CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lieutenant Governor

State of New Jersey
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW AND PUBLIC SAFETY
PO BOX 080
TRENTON, NJ 08625-0080

PAULA T. DOW
Attorney General

DIRECTIVE NO. 2010-4

To: Stephen J. Taylor, Director
Division of Criminal Justice

All County Prosecutors

FROM: Paula T. Dow
Attorney General

DATE: July 1, 2010

SUBJECT: **Supplemental Directive Regarding Extended Term Applications Under N.J.S.A. 2C:43-6f in Drug-Free School Zone Cases**

I. Uniform Response to Motions by Repeat Drug Dealers to be Sentenced/Re-sentenced Under N.J.S.A. 2C:35-7b

On March 12, 2010, I issued Directive No. 2010-2, modifying the Brimage Guidelines to account for the enactment of N.J.S.A. 2C:35-7b. The new statute, which took effect on January 12, 2010, authorizes judges in certain cases to waive or reduce the mandatory minimum sentence prescribed by the school zone law. Part II, Section 4 of Directive No. 2010-2 directs all prosecutors to oppose a school zone defendant's application to be sentenced or re-sentenced under N.J.S.A. 2C:35-7b if the defendant had previously been convicted of drug manufacturing, distribution, or possession with intent to distribute and is thus subject to an extended term of imprisonment and stipulated term of parole ineligibility pursuant to N.J.S.A. 2C:43-6f. Relatedly, Part II, Section 2b of Directive No. 2010-2 generally requires prosecutors to appeal any sentence or re-sentence of repeat drug dealers.

The position adopted in Directive No. 2010-2 is consistent with, indeed required by, the plain language of N.J.S.A. 2C:35-7b, which provides in pertinent part that, "Nothing in this subsection [authorizing a judicial waiver or reduction of an otherwise mandatory sentence] shall

be construed to establish... a basis for not imposing a term of imprisonment or term of parole ineligibility authorized or required to be imposed pursuant to subsection f. of N.J.S.A. 2C:43-6 ..." The Legislature has thus stated unequivocally that school zone defendants for whom a repeat offender extended term is authorized are not eligible for sentencing lenity under N.J.S.A. 2C:35-7b, and for these recidivist offenders, any mandatory sentence prescribed by the Comprehensive Drug Reform Act can only be waived or reduced under the authority of N.J.S.A. 2C:35-12 and in accordance with the Brimage Guidelines that are designed to ensure uniformity throughout the State in the exercise of prosecutorial discretion under N.J.S.A. 2C:35-12.

It has since been brought to my attention that convicted school zone defendants who have previously been convicted of a drug distribution-type offense have nonetheless begun to file re-sentencing applications under N.J.S.A. 2C:35-7b, or are seeking judicial lenity under N.J.S.A. 2C:35-7b at their initial sentence, arguing that the statutory prohibition applies only to cases where the State has filed a formal motion for an extended term under N.J.S.A. 2C:43-6f. In most school zone cases, formal applications for the extended term were not filed because the plea offer calculated under the Brimage Guidelines for a Criminal History Category IV or V defendant was less than the three-year parole ineligibility term prescribed by the school zone offense itself, making it unnecessary for the prosecutor to rely upon the extended term or its stipulated parole ineligibility provision to meet the requirements of the Brimage Guidelines. See Guidelines, Section 3.2 (explaining how prosecutors must "structure" plea offers by requiring defendants to plead guilty to multiple counts, or by imposing extended terms, as may be necessary to make certain that the term of parole ineligibility ultimately imposed by the court at sentencing is consistent with the parole ineligibility term calculated under the Brimage Guidelines).

The Brimage Guidelines account for a school zone defendant's extended-term eligibility through the use of the Criminal History Categories that are incorporated into Table 1 of the Tables of Authorized Dispositions. See Guidelines, Section 3.6. In this way, a defendant's prior drug distribution-type conviction(s) and resultant extended term eligibility is always accounted for in arriving at a uniform Brimage plea offer and sentence. The only reason why the Brimage Guidelines have not required in all cases that prosecutors apply for extended terms is that in most school zone cases, filing a formal application would be an unnecessary and perfunctory exercise.[1] Because the school zone offense carries its own three-year period of parole ineligibility, in any case where the Brimage-calculated parole ineligibility term is less than 36 months, there is simply no need for prosecutors to resort to the extended term feature and its distinct three-year minimum term of parole ineligibility to ensure that the defendant is actually sentenced to the parole ineligibility term calculated under the Brimage Guidelines. In other words, an application

---

[1] The sole basis for an extended term under N.J.S.A. 2C:43-6f -- a defendant's criminal history -- is an objective circumstance that is reliably established by fingerprint-verified records associated with a defendant's unique SBI number, and, when necessary, by certified copies of official judgments of conviction. For this reason, a defendant's eligibility for an extended term under N.J.S.A. 2C:43-6f is rarely if ever contested.

for an extended term is not needed in school zone cases to achieve the statewide uniformity in sentencing that was demanded by the Supreme Court in State v. Brimage, 152 N.J. 1 (1998). Furthermore, and ironically in light of the recent spate of defense applications for re-sentencing under N.J.S.A. 2C:35-7b, the pragmatic approach that has been taken in implementing the Brimage Guidelines has actually benefitted recidivist school zone defendants by sparing them from being sentenced within the extended term range that would automatically apply if prosecutors were to file an extended term application. See note 3 and accompanying text, infra.

The position taken in Supplemental Directive No. 2010-2 is consistent with the plain language of the last paragraph in N.J.S.A. 2C:35-7b, quoted above, which clearly identifies those school zone defendants who are not eligible to have their mandatory minimum sentence waived or reduced in the discretion of the sentencing court. It is critical to note in this regard that N.J.S.A. 2C:35-7b expressly excludes from the ambit of judicial sentencing discretion those school zone defendants for whom the repeat offender extended term is "authorized *or* required to be imposed." (emphasis added to show that either distinct circumstance would suffice to exclude a defendant from the ambit of judicial sentencing discretion under the revised school zone law). Simply stated, the plain language of the new statute shows that the Legislature meant to disqualify not only those school zone defendants for whom the repeat offender extended term is *required to be imposed*, but also those school zone defendants for whom the extended term is not required, but rather is merely "*authorized*."

Read in the context of N.J.S.A. 2C:43-6f, the phrase "required to be imposed" as used in N.J.S.A. 2C:35-7b can only refer to cases where the prosecutor has actually filed an application for the extended term, in which event the defendant "shall... be sentenced by the court to an extended term... notwithstanding that extended terms are ordinarily discretionary with the court." N.J.S.A. 2C:43-6f. See State v. Lagares, 127 N.J. 20, 23 (1992) (noting that N.J.S.A. 2C:43-6f "permits imposition of an extended term on defendants convicted of drug-related offenses who have previously been convicted of similar crimes. Whether an extended term is imposed depends on the prosecutor because Section 6f takes effect only on his or her application."). In other words, an extended term under N.J.S.A. 2C:43-6f would only be "required to be imposed" within the meaning of N.J.S.A. 2C:35-7b if the prosecutor actually makes a formal application for an extended term; a court would not be required to impose the extended term in any case where the prosecutor for whatever reason does not make application for the enhanced sentence.

The critical word "authorized" as used in the new statute, in turn, must then refer to previously convicted defendants who are *eligible* for the extended term by reason of their criminal record. Any other interpretation of the new law would have the effect of rendering the term "authorized" superfluous. See D'Annunzio v. Prudential Ins. Co., 192 N.J. 110, 129 (2007) ("When interpreting a statute or regulation, we endeavor to give meaning to all words and to avoid an interpretation that reduces specific language to mere surplusage.") Applying this well-recognized canon of statutory construction, it must be assumed that the Legislature would not

have included the word "authorized" in its formulation if it had meant only to refer to defendants for whom the prosecutor had actually made application for the extended term, since in the event of any such prosecutorial application, the extended term would be required to be imposed and thus covered under the second part of the subjunctive statutory formulation.

Aside from violating this basic principle of statutory construction, the argument now being made on behalf of repeat drug dealers leads to a bizarre result. Were the defense interpretation to be accepted, the only recidivist defendants who would benefit from the opportunity for judicial lenity would be those who had committed their offenses in a school zone. This is so because N.J.S.A. 2C:35-7b by its literal terms applies only to defendants who have been convicted of a school zone offense,[2] and because, as a practical matter, in a non-school zone case, the prosecutor must file an extended term application in order to subject the defendant to a mandatory minimum sentence under the Comprehensive Drug Reform Act and thus make the case "Brimage-eligible" within the meaning of the Brimage Guidelines.

The point is simply that non-school zone repeat drug offenders cannot possibly take advantage of the judicial discretion afforded by N.J.S.A. 2C:35-7b, and thus have no opportunity to argue for probation or a custodial sentence less than that agreed to by the prosecutor under the Brimage Guidelines. The effect of the interpretation now being urged by some defendants, therefore, would be to reward previously-convicted drug dealers for having committed their latest offense within a school zone. It is inconceivable, however, that the Legislature intended that committing the underlying drug offense within a school zone should serve as a mitigating factor, that is, a circumstance that would afford a defendant an opportunity to argue for judicial lenity (and the possibility of a non-custodial sentence) that would not be available if the same offense conduct had occurred outside a drug-free school zone. While the Legislature by its recent reform of the school zone law recognized that commission of an offense within 1,000 feet of school property should not reflexively result in imprisonment, it is hardly possible that the Legislature meant for recidivist defendants to fare better at sentencing for having committed their latest offense in a school zone. The only rational construction, therefore, is that the Legislature intended that N.J.S.A. 2C:35-7b would not change sentencing law and practice as to those

---

[2] The partial restoration of judicial sentencing discretion that is authorized by N.J.S.A. 2C:35-7b was intended to give judges an opportunity to ameliorate the potential harshness of the school zone offense, recognizing that the school zone law prescribes enhanced punishment even in cases where the school at the center of the protected zone was not in session, and in cases where school-aged children were not in the vicinity of the offense and not otherwise directly endangered by the offense conduct. Consistent with its purpose to address problems inherent to the geographic breadth of the substantive school zone law, especially in urban areas where almost all property is situated within 1,000 feet of a school, the new statute by its literal terms applies only to sentences imposed on school zone convictions. The statute expressly provides in this regard that, "Nothing in this subsection shall be construed to establish... a basis for not imposing a term of imprisonment or term of parole ineligibility... upon conviction for a crime other than the offense set forth in this subsection [*i.e.*, the school zone offense defined in N.J.S.A. 2C:35-7]." N.J.S.A. 2C:35-7b.

defendants who are subject to an extended term under N.J.S.A. 2C:43-6f.

The position taken in Directive No. 2010-2 is also consistent with the Supreme Court's rationale in State v. Lagares, 127 N.J. 20 (1992), where the Court recognized that the extended term feature is "rationally related to the legitimate governmental interest of battling crime by punishing recidivists more severely. Repeat offenders are more dangerous than first-time convicts and deserving of more punishment." 127 N.J. at 35. The exclusion of all repeat drug dealers from the ambit on N.J.S.A. 2C:35-7b is consistent with the well-established legislative policy of treating repeat drug dealers more severely at sentencing than first offenders. While N.J.S.A. 2C:43-6f expressly provides that the stipulated three-year minimum term imposed on repeat drug dealers can be waived or reduced pursuant to N.J.S.A. 2C:35-12, that waiver or reduction is accomplished through the Brimage Guidelines -- thereby assuring statewide uniformity in sentencing.

For all of the foregoing reasons, in all litigation in trial courts, the Appellate Division, and the Supreme Court, prosecutors must continue to assert that repeat drug dealers are ineligible to be sentenced at any time under N.J.S.A. 2C:35-7b. Prosecutors shall keep the Appellate Bureau of the Division of Criminal Justice apprised of the status of all litigation concerning any applications by repeat drug dealers to be sentenced or re-sentenced pursuant to N.J.S.A. 2C:35-7b.

II Pro-active Steps to Ensure the Appropriate and Uniform Punishment of Repeat Drug Dealers in Pending and Future Cases

Although it must be expected that courts will uniformly reject defendants' argument that they are not ineligible to be sentenced or re-sentenced under N.J.S.A. 2C:35-7b because prosecutors in structuring their plea offers did not apply for extended terms at a time when such applications were not needed to achieve the Brimage-calculated sentence, henceforth, to ensure that this issue cannot be raised in any future proceedings by recidivist school zone drug dealers, and to comply with the statewide uniformity requirements of State v. Brimage, supra, prosecutors must take one of the two following precautions in all school zone cases where the defendant is subject to an extended term under N.J.S.A. 2C:43-6f by reason of one or more prior drug distribution/possession with intent convictions:

Option #1.

The prosecutor must as an integral part of the Brimage plea offer formally file a motion for an extended term under N.J.S.A. 2C:43-6f. Note that this option would not increase or

otherwise affect the term of parole ineligibility calculated pursuant to the Brimage Guidelines, and the Brimage plea offer would provide that the three-year parole ineligibility term prescribed by N.J.S.A 2C:43-6f, as well as the distinct three-year parole ineligibility term prescribed in the school zone law itself, would be reduced pursuant to N.J.S.A. 2C:35-12 to the term calculated under the Brimage Guidelines. It should be noted, however, that while this first option would not effect the Brimage-calculated parole ineligibility term, should a prosecutor elect to pursue this option, the overall sentence imposed by the court upon conviction of a third-degree school zone offense must be within the extended term range for a third-degree crime (*i.e.*, five to ten years). See note 3, infra.

Option #2.

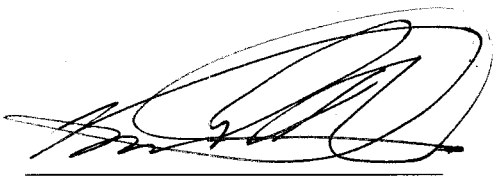
The plea offer must require the defendant to expressly acknowledge that he or she is subject to an extended term under N.J.S.A. 2C:43-6f by reason of one or more prior qualifying convictions, and that in consideration for the State's agreement not to formally apply for an extended term under N.J.S.A. 2C:43-6f, in which event the sentencing court would be required by law to impose a sentence within the extended term range,[3] the defendant must acknowledge that he or she is not eligible to be sentenced at any time in the court's discretion under N.J.S.A. 2C:35-7b, and must agree not to seek to be sentenced or re-sentenced under N.J.S.A. 2C:35-7b. If the defendant does not agree to all of these conditions and stipulations, the prosecutor must resort to option #1 and file an application for an extended term as part of the plea offer.

III Effective Date

This Supplemental Directive shall take effect immediately, and shall apply to all pending school zone cases. In any school zone case where a plea offer has already been tendered and is outstanding, such offer shall be deemed to be immediately rescinded and shall be modified to comply with the requirements of this Supplemental Directive.

---

[3] While imposition of the extended term would have no impact on the parole ineligibility term calculated pursuant to the Brimage Guidelines, it could effect the length of defendant's imprisonment should he or she for any reason fail to earn parole following the expiration of the parole ineligibility term. If the prosecutor were to formally apply for an extended term (option 1), the plea offer could not provide, for example, for a four-year sentence with a Brimage-calculated period of parole ineligibility, since a four-year sentence would be outside the extended term range, and would thus constitute an illegal sentence. Rather, when option 1 is used, the plea offer must, at a minimum, provide for a five-year prison sentence.



Paula T. Dow
Attorney General

Attest: 
Phillip H. Kwon
First Assistant Attorney General

Dated: July 1, 2010