to it, breeding contempt for law and disrespect for the enforcers of it, by being anachronistic or hypocritical.
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> N.J. CRIMINAL LAW REVISION COMMISSION, 1 FINAL REPORT: REPORT AND PENAL CODE vii - viii (1971).

state's first comprehensive penal code.[4] The principal problems with the state's prior penal code included disorganization, inconsistent legislative policy, and extensive reliance on case law for certain fundamental principles.[5] The Commission, relying heavily upon the MODEL PENAL CODE ("MPC") and, to a large extent, the work of other States[6], submitted its final draft to the Governor and the Legislature in 1971.[7] On September 1, 1979 the New Jersey Legislature enacted the NEW JERSEY CODE OF CRIMINAL JUSTICE ("Code") in Title 2C of the New Jersey Statutes Annotated.[8]

Although the Commission relied on the MPC and the law of other states, the commission also relied on New Jersey case law. This paper will address one legal doctrine that was not only retained from New Jersey case law, but more importantly has

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[4] Id.

[5] Id. The commission elaborated on the problems, stating

> New Jersey never had a comprehensive penal code . . . Our statutes now only define the elements of the offenses . . . Even this is not done according to the harm done or threatened by the offenders . . . This makes impossible any sort of consistent legislative policy . . . We have almost no statutes relating to the general part of the criminal law . . . for example, to principles of liability . . . Presently, this is found in our case law . . . Modernization and rationalization compel enactment of statutory law on topics relating to culpability . . . .
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> Id. at viii – ix.

[6] Id. at x. "[The] Model Penal Code . . . has been the principle basis of our study . . . Additionally . . . [we] have drawn heavily upon the work of [New York, Illinois, Wisconsin, Michigan, California, and Connecticut]. Id. at x – xi.

[7] Robert E. Knowlton, Comments Upon the New Jersey Penal Code, 7 CRIM. JUST. Q. 89, 89 (1979-1980).

[8] State v. Molnar, 81 N.J. 475, 487 (1980).

evolved drastically since the enactment of Title 2C. This is the doctrine of Lesser Included Offenses. The doctrine of Lesser Included Offenses has connections to constitutional law, statutory law, and substantive criminal law. This paper will involve these various areas. Part One of this paper will briefly cover indictment and double jeopardy as each constitutional provision relates to lesser included offenses. Part Two of this paper will provide a brief illustration of lesser included offenses for homicide. Part Three of this paper will examine the doctrine of Lesser Included Offenses, explaining the common law doctrine and tracing its evolution during the last century. Part Four of this paper will briefly canvass Related Offenses. Part Five of this paper will cover Scope of Review. Finally, Part Six of this Paper will examine Doctrine and Policy.

INDICTMENT

"No person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury." N.J. CONST. art. 1, ¶ 8. "In all criminal prosecutions the accused shall have the right . . . to be informed of the nature and cause of the accusation . . . ." N.J. CONST. art. 1, ¶ 10. The indictment gives notice to an offender of pending criminal charges. In order adequately to provide notice, the indictment must satisfy certain requirements. First, the indictment must "inform the defendant of the offense charged against him, so that he may adequately prepare his defense." State v. LeFurge, 101 N.J. 404, 415 (1986). Second, the indictment must be specific enough to allow the offender to avoid later prosecution for the same offense. Id. Finally, the indictment must be specific enough to prevent the petit jury from convicting the defendant of an offense that the grand jury did not consider or charge. Id. In this

way, the indictment gives a defendant notice of pending criminal charges and limits the possible scope of punishment.

These requirements provide a defendant with a "distinctive safeguard, to wit, that no man shall be brought to trial for crime unless a grand jury shall first find sufficient cause for the charge." State v. LaFera, 35 N.J. 75, 81 (1961) (citations omitted). In order to preserve this safeguard as a right for the accused, "the indictment must allege all the essential facts of the crime, lest an accused be brought to trial for an offense the grand jury did not find." Id. (emphasis added). Frequently the burden of proof for an indictment is referred to as probable cause. This "probably means a 'prima facie' case rather than the less exacting 'probable cause' which will justify a search . . . [An] indictment imports the existence of facts sufficient to subject a defendant to trial and to the intermediate deprivations already mentioned." Trap Rock Industries, Inc. v. Kohl, 59 N.J. 471, 488, 284 A.2d 161, 169-70 (1971).

Probable cause in the context of search and seizure, though undefined, is an objective test based on the totality of factual circumstances. To establish probable cause for a warrantless search and seizure, the prosecutor must put forward evidence of the objective facts and reasonable inferences. However, a prima facie case is more than a test of objective factual observations and the reasonable inferences. Rather, a prima facie case requires the grand jury to find that the state's evidence satisfies each element of the crime.

The burden on the state to make a prima facie case for the purposes of indictment is also relevant to the constitutional protection against double jeopardy and the doctrine of lesser included offenses. All of these employ an elements test. If the grand jury

returns an indictment, finding that an accused probably committed a greater offense based on the state's prima facie presentation of evidence, then logically the grand jury would have found that the defendant committed a lesser offense, defined by a subset of the elements of the greater offense, based on the same evidence.

The burden of proof for a prima facie case is low. The evidence must prove only that it is more probable than not that a crime was committed and that the defendant committed each element of the crime. The grand jury is of ancient origin. In the Anglo-American system of justice, the grand jury served both as an accusatory body, advancing the public interest in the discovery of evidence, as well as safeguarding citizens against unwarranted criminal accusations. LeFurge, 101 N.J. at 418, 502 A.2d at 43 (1986). In addition, the proceeding is an ex parte inquest and should not be changed into a mini trial. State v. Hogan, 144 N.J. 216, 235 (1996).

The indictment is only a pleading device. LeFurge, 101 N.J. at 419. And "[p]leading is never an end in itself. It is merely the vehicle for the merits of a controversy." State v. La Fera, 35 N.J. 75, 81 (1961). As a pleading device, the principles and purposes of the indictment serve goals other than those enumerated above. The grand jury, after all, is vested with the authority to allow the state to proceed against the accused.

The grand jury indictment does not hem the state into a single theory of the case. After all, the threshold of proof required for the grand jury to return a true bill is low. Rather than hemming the state into a single theory of the case, the indictment puts the accused on notice for both the offense on the indictment and any offenses that are necessarily included in the indicted offense. State v. Saulnier, 63 N.J. 199, 205 (1973).

> [T]he principle[] that an indictment must fairly apprise a defendant of the charges against him . . . [is] sufficiently flexible to accommodate the common-law doctrine that a defendant may be found guilty of a lesser offense included in the offense charged in the indictment. This common-law doctrine was originally designed to aid the prosecution so that it would not fail entirely where some element of the greater offense was not established.
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> [State v. LeFurge, 101 N.J. 404, 419 (1986)].

Though originally devised to aid the prosecution, the common law doctrine also benefited the defendant by enabling a finding of lesser consequence. Saulnier, 63 N.J. at 205. The original purposes for the doctrine of lesser included offenses will figure prominently as this research traces the evolution of the doctrine in New Jersey over the last century.

The common law doctrine of lesser included offenses consisted of two prongs. First, the "elements prong," which relates to the offense charged in the indictment. As explained above, the indictment provided notice to the accused of the pending criminal charges. Additionally, the indictment also gave notice for any lesser offense necessarily included in the indictment. The elements test was the first prong in determining whether the lesser offense was "necessarily included" in the indictment. It required a court to consider whether the lesser offense contained a subset of all the elements in the offense charged in the indictment.

The second prong of the doctrine was the evidence prong, also known as the "rational basis test." Recent cases, which this paper will explore, demonstrate innovations in tackling the "elements prong." But the most dramatic doctrinal changes have occurred with respect to the "rational basis" test. At common law the "rational basis

test" precluded jury instructions based on the evidence.[9] "The question is whether proof of the elements common to both offenses also establishes the remaining elements of the greater, thereby precluding a finding that the lesser offense was committed."[10] This prong required a court to determine whether the evidence introduced at trial satisfied the elements of the offense charged in the indictment. Sometimes the evidence did not satisfy all of the elements of the indicted offense. When that occurred, the jury might not convict upon instruction for the greater offense. To avoid an acquittal where the record evidence did not satisfy all the elements of the indicted offense, the prosecutor could request, or the court could independently instruct, the jury to consider an offense with a subset of the elements of the indicted offense and which the record evidence supported. The rational basis test precluded offenses because it required the trial court to consider the record evidence and the elements of the greater offense on the indictment. If the record evidence, developed at trial, established all the elements of the offense charged, then the instruction for the lesser offense was precluded. But if the evidence developed at

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[9] See Kyron Huigens, The Doctrine of Lesser Included Offenses, 16 U. PUGET SOUND L. REV. 185, 231 (1992) (explaining the doctrine of lesser included offenses in the state of Washington). Professor Huigens explained:

> [T]he doctrine as a whole ensures a close fit between the evidence actually developed at trial and the offense of which the defendant is ultimately convicted . . . In a very real sense, the doctrine of lesser included offenses maintains contact between the criminal code and the world in which crimes are committed.
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> Id. at 187.

[10] Id. at 235 (emphasis added). Although Prof. Huigens' article is about Washington law, the principles are similar to New Jersey common law.

trial failed to establish an element of the greater that was not required by the lesser, then this required an instruction for the lesser offense. Thus, the common law doctrine gave both parties flexibility at trial. "[T]he doctrine serve[d] both sides, providing each a strategic flexibility—a fall-back position—in the trial of a case, while preserving both prosecutorial discretion and the defendant's right to notice and the opportunity to defend."[11] It allowed the prosecutor to secure a conviction for a lesser offense where there was a tighter fit between the legal elements and the record evidence. It also allowed the defendant to avoid punishment for a crime that the evidence failed to establish.

DOUBLE JEOPARDY

"No person shall, after acquittal, be tried for the same offense." N.J. CONST. art. 1, ¶ 11. This "great safeguard of individual freedom" has its origins in "the common law of this State." State v. Williams, 30 N.J. 105, 113 (1959). "The significance of the term 'same offense' is not limited to the same offense as an entity and designated as such by legal name, but it comprehends also any integral part of such offense which may subject the offender to indictment and punishment . . . ." Id. at 114. Accordingly, the double jeopardy clause protects the individual "against three harms: re-prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense . . . ." State v. Womack, 145 N.J. 576, 582, 679 A.2d 606, 608 - 609 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)). The double jeopardy provision of the "New Jersey Constitution . . . is at a minimum co-extensive with that of the United States Constitution." Id. (citing State v.

[11] Id. at 187.

Churchdale Leasing, Inc., 115 N.J. 83, 107-08, 557 A.2d 277 (1989)). Thus, the constitutional text "same offense" was intended to be conceptually broad.

A closer look at the scope of the term "same offense" reveals the relevance of this provision of double jeopardy law to the doctrine of lesser included offenses. It prohibits the state, following either conviction or acquittal, from prosecuting an individual again not only for the felony charged on the indictment, known as the "greater offense," but also for any offense whose elements are necessarily included in the actual offense on the indictment. This derives from the common law defense of autrefois acquit and autrefois convict.[12] The common law defenses of autrefois acquit and autrefois convict are relevant both to the Double Jeopardy provision[13] in the 1947 New Jersey Constitution,

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[12] State v. Di Giosa, 3 N.J. 413, 417-18, 70 A.2d 756, 759 (1950). The court explained:

> It is an ancient principle of the common law that one may not be twice put in jeopardy for the same offense. The pleas of Autrefois acquit and Autrefois convict are grounded on the maxim that a man shall not be brought into danger of his life for one and the same offense more than once . . . It protects against a second prosecution for the same identical act and crime.
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> Id. (internal quotations and citations omitted).

[13] The Di Giosa court explained:

> Immunity from double jeopardy . . . was secured by the successive constitutions of New Jersey . . . Our courts of justice would have recognized it, and acted upon it, as one of the most valuable principles of the common law, without any constitutional provision . . . [T]his great principle forms one of the strong bulwarks of liberty; and that if it be prostrated, every citizen would become liable, if guilty of an offence, to the unnecessary costs and vexations of repeated prosecutions, and if innocent, not only to those, but to the danger of an erroneous conviction from repeated trials.
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> Id. at 418-19 (internal quotations and citations omitted)

Article 1, ¶ 11 and to the doctrine of lesser included offenses.[14] A case that illustrates this is State v. Midgeley, 15 N.J. 574 (1954).

In Midgeley the defendant was indicted for the statutory offense of arson[15] under R.S. 2:109-1 for burning a dwelling house. Id. at 575. The statutory offense of arson shared some similarities with the common law offense of arson, as well as some notable differences. Id. at 576. At common law, this "felony was a crime against *another's habitation*, not against another's property but against his life and safety at his place of abode, that is, his dwelling house." Id.[16] The statutory offense of arson set forth in R.S. 2:109-1 to R.S. 2:109-6 expanded the scope of the offense with respect to the material element of the structures burned. The statute made it a crime either to burn or attempt to burn not only the dwelling of another, but also one's own dwelling as well as other buildings. Id. The statutory structure of R.S. 2:109-1 through 2:109-6 provides evidence

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[14] "[W]here the accused may be convicted of a lesser offense included in the greater laid in the indictment, an acquittal or conviction of the greater offense is on grounds of former jeopardy a bar to a subsequent trial for the lesser offense." Id. at 419.

[15] "Arson; punishment. Any person who shall willfully or maliciously burn, or cause to be burned . . . any dwelling house, whether it be his own or that of another . . . shall be guilty of arson . . . ." R.S. 2:109-1 (1937).

[16] See also L. 1898, c. 235, § 123, C. S. p. 1785 (amended L. 1919 c. 106, §§ 1-3) (explaining the nature and elements of the offense). "At common law a man might burn his own house without incurring liability to indictment, unless it was so situated, with respect to the houses of others, as to endanger their safety." Id.

of legislative intent to make arson under 2:109-1 a crime for burning places where a person may actually live.

There were also notable distinctions between the statutory offense and the common law. Judicial interpretation originally construed the material element "of another" in R.S. 2:109-1 similarly to the common law offense, requiring that the offender burn an actual dwelling. Id. at 577. This was the interpretive precedent for R.S. 2:109-1 prior to the statute's amendment in 1919.

The defendant in Midgeley was charged with burning a building, and tried for arson. The trial judge directed a verdict of acquittal because the building in question had not been occupied for two years, and occupation was a prerequisite for the common law crime of arson. The trial judge applied case law which interpreted the statutory text "of another" in accord with the common law offense of arson. This judicial precedent was established prior to 1919 and interpreted this statutory text as requiring actual occupancy and not simply ownership. Id at 577 (internal citations omitted).

Following the acquittal, the state obtained a second indictment against defendant for violation of R.S. 2:109-3(b)[17], charging defendant with the burning of "an unoccupied

[17] "Setting fire to buildings, dwelling houses or ships. Any person who shall willfully or maliciously set fire to . . . with intent to burn . . . any dwelling house . . . or other house or building of another . . . shall be guilty of a misdemeanor." R.S. 2:109-3(b); See also State v. Midgeley, 15 N.J. 574, 576 (1954) (quoting statute). This might be an example of the inconsistent legislative policy that concerned the Law Commission and the Legislature. See supra notes 1 - 5 and accompanying text. An indictment for arson required burning, and necessarily included attempted arson. This statute seems to

dwelling house." Id. at 576 (emphasis added). When the prosecution conceded that it would rely on identical proofs that had been used in the first trial, defendant responded by claiming autrefois acquit. The trial court dismissed the second indictment.

On appeal, the Supreme Court found that the trial court erroneously directed a verdict of acquittal at the first trial,[18] reasoning that the arson statutes were amended in 1919 for the purpose of redefining the common law. Common law arson required the burning of a dwelling house that was actually occupied by another. However, the 1919 amendments to the arson statutes repealed the common law element requiring the dwelling to be occupied.[19] The Supreme Court stated that the material elements of the amended statutes required proof, irrespective of whether the structure was occupied or unoccupied, of (1) the voluntary act of burning (2) the attendant circumstance of a building or a dwelling and (3) the mental culpability of either willfulness or malice. Id. at 578. That the owner had not occupied the dwelling for two years, as the State's proofs demonstrated, should not have foreclosed the first prosecution. Therefore, the judgment of acquittal in the first trial was error.

Nevertheless, the Supreme Court barred the second prosecution as a violation of double jeopardy. The court applied the elements test which is relevant to both double

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illustrate the confusion: setting fire with intent to burn seems to qualify as attempted arson. R.S. 2:109-3(b), however, defined an offense separate from arson and attempted arson.

[18] The Court speculated that the State obtained a second indictment because the law prevented the State from seeking appellate review of an acquittal. Id. at 579.

[19] The text is silent as to actual occupation.

jeopardy and the doctrine of lesser included offenses. The Court determined that at the first trial, defendant could have been found guilty of (1) the offense charged in the indictment, (2) an offense necessarily included in the offense charged, (3) an attempt to commit the offense charged, or (4) an attempt to commit an offense necessarily included in the offense charged. Id. at 579-80. This demonstrates the application of the elements test for double jeopardy to determine whether an offense is "necessarily included" in the indictment. The same test, the elements test, applies to the doctrine of lesser included offenses.

> "Same offense" in terms of double jeopardy includes not only the offense charged in the first indictment but also any offense of which the accused could properly have been convicted on the trial of the first indictment . . . Where the accused may be convicted of a lesser offense included in the greater laid in the indictment, an acquittal or conviction of the greater offense is on grounds of former jeopardy a bar to a subsequent trial for the lesser offense.
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> [Id. (internal citations omitted)].

The court compared the elements of R.S. 2:109-1, 2(a) and 3(b). Arson under R.S. 2:109-1 required proof that the offender voluntarily acted to burn a place where a person might reside, namely a "dwelling house," with a mental element of malice or willfulness. The high misdemeanor under R.S. 2:109-2(a) required proof that the offender voluntarily and maliciously acted to burn a place where a person might work, but not necessarily reside.[20] The misdemeanor under R.S. 2:109-3(b) required proof that the offender committed the voluntary act of setting fire to either a residence or place of

[20] "Burning . . . buildings other than dwelling houses. Any person who shall willfully or maliciously burn or cause to be burned . . . any shop, storehouse, warehouse, malt house, mill, or other building, whether it be his own or that of another . . . ." R.S. 2:109-2(b).

work with the mental elements of malice and the intent to burn.[21] The court determined that the elements of the original indictment for R.S. 2:109-1 necessarily included the elements of 2:109-2(a) and 2:109-3(b).[22] In addition, the court determined that the state planned to use the same evidence at the second trial. Therefore, the court barred the second prosecution on grounds of double jeopardy. The foregoing demonstrates that an acquittal at trial for an offense that includes lesser offenses forecloses further prosecution for those lesser offenses.

Double Jeopardy and the doctrine of lesser included offenses are also relevant when an individual is acquitted of a greater offense but convicted of an offense necessarily included in the indictment. State v. Williams, supra, 30 N.J. 105 (1959) illustrates this point. Prior to Benton v. Maryland, 395 U.S. 784 (1969), states were free to provide their citizens with less protection than required under the double jeopardy clause in the Fifth Amendment, and many departed from Fifth Amendment jurisprudence in the downward direction. Nevertheless, in State v. Williams the Supreme Court of New Jersey adopted the principle of "exoneration" that the United States Supreme Court had adopted for the Fifth Amendment for federal prosecutions in Green v. United States, 355 U.S. 184 (1957). Under the principle of exoneration, when a person indicted and tried for a greater offense is convicted for a lesser included offense, the conviction for the lesser

[21] See supra note 17. See also supra note 5 (describing inconsistent legislative policy).

[22] This diagram parses the elements of the arson statute.

Statute	Voluntary Act	Mental State	Attendant Circumstance
R.S. 2:109-1 See supra note 15	Burn	Malice / Willful	Building where person lives
R.S. 2:109-2(b) See supra note 20	Burn	Malice / Willful	Building where person works
R.S. 2:109-3(b) See supra note 17	Set Fire	Malice + Intent to Burn	Building where person lives or works

offense represents either an actual or implied acquittal for the greater offense. Exoneration occurs when the conviction for the lesser offense is reversed on appeal. The defendant's conviction is expunged from the record, and upon retrial the person may be charged, at most, for the lesser offense of his conviction. Retrial for any greater offenses in the original indictment is barred. Williams, 30 N.J. at 124.

Like the federal counterpart, the term "same offense" incorporates the offense charged on the indictment and any offense which contains a subset of the elements of the indicted offense. But double jeopardy does not bar retrial for related offenses, defined with elements that are not limited to a subset of the elements of the indicted offense.

> The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . . A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."
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> Blockburger v. United States, 284 U.S. 299, 304 (1932) (emphasis added) (internal citations and quotations omitted).

The United States Supreme Court attempted to expand the scope of double jeopardy to bar subsequent prosecutions for related offenses arising out of the same conduct. In addition to the elements test required by Blockburger, the Court in Grady v. Corbin stated, "if, to establish an essential element of an offense charged in [the second] prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted," then the second prosecution would be prohibited. 495 U.S. 508, 510 (1990). "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Id. at 521. But in United States v. Dixon, the Court overruled Grady's same conduct test.

> Unlike Blockburger analysis, whose definition of what prevents two crimes from being the "same offence," . . . [and] has deep historical roots and has been accepted in numerous precedents of this Court, Grady lacks constitutional roots. The "same-conduct" rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy.
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> [United States v. Dixon, 509 U.S. 688, 704 (1993)]

New Jersey courts have construed the New Jersey double jeopardy clause as being "co-extensive with that of the United States Constitution." State v. Womack, 145 N.J. 576, 582, 679 A.2d 606, 609 (1996) (citing State v. Churchdale Leasing, Inc., 115 N.J. 83, 107-08, 557 A.2d 277 (1989)). Double Jeopardy under the New Jersey Constitution, like its federal counterpart, does not bar retrial for related offenses arising out of the same conduct.

New Jersey statute, however, provides sub-constitutional rights to citizens that exceed the protection of Double Jeopardy. "The compulsory-joinder provision[23] of our Code, which is based on § 1.07(2) of the Model Penal Code, appears to impose greater restrictions on multiple prosecutions than are afforded by the United States Supreme Court's interpretation of the double-jeopardy clause of the fifth amendment." State v. LeFurge, 101 N.J. 404, 417-418, 502 A.2d 35, 42 (1986).

The foregoing is generally intended to demonstrate additional aspects of double jeopardy that overlaps with the doctrine of lesser included offenses.

LESSER INCLUDED OFFENSES: COMMON LAW AND TITLE 2C

The doctrine of lesser included offenses derives from common law. State v. Saulnier, 63 N.J. 199, 205 (1973) "The common law doctrine that a defendant may be

[23] See infra notes 108-112 and accompanying text.

found guilty of a lesser offense necessarily included in the greater offense charged in the indictment is well recognized in our State." Id. (citations omitted). To support the proposition that the doctrine of lesser included offenses derives from common law, the Saulnier Court cited State v. Zelichowski, 52 N.J. 377, 383-385 (1968); State v. Midgeley, 15 N.J. 574, 579 (1954); and State v. Staw, 97 N.J.L. 349, 350 (E. & A. 1922).

State v. Saulnier and State v. Zelichowski illustrates the doctrine of lesser included offenses as a rule of offense preclusion based on the record evidence.[24] Midgeley was explored above. The common law doctrine allowed the prosecutor to secure a conviction when the trial record did not develop as expected. This can occur for a variety of reasons. First, the witnesses for the state might fail to testify about material facts. Second, cross-examination may undercut the factual basis of the witness' testimony on direct by way of impeachment evidence. Finally, the prosecutor may not create the expected momentum in the presentation of evidence. This is not an exhaustive list of reasons. It is intended, however, to explain why the evidence might not develop as expected during the trial. When that happens, the doctrine of lesser included offenses aided the prosecutor by providing a fallback position for securing some conviction at the close of trial.

In State v. Saulnier, 63 N.J. 199 (1973) two State Troopers saw a yellow van in an area known for drugs. The troopers saw Saulnier standing with another individual next to the open door of the van. A third person was sitting in the driver's seat of the van. Saulnier saw the troopers and hurriedly walked away. The driver threw a brown bag from the van. The brown bag contained 73.95 grams of marijuana and 18 grams of

[24] See supra notes 9 – 11 and accompanying text.

hashish. The second trooper apprehended and searched Saulnier, seizing 2.89 g of marijuana and .49 g hashish.

Possession of marijuana or hashish in quantities greater than 25 gram or 5 grams respectively was a high misdemeanor; possession of lower quantities was a disorderly person violation. The state charged Saulnier with the high misdemeanor offense for possession of marijuana and hashish. The State's theory for this high misdemeanor charge was that defendant jointly possessed the drugs in the bag.

At the bench trial, the trooper testified. At the close of state's case in chief, Saulnier moved to dismiss on the grounds that the State failed to prove his joint possession of the bag. The judge granted the motion with respect to the high misdemeanor as charged in the indictment. But the court proceeded on the issue of the disorderly person offense based on the drugs seized from Saulnier personally. Saulnier objected, claiming (1) that he was never on notice for the disorderly person's offense; and (2) that the disorderly persons offense was not a lesser offense included of the high misdemeanor. After the court overruled the objection, Saulnier denied possession of the contraband. The court, however, found the trooper's testimony credible, and adjudicated defendant guilty as a disorderly person offender.

On appeal the Supreme Court sustained the conviction. The Supreme Court reasoned that at common law a defendant could be found guilty of a lesser offense necessarily included in the greater offense charged in the indictment. The Court explained that the original intent of the doctrine was to help a prosecutor when the evidence failed to establish an element of a greater offense. The court also explained that the doctrine "also redounded to the benefit of the defense." Id. at 205. First, the doctrine

"enabled a finding of lesser consequence." Id. Second, the doctrine protected the defendant's rights against double jeopardy by handling all the criminal matters in one trial. Id. The Court explained, "[t]here need not be a jury charge with respect to an included offense unless there is a rational basis in the evidence for a finding that the defendant was not guilty of the higher offense charged but guilty of the lesser included offense." Id. at 206-7.

Saulnier illustrates both the elements test and the traditional rational basis test of lesser included offenses. As to the elements test, the high misdemeanor necessarily included the elements of the disorderly person's offense. The elements of the high misdemeanor consisted of (1) possession (2) of marijuana or hashish (3) in quantities greater than 25 grams or 5 grams respectively. The elements of the disorderly persons offense consisted of consisted of (1) possession (2) of marijuana or hashish (3) in quantities less than or equal to 25 grams or 5 grams respectively. As to the rational basis test, the state proceeded on the theory of joint possession. If the state's evidence had proved the truth of this theory, then this would have precluded the lesser included offense. But the evidence did not develop at trial as had been anticipated, and the state was unable to establish joint possession over the bag. The failure to prove the element of joint possession provided a rational basis for the fact finder to acquit for the high misdemeanor. The same facts, however, established the elements for the included disorderly person's statute. The record clearly indicated a basis to acquit defendant for the greater offense and convict for the lesser offense. The trial judge, however, was not required to ignore materially inculpatory evidence on the record. The tighter fit with the facts allowed the prosecutor to secure a conviction, and it only exposed defendant to

liability for the lesser offense that the record proved. In this way, the doctrine provided for an outcome that balanced the competing interests of the prosecutor and the defendant. The prosecutor sought the maximum penalty, but the evidence failed to prove all of the required elements. The defendant wanted to be found not guilty, but could not disprove the inculpatory evidence for the lesser included offense.

The Saulnier Court explained that the doctrine "was originally designed to aid the prosecution so that it would not fail entirely where some element of the greater offense was not established." Id. at 205 (citations omitted). In addition, the doctrine of lesser included offenses "also redounded to the benefit of the defense since it enabled a finding of lesser consequence . . . and precluded a later independent prosecution of the lesser offense as double jeopardy." Id. (emphasis added and citations omitted). This overlap with double jeopardy suggests an alternative explanation of the manner in which the common law doctrine was a "rule of preclusion." Double jeopardy prohibited a later independent prosecution not only for the greater offense, but also for a lesser included offense. The common law doctrine of lesser included offenses secured the constitutional right against double jeopardy by consolidating all criminal matters set forth by the indictment into one trial, and potentially reduced the offender's liability. These rights were viewed as more important than administrative burdens that might arise for a trial court in determining how to charge a jury regarding lesser included offenses. "Any additional procedural inconvenience it entailed in the trial itself was outweighed by the resulting higher measure of justice and the increased efficiency in judicial administration." Id. (citation omitted).

In State v. Zelichowski, 52 N.J. 377 (1968), defendant was indicted for murder, and tried for participating with a group of four assailants that beat a man in the park. Approximately a day and a half after the attack, the police found the victim. Though still alive, the victim was covered with "crusty blood," wearing only a ripped T-shirt and socks. The victim died at the hospital about three days later. Defendant claimed at trial that the group stopped beating the victim when they saw a police car. Other evidence indicated that the victim was about one hundred feet from where the beating occurred. There was no evidence to prove that the group stripped the victim of his clothes.

The state's theory of the case was murder. However, at trial, "[t]he court decided to charge on atrocious assault and battery[25] because it also felt that, upon the evidence submitted, the jury might entertain a reasonable doubt as to cause of death." The court determined that the elements of atrocious assault and battery are necessarily included in murder[26] even though violent physical attack, an element of atrocious assault and battery, was not an element of homicide. As such, the indictment for murder provided notice to defendant for potential liability on atrocious assault and battery. With respect to the rational basis prong, approximately fifteen hours lapsed between the actual beating and the discovery of the victim. In addition, the victim was covered in "crusty blood." Finally, after the beating the victim's location changed, and there was no accounting for the removal of his clothing. These deficiencies in the record evidence indicated that the

[25] "Atrocious assault and battery. Any person who shall commit an atrocious assault and battery by maiming or wounding another shall be guilty of a high misdemeanor." R.S. 2:110-1 (1937); see also N.J.S.A. 2A:90-1 (repealed by L.1978, c. 95, § 2C:98-2)

[26] For statutory language and structure, see infra notes 28-30 and accompanying text.

defendant might not have directly caused the victim's death, and provided a rational basis for the jury to acquit for murder. The same evidence, however, provided a rational basis to convict defendant for atrocious assault and battery. The jury acquitted for murder and convicted for atrocious assault and battery. Zelichowski demonstrates the trial court's obligation to instruct the jury sua sponte for lesser included offenses. Similar to Saulnier, this case also illustrates where the record evidence failed to preclude an instruction for a lesser included offense. The evidence introduced at trial and the appropriate jury instructions allowed the jury to find a tighter fit between the record and the elements of atrocious assault and battery.

The foregoing is intended to explain generally the basic tenets of the common law doctrine of lesser included offenses.

HOMICIDE: THE INTERPLAY OF SUBSTANTIVE CRIMINAL LAW & THE DOCTRINE OF LESSER INCLUDED OFFENSES

The doctrine of lesser included offenses in general, and the rational basis rule in particular, are both nuanced. Rational basis relies on the evidence presented at trial. Since its intricate nuance defies rigid application, it cannot be easily expressed in statutory text. The MODEL PENAL CODE ("MPC") and similarly the NEW JERSEY CODE OF CRIMINAL JUSTICE ("Code"), embodies the common law doctrine with a delineation of its contours. Notably, neither the MPC nor the Code replaces this doctrine.

The New Jersey Legislature gave contours to the common law doctrine of "included offenses," in 2C:1-8(d).[27] However, the subdivisions within 2C:1-8(d) are "not

[27] The statute for lesser included offenses provides

> An offense is . . . included when: (1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

all encompassing . . . [and these] statutory categories of lesser-included offenses . . . are not water-tight compartments." State v. Sloane, 111 N.J. 293, 300 (1988). The contours provided by the statute do not cover the extent of the doctrine of lesser included offenses. For example, none of the statutory subdivisions accommodates the substantive law both before and after the adoption of Title 2C where passion-provocation mitigates murder to the lesser included offense of manslaughter. Id.

> Yet when there is a rational basis in the evidence, a passion-provocation manslaughter charge may appropriately be considered as a lesser-included offense of murder . . . [This] comports with [the] general view that . . . the jury should resolve the degree of an actor's guilt on the basis of the evidence presented to the jury.
>
> [Id.].

Interestingly, even though none of the textual provisions in 2C:1-8(d) accommodate passion-provocation to mitigate murder to manslaughter, N.J.S.A. 2C:11-4(b)(2) defines manslaughter in relevant part as a "homicide which would otherwise be murder under section 2C:11-3 [that] is committed in the heat of passion resulting from a reasonable provocation." The statutory text expresses the result, but it is the doctrine of lesser included offenses that provides the legal basis.

Prior to 1978, homicide under Title 2A comprised different degrees. The greatest homicide offense was first-degree murder, defined as "[m]urder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful,

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> (2) It consists of an attempt or conspiracy to commit the offense charged or to commit an offense otherwise included therein; or (3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.
>
> N.J.S.A. 2C:1-8(d).

deliberate, and premeditated killing, or which shall be committed in perpetrating or attempting to perpetrate arson, burglary, rape, robbery or sodomy . . . ." R.S. 2:138-2 (1937).[28] A lesser included offense of first-degree murder was second-degree murder, defined as "all other kinds of murder." Id. The material elements of second-degree murder, derived from common law, consisted of the voluntary act of killing and the mental state of either (1) intent to kill, (2) intent to cause serious bodily harm, (3) extreme reckless disregard for value of human life, or (4) intent to commit an unenumerated felony during which death results.[29] A lesser included offense of second-degree murder was manslaughter. "[Any] person who shall commit the crime of manslaughter shall be punished by fine . . . or imprisonment at hard labor or otherwise . . . or both." R.S. 2:138-5 (1937). Though undefined by statute, the material elements of manslaughter, again

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[28] The premise of felony murder culpability is that the intent to commit the underlying offense substituted for the specific intent required for proof of first degree murder. See, e.g., State v. Mathis, 47 N.J. 455, 464, 221 A.2d 529, 533 (1966) (explaining felony murder with robbery as the predicate offense). The Mathis court explained:

> Common to [robbery and attempted robbery] is the felonious intent to rob, and it is that intent which serves as a substitute for the malicious intent which otherwise would be required for murder in the first degree . . . To put it another way, the charge here is . . . the completed crime of murder, and we look to the robbery phase to find an additional fact which bears upon the degree or nature of the murder.
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> Id. (internal citations and quotations omitted).

[29] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 503 (Matthew Bender & Co. ed., Lexis 2001).

derived from case law, consisted of (1) a killing (2) committed in the heat of passion (3) which was the result of legally adequate provocation (4) with no adequate cooling time.[30]

Prior to the adoption of Title 2C, the New Jersey judiciary articulated "imperfect self defense" as a partial justification correlated with passion-provocation. State v. Williams, 29 N.J. 27, 42-43 (1959). "Imperfect self defense" mitigated murder to manslaughter by negating the malice required for the greater homicide offense. One of the legal issues in State v. Williams dealt with whether the intent to either kill or cause serious bodily injury inherent[31] in the use of a deadly weapon (a gun) could be negated by the shooter's mistake of fact as to the amount of force required for self defense. Id. at 42.

[30] The element of mental culpability was central to the distinction between degrees of homicide.

	Voluntary Act	Attendant Circumstance	Mental Culpability
Murder 1	Kill	Another Human	Willful, Deliberate, Premeditated
Murder 1 – Felony Murder	Kill	Another Human	Intent to Commit Arson, Burglary, Rape, Robbery, or Sodomy
Murder 2	Kill	Another Human	(1) Intent to Kill, (2) Intent to Cause Serious Bodily Injury, or (3) Extreme Reckless Disregard for Value of Human Life
Murder 2 – Felony Murder	Kill	Another Human	Intent to Commit Unenumerated Felony
Manslaughter	Kill	Another Human, No Adequate Cooling Time	Either (1) Heat of Passion & Legally Adequate Provocation or (2) Honest & Reasonable Mistake of Fact

[31] The court in State v. Williams, 29 N.J. 27, 36, 148 A.2d 22, 27 (1959) stated:

> We cannot concur in a differentiation between an intent to do grievous or great bodily harm and an intent to do less than great bodily harm in the context of a wounding by firearms. When a man shoots another for the purpose of disabling him, it seems inescapable that he intends grievous bodily harm.

The facts involved a police officer who killed an elusive suspect while attempting to arrest him. The grand jury returned an indictment for murder. The state's theory of the case was that defendant, a police rookie who had consumed alcohol while celebrating his graduation from police academy, was trigger happy, exceeded lawful authority in using the weapon, and had the intent to kill. The State's evidence at trial included testimony that the victim had pleaded for his life before the defendant fired the fatal shots. In addition, a state's expert testified that the gunshot at close range to the victim's femoral artery in the left thigh caused blood loss, shock, and death.

Williams testified in his own defense. While at the bar, he saw a man approach a woman, heard the woman coarsely rebuff him, and saw the woman push the man. Suspecting solicitation, Williams approached the man and identified himself. The suspect assaulted Williams, a chase ensued, and Williams shot at the suspect with the intent to subdue. After a brief interim struggle, the suspect fled again. This time Williams shot the man at close range, killing him. Williams testified that he only intended to disable the suspect, and maintained that during the transaction he was acting at all times in his capacity as a police officer in the discharge of his duties.

At the conclusion of the trial, the court instructed the jury with (1) first degree murder, (2) second degree murder with intent to cause serious bodily harm (there was no clear instruction on intent to kill), (3) manslaughter (based on (a) intent to do less than great bodily harm or (b) passion-provocation), and (4) acquittal. The jury convicted defendant of second degree murder.

On appeal the Supreme Court reversed the conviction. The Supreme Court reasoned that the trial court erred by failing to instruct the jury sua sponte that an honest

and reasonable mistake of fact would mitigate defendant's culpability from second degree murder to manslaughter. The Court found that under circumstances involving the use of a deadly weapon, a mistake as to the amount of force required for self defense that is both honest and reasonable would negate the malice of murder. In physical confrontations police officers act under a duty to subdue suspects. Accordingly, the Court reasoned that the subjective mistake of fact as to the amount of force required for self defense in order to subdue a resisting and elusive suspect coupled with the objective status of the police officer acting in the line of duty could negate the malice of second degree murder and mitigate the killing to manslaughter.

This case is particularly instructive regarding the doctrine of lesser included offenses and jury instructions. Here, defendant was indicted for "murder." The elements of manslaughter were necessarily included in the elements of the indicted offense. The facts provided the jury with a rational basis to acquit for murder and convict of manslaughter. Even though the judge instructed them on passion-provocation manslaughter, the reasoning of the high court determined that passion-provocation was not the only theory of mitigation. Rather, the facts clearly indicated that the jury could have acquitted the defendant for the greater offenses of first- and second-degree murder, and convicted on the lesser offense of manslaughter, based on the officer's honest and reasonable mistake of fact. The record evidence failed to preclude the lesser homicide offenses, so an instruction on mistake of fact would have allowed the jury to find a tighter fit between the trial evidence and the lesser homicide offense.

The reasoning of the Court in Williams was consistent with the common law[32] defense for mistake of fact.[33] At common law, an honest mistake alone could negate the

[32] See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 152-55 (Matthew Bender & Co. ed., Lexis 2001). Dressler explains:

> An actor who is mistaken about some fact does not have the same kind of opportunity to avoid doing evil that he would have if he knew what he was doing . . . [A] mistake of fact may exculpate an actor [because] what makes a person's mistaken action "involuntary" has more to do with his cognition . . . than with his volition.
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> Id. at 152 (internal quotations and citations omitted).

[33] A mistake of fact may negate the actor's "*mens rea*" in one of two ways. Id. Dressler set forth the general premise, explaining the moral culpability approach and the elemental approach. First, addressing the moral culpability approach, Dressler explained "in a general sense . . . [*mens rea*] describe[s] the actor's 'vicious will,' or his moral culpability for causing the social harm . . . ." Id. Second, addressing the "elemental" approach, Dressler explained that "[mens rea] in the narrower sense . . . describe[s] the particular mental state that is an express element of the offense . . . ." Id. Dressler elaborated:

> [P]roof that a person was factually mistaken [may] demonstrate[] that, despite appearances, he acted in a morally blameless manner and that, therefore, he is not deserving of punishment for causing the social harm. A mistake of fact may also negate "*mens rea*" in the "elemental" sense. That is, because of a mistake, a defendant may not possess the specific state of mind required in the definition of the crime. In such circumstances, the defendant must be acquitted because the prosecutor has failed to prove an express element of the offense.
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> Id. (emphasis added).

mental element of specific intent crimes.[34] With general intent crimes of malice, however, the mistake of fact was required to be both honest and reasonable.[35] Common law murder was a crime of malice. When degrees of murder were enacted later, murder in the first degree was made a crime of specific intent, while murder in the second degree remained the same as common law murder requiring the general intent of malice. The jury in State v. Williams was never instructed as to the mistake of fact to mitigate murder to manslaughter. Thus, the jury convicted Williams for second degree murder. As a matter of law, however, the malice in second degree murder could be negated by an honest and reasonable mistake of fact with respect to the amount of force required for self defense. This was consistent with the common law and an appropriate instruction would have allowed the jury to acquit defendant of second degree murder and convict him of manslaughter.

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[34] The rule of law for specific intent crimes accords with the elemental approach described in note 33. Id. at 153. An honest mistake alone negates the specific-intent element of the crime because:

> A defendant is not guilty of an offense if his mistake of fact negates the specific-intent portion of the crime, i.e., if he lacks the intent required in the definition of the offense. It does not matter that the defendants' mistake . . . may have been unreasonable—reckless or negligent—under the circumstances. Acquittal follows inextricably from the fact that a person may not be convicted of an offense unless every element thereof, including the mental-state element . . . is proved."
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> Id. at 155.

[35] "[W]ith general-intent offenses—crimes that did not include a specific-intent element—the jurists sought to determine if the actor's mistake negated his moral culpability for the crime." Id. at 153. This is in accord with the moral culpability approach described in note 33.

According to the court, the police officer's honest and reasonable mistake of fact correlated with legally adequate provocation in the passion-provocation defense, which also negated the malice of murder and mitigated one's liability to the lesser included offense of manslaughter. "By parity of considerations, the illegal offer of resistance to one who is bound to press to overcome it should be deemed to equal provocation, and the purpose of the officer to discharge official duty should be held to dispel the existence of malice . . . [because it] is in essence a culpable error of judgment made in the stress of an encounter he did not invite." Williams, supra, 29 N.J. at 43.

Moving forward, this paper will look more closely at the rational basis test as it was applied at common law and the evolution that this test has undergone since 1980.

RATIONAL BASIS IN TITLE 2C:1-8(e)

N.J.S.A. 2C:1-8(e) now provides: "The Court shall not charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense."[36] The text of the statute establishes a general prohibition on courts in criminal trials: they are not precipitously to charge juries with instructions for lesser included offenses. This protects the individual from unwarranted criminal liability. This general prohibition, however, has an exception. The exception applies only if there is a rational basis to convict of a lesser included offense.

The text of the statute raises at least three interpretational questions. First, when read in isolation, the term "included offense" is undefined. The meaning of this term is dealt with structurally, however, because 2C:1-8(d) defines this term.[37] Nevertheless,

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[36] N.J.S.A. 2C:1-8(e).

[37] See supra note 27.

two other interpretational issues remain with 2C:1-8(e). The meaning of the term "rational basis" is facially ambiguous. Nothing within the text of subdivision (e), or the neighboring subdivisions of 2C:1-8, or within any other provision in Title 2C generally, indicates the meaning of "rational basis." Ambiguity in a textual provision can sometimes be resolved by reference to the section's title.[38] The title of 2C:1-8 is "Methods of prosecution when conduct constitutes more than one offense." Thus, the title does not indicate the meaning of the term "rational basis." Additionally, it is unclear from the text alone whether the presence of a "rational basis" triggers a judicial obligation to instruct the jury for lesser included offenses, or whether this decision is within the trial court's discretion.

Though not resolved statutorily, the Commission acknowledged these two interpretational issues. Accordingly, the Commission commentary to 2C:1-8(e) states, "[t]his is in accord with the New Jersey rule . . . ." The commentary continues by enumerating cases which stand for the legislatively intended rational basis proposition. These cases include State v. Sinclair, 49 N.J. 525, 540 (1967); State v. Mathis, 47 N.J. 455, 466 (1966); State v. Davis, 50 N.J. 16 (1967); State v. Pacheco, 38 N.J. 120, 131 (1962); State v. Wynn, 21 N.J. 264, 270 (1956); and State v. Sullivan, 43 N.J. 209, 245

[38] The title of a statute or of a subdivision may provide a guide to courts for determining legislative intent. "If there is any uncertainty in the body of an act, the title may be resorted to for the purpose of ascertaining legislative intent and of relieving the ambiguity . . . ." Bellew v. Dedeaux, 240 Miss. 79, 84 (1961) (quoted in OTTO J. HETZEL, MICHAEL E. LIBONATI, & ROBERT F. WILLIAMS, LEGISLATIVE LAW AND STATUTORY INTERPRETATION: CASES AND MATERIALS 740-41 (3rd ed. 2001).

(1964).[39] The commentary demonstrates the intent of the drafters of the "rational basis" provision in Title 2C to incorporate New Jersey case law into the Code, even though the Code was based largely on the MPC.

The language of 2C:1-8(e) "is derived from an earlier draft of the Model Penal Code, [MPC § 1.08 (Tent. Draft No. 5, 1956)]." State v. Crisantos, 102 N.J. 265, 276, 508 A.2d 167, 172 (1986). The American Law Institute amended this MPC provision, and it currently states, "The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." MPC § 1.07(5) (emphasis added).

> As [this MPC section was] originally drafted . . . the reporter [was] of the view that if the evidence "would not justify any other verdict except a conviction of that offense or an acquittal, it would be improper to instruct the jury with respect to included offenses" and might constitute "an invitation to the jury to return a compromise or otherwise unwarranted verdict." The words "be obligated to" following "The Court shall not" were added to allow a court to submit an illogical included offense if the court believes that it is proper to do so. This, in effect, recognizes the jury's right to return a compromise verdict . . . ."
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> Crisantos, supra, 102 N.J. at 276, 508 A.2d at 172-73 (quoting MPC § 1.07 comment at 134).

The New Jersey Law Commission relied largely on the MPC when it revised the state's statute. The Commission, however, retained state law for jury instructions on lesser included offenses,

> reflecting an unwillingness to accede to the reasoning offered to support the [MPC] revision. Accordingly, under our Code it is improper for a trial court to charge [a lesser included offense], even when requested by the defendant, if there is no evidence in the record to support a [lesser] conviction.

[39] N.J. CRIMINAL LAW REVISION COMMISSION, 2 FINAL REPORT: COMMENTARY 26 (1971).

> State v. Crisantos, 102 N.J. 265, 276, 508 A.2d 167, 173 (1986) (emphasis added).

To understand the evolution of the rational basis test, it is necessary to examine the manner in which courts prior to and following the enactment of Title 2C understood and applied the rational basis rule. Earlier this paper covered State v. Saulnier, 63 N.J. 199, 205 (1973), State v. Zelichowski, 52 N.J. 377, 383-385 (1968), and State v. Midgeley 15 N.J. 574, 579 (1954). These cases stand for the general common law doctrine of lesser included offenses. These cases, however, are unlike the cases cited by the Code commentary for the rational basis rule. Saulnier, Zelichowski, and Midgeley were "easy cases." They succeeded in demonstrating the general doctrine, but the facts in those cases provided for straightforward analysis and logic. In Saulnier the prosecutor sought to convict the defendant for a crime that did not fit the evidence. In Zelichowski there was a gap in time for which the prosecution could not account. These were obvious problems in the state's proofs.

By contrast, the cases cited in the Code commentary involve record evidence that is much more involved. These cases look not only at the state's evidence and its inherent deficiencies, but also at the defendant's evidence. Some of these cases involved facts that warranted instructions on lesser included offenses, and some did not. The cases cited by the Code commentary demonstrate the nuances of the rational basis test in greater detail. The rational basis rule itself is easy to articulate. The identification of a rational basis, however, and the application of the rule may require trial and appellate courts carefully to evaluate the record evidence from the trial.

The structure of this analysis will take the following form. Part One will cover the common law cases cited by the Commission where a rational basis in the evidence

required jury instructions on lesser included offenses. Part Two will cover the common law cases cited by the Commission where there was no rational basis in the evidence to warrant jury instructions on lesser included offenses. Part Three will trace the evolution of the rational basis rule through a line of cases since the enactment of Title 2C. Part Four of this paper will briefly canvass Related Offenses. Part Five of this paper will cover Scope of Review. Finally, Part Six of this Paper will examine Doctrine and Policy.

COMMON LAW CASES DEFINING "RATIONAL BASIS"

The Law Commission cited six cases in the Commentary for 2C:1-8(e). Each case illustrates the doctrine of lesser included offenses in trials for Felony-Murder.[40] Felony-murder was and is uniquely positioned. "[T]he jury is required, except in felony murder cases . . . to determine and designate by its verdict whether the finding of murder is in the first or second degree . . . ."[41] This general rule applied in trials where the state sought to prove either specific intent or malice murder.[42] In trials for first degree felony-murder, however, the record evidence precluded second degree felony-murder and nonfelony murder only if it reflected indisputably[43] that the killing occurred in the course

[40] See supra note 30.

[41] State v. Sullivan, 43 N.J. 209, 245, 203 A.2d 177, 196 (1964) (emphasis added).

[42] See supra note 30.

[43] For example, when defendant raises misidentification or alibi defenses, he asserts that he was not and could not have been involved in any of the alleged conduct. At the same time, he may concede that the other aspects of the conduct took place as the state claims.

of the underlying offense.[44] Therefore, as a general rule in first degree felony-murder trials, the court was obligated to instruct only for conviction of first degree murder or acquittal. But "in cases where the thesis of the State's prosecution is felony-murder, if a factual issue arises as to whether the killing was a felony or nonfelony murder, the jury must be instructed that a finding of nonfelony killing must be accompanied by a designation of first or second degree murder."[45] Thus, if the record evidence proved a killing but did not indisputably prove the commission of the underlying offense, then the record failed to preclude other forms of homicide. This obligated the trial court to instruct the jury with both felony murder and the appropriate lesser homicide offenses. The record evidence coupled with the appropriate instructions allowed the jury to acquit for the greater offense and convict of a lesser homicide offense, giving discretion to the jury to find the tightest fit between the facts and the law.

Each case cited by the Law Commission involved an indictment for "murder," which is sufficient to encompass first-degree murder, second-degree murder, and

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[44] This accurately states the law. But the Law Commission cases dealt with the preclusion of nonfelony murder, and none of them explored second degree felony-murder. For a more detailed account of judicial limitations on the reach of second-degree felony-murder, see SANFORD H. KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 459-471 (7th Ed., Aspen Publishers 2001) (illustrating the "inherently dangerous-felony" limitation which analyzes either the elements of the felony in the abstract or the particular facts of the case.)

[45] Sullivan, 43 N.J. at 245, 203 A.2d at 196. (emphasis added).

manslaughter.[46] In each trial the state's theory was felony-murder,[47] with robbery as the underlying offense. Robbery, as defined by statute, was "Any person who shall forcibly take from the person of another, money or personal goods and chattels, of any value whatever, by violence or putting him in fear . . . ."[48] For purposes of lesser included offenses, the elements prong was based on the offense charged on the indictment, irrespective of the state's theory at trial.

One of the felony murder cases with record evidence that failed to preclude other homicide offenses is State v. Mathis, 47 N.J. at 460. The defendant was indicted for "murder." The indictment gave the defendant notice of the pending charge for murder as well as the lesser-included offenses. The bill of particulars charged defendant with killing during a robbery. The record evidence included testimony from witnesses who saw defendant at the alleged location first assaulting the victim and then removing the victim from the scene. Found in the burned wreckage of a car, the victim's trouser pocket was turned inside out and his charred body had four .22 caliber gunshot wounds. The state proffered that there was gunfire at the time of the assault, and that defendant attempted to sell a small gun with a box of shells shortly after the murder. There was no direct proof, however, of robbery because the victim's wallet and some change were still in his trousers. The state sought to introduce evidence that the victim habitually wore a wristwatch, his wedding ring, and a lapel pin, all of which were missing. The trial court,

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[46] Id. at 241-242, 203 A.2d at 194.

[47] See supra note 28 and accompanying text for definition of first degree felony murder.

[48] R.S. 2:166-1 (1937) ("Robbery").

however, struck this evidence from the record.[49] Raising alibi and misidentification defenses, the defendant maintained that he was at his father's house at the time of the murder and denied all knowledge of the victim and the event.[50]

The only record evidence with logical relevance to robbery, the underlying offense, consisted of the victim's pant pocket turned inside out. During the charge conference, the state and the defendant agreed that the judge should instruct the jury with conviction of first-degree murder or acquittal.[51] The jury convicted defendant for first degree murder and he was sentenced to death.

Reversing the conviction, the Supreme Court stated, "If under the proof there is in fact no room for dispute as to whether the killing occurred in the perpetration or attempt to perpetrate the felony, our cases say the issue should not be left to the jury . . ." State v. Mathis, 47 N.J. 455, 467, 221 A.2d 529, 535 (1966). The court explained further that in the context of felony murder where the evidence against the defendant has precluded the lesser offenses, "[t]o leave the issue of second-degree murder with the jury in such circumstances could conceivably lead to a compromise verdict." Id.

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[49] The state's original bill of particulars alleged attempted robbery, but the state amended the bill of particulars at trial to allege completed robbery. Defendant, not expecting this, moved to strike this evidence of completed robbery, which the trial court granted.

[50] Thus, defendant denied his personal involvement in the alleged crimes. At the same time, however, defendant may have conceded all the other aspects of the state's evidence. This defense strategy required the jury to decide only if the state proved beyond a reasonable doubt that defendant personally committed the crimes.

[51] See supra notes 41-46 and accompanying text.

The Mathis Court provided one formulation central to the rational basis inquiry. The threshold "rational basis" question was whether the record evidence provided room for dispute as to the underlying offense of robbery. Id. at 467. This threshold question hinged, in turn, on whether the proof itself was "so unequivocal as to make it idle to ask the jury to pass upon it." Id. It must "appear[] clearly from the evidence that the [offense] was of no lower degree." Id. Thus, when the record evidence proves the killing occurred in the course of the underlying offense, then it precludes other homicide offenses and obligates the trial judge to instruct only for first degree murder or acquittal. An instruction for a lesser included offense would allow the jury to acquit for the greater felony murder offense and convict of a lesser homicide offense only by sheer speculation and compromise. Evidence that precluded lesser homicide offenses demanded that the jury receive instructions only for first degree murder. Id.

A defendant has two occasions at the trial to undercut practically the state's evidence: cross examination of each witness for the state, and direct examination of defense witnesses during the defendant's case in chief. Furthermore, during the defendant's case in chief, the defendant may attempt to present evidence to exculpate himself, or otherwise to justify or excuse his actions. The facts may prove beyond a reasonable doubt that the defendant is guilty of having committed a crime. The degree of guilt, however, may remain disputable for the factfinder, obligating the trial judge to charge the jury with instructions for lesser included offenses. Finally, the state's own evidence might provide the basis for the instructions on lesser included offenses. Mathis illustrated the final scenario.

In Mathis the grand jury indictment for "murder" was sufficient to encompass first-degree murder, second-degree murder, and manslaughter.[52] The state pursued a felony-murder theory with robbery as the underlying offense. The Mathis court explained,

> Common to [robbery and attempted robbery] is the felonious intent to rob, and it is that intent which serves as a substitute for the malicious intent which otherwise would be required for murder in the first degree . . . To put it another way, the charge here is . . . the completed crime of murder, and we look to the robbery phase to find an additional fact which bears upon the degree or nature of the murder.[53]

Based on the record evidence, however, the jury could have acquitted for felony-murder with robbery[54] as the underlying offense. The only evidence relevant to robbery or attempted robbery consisted of the trouser pocket. Furthermore, the record indicated that his wallet and money had not been stolen. This failure to prove indisputably the elements of robbery and, thus, to preclude lesser homicide offenses obligated the trial judge to instruct the jury with the appropriate lesser homicide offenses necessarily included in the indicted offense of "murder." The Mathis Court explained, if "the issue of [the degree of guilt] is improperly taken from the jury, the jury might convict of [a greater offense] or acquit a man whose guilt is of a lesser degree." Id.

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[52] See supra note 46 and accompanying text.

[53] State v. Mathis, 47 N.J. 455, 464, 221 A.2d 529, 533 (1966) (internal citations and quotations omitted).

[54] See supra note 48 and accompanying text.

The same record, however, provided the jury with a rational basis to convict for second degree murder.[55] The overarching question was whether proof of the elements common to "murder" as indicted and second degree murder also established the remaining elements of the greater, thereby precluding a finding that the lesser offense was committed.[56] The record evidence, however, did not preclude jury instructions on other homicide offenses.[57] "The fact of a robbery or attempt to rob [was] not indisputable." Id. at 468. Eyewitnesses saw defendant physically assault and remove the victim from the area, the charred body of the victim was found in a burned car, and four gunshot wounds directly caused the victim's death. Thus, the record evidence provided the jury with a rational basis upon which to acquit for first degree murder on a felony murder theory and convict for other homicide offenses. Even though the trial court was obligated to instruct the jury with second degree murder, the supreme court reversed the conviction on other grounds. Nevertheless, the reasoning of the Mathis court demonstrates that the record evidence "clearly indicated" the grounds to acquit for the greater offense and convict for the lesser.

In State v. Sinclair, 49 N.J. 525, 525 (1967), two defendants were indicted for "murder," which incorporated first-degree murder, second-degree murder, and

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[55] See supra notes 29 - 30 and accompanying text.

[56] See supra note 10 and accompanying text.

[57] Mathis, 47 N.J. at 467-68, 221 A.2d at 535 (quoting Sullivan, 43 N.J. at 241-242, 203 A.2d at 194).

manslaughter.[58] The state's theory of the case was felony-murder[59] with attempted robbery[60] as the underlying offense.

Abraham Friedman, the principal prosecution witness, testified that he was at his liquor store in Newark with his wife Esther and a customer when two men entered the store. One took out a gun and announced "this is a stickup." The other man pushed a button and turned a handle to open the register, and then reached inside the register. The customer intervened, and was shot. Esther attempted to escape, and she was shot too. Friedman testified that he hit one of the men in the head with a bottle while the assailant's hands were in the register. Next, he ran to the rear of store to sound the burglar alarm. Blood marks were later found around the icebox but none near the cash register. Both assailants absconded, and no money was taken. Friedman identified both men, and the police arrested each of them separately. One of them had the gun that fired the fatal bullets.

The defense impeached Friedman's testimony with conflicting statements he made to different people in the hours following the killings. In addition, physical evidence contradicted other details in Friedman's story that went to the heart of the state's theory of attempted robbery. On the night of the incident, Friedman inconsistently reported about three facts: (1) the first man's alleged announcement that "this is a stickup," (2) the second man opening the register, and (3) the events at the cash register. Additionally, the police found no fingerprints in the area of the cash register.

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[58] See supra note 46 and accompanying text.

[59] See supra note 30.

[60] See supra note 48 and accompanying text.

At the close of trial, the defense asked for both a second-degree murder and a manslaughter instruction. Where a murder indictment incorporates first degree murder, second degree murder, and manslaughter, defendant presumably argued that the record evidence would allow the jury to acquit for felony murder, with robbery as the underlying offense, but convict for a lesser homicide offense like second-degree murder.[61] Although the record evidence proved that the two defendants directly caused the victims' deaths, the impeachment evidence created uncertainty as to the underlying robbery offense. The trial judge denied the motion and instructed the jury either to convict the defendants of first-degree murder or to acquit. The jury convicted the defendants of first-degree murder on the state's felony murder theory.

Unsurprisingly, the Supreme Court reversed, citing Mathis. Similar to Mathis, this case involved an indictment for murder, and the state pursued a felony murder theory with attempted robbery as the underlying offense.[62] In contrast to Mathis, however, defendant here impeached the state's evidence for the attempted robbery. Accordingly, the rule set forth in State v. Sullivan for felony-murder obligated the trial judge to give an instruction for lesser homicide offenses.

The record evidence did not preclude the lesser homicide offenses, obligating the trial judge to instruct accordingly. "To force the jury to choose on the evidence in the case between first-degree murder and acquittal raises the possibility that the defendants might have been convicted of first-degree murder though their guilt was of a lesser degree." Id. at 543. The Sinclair court explained that if "on the evidence it would not be

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[61] See supra note 30.

[62] See supra note 53 and accompanying text.

idle to have the jury decide whether defendants committed an [offense of lesser degree] other than [the offense charged], it is error not to charge the possibility of a verdict of [the lesser included offense]." Id. at 540 (emphasis in original).[63]

While the jury could have forgiven the inconsistencies based on the traumatic surrounding circumstances and convicted for first degree murder, likewise the jury could have acquitted the defendants for first degree murder, based on the impeachment evidence, and convicted them for killings of a lesser degree. The record contained evidence that inculpated defendants for shooting and killing the victims. The supreme court reasoned that the record evidence failed to prove indisputably the elements of attempted robbery and preclude other homicide offenses, obligating the trial court judge to instruct the jury accordingly.[64] With respect to the requested instruction for second-degree murder, the Sinclair court said that in light of the impeachment evidence, "all these factors make it not idle to have the jury decide [the degree of guilt] . . . it is enough that the evidence leaves room for dispute as to [how] the killings occurred . . . ." Id. at 542.

The court in Sinclair characterized the rational basis inquiry as whether the evidence of guilt was "such that only by sheer speculation or compromise could the jury return a verdict other than guilty of [the greater offense] or not guilty." Id. If the evidence of guilt for felony murder proved indisputably both a killing and the elements of

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[63] The Court also noted parenthetically that the record evidence would have allowed the state to pursue the theory of willful, deliberate, and premeditated murder at trial, an alternate theory for the murder indictment.

[64] See supra notes 29 – 30 and accompanying text.

the underlying offense, then this would have precluded any lesser homicide offenses. Accordingly, an acquittal would result only from speculation or compromise, so the tightest fit is between the evidence and the greater offense. This common law doctrine provided for preclusion of instructions based on the evidence, and preclusion prohibited the trial court from charging the jury with lesser included offenses. But in Sinclair the impeachment evidence undercut the state's evidence with respect to robbery.

Finally, the court held that although the defense had requested an instruction on manslaughter as a lesser included homicide offense, the trial court correctly denied this request. The impeachment evidence only went to the underlying robbery offense, mitigating the crime to second degree murder. But the record also included evidence of the defendants' voluntary intoxication. Voluntary intoxication, however, is only a defense to specific intent crimes, such as attempted robbery. Accordingly, a defendant may argue that his voluntary intoxication at the time of the crime prevented him from forming the specific intent required in the definition of the offense. The common law, however, did not provide voluntary intoxication as a defense for general intent crimes, like second degree murder. This was so because "'general intent' referred to an offense for which the only *mens rea* required was a culpable state of mind . . . [T]he voluntary act of impairing one's mental faculties with intoxicants is a morally blameworthy course of conduct that renders the actor culpable for the ensuing harm. [Accordingly,] a person's voluntary intoxication *proves*, rather than negatives, his '*mens rea*.'"[65]

[65] JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 324-25 (Matthew Bender & Co. ed., Lexis 2001).

This distinction in the law for voluntary intoxication between specific intent and general intent appears to have been in accord with the moral culpability and elemental approaches to mistakes of fact.[66] For the mistake of fact defense, an honest mistake alone negated specific intent, but general intent could be negated only by an honest and reasonable mistake. Voluntary intoxication, like an honest mistake of fact, negated specific intent. But voluntary intoxication was reckless conduct. So even though an honest and reasonable mistake of fact negated general intent, voluntary intoxication was inherently unreasonable and therefore did not negate the malice of second degree murder.

If voluntary intoxication had been relevant in Sinclair, this defense would only have negated the intent to rob, the felony portion of the felony-murder, and thus allow the jury to acquit for first degree felony-murder. Nevertheless, an instruction for second degree murder would have allowed the jury to convict for the unlawful killing. The reckless act of drinking, however, falls within "depraved heart" second degree murder. Unlike the honest and reasonable mistake of fact, voluntary intoxication is inherently unreasonable and therefore does not negate the general intent of malice in second degree murder to the lesser offense of manslaughter. Thus, the trial court did not err by denying the manslaughter instruction.

In State v. Wynn, 21 N.J. 264 (1956), the defendant was indicted for "murder." The state's theory of the case was felony-murder with robbery as the underlying offense. The defendant confessed to demanding money from the taxi cab driver, striking the driver, pulling the victim from the taxi, striking him again, kicking him several times, and

[66] See supra note 33.

taking the driver's wallet, watch, and jacket. The police found the victim's watch in the defendant's pocket. This confession was admitted at trial.

The defendant, however, testified at trial. His defense was voluntary intoxication and provocation. He testified that he had been drinking before the killing, and claimed that during the cab ride, an argument occurred with the taxi driver about the fare for the ride. He claimed that the driver instigated the fight with a racial epithet. This fact, the racial epithet, was not in defendant's confession. Defendant pulled the driver from the taxi to beat him, and during the fight the driver dropped his wallet. Defendant later took the driver's wallet, and also claimed that the victim's wristwatch was flung from his body in the scuffle. Defendant testified that after the scuffle, he got into the cab to drive away, and the victim was yelling at him. The defendant testified that he found the watch on the back seat of car and took the jacket thinking it was his.

At the conclusion of the testimony, the trial court instructed the jury on first-degree murder based on the state's theory of a killing during a robbery, second degree murder, and acquittal. The court instructed:

> If under the evidence Wynn is guilty at all, he is guilty of murder in the first degree.[67] So that, while you may return a verdict of guilty of murder in the second degree, such a verdict would be inconsistent with the theory upon which this case has been tried . . . [I]t is by statute only that such a verdict [of second degree murder] can be returned in this case, and is wholly inconsistent with the

[67] This jury instruction is strikingly similar to an earlier opinion rendered by the Supreme Court affirming the jury conviction in the felony-murder trial, with robbery as the underlying offense, of State v. Zeller, 77 N.J.L. 619, 621, 73 A. 498 (N.J. Err. & App. 1909). "If under the evidence Zeller was guilty at all, he was guilty of a murder committed in the perpetration of a robbery." Id.

> theory upon which the case has been tried. In the event that you find that the State has failed to show beyond a reasonable doubt the guilt of this defendant, then your verdict will be not guilty. So there are any one of four verdicts which you may return; guilty of murder in the first degree, guilty of murder in the first degree with a recommendation of life imprisonment, guilty of murder in the second degree or not guilty'.
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> State v. Wynn, 21 N.J. 264, 269, 121 A.2d 534, 537 (1956).

The jury convicted the defendant of murder in the first-degree.

The Supreme Court granted certification and reversed. With respect to the instructions, the Supreme Court identified various errors. First, the trial court did not instruct the jury with the elements of second degree murder. This is inherently problematic because it foreclosed the jury's ability to consider the facts with reference to the elements of the offense. As the Supreme Court stated, "Where the life of an accused is at stake, it is too risky to determine what the instructions in this case could mean to the twelve lay minds of the jurors." Id. at 271. Second, the trial court stated on the record that the jury should either convict based on the state's felony murder theory or acquit. Id. Finally, the trial court's unique endorsement of the state's theory of felony murder ignored that the "murder" indictment encompassed first degree murder, second degree murder, and manslaughter, and that when the record evidence failed to prove indisputably the elements of underlying offense and, thus, preclude other homicide offenses, then the instructions for the other homicide offenses were required.[68]

The Court reasoned that the evidence on the record before the court provided a rational basis to charge the jury with (1) felony murder (first-degree murder), (2) wilful,

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[68] See Graves v. State, 45 N.J.L. 203, 206 (Sup. Ct.), affirmed 45 N.J.L. 347 (E. & A. 1883) (cited in State v. Sullivan, 43 N.J. 209, 241-242, 203 A.2d 177, 194 (N.J. 1964)).

deliberate and premeditated murder (first-degree murder), (3) second-degree murder with intent to cause serious bodily harm, and (4) manslaughter. Id. at 269-70. The indictment for "murder" incorporated all of these offenses, and the record evidence provided a factual basis to charge the jury with all the separate theories.

First, defendant's case in chief made both the robbery and the killing disputable issues of fact. The jury could have acquitted defendant entirely. Alternatively, the members of the jury could have acquitted defendant for the robbery, which was the felony portion of the felony murder, and convict for a different homicide offense.

Second, defendant had adduced evidence of intoxication. The intoxication evidence could have negated the specific intent element of robbery on the felony murder theory as well as the element of willfully deliberate premeditation for murder. Negating the specific intent of robbery would have allowed the jury to consider other homicide theories. Negating the element of willfully deliberate premeditation would have mitigated the crime to second degree murder. Voluntary intoxication, however, did not negate the element of malice in second degree murder.

The defendant also presented provocation evidence. While provocation evidence is irrelevant to the specific intent element of robbery, it can mitigate the specific intent element of first degree murder and the malice element of second degree murder to manslaughter. The defendant argued that the dispute over the cab fair and the racial epithet constituted provocation. Accordingly, the record evidence provided a rational basis: (1) to acquit for the robbery, the felony portion of the felony murder, based on defendant's testimony of the incident; (2) to acquit for the robbery, the felony portion of the felony murder, based on defendant's testimony about voluntary intoxication because

that could have negated the element of specific intent in the robbery statute; (3) to acquit for willfully deliberate premeditated murder because of either voluntary intoxication or passion-provocation; and (4) to acquit for the malice element of second degree murder based on passion-provocation; and convict for manslaughter. The Court in Wynn acknowledged that the jury could have convicted for felony murder, but also rebuked the trial judge for limiting the jury to this theory of the case when the record evidence would have allowed them to convict on alternative theories.

This case is unlike Mathis and Sinclair. In Mathis the state's own evidence failed to prove indisputably the elements of the underlying robbery offense and preclude lesser included homicide offenses. In Sinclair the defendant impeached the testimony of the state's principal witness, so the state failed to prove indisputably the elements of the underlying offense of attempted robbery and preclude lesser included homicide offenses. In Wynn, the defendant's case in chief provided the rational basis to instruct the jury on lesser included offenses. Where the record evidence did not preclude lesser included felony and nonfelony murder, the trial judge was obligated to instruct the jury accordingly. The trial court should have allowed the jury, the finders of fact, to weigh the competing theories of the case. Instead, the trial court essentially gave the jury an all-or-nothing instruction, curtailing the jury's discretion where the record evidence provided a factual basis to convict for the greater offense as well as a rational basis for jury to acquit for the greater and convict for the lesser. The jury's independence allows the jury to determine the tightest fit with the facts based on the record before them. The petit jury's discretion as finder of fact at trial tempers the prosecutor's discretion in charging.

The foregoing cases demonstrate instances where the trial court was obligated to charge the jury with instructions for lesser included homicide offenses because the record evidence failed to preclude them. Therefore these demonstrate the common law meaning of "rational basis" as a rule of preclusion of offenses by the evidence. Furthermore, this analysis answers the first interpretational question raised above as to 2C:1-8(e). A "rational basis" was found on the record if the record evidence, adduced by either the state or the defense, failed to prove indisputably the underlying offense and preclude the lesser homicide offenses. Thus, the jury should have been empowered not only to convict for the indicted offense, but also to acquit for that offense and convict for a lesser offense.

These cases also answer the second interpretation issue as to 2C:1-8(e), which inquired whether the presence of a "rational basis" obligates the court to charge the jury with instructions for lesser included offenses, or whether this decision is within the trial court's discretion. When the state's evidence failed to preclude lesser homicide offenses, as in Mathis, or when the record evidence contained impeachment evidence and the defendant requested the instruction, as in Sinclair, or when the record evidence provided a basis from the defendant's case in chief, as in Wynn, the trial court must instruct the jury for the offenses which the record failed to preclude.

CASES WHERE THERE WAS NO "RATIONAL BASIS" IN THE EVIDENCE FOR A LESSER-INCLUDED OFFENSE INSTRUCTION

Two cases cited by the Law Commission apply the common law doctrine of lesser included offenses where there was no "rational basis" to charge the jury with lesser included offenses.

In State v. Davis, 50 N.J. 16, cert. denied, 389 U.S. 1054 (1968), the defendant was indicted for "murder." As in Mathis, Sinclair, and Wynn, the state's theory was felony murder with robbery as the underlying offense. The defendant killed the victim in the course of robbing his rug store. At the time of his arrest, just two hours after the killing occurred, the defendant had the victim's wallet, the murder weapon, and blood on his clothing which matched the blood type of the victim. Eyewitnesses who testified at trial placed the defendant at the scene of the crime at the time of the killing. Finally, when the accused was apprehended by the police, he exculpated the individual who was with him but said nothing about himself. The defense introduced evidence of defendant's general background, expert testimony that forensic evidence did not decisively prove whether the gun was the fatal weapon, and testimony from the defendant's sister as to the time he had left her apartment on the date of the killing.

The trial court instructed the jury only on first-degree murder, and the jury convicted the defendant. The defendant appealed, arguing that the trial court should have instructed the jury sua sponte on second degree murder. Presumably this was based on the proposition that a murder indictment encompassed first-degree murder, second-degree murder, and manslaughter.[69] In support of this contention, defendant argued that his possession of the victim's wallet was equivocal, and maintained that the state failed to prove that the victim actually possessed the wallet at the time of the killing. This defense theory is dependent on the premise that the state's evidence can provide the rational basis for the charge of lesser included offenses, similar to the facts in Mathis. The defendant argued on appeal that the lack of certainty in the evidence about the wallet failed to

[69] See supra note 46 and accompanying text.

preclude lesser homicide offenses. This theory on appeal, however, was inconsistent with the felony-murder cases requiring the court to instruct sua sponte where the record evidence "clearly indicated" that the state failed to prove indisputably the elements of robbery and preclude lesser homicide offenses, thus providing a rational basis to acquit for felony-murder and convict for the lesser included offenses.[70] The Court stated "[if] under the proof there is in fact no room for dispute as to whether the killing occurred in the perpetration or attempt to perpetrate the felony, our cases say the issue should not be left to the jury." Id. at 27 (citations omitted). The Supreme Court held that "there was no tenable explanation of the homicide in terms other than a killing in the course of a holdup." Id. at 28. The Court determined that the evidence against the defendant of robbery consisted of more than just the possession of the wallet. Based on the record evidence, the court reasoned that it would

> be sheer speculation to say, if defendant was the slayer, that the wallet came into his hands in some unconnected way. Nothing in the state of the record suggested that possibility. Hence the trial court concluded it would be idle to ask the jury to consider whether the killing occurred other than in the course of a robbery.
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> Id. (emphasis added)

Accordingly the record evidence precluded the lesser homicide offenses.

In State v. Pacheco, 38 N.J. 120 (1962), the defendant was convicted at trial for first-degree murder. As in Mathis, Sinclair, Wynn, and Davis, the state's theory was felony murder with robbery as the underlying offense. The state proceeded at trial on a co-conspirator theory of liability. A confederate, who confessed to killing the victim in the course of the robbery, testified for the state. The state also provided evidence from

[70] See supra note 30.

two police officers. After being placed under arrest by the police, both the confederate and the defendant reenacted the crime as part of the police investigation. The two men went to a farm, planning to take the owner's money. The owner was bound, gagged, and beaten to death. The confederate took the victim's money and then searched the house for more money, which is relevant to the evidence of robbery as the underlying offense. The police found the victim's body in the cellar two days after the killing. The defendant testified at trial that he acted under duress, with the confederate coercing his participation at knife-point. The judge charged the jury with wilful, deliberate and premeditated murder, felony murder in committing or attempting to commit robbery, murder in the second-degree, and manslaughter.

The jury returned a verdict for first degree murder. Although the Supreme Court reversed the conviction on other grounds[71], the Court determined in dictum that the evidence on the record only went to first-degree murder on a felony murder theory or to acquittal.[72] The trial court overcharged the jury, since it should have instructed the jury

[71] Jencks v. United States, 353 U.S. 657 (1957) gives the defendant the right to inspect and use a witness' prior notes and statements, if available, for impeachment on cross-examination. Here, the trial court forced defendant to be bound by the contents of all of the adverse witness' notes. Thus, the supreme court reversed the conviction because this trial court ruling was prejudicial error.

[72] Certain facts in this case are similar to the facts in State v. Zeller, 77 N.J.L. 619, 621, 73 A. 498 - 73 A. 498 (N.J. Err. & App.1909). Here defendant reenacted the crime for the police. The defendant in Zeller confessed to the police. The important distinction is that here the trial court erroneously overcharged the jury where the state's felony-murder

only with respect to the offenses matching the evidence. Here, instructions for first degree murder on a felony murder theory or acquittal were the only appropriate instructions that the evidence allowed. The state's evidence proved the elements of felony-murder with robbery as the predicate offense. So, the record evidence precluded instructions for lesser homicide offenses.

THE SEA CHANGE IN THE LAW OF RATIONAL BASIS

In 1980 the Supreme Court of New Jersey altered drastically the doctrine of lesser included offenses. It shifted the doctrine from one that primarily benefited the prosecutor while also redounding to the benefit of the defendant to one primarily for the benefit of the defendant with some residual possible benefits for the prosecutor. The common law doctrine of lesser included offenses in general, and the rational basis rule in particular, was one of offense preclusion based on the evidence. "The question [was] whether proof of the elements common to both offenses also establishes the remaining elements of the greater, thereby precluding a finding that the lesser offense was committed."[73] It allowed juries to obtain accurate results based on the tightest fit with the record evidence, or grant mercy on mitigation. At common law the doctrine was primarily an aid to the prosecutor. It enabled the state to secure a conviction even when the facts failed to satisfy the material elements of the greater offense charged, but nevertheless satisfied a lesser offense defined by a subset of the elements of the greater offense. In 1980, the court changed course and transformed the rational basis rule into a rule of "sufficiency."

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evidence precluded nonfelony murder. In Zeller, however, the trial court correctly charged felony-murder because the evidence precluded nonfelony murder theories.

[73] See supra note 10 and accompanying text.

"Sufficiency" means that trial courts might be required not only to consider the testimony on the record but also the inferences that might be drawn from the testimony. This doctrinal shift occurred in State v. Powell, 84 N.J. 305 (1980) and has been a source of difficulty.

The defendant in Powell, a police officer, was tried for the murder of his common law wife Debbie Couch. Since the events occurred in 1975, before the 1978 enactment of Title 2C, the decision became part of the common law that preceded Title 2C. Thus, the sufficiency test set forth in Powell became retroactively part of the common law tradition that the Law Commission incorporated in 2C:1-8(e) as the "rational basis rule."[74] The central pieces of evidence in Powell included two statements defendant gave to the police. In the first statement, defendant alleged that enemies killed the victim. According to this statement, defendant returned to the house where he found the victim dead in her chair. In his second statement to the police, defendant admitted to an accidental shooting after an argument. He stated that the victim lunged for and grabbed his revolver, and that when he tried to take it away, the gun went off. He thought she was going to shoot him, and claimed to be surprised that the victim was struck. He elaborated that he left the scene in order to drive to Atlantic City because he did not realize what had happened. During the drive he threw the gun out of the car.

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[74] See State v. Crisantos, 102 N.J. 265, 271 (1986) (stating that Powell applied common law principles to suggest "that if there is plausible evidence in the record to support a conviction of a lesser degree of criminal homicide, and a jury instruction on the lesser offense is requested, it is error not to submit that issue to the jury.").

At trial, defendant advanced four different theories. The first theory was alibi, claiming he was in Atlantic City at the time. The second theory claimed the shooting was accidental. The third theory was self defense. The fourth theory was passion-provocation. In addition, defendant disavowed the second statement to the police.

At the charge conference, the defendant requested instructions for manslaughter. The defendant argued that based on the second statement to the police, "the jury . . . could reasonably infer . . . that the deceased tried to grab his gun and kill him, and that Powell, in a fit of rage, took the gun away from her and killed her." Id. at 307. The judge refused to instruct the jury on passion-provocation because the defendant had disavowed the second statement, but did instruct the jury on alibi, accident, and self-defense. The jury convicted defendant and the Supreme Court reversed, declaring:

> In determining whether a (lesser offense) instruction should have been given, the issues involved are: first, the inferences that properly can be drawn from the proofs in the case, and second (very closely related to the first) the quantum, or weight, of evidence needed to justify such a charge. As for the first, there are no legal rules as to what inferences may be drawn. The question is one of logic and common sense. As for the second, while different formulations exist, we believe the inferences that flow from the record in this case are more than sufficient, no matter what the test, to warrant submission of the manslaughter charges to the jury.
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> [State v. Powell, 84 N.J. 305, 314, 419 A.2d 406, 410 - 411 (1980)]

Powell is the first case to require trial courts to consider not only the record evidence but also the inferences. The standard for determining inferences is not set by "legal rules" but rather by "logic and common sense." The inquiry is fact-specific, so there is no precedent for other courts to determine how much weight is sufficient to trigger the requirement of giving an instruction for lesser included offenses. The Powell court left the determination of sufficiency to the sole discretion of judges. But just as the

reasonable minds of jurors may differ, similarly the reasonable minds of judges may differ. The prong for determining the weight of the inferences is based on sufficiency of the record evidence and inferences. This formulation made a clear break from the chain of common law precedent for lesser included offenses. In the past, the doctrine precluded lesser offenses based on the record evidence. This new formulation required jury instructions for lesser offenses, triggered by a defendant's request, based on the record evidence and possible inferences.

Although the Powell court articulated only a two prong test, it implies a third prong that imposes additional requirements on the prosecutor. This departed from the common law doctrine, where record evidence failed to prove indisputably the elements of the greater offense and thus preclude lesser offenses, which obligated trial courts both to instruct and, thus, to allow the jury to convict of a lesser offense based on a tighter fit between the legal elements and the record evidence. Under Powell the implied third prong imposes the burden on the prosecutor not only to prove the state's case for the indicted offense beyond a reasonable doubt and preclude lesser offenses, but also to rule out decisively and indisputably any inferences that might justify lesser included offense instructions. The defendant in Powell requested a manslaughter instruction, which the trial court denied. The importance of the request itself to the doctrine of lesser included offenses will be fleshed out in the analysis of later cases in this paper.

The Powell court's dictum spoke generally about the duty of courts to give instructions sua sponte for lesser included offenses. The Powell court "express[ed] no opinion . . . as to the effect, on appeal, of a failure so to charge where no request has been

made. Rather we shall state the duty of the trial court when similar circumstances present themselves." Id. (emphasis added). The court went on to state in dicta:

> [W]here the facts clearly indicate the possibility [of a lesser included offense], we see no reason why the trial judge should not also be obliged even without any request being made, so to charge. Furthermore, we question whether it is proper for the trial court to omit such a charge simply because defense counsel specifically requests that it not be given, even where the prosecution concurs in that request."
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> Id. (emphasis added)

Whereas this language was dicta in Powell, the issue of the trial court's duty to give instructions sua sponte arose in State v. Choice, 98 N.J. 295 (1985). The defendant in Choice made overtures to his former wife to resume an intimate relationship with her. When she rebuffed him, he surprised her on mother's porch and shot her twice in the head. Defendant was indicted and, despite his alibi defense, he was convicted for murder.[75] During the charge conference, neither party submitted a request to the court for instructions on manslaughter.[76] On appeal, the defendant used the state's evidence in an

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[75] N.J.S.A. 2C:11-3 provides:

> Criminal homicide constitutes murder when: (1) The actor purposely causes death or serious bodily injury resulting in death; or (2) The actor knowingly causes death or serious bodily injury resulting in death; or (3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping, carjacking, criminal escape or terrorism . . . and in the course of such crime or of immediate flight therefrom, any person causes the death of a person other than one of the participants . . . ."
>
> Id.

[76] "Criminal homicide constitutes manslaughter when: (1) It is committed recklessly; or (2) A homicide which would otherwise be murder under section 2C:11-3 is committed in

attempt to argue that the court should have given an instruction on manslaughter. The Court upheld the conviction and attempted to set forth the governing standards for a trial court to give instructions *sua sponte*.

The Choice court stated that the "trial court does not . . . have the obligation on its own meticulously to sift through the entire record . . . to see if some combination of facts and inferences might rationally sustain a [lesser included jury] charge." Id. at 299. The Choice court went on to state, in the absence of a request, "It is only when the facts 'clearly indicate' the appropriateness of that charge that the duty of the trial court arises." Id. Similarly, when the facts do not "clearly indicate" the appropriateness of the charge, then the court must not give the instruction for the lesser included offense and need not "sift through the record." Although the Choice court appears to have set forth the rule, it leaves open the obvious question: When are the facts "clearly indicated?"[77]

Notwithstanding this apparent ambiguity in the law, Powell and Choice indicate two separate standards for the rational basis test for jury instructions on lesser included offenses. Powell applies when the defendant requests the charge. Under Powell the court must conduct a two prong test. First, it must conduct a sufficiency test and determine the facts and inferences that might justify an instruction on a lesser included offense. Second, the court must determine whether the weight of the facts and inferences justify an instruction on a lesser included offense. The implied third prong is to determine whether the prosecutor can rule out decisively and indisputably the facts and inferences

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the heat of passion resulting from a reasonable provocation." N.J.S.A. 2C:11-4(b) (emphasis added).

[77] This paper will later suggest what the standard for "clearly indicated" ought to be.

established by prongs one and two. Alternatively, under Choice the court is not obligated on its own to charge the jury with a lesser included offense unless the record clearly indicates that the jury could acquit for the greater and convict for the lesser offense.

State v. Crisantos, 102 N.J. 265 (1986) enunciates the limits of the rational basis test of sufficiency under Powell. It also reaffirms the state common law for lesser included offenses before Powell as well as state law for felony murder and lesser included homicide offenses.[78] The defendant in Crisantos was indicted for first degree armed robbery[79] and murder.[80] The victim, Ramon Torres, was a 54 years old who was drunk and walking home from a bar. The defendant and Francisco Ruiz, young men in their early twenties, broke the victim's ankle, disabling him and robbing him of his jewelry and wallet. Nicholas Santana, the state's principal witness, found Torres beaten but conscious, with his ankle broken. The attackers were hiding nearby, but Santana did not know. Santana left to call the police from a phone booth across street, and when he returned he saw two men stabbing Torres. Santana threatened the men with a fence post, and they fled. Later, a broken knife blade was found in the deceased victim's overcoat.

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[78] See supra notes 41-46 and accompanying text.

[79] N.J.S.A. 2C:15-1 provides:

> A person is guilty of robbery if, in the course of committing a theft, he (1) Inflicts bodily injury or uses force upon another; or (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or (3) Commits or threatens immediately to commit any crime of the first or second degree. An act shall be deemed to be included in the phrase "in the course of committing a theft" if it occurs in an attempt to commit theft or in immediate flight after the attempt or commission.
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> Id.

[80] See supra note 75.

Defendant testified that although he was on the scene, he neither robbed nor killed Torres. He did testify, however, that he engaged in a physical altercation with the victim after the victim provoked him with ethnic slurs and profanity. Defendant testified that Ruiz intervened and stabbed the victim. Claiming that Ruiz acted alone in the killing, defendant offered corroboration testimony from four roommates of Ruiz. The state, however, impeached the corroboration evidence by exposing internal weaknesses in their stories and prior inconsistent statements given to the police.

At the charge conference, the defendant requested an instruction for manslaughter. The trial court, concluding that nothing in the record provided a rational basis either facially or by inference to justify an instruction on manslaughter as a lesser included offense of murder, instructed the jury on felony murder, murder, and robbery. The jury convicted defendant of felony murder and first degree armed robbery.

On appeal, the defendant argued that the trial court erroneously refused the instruction for manslaughter. The court affirmed the conviction at trial, and stated "a court is not obligated to[81], indeed should not, instruct a jury to return a verdict that would clearly be unwarranted by the record." Id. at 273. In affirming the felony-murder conviction and rejecting the alleged error, the Crisantos court relied extensively on the pre-Powell cases. However, the court also stated, "abstract rules are only guides in

[81] See MPC 1.07(5). "The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Id. See also State v. Crisantos, 102 N.J. 265, 275-78 (1986) (contrasting MPC 1.07(5) with the N.J.S.A. 2C:1-8(e)).

defining the parameters of [lesser included offenses]. The specific evidence in each case must be carefully evaluated in the context of the entire record to determine whether [a lesser included offense] may properly be considered by the jury." Id. at 275 (emphasis added). The court stated that, even with respect to the sufficiency standard set forth in State v. Powell, under N.J.S.A. 2C:1-8(e)[82] "it is improper for a trial court to charge manslaughter, even when requested by the defendant, if there is no evidence in the record to support a manslaughter conviction." Id. at 276.

Here, the record contained evidence of provocation. As a matter of statutory interpretation, N.J.S.A. 2C:11-4(b)(2) defines manslaughter as, "A homicide which would otherwise be murder under section 2C:11-3 [that] is committed in the heat of passion resulting from a reasonable provocation." N.J.S.A. 2C:11-3 includes the statutory provisions for felony-murder. So, as a matter of strict statutory interpretation, defendant seemingly had a legitimate argument that felony-murder could be mitigated to manslaughter by provocation. After all, the text of 2C:11-4(b)(2) provided that provocation would mitigate any homicide under 2C:11-3 to manslaughter.

Nevertheless, the court construed 2C:11-4(b)(2) consistently with the common law crime of manslaughter, where passion-provocation only negates willfully deliberate premeditated murder and the malice of second degree murder, but is irrelevant to the specific intent element of the underlying robbery offense in felony-murder. Similarly, the provocation defined in 2C:11-4(b)(2) does not negate the mental elements of purpose or

[82] See supra note 36 and accompanying text.

knowledge as defined[83] in the underlying robbery offense. If the record evidence provided an inference of an honest and reasonable mistake of fact[84], voluntary intoxication[85], or any other defense that negates mental culpability, then this inference would negate the mental culpability of robbery and allow an instruction on a lesser nonfelony homicide offense.

In Crisantos the record evidence both proved indisputably the elements of the underlying offense and precluded lesser homicide offenses. This is consistent with the cases cited by the Law Commission in their commentary to 2C:1-8(e). Since there was no rational basis in the record evidence, either in fact or inference, the Crisantos court

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[83] See supra note 79. See also N.J.S.A. 2C:2-2(c)(3) (requiring statutes not stating culpability requirement to be construed as defining the culpability as knowledge).

[84] See N.J.S.A. 2C:2-4 ("Ignorance or Mistake").

> Ignorance or mistake as to a matter of fact or law is a defense if the defendant reasonably arrived at the conclusion underlying the mistake and; (1) It negatives the culpable mental state required to establish the offense; or (2) The law provides that the state of mind established by such ignorance or mistake constitutes a defense.
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> Id. (emphasis added).

[85] See N.J.S.A. 2C:2-8(b) ("Intoxication"). "When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial." Id. (emphasis added). But if the purpose or knowledge establishes an element of the offense, the voluntary intoxication is a defense because knowledge means "awareness." See N.J.S.A. 2C:2-2(b). This mirrors the common law for voluntary intoxication, specific intent, and general intent.

went on to apply the pre-Code law for felony-murder and lesser included homicide offenses. Id. at 276-78. This was entirely consistent with state precedent for felony-murder, as explored at length in the preceding section, and cited by the Law Commission in their commentary to 2C:1-8(e).

The holding and reasoning in Crisantos demonstrates that even with the sea change established by Powell, converting common law rational basis from a test of preclusion to a test of sufficiency upon a defendant's request, if the record evidence for felony-murder both proves indisputably the elements of the underlying offense and precludes lesser homicide offenses, then "The Court shall not charge the jury with respect to an included offense [because] there is [no] rational basis for a verdict convicting the defendant of the included [lesser homicide] offense." 2C:1-8(e).

Felony-murder under title 2C, at least in part, preserves the common law doctrine of lesser included offenses which provided for the preclusion of lesser homicide offenses based on the record evidence. This rule, however, is not exclusive to felony-murder under New Jersey law. The doctrine of lesser included offenses applies to all crimes. Crisantos stands for the proposition that when there is absolutely no record evidence or inference at all, then even under Powell a defendant cannot insist on an instruction for a lesser offense or obtain a reversal of his conviction on appeal.

When the question is whether the evidence "clearly indicated" a rational basis obligating an instruction for a lesser included offense, our courts should be guided by the body of common law cited by the Law Commission which is still a part of the New Jersey doctrine for lesser included offenses. Although the Supreme Court has never expressly held that the cases cited by the Law Commission should guide a court when

considering whether the trial court is obligated to give an instruction *sua sponte*, the reasoning provided in Crisantos demonstrates that the cases cited by the law commission are controlling in determining whether there is error. Both the cases cited by the law commission, all cases of felony-murder, and the other cases analyzed earlier in this paper, Midgeley, Zelichowski, and Saulnier, give meaning to the "clearly indicated" standard and the doctrine of lesser included offenses as a rule of preclusion. If our judiciary erroneously applies the Powell rational basis test for sufficiency where the standard is supposed to be "clearly indicated," this violates the command of 2C:1-8(e) and the common law upon which that statutory provision is based. Furthermore, Powell endorsed the common law in dicta and Choice held as precedent that the standard for "clearly indicated" is not a test of sufficiency but rather a test of preclusion of offenses based on the record evidence.

Crisantos, which was decided in 1986, did not overrule Powell. Just as the decision in Crisantos demonstrated the full force of common law doctrine which precluded lesser offenses, the reasoning in State v. Sloane, 111 N.J. 293 (1988) demonstrated the full force of the Powell precedent and its implications for the doctrine of lesser included offenses and the rational basis test. In Sloane, the grand jury indicted the defendant for second-degree aggravated assault[86] (purposely or knowingly causing serious bodily injury[87]) and possession of a weapon for an unlawful purpose.[88]

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[86] "A person is guilty of aggravated assault if he: Attempts to cause serious bodily injury to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury." N.J.S.A. 2C:12-1(b)(1) (emphasis added for purposes of the indictment).

The victim, Clyde Jones, testified, describing two encounters. The first involved an exchange of words but no physical violence, and ended when defendant left the scene. The second occurred shortly after the first when defendant returned with a friend. The two circled Jones and attacked him with a knife, and Jones defended himself with a lug wrench. An eyewitness corroborated this testimony. Jones was stabbed through the bicep, front and back and into the forearm, and then in the back. The nature of his injury was central to the Sloane court's analysis.

Defendant testified, on the contrary, that Jones attempted to rob him and attacked him with a crowbar. Furthermore, Jones had a knife, and Jones injured himself with it. The state impeached this testimony with defendant's prior statement, given to the police at the time of the incident, when he reported that he took the knife away from Jones and stabbed him.

During the charge conference, defendant requested a jury instruction on third degree aggravated assault.[89] The trial court rejected the request and instructed the jury on

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[87] "Serious bodily injury means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ." N.J.S.A. 2C:11-1(b).

[88] "Any person who has in his possession any weapon, except a firearm, with a purpose to use it unlawfully against the person or property of another is guilty of a crime of the third degree." N.J.S.A. 2C:39-4(d).

[89] "A person is guilty of aggravated assault if he: Recklessly causes bodily injury to another with a deadly weapon." N.J.S.A. 2C:12-1(b)(3).

the offense charged on the indictment, second-degree aggravated assault. The jury convicted defendant of this offense.

On appeal the Supreme Court reversed the conviction. The Supreme Court first analyzed the substantive crime of assault under the Code. The grading of assault reflected "three factors: (1) the degree of injury inflicted or attempted to be inflicted on the victim; (2) the nature of the force, i.e., whether a firearm or other deadly weapon was used; and (3) the mental state of the actor." Id. at 296-97. Based on these factors, the court analyzed the statutory structure of the Code for assault offenses.[90] The Court believed that the decision by the trial court to charge only second degree aggravated assault "was too tight a fit for the facts, given the legislative grid of criminal culpability, which depends on a jury determination of various elements of the offense." Id. at 298 (emphasis added).

The statement that the instruction was "too tight a fit for the facts," demonstrates the effect of Powell on New Jersey's doctrine of lesser included offense. The common law doctrine before Powell required the state to present evidence and to preclude lesser offenses. Before Powell, evidence that failed both to prove indisputably the elements of

[90] This combines two charts in State v. Sloane for the relevant assault offenses:

	Injury Inflicted	Mental State	Nature of Force	Statutory Penalty
2nd Degree Aggravated Assault	Serious Bodily Injury	Knowing or Purposeful		5-10 years – 2C:12-1b(1)
3rd Degree Aggravated Assault	Bodily Injury	Knowing or Purposeful	With a Deadly Weapon	3-5 years – 2C:12-1b(2), (5)
4th Degree Aggravated Assault	Bodily Injury	Reckless	With a Deadly Weapon	1-3 years – 2C:12-1b(3),(4),(5)
Disorderly Person – Simple Assault	Bodily Injury	Knowing, Purposeful, or Reckless		2C:12-1a(1)
Disorderly Person – Simple Assault	Bodily Injury	Negligent	With a Deadly Weapon	2C:12-1a(2)

the greater offense and preclude lesser offenses required the trial courts to instruct the jury about the lesser offenses. This enabled the jury to find the tightest fit with the facts.

Here, the defendant asked for the instruction, triggering Powell analysis for rational basis. First, the trial court was obligated to determine the facts and possible inferences based on the record.[91] Second, the trial court was obligated to determine the weight of the facts and inferences. If the facts and inferences were sufficient, and if the state's evidence did not dispel these facts and inferences beyond a reasonable doubt, then the trial court was obligated to grant the requested instruction for the lesser included offense. The Court considered the fact of a lost arm or a lost eye, reasoning that those injuries would qualify as "serious bodily injury," and surmised that an injury to the arm could be either "serious bodily injury" or "bodily injury."[92] Had defendant been acquitted of second degree assault, the Sloane court reasoned that double jeopardy would bar a second prosecution for third degree aggravated assault because it would require the same facts. The Sloane court noted that this is reflected in 2C:1-8(d)(1).[93]

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[91] Importantly, the Sloane court cited Crisantos, supra, 102 N.J. at 278 for this proposition! The defendant in Crisantos asked for an instruction which had no basis. Crisantos demonstrates that even the sufficiency test established in Powell for rational basis has its limits: this is when no fact or inference can be drawn from the record to acquit for a greater offense and convict of a lesser included offense.

[92] "Bodily injury means physical pain, illness or any impairment of physical condition." N.J.S.A. 2C:11-1(a).

[93] Id. This is also consistent with state precedent for Double Jeopardy under State v. Midgeley, but the Sloane court did not cite this precedent.

Furthermore, the court found that State v. Zelichowski set forth the precedent that atrocious assault and battery could be a lesser included offense of murder even though "violent physical attack" was not an element of murder. The "violent physical attack" element of atrocious assault and battery required relevant proof at trial, unlike murder which had no such element. Nevertheless, the Zelichowski court had reasoned that atrocious assault and battery could be a lesser included offense of murder when the evidence demonstrated that the homicide was committed by violent physical attack.

Thus, the Sloane court found that Zelichowski stood for the proposition that the degree of injury to the victim was more important as a matter of law than the technical analysis of whether the elements of each offense defined the nature of the force, because some of the offenses were silent on that element.[94] The Sloane court found that 2C:1-8(d)(3) was in accord with the Zelichowski proposition.[95] Accordingly, the Sloane Court reasoned that the difference in degree of injury justified treating third degree assault, requiring "bodily injury," as a lesser included offense of second degree assault, requiring "serious bodily injury," irrespective of the element in third degree assault defining the nature of the force element as use of a deadly weapon.

Additionally, the Sloane court stated, the subdivisions within 2C:1-8(d) are "not all encompassing . . . [and these] statutory categories of lesser-included offenses . . . are not water-tight compartments." 111 N.J. at 300. The statute only provides contours for the doctrine of lesser included offenses, but does not limit the extent of this doctrine. As the Sloane court explained, none of the statutory subdivisions accommodates the

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[94] See supra note 90.

[95] Id.

substantive law both before and after the adoption of Title 2C where passion-provocation mitigates murder to the lesser included offense of manslaughter.[96] Id. "Yet when there is a rational basis in the evidence, a passion-provocation manslaughter charge may appropriately be considered as a lesser-included offense of murder . . . [This] comports with [the] general view that . . . the jury should resolve the degree of an actor's guilt on the basis of the evidence presented to the jury." The court concluded that since the defendant requested the lesser offense instruction, the Powell sufficiency test for rational basis required that the determination of the defendant's degree of guilt be given to the jury.[97]

The implications of Sloane for the prosecution are significant. The Powell test implies a third prong requiring the prosecutor not only to present evidence that precludes

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[96] Id. Interestingly, even though none of the textual provisions in 2C:1-8(d) accommodate passion-provocation to mitigate murder to manslaughter, N.J.S.A. 2C:11-4(b)(2) defines manslaughter in relevant part as a "homicide which would otherwise be murder under section 2C:11-3 [that] is committed in the heat of passion resulting from a reasonable provocation." The statutory text expresses the result, however it is the doctrine of lesser included offenses that provides the legal basis.

[97] See State v. Powell, 419 A.2d 406, 412 n.12 (1980) (noting Pennsylvania policy without citing a particular case). The Powell court noted

> In Pennsylvania, a defendant charged with a murder is automatically entitled to an instruction on manslaughter, whether or not evidence of mitigation exists in the record. The policy behind this automatic rule stems from an historical argument that a jury's mercy-dispensing power must be respected by leaving the possibility of a reduced verdict open at all times.
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> Id.

the elements of lesser included offenses, but also to dispel beyond a reasonable doubt the defendant's facts and inferences. The Sloane court reasoned in dicta that a lost arm or a lost eye would qualify as serious bodily injury and not merely bodily injury. So, hypothetically, a defendant who allegedly caused a victim to lose an eye or an arm and requested an instruction on third degree aggravated assault would trigger Powell analysis. However, the prosecutor would be in a position to refute any inferential rational basis for the request beyond a reasonable doubt based on the fact that the victim lost an eye or an arm. The prosecutor in Sloane, however, was not able to dispel defendant's facts and inferences because the arm injury was not necessarily serious bodily as a mixed matter of law and fact.

Powell, Sloane are Crisantos coexist. If the defendant asks for an instruction on a lesser included offense where the record evidence establishes each element of the offense and the record contains no fact or inference to make an element of the offense disputable, then this precludes the lesser offense and the court must not give the instruction for the lesser included offense. This occurred in Crisantos. Defendant introduced evidence of provocation. Although this could negate the subjective element of the murder instruction, provocation does not negate the evidence of the defendant's subjective intent to purposely and knowingly commit robbery, the underlying offense of the felony-murder. Since provocation did not make the fact of a robbery disputable, the Supreme Court upheld the jury's verdict for felony-murder. Alternatively, if defendant asks for an instruction on a lesser included offense where the record evidence establishes each element of the offense but the record also contains a fact or inference which might make an element of the offense disputable, then the instruction for the lesser offense must be

given. This occurred in Powell and Sloane. Powell mandates a trial court judge who denies a requested instruction to determine before denying the request that there is absolutely no record evidence, factual or inferential, that could possibly make the elements of the charged offense not indisputable so that a jury's acquittal would truly be sheer speculation or compromise.

State v. Smith, 136 N.J. 245 (1994) provides another approach for courts to apply the elements test for lesser offenses. The grand jury indicted defendant for, among other things, Armed Robbery.[98] The victim testified that defendant threatened him with a large knife, took his money, and fled without paying his cab fare. Defendant was apprehended with the money in his possession. At trial, defendant denied the robbery, but admitted that he "cheated [the victim] out of the cab fare by not paying him." During the charge conference, the judge rejected defendant's request for an instruction on theft of services. The judge instructed the jury on (1) armed robbery and (2) a weapon possession charge. The jury convicted defendant on both counts.

The Appellate Division, in an unpublished opinion, reversed the conviction, reasoning that theft was a lesser included offense of robbery. Citing State v. Sloane, 111 N.J. 293, 299 (1988), the Appellate Division determined that the trial court judge should have given the instruction for theft that defendant requested to protect against a conviction that was too tight a fit with the facts. Relying on State v. Talley, 94 N.J. 385,

[98] See supra note 79.

466 (1983)[99], the Appellate Division found that theft of services[100] was a lesser included offense of robbery because of the theft consolidation statute.[101]

The Supreme Court, however, reinstated the conviction. The court reasoned that defendant's confession at trial did not make theft of services, defined with an element of deception, a lesser offense of robbery. This reversed the finding of the Appellate Division with respect to the consolidation statute. In addition, the court rejected the argument that the legislature enacted both robbery and theft of services with the intent of punishing the harm of "taking." Thus, the court declined to examine statutory structure

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[99] In State v. Talley defendant was indicted for First Degree Armed Robbery and the court instructed the jury sua sponte for theft of services. The jury convicted for theft of services. Upholding the conviction, the Supreme Court reasoned that theft of services, defined by N.J.S.A. 2C:20-4, has an element of fraudulent taking, so that particular offense is not necessarily included in robbery. The Court interpreted the theft consolidation statute, N.J.S.A. 2C:20-2(a), see infra note 101. The court reasoned that an indictment for robbery necessarily included any conduct denominated as theft. The court concluded that irrespective of the underlying conduct, "theft" is defined as "an unlawful taking that may occur with or without force" and is necessarily included in robbery.

[100] "A person is guilty of theft if he purposely obtains services which he knows are available only for compensation, by deception or threat, or by false token, slug, or other means . . . ." N.J.S.A. 2C: 20-8a (emphasis added).

[101] "A charge of theft . . . may be supported by evidence that it was committed in any manner that would be theft . . . under this chapter, notwithstanding the specification of a different manner in the indictment or accusation . . . ." N.J.S.A. 2C:20-2.

to determine legislative intent. Therefore this elements test was distinct from State v. Sloane, 111 N.J. 293 (1988) (determining legislative intent by examining statutory structure for assault). Instead, the Smith court examined the statutory text defining the material elements of robbery and theft of services. The Smith court reasoned that the elements of robbery did not necessarily include the additional element of deception or services. Thus, the court stated that "because the element of deception is an essential ingredient of obtaining services without payment but is not required for a robbery conviction, theft of services cannot be said to be a lesser-included offense of robbery . . . ." Smith, 136 N.J. at 250.

With respect to the facts at issue, the Smith court reasoned that a

> threat of immediate bodily injury, with or without a knife, with its greater attendant culpability and risk of injury, establishes an offense that is different from theft of services not simply in degree but in kind. The first poses a risk of physical injury, but the second involves at most a financial loss.

Id. at 251.

Finally, the court determined that defendant did not have a right to an instruction on theft by deception as a related offense.

> We also note that the issue of related lesser offenses does not raise the difficult constitutional questions . . . implied by a defendant's right to have a jury consider instructions on lesser-included offenses rationally supported by the evidence. The danger of a compromise verdict of guilt on the greater charge when the trial court refuses to instruct the jury on a lesser-included offense indicated by the proofs and requested by the defendant . . . is not posed by refusal to charge the jury on lesser offenses that are not included in the offense on which the defendant has been indicted.

[Id. at 252-53 (internal quotations and citations omitted)].

This language with respect to related offenses is consistent with the determination that charging is a prosecutorial power and courts are required to defer to this exercise of

executive branch authority. The current doctrine of lesser included offenses balances this deferential role on the one hand with a defendant who, on the other hand, might seek a conviction on a lesser offense whose elements are necessarily included in the indicted offense and for which there is, at the very least, an inferential basis rationally to acquit for the greater and convict for the lesser.

State v. Brent, 137 N.J. 107 (1994) is a culmination of Powell, Crisantos, and Sloane. The sufficiency analysis established in Powell has limits, as demonstrated in Crisantos. Crisantos stands for the proposition that even if the defendant asks for the instruction, he will get it only if there is record evidence of a fact or inference for the jury to acquit for the greater and convict for the lesser. In Sloane, where the defendant asked for a lesser included instruction, the Supreme Court determined it was error to refuse to grant it. The Sloane court determined legislative intent for each degree of assault, and concluded that the record evidence was sufficiently equivocal so that the denial of the requested instruction was error.

The defendant in Brent was indicted for First Degree Kidnapping (by asportation) and First Degree Aggravated Sexual Assault. Defendant seized the victim on the street, carried her to an undeveloped lot, threw her to the ground, struck her in the face, dragged her to an area concealed by shrubs, and raped her. The police came, defendant fled, and the police caught him with leaves in his hair and on clothes, wearing only under-shorts below his waist. The defendant's theory of the case was misidentification. He testified that he was going to his brother's house when the police accosted him from behind with a club. He ran and hid in shrubs, and denied any contact with the victim.

When the defendant requested an instruction for Criminal Restraint as a lesser included offense of Kidnapping, the trial court declined, reasoning that the elements of Criminal Restraint were not necessarily included in the Kidnapping statute. Although this requested instruction was inconsistent with his theory of the case, the court in Powell said that an inconsistency like this is irrelevant if the defendant asks for the instruction.

The Appellate Division reversed. In reversing the conviction, the Appellate Division reasoned that the trial court should have granted defendant's requested instruction. The Supreme Court, however, reversed the Appellate Division. Their reasoning is instructive for the doctrine of lesser included offenses. The first step in the analysis is to determine who submitted the request.

> "[W]here the defendant has not requested the charge, the existence of a lesser included offense should be analyzed largely on the basis of elements in the indictment to make sure those elements are "included" in the indictment so that the defendant has had fair notice of potential liability on the charge. Where the defendant requests the charge, on the other hand, analysis should focus on facts to ensure that there is a rational basis for a jury to reject the greater charge and convict of the lesser"
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> [State v. Brent, 137 N.J. 107, 116 (1994) (citing CANNEL, NEW JERSEY CRIMINAL CODE ANNOTATED, comment 13 on N.J.S.A. 2C:1-8e (1993)].

Accordingly, when the defendant requests the instruction for a lesser included offense, this triggers Powell analysis for rational basis. Nevertheless, "a trial court cannot charge a jury on any offense requested or [scour the statutes for an offense that is] suggested by the evidence." Id. at 118. "The prosecutor has the primary charging responsibility, and the role of the court, within constitutional limitations, is to implement the statutory pattern of the Code for charging and prosecuting criminal offenses." Id. (quoting Sloane, supra, 111 N.J. at 302). Furthermore, the court stated that although a defendant is entitled, upon request, to an instruction on a lesser included offense for

which there was only an inferential rational basis, "sheer speculation does not constitute a rational basis." Id.

At trial, the defendant in Brent did in fact request the instruction for Criminal Restraint. Since the trial court held that criminal restraint did not contain the elements of kidnapping, the Supreme Court first addressed the elements test. The Brent court looked not only at the plain statutory text defining the elements but also reviewed the legislative intent in enacting the crimes of kidnapping[102] and criminal restraint.[103]

This analysis to determine legislative intent is consistent with the goals of the analysis in Sloane, which determined legislative intent based on the statutory structure. The legislative intent in the assault statute treated the injury inflicted on the victim as a more significant factor in the statutory elements than the attendant circumstance defining the nature of the force. The Sloane court found that this was consistent with the double jeopardy elements test and case law for lesser included offenses.

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[102] N.J.S.A. 2C:13-1(b) provides

> A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period, with any of the following purposes: (1) To facilitate commission of any crime or flight thereafter; (2) To inflict bodily injury on or to terrorize the victim or another; or (3) To interfere with the performance of any governmental or political function.
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> Id.

[103] A person commits the third-degree crime of criminal restraint if the person "knowingly . . . [r]estrains another unlawfully in circumstances exposing the other to risk of serious bodily injury [or] [h]olds another in a condition of involuntary servitude." N.J.S.A. 2C:13-2.

Similarly, the Brent court determined that the principal harm the legislature intended to punish in the kidnapping statute was isolation of the victim. Id. at 120-21 (quoting State v. Masino, 94 N.J. 436, 445 (1983) and MODEL PENAL CODE § 212.1 cmt. at 15 (Tentative Draft No. 11, 1960)).[104] The Brent court found that the element of asportation went directly to the harm of isolation, as moving the victim increased the risks inherent in isolation. Id. at 121 (quoting Masino, 94 N.J. at 447). In contrast to the kidnapping statute, the court found that isolation of the victim was not a harm that the legislature intended to punish under the criminal restraint statute. Unlike kidnapping, where the legislature intended to punish the offender for isolation of the victim, criminal restraint could be committed without isolation of the victim. Notwithstanding this elements analysis, the court stated that the "determination of whether an offense is lesser included, as defined by N.J.S.A. 2C:1-8d, cannot be made in the abstract. A court must look at the version of the offense charged established by the record before it." Id. at 122. The court concluded that criminal restraint was a lesser included offense of kidnapping in this particular case. The court reasoned that

> kidnapping by removal a substantial distance to commit an aggravated sexual assault almost invariably involves restrain[ing] another unlawfully in circumstances exposing the other to risk of serious bodily injury . . . [because] it can be established by proof of the same or less than all the facts required to establish the commission of the offense charged
>
> [Id. (internal citations and quotations omitted)]

[104] The Masino court determined the legislative intent by reference to the MPC, Pennsylvania case law under an analogous kidnapping statute, and the N.J. CRIMINAL LAW REVISION COMMISSION, VOL. II: COMMENTARY (1971). State v. Masino, 94 N.J. 436, 445-447, 466 A.2d 955, 960-961 (1983).

Thus, the elements of criminal restraint were necessarily included in kidnapping. Next the court considered whether the evidence provided a rational basis to acquit for kidnapping and convict for criminal restraint. Applying the Powell test for sufficiency, the court found no fact or inference to be drawn from the record which would allow the jury to acquit for the greater offense and convict for the lesser offense. With testimony from the victim, an eyewitness, several police officers, and other occurrence witnesses, the state had succeeded in making a solid case of kidnapping. Defendant's misidentification defense failed to introduce an inference that would negate any of the elements of the kidnapping statute and mitigate the offense to criminal restraint. There being no error in the trial court's denial of the requested instruction, the Supreme Court reversed the Appellate Division and affirmed the conviction.

State v. Thomas, 187 N.J. 119 (2006) came before the Supreme Court after defendant was indicted[105] and convicted for multiple offenses.[106] The offenses were the result of an attack on a woman in a parking lot and the high-speed chase that followed.

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[105] Second Degree Robbery, Second Degree Eluding, Third Degree Possession of a Weapon for Unlawful Purpose, Third Degree Aggravated Assault, Fourth Degree Criminal Mischief, Fourth Degree Resisting Arrest, Third Degree Receiving Stolen Property, and Third Degree Burglary and Third Degree Theft (both dismissed pretrial).

[106] Second Degree Robbery, Second Degree Theft, Second Degree Eluding, Third Degree Possession of a Weapon for Unlawful Purpose, Third Degree Aggravated Assault, Simple Assault, Fourth Degree Criminal Mischief, Fourth Degree Resisting Arrest, Third Degree Receiving Stolen Property.

At the charge conference, the court sua sponte stated its intent to charge the jury with Theft as a lesser included offense of Robbery. Defendant agreed to this determination. The court granted defendant's request for an instruction on Simple Assault as a lesser included offense of Aggravated Assault with a Deadly Weapon. The offense of Hindering, which was brought up for the first time on appeal, was never requested as a lesser included offense of Robbery. Finally, when the judge informed counsel that he would charge Eluding, which the state had charged on the indictment, defendant never objected.

Unlike Smith and Brent, which provide different approaches to the elements test for lesser included offenses, the Thomas court set forth a complete framework for determining whether a jury should be instructed with lesser included offenses. (1) The court must identify the indicted offense. This involves determining whether all the elements of offense were charged in the indictment. (2) The court must then determine whether all the elements of the offense were charged to jury. (3) The court must consider whether the state proved all of the elements beyond a reasonable doubt with all inferences to the state. (4) The court must determine whether defendant had notice of the elements charged. (5) Courts must conduct an elements test. This comparison might involve a comparison of the elements set forth in the statutory text, similar to the approach in State v. Smith. Alternatively, this comparison might involve a comparison of the elements based on statutory structure, similar to the approach in State v. Sloane. Furthermore, this comparison might involve resorting to case law to determine intent, similar to the approach in State v. Brent. These are only three different examples of the elements test. Other tools of statutory interpretation might be relevant to the elements test, including but

not limited to the Law Commission Commentary, legislative history[107], or the Model Penal Code Commentary. (6) The court must determine whether the requested charge satisfies the definition of included offense under 2c:1-8(d). The Sloane, Smith, and Brent courts all engaged in this analysis. Additionally, the court must determine whether there is a rational basis in the evidence to acquit for the greater offense and still convict of the lesser offense. The appropriate analysis is determined by the next step: identifying the party that requested the instruction.

(7) A defendant's request for an instruction on a lesser included offense triggers Powell analysis. Powell analysis for rational basis is a test of sufficiency. The trial court must consider the facts and inferences to be drawn from the record. Generally the required quantum of weight seems to be miniscule. In State v. Smith, however, where the Appellate Division reversed the conviction on a miniscule hint of record evidence, the Supreme Court reinstated the conviction. Where, as in State v. Thomas, the defendant did not ask for the instruction at trial, the Appellate Division reversed based on its conclusion that this miniscule record evidence was a sufficient rational basis quantum for the trial court to give a lesser included offense instruction. The Supreme Court reinstated the conviction.

[107] See, e.g., State v. Bridges, 133 N.J. 447, 459-62, 628 A.2d 270, 276-77 (1993) (interpreting legislative history to determine statutory intent for co-conspirator liability set forth under N.J.S.A. 2C:2-6).

RELATED OFFENSES

Related offenses involve issues of joinder and severance governed by N.J.S.A. 2C:1-8(b)[108] and (c)[109], and set forth more fully in the Rules of Court in R. 3:7-6[110] and R. 3:15-2[111] respectively. Related offenses have been characterized as sharing "a common factual nucleus." State v. Thomas, 187 N.J. 119, 130, 900 A.2d 797, 803 (2006) Both the text of the court rules and the case law on joinder and severance suggests that if the

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[108] The mandatory joinder provision states,

> Limitation on separate trials for multiple offenses. Except as provided in subsection c. of this section, a defendant shall not be subject to separate trials for multiple criminal offenses based on the same conduct or arising from the same episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction and venue of a single court.
>
> N.J.S.A. 2C:1-8(b).

[109] "Authority of court to order separate trials. When a defendant is charged with two or more criminal offenses based on the same conduct or arising from the same episode, the court may order any such charges to be tried separately in accordance with the Rules of Court. N.J.S.A. 2C:1-8(c).

[110] R. 3:7-6, which governs permissive joinder, states

> Two or more offenses may be charged in the same indictment or accusation in a separate count for each offense if the offenses charged are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan. Relief from prejudicial joinder shall be afforded as provided by R. 3:15-2.

[111] R. 3:15-2(b), which governs severance, states

> If for any other reason it appears that a defendant or the State is prejudiced by a permissible or mandatory joinder of offenses or of defendants in an indictment or accusation the court may order an election or separate trials of counts, grant a severance of defendants, or direct other appropriate relief.

state wants to join related offenses, the prosecutor must do so in the indictment. Similarly, if either party wants to sever the offenses, the text and the case law suggests that severance may be granted either upon a showing of prejudice or when there is a no factual bridge between the offenses based on analysis under N.J.R.E. 404(b).[112]

Absent a defendant's request for an instruction on a lesser included offense, the "prosecutor has the primary charging responsibility, and the role of the court, within constitutional limitations, is to implement the statutory pattern of the Code . . . for charging and prosecuting criminal offenses." State v. Thomas, 187 N.J. 119, 133, 900 A.2d 797, 805 (2006). If the grand jury did not indict for a related offense at the outset, then the court has no duty to join a related offense sua sponte. Id. If a defendant asks for an instruction on a related offense that has not been charged by the prosecutor, then that is a knowing and intelligent waiver of his right to be tried only for the indicted offenses and lesser included offenses for which he had notice. Id at 132-133. In the absence of either an indictment or a defendant's waiver, trial courts are not permitted to join related offenses sua sponte.

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[112] With respect to severance, our courts have determined:

> Central to the inquiry is whether, assuming the charges were tried separately, evidence of the offenses sought to be severed would be admissible under [N.J.R.E. 404(b)] in the trial of the remaining charges. If the evidence would be admissible at both trials, then the trial court may consolidate the charges because a defendant will not suffer any more prejudice in a joint trial than he would in separate trials.
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> State v. Chenique-Puey, 145 N.J. 334, 341, 678 A.2d 694, 697 (1996) (internal citations and quotations omitted); see also State v. Pitts, 116 N.J. 580, 601-02, 562 A.2d 1320 (1989); State v. Pierro, 355 N.J. Super. 109, 117, 809 A.2d 804, 809 (App. Div. 2002) (citing Chenique-Puey).

SCOPE OF REVIEW

If the defendant asks for the instruction and the court denies the request, then the scope of review is Harmless Error. If a defendant asks for the instruction, determining whether there was error necessarily entails Powell analysis. The state shoulders the burden to prove that denying the request was harmless beyond a reasonable doubt. This proposition is fairly indicated by State v. Crisantos, where the court applied harmless error review after the defendant asked for an instruction that the court rejected. The state will prevail in showing that the error was harmless beyond a reasonable doubt by dispelling, beyond a reasonable doubt, any fact or inference to be drawn from the record that might provide a sufficient basis for the jury to acquit for the greater and convict for the lesser included offense.

However, Powell analysis does not automatically trigger a finding of error. There are examples where the Appellate Division applying Powell analysis came to an incorrect result and the New Jersey Supreme Court reversed. See, e.g., State v. Crisantos, 102 N.J. 265 (1986) (no rational basis to acquit for greater and convict of lesser), State v. Smith, 136 N.J. 245 (1994) (elements test not satisfied), and State v. Brent, 137 N.J. 107 (1994) (passing elements test but failing rational basis test for sufficiency).

When a defendant does not request an instruction on a lesser included offense and argues on appeal that the trial court should have given the instruction sua sponte, the scope of review is Plain Error under Choice analysis. Choice requires that the rational basis be "clearly indicated" for the jury to acquit for the greater and convict for the lesser.

The New Jersey Supreme Court explained the plain error standard of review in State v. Isiah Macon, 57 N.J. 325 (1971). First, "It is fundamental in our practice that a

claim of error which could have been but was not raised at trial will not be dealt with as would be a timely challenge." Id. at 333. The Macon court explained the basis for the different standards for scope of review.

> It may be fair to infer from the failure to object below that in the context of the trial the error was actually of no moment. Further, to rerun a trial when the error could easily have been cured on request, would reward the litigant who suffers an error for tactical advantage either in the trial or on appeal . . . In any event, except in extraordinary circumstances, a claim of error will not be entertained unless it is perfectly clear that there actually was error. In other words, if upon a timely objection a different or further record might have been made at the trial level, and the claim of error might thereby have been dissipated, we will neither reverse on an assumption that there was error nor remand the matter to explore that possibility . . . These principles rest upon the belief that our practice offers every opportunity for a fair trial, and that unless there is some order in the trial of cases, the State judiciary cannot hope to meet the swollen demands upon it.
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> [State v. Isiah Macon, 57 N.J. 325, 333 (1971) (emphasis added).]

The plain error analysis unfolds in steps. First, the court must determine whether there was error. Second, the court must determine whether the error is plain. Finally, the error must be "clearly capable of producing an unjust result." Id. at 337.

With respect to the first prong of plain error and a claim that a trial judge should have given an instruction for a lesser included offense sua sponte, the rational basis for the instruction must be "clearly indicated." However, the Court has never provided clear guidance for a rational basis that is "clearly indicated." Nevertheless, the analysis of the cases prior to the enactment of Title 2C represents the "clearly indicated" paradigm.

Despite this precedent for plain error standard of review, there are cases of somewhat older as well as more recent vintage where the Appellate Division erroneously reversed a trial court conviction. In State v. Smith, 136 N.J. 245 (1994), the Appellate Division erroneously applied the elements prong, which the Supreme Court rehabilitated. In State v. Brent, 137 N.J. 107 (1994), the Appellate Division erroneously applied Powell

for the rational basis prong, which the Supreme Court cured. The remainder of this section explores three more cases of Appellate Division error.

The Appellate Division reversal of the conviction in State v. Thomas provides one example. In Thomas during the charge conference defendant never requested hindering as a lesser included offense of robbery, and never objected to the eluding charge. Defendant argued, and the Appellate Division in an unpublished opinion agreed, that the trial court should have given a Hindering instruction sua sponte. The Appellate Division applied the Powell standard to determine that the trial court had committed error. The Appellate Division found that "there was a rational, albeit slim, basis on which the jury could have found defendant not guilty of the robbery, if it credited his statement made after arrest." Thomas, 187 N.J. at 128. As a result, the Appellate Division concluded that "the failure of the [trial] judge to sua sponte provide the lesser offense instruction constituted plain error, requiring reversal of defendant's robbery conviction." Id. The Supreme Court cured this Appellate Division error. In this case, the indicted offense at issue was "Robbery." The elements test for lesser included offenses is performed based on the indicted offense. The "Lesser Offense" raised on appeal was "Hindering" defined by N.J.S.A. 2C:29-3. The Supreme Court determined that the elements of "Hindering" were not necessarily included in "Robbery." As the court stated, "[h]indering and robbery do not share even one element in common and, hence, one is not an included offense of the other, but only an additional offense related to defendant's conduct." State v. Thomas, 187 N.J. 119, 135, 900 A.2d 797, 807 (2006). Thus, even though defendant's request triggered Powell analysis of the facts, there was no need to conduct that analysis because the Hindering was a related offense, which is not a lesser included offense.

A second example is the unpublished opinion of State v. Charles E. Macon, Docket # A-1886-O4T4 (App. Div. 2006), where the grand jury indicted defendant for First Degree Carjacking, Second Degree Robbery, Third Degree Burglary, Third Degree Aggravated Assault, and Fourth Degree Contempt (which the trial court severed from the indictment and dismissed). A woman heard someone trying to start her car sometime after midnight. Expecting to find her oldest son, because the two shared the car, she went downstairs and outside in her nightgown. Instead of finding her son, she found the defendant who got out of the car and approached her in a threatening manner. The woman attempted to escape back to her house, but defendant violently knocked her to the ground, punching her, twisting her head, choking her, and fondling her. The victim's screams drew the attention of a neighbor and defendant fled. Defendant was apprehended later with items he had taken from the victim's house. Forensic evidence included DNA on two cigarette butts found at the scene. One was inside the victim's car and it matched defendant's DNA. In addition, a blood stain on defendant's jeans matched the victim's DNA.

Defendant pursued a theory of misidentification. Importantly, no one at trial requested instructions for lesser included offenses. The jury convicted defendant on everything except the burglary.

On appeal, defendant argued that the court should have given an instruction for attempted theft as a lesser included offense of carjacking and robbery sua sponte. Under Choice, the standard for determining plain error is a "clearly indicated" rational basis. Nevertheless, the Appellate Division erroneously applied a Powell standard. The request serves as the trigger for Powell's sufficiency analysis. Though no party requested the

lesser offense instruction, the Appellate Division reasoned that when defendant got out of the car, the jury could have inferred different things about his criminal intent. The record evidence demonstrated that, based on objective facts, the events unfolded as a continuous criminal transaction without interruption. The Appellate Division, nevertheless, compartmentalized these events based on possible inferences about the defendant's subjective intent. This was erroneous because no request for a lesser included offense had been made. Having applied the incorrect standard, the Appellate Division reached an erroneous result, finding plain error where there was none, and reversing the conviction. The Supreme Court denied certification, and the retrial took place in May 2008. Based on the reversal, the retrial included a jury instruction for attempted theft. The second jury returned the same verdict as the first one.

A third example is the unpublished opinion of State v. Brian Jenkins, Docket No. A-4075-04T4 (App. Div. 2007), where the petit jury convicted defendant for purposeful or knowing murder, felony murder, armed robbery, and possession of a weapon for an unlawful purpose. This Appellate Division panel provided a sparing summary of the facts of this case. The victim was a 59-year-old woman who lived alone in the same building as defendant in Burlington County. During the early phases of the police investigation, defendant denied knowing about her death, but he eventually gave a statement to the police where he admitted to stabbing the victim.

Defendant testified at trial. He stopped by the victim's apartment to pay a social call. During the visit, the victim went into her kitchen. When defendant went into the kitchen, the victim ordered him to leave and started pushing him repeatedly. Defendant grabbed a knife, slashed out at the victim, saw some blood, and thought she was cut.

Defendant, the victim, and the knife fell to the floor. Defendant wrested the knife from the victim in the middle of a struggle and stabbed her in the chest.

> On his way out of the apartment, he took [the victim's] purse because he believed her keys were there and he wanted to take the car to get as far away as possible. He did not, however, take it. Instead, he removed cash he found in the purse and then discarded the purse in a nearby trash dumpster.

The Appellate Division reversed on grounds related to voir dire after an extensive review of the voir dire record. With respect to lesser included offenses, the panel did not set forth the details of the charge conference. Nevertheless, the Appellate Panel concluded

> that defendant was entitled to a jury instruction on theft as a lesser included offense of robbery. Defendant testified that he went to [the victim's] home to discuss his mother's hospitalization and that the theft occurred after he stabbed Hinson following a confrontation which he claims she started. Such testimony suggests that the theft was an afterthought. We are therefore satisfied that if this testimony is credited by a jury, there is a rational basis for a verdict on theft.

The panel provided scant guidance for retrial. As a result, a cross-examination of the opinion for the areas where the Appellate Division remained silent is necessary.

First, the panel's opinion is silent as to the defenses raised. The statement of facts, however, implies that defendant raised self-defense and provocation. Self-defense is a complete defense to purpose or knowing murder and lesser homicide offenses, and provocation is partial defense to mitigate murder to manslaughter. Provocation, however, does not go to the predicate offense for felony-murder, which in this case was armed robbery.

Second, the panel's opinion is silent about the trial court's instructions for aggravated manslaughter and manslaughter. Based on defendant's testimony and the

implied defenses described in point one above, the panel's silence as to these lesser offense instructions implies that the trial court gave them to the jury.

Third, the panel omitted the details of the charge conference, so it is unknown whether defendant requested a theft instruction. Whether requested or not, defendant's own testimony inculpated him for robbery[113], which in turn inculpated him for felony murder. A requested instruction triggers Powell, which implies a third prong allowing the prosecutor to dispel inferences. If the theft instruction was requested, common sense dictates that defendant's own inculpatory testimony dispels the possible inferences for a robbery acquittal and a theft conviction. Alternatively, if the instruction was not requested, then common sense again dictates that the inculpatory testimony does not "clearly indicate" a rational basis to acquit for robbery.

Fourth, despite the foregoing point, the panel treated defendant's inculpatory testimony as a rational basis to acquit for robbery and convict for theft. This implies a rational basis to acquit for felony murder also.

The foregoing analysis indicates that, possibly, the panel used the doctrine of lesser included offenses without sufficient explanation to attack the felony-murder conviction. The panel stated that the jury convicted defendant for purposeful or knowing murder, felony murder, armed robbery, and a weapon offense. The jury conviction for purposeful or knowing murder makes the reversal and the implied message about felony murder even more pronounced. The record evidence (1) established all the elements of purpose or knowing murder and (2) either completely or partially defends this murder

[113] See supra note 79 (including "immediate flight" in the definition of "in the course of committing a theft").

through self-defense and provocation. Neither of those defenses goes to the intent to commit robbery, the predicate offense of felony-murder. Thus, by mandating an instruction for theft upon retrial, the panel may have signaled its disapproval of felony-murder as a matter of doctrine. Requiring a theft instruction would allow the jury to acquit defendant for felony murder, requiring a conviction only on the intentional homicide theories.

The foregoing analysis of State v. Brian Jenkins indicates a possible appellate division "precedent." Here, "precedent" does not mean the same as "mandatory authority" or "persuasive authority." Rather, "precedent" means "the way courts want business to be conducted." Thus, as a matter of "precedent," appellate courts may attempt to discourage prosecutors and trial courts from felony murder convictions. An exception to this "precedent" might apply in situations where felony murder is the only theory available, and there is no record evidence to support a conviction for intentional homicides. The foregoing inferences raise reasonable questions whether this reversal actually signals appellate court precedent with respect to felony murder, and whether such an exception for felony murder convictions will emerge.[114]

[114] See also State v. Nyhammer, 396 N.J. Super. 72, 932 A.2d 33 (App. Div. 2007) for an additional example of results oriented appellate panel jurisprudence. Nyhammer, like State v. Charles Macon and State v. Brian Jenkins, was a Burlington County trial. Defendant in Nyhammer confessed to a sex offense involving a child. At trial, the child victim was unable to testify, so the state moved to introduce a recording of the child's statement under the hearsay exception for child victims of sex offenses. The trial court admitted the evidence, over defendant's objection. The appellate panel reversed the

POLICY AND DOCTRINE

Pre-Powell case law for lesser included offenses should govern a trial court's duty to give an instruction sua sponte. The doctrine of lesser included offenses suggests a retributivist policy in justification for punishment.[115] Unlike the utilitarian calculations made for the net benefit of society, such as deterrence and rehabilitation, the doctrine of lesser included offenses acknowledges the interplay between the jury's power to punish and the moral culpability of the individual offender. "Juridical punishment . . . must in all cases be imposed only because the individual on which it is inflicted *has committed* a *crime* . . . He must first be found guilty and *punishable*, before there can be any thought of drawing from his punishment any benefit for himself or his fellow-citizens."[116] Insofar

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conviction as a violation of the Sixth Amendment Confrontation Clause under the new rule set forth Crawford v. Washington, 541 U.S. 36 (2004). The appellate panel, however, omitted all the dates in its statement of the facts. Importantly, defendant had been sentenced in 2003. The panel reversed the conviction by applying pipeline retroactivity to this new Sixth Amendment rule. But the Nyhammer panel did not explain the doctrine of pipeline retroactivity; the Nyhammer panel did not cite the state's legal precedent for pipeline retroactivity; and the Nyhammer panel did not state that it was applying pipeline retroactivity to reverse the conviction under Crawford. The New Jersey Supreme Court has granted certification and that appeal is pending. 193 N.J. 586, 940 A.2d 1219 (2008).

[115] See SANFORD H. KADISH & STEPHEN SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 102-108 (7th Ed., Aspen Publishers 2001) (source omitted).

[116] Id. at 102 (citation omitted).

as these deontological justifications for punishment precede teleological calculations, New Jersey courts follow suit in conducting court business. With respect to the doctrine of lesser included offenses, the trial judge who performs his duty to instruct the jury sua sponte when the record evidence "clearly indicates" a failure to preclude lesser offenses allows the jury to determine accurately that the offender is both guilty and punishable. Following conviction, the trial court may consider legislatively approved aggravating and mitigating factors at sentencing. See N.J.S.A. 2C:44-1 (articulating factors that are both retributive and consequentialist); R. 3:21-4(g) ("At the time sentence is imposed the judge shall state reasons for imposing such sentence including findings pursuant to the criteria for withholding or imposing imprisonment or fines under N.J.S.A. 2C:44-1 to 2C:44-3 and the factual basis supporting a finding of particular aggravating or mitigating factors affecting sentence.").

Trial judges should be obligated only to instruct the petit jury for the indicted offense found by the grand jury and lesser included offenses "clearly indicated" on the trial record. First, the instructions set forth the elements of each offense, which allows the jury to determine whether the accused has committed a blameworthy action. Second, this obligation promotes accuracy because it allows the jury to apply independently the law to the evidence presented during the trial.

Furthermore, retaliation for wrongdoing achieves justice because it is based on equality, personhood, and victim vindication. Retributive justice not only restores the social balance that the offender has offset by his wrongful conduct. It also restores the balance between the offender and his victim. When the trial judge gives an instruction sua sponte for the "clearly indicated" record evidence, the court allows the jury to find

the tightest fit between the criminal code and the "clearly indicated" record evidence. This acknowledges the power conferred upon the jury not only to render an individual deserving of punishment through their denunciation, but also to determine with greater accuracy the punishment that the individual deserves. Thus, the court's duty to instruct sua sponte only upon "clearly indicated" record evidence corresponds to the principle of equality and personhood. Of equal importance, it advances the court's ability to punish the offender with the appropriate legislatively approved sentence for his erroneous assumption of moral superiority to his victim.

"The ultimate justification of any punishment is . . . that it is the emphatic denunciation by the community of a crime."[117] If the jury is to emphatically denounce an offender with a finding of guilt, then policy requires the trial court to withhold the power to convict an individual for any crime which has been ruled out, or in other words precluded, by the record evidence. This is so because an unjustified instruction for a lesser included offense empowers the jury to render the offender punishable where punishment is undeserved. Ultimately, the "retributivist punishes because, and only because, the offender deserves it . . . For a retributivist, the moral culpability of an offender also gives society the *duty* to punish."[118] Therefore, retributivist policy requires trial courts to instruct the jury to determine a defendant's guilt only for a crime that is "clearly indicated."

The cases decided before Powell stand for this policy. In State v. Saulnier the record "clearly indicated" that defendant did not possess the required quantities of drugs

[117] Id. at 105 (citation omitted).

[118] Id. at 107-108.

to secure a conviction of a high misdemeanor offense, but there was evidence that defendant possessed quantities of drugs for a conviction of a lesser offense. In Saulnier the trial court considered the lesser included disorderly persons offense sua sponte. This advanced retributivist justice by allowing the factfinder to convict for a disorderly person's offense which corresponded to the record evidence. The record evidence clearly indicated the punishment that the offender deserved.

Similarly, in Zelichowski the state pursued a conviction for murder, but the record evidence did not correspond with this crime so the jury might have acquitted. The court in Zelichowski gave an instruction for atrocious assault and battery sua sponte, and the jury convicted the defendant for the lesser offense. This advanced retributivist justice. First, it allowed the jury to strike an equal balance between the crime committed and the offender's moral deserts. Second, it allowed the jury to restore the social equilibrium between the defendant and society. Third, it allowed the jury to correct accurately the offender's erroneous assumption of moral superiority to his victim.

All of the cases cited by the Law Commission, trials for felony murder, stand for this proposition. In State v. Mathis the trial court failed to give the instruction for the lesser offense of second-degree murder even though the record evidence clearly indicated that the state's evidence about robbery, the underlying felony, was disputable. This paucity of record evidence not only failed to preclude the lesser homicide offenses, it also hindered retributivist justice by inhibiting the jury's ability to convict the offender for what he deserved. Similarly, in State v. Williams the trial court failed to give an instruction for imperfect self defense where the record evidence clearly indicated the defendant's honest and reasonable mistake of fact. As a matter of doctrine, the jury could

have found that this mistake negated the specific intent element of murder and the malice element of second degree murder, allowing the jury to convict for manslaughter. As a matter of policy, the failure to instruct the jury for the lesser offense hindered retributivist justice because it restricted the jury's ability to find the facts and to convict the offender according to their finding. In State v. Wynn the trial court failed to give the jury an instruction on manslaughter where the record evidence clearly indicated passion-provocation. As a matter of retributivist policy, this deprived the jury of the ability to strike the balance between the criminal statute and the record evidence concerning the crime.

Saulnier, Zelichowski, Williams, Mathis, Sinclair, Wynn, Davis, and Pacheco demonstrate the doctrine of lesser included offenses as one of preclusion. As a matter of doctrine, the lesser offense should be given to the jury only if the record evidence does not preclude it. As a matter of policy, retributivist justice allows the jury, through appropriate instructions, to find the intersection between the facts and the law. This intersection most accurately points to the conviction that the offender deserves. These cases were all prior to Powell: They all stand for the common law principals intended by the New Jersey Law Commission for N.J.S.A. 2C:1-8(e) and they all correspond with retribution theory and the authority of the jury to convict.

Powell itself stated in dicta the policy basis for the duty of a trial judge to charge lesser included offenses sua sponte. That is, when the record evidence "clearly indicates" the rational basis for the instruction.

> There is a third party involved (represented by the jury): the State itself, on behalf of its citizens. Their interest is paramount, even more important than preserving the "purity" of the adversary system, especially when there seems to be no justifiable end served by that system in this particular situation. Very simply,

> where the facts on the record would justify a conviction of a certain charge, the people of this State are entitled to have that charge rendered to the jury, and no one's strategy, or assumed (even real) advantage can take precedence over that public interest . . . The judge is . . . the law's representative, and it is his duty to see that the will of the law is done. The real function of the adversary system is to help him fulfill that duty.
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> State v. Powell, 84 N.J. 305, 319, 419 A.2d 406, 413-14 (1980)

The policy for lesser included offenses also takes account of defendant interests. A defendant's request for an instruction on a lesser included offense, viewed from a policy perspective, is a plea for the jury's mercy-dispensing power. See id. at 316 n.12 (citing Pennsylvania policy in murder trials). To allow the jury to grant mercy without granting an acquittal, the Powell court enabled defendants to obtain the requested instruction on a mere showing of sufficiency. In speaking about the jury's mercy-dispensing power, the Powell court referred to jurisdictions that granted a request for a lesser included based on a "scintilla of evidence." Id. In State v. Crisantos, however, our state supreme court observed that 2C:1-8(e) requires a "rational basis" and stated that "this formulation is somewhat more restrictive." 102 N.J. 265, 278, 508 A.2d 167, 174 (1986). The case law precedent cited by the Law Commission supports this determination that a "rational basis" is somewhat more restrictive. Thus, the letter of the law, the substance of the common law, and legal policy requires a "rational basis" when the defendant requests the instruction. As in Cristantos, there must be a rational basis to negate the culpability defined in the robbery statute. As in Brent there must be a rational basis to negate the culpability defined in the kidnapping statute. Just as rational basis was intrinsic to New Jersey Law prior to the enactment of Title 2C, so too it is intrinsic to our Code of Criminal Justice, even with Powell sufficiency analysis. A rational defendant

would seek acquittal, so a request for a lesser included offense must also have a rational basis, albeit slight, to justify the instruction of the lesser included offense to the jury.

The request for a lesser included offense triggers Powell analysis for sufficiency to determine a factual or inferential rational basis. If there is a rational basis for the defendant's requested instruction under Powell, and the state cannot dispel the inferences beyond a reasonable doubt, then the court should give the instruction because it allows the jury to exercise its mercy-dispensing power based on evidence or inferences of mitigation.

CONCLUSION

Identifying the doctrinal categories for the application of the law of lesser included offenses will, hopefully, produce greater accuracy at trial with respect to instructions for lesser included offenses. This, in turn, will result in fewer Appellate Court reversals. Identifying the policy basis will, hopefully, lend to stability in this doctrine.

The case law for lesser included offenses provides the doctrinal precedent. The cases also suggest a retributivist policy to justify the conviction and punishment of offenders. By converting this doctrine from one primarily aiding the prosecutor into one primarily aiding the defendant, the courts have given the jury the ability not only to punish but also to dispense mercy.

A request for a lesser offense may appear to the trial advocate to be an invitation for jury compromise. Both the case law and retributivist policy demonstrates the breadth of the jury's authority to punish and to dispense mercy, while at the same time imposing limits on this authority and preventing sheer compromise. Hence, "The Court shall not

charge the jury with respect to an included offense unless there is a rational basis for a verdict convicting the defendant of the included offense."[119] Ultimately, this research will, hopefully, contribute to the finality of convictions. That is, after all, what the jury and society at large prefer.

[119] See supra note 36 and accompanying text.