

BRIMAGE GUIDELINES 2

**REVISED ATTORNEY GENERAL GUIDELINES
FOR NEGOTIATING CASES
UNDER N.J.S.A. 2C:35-12**

**SECTION 1 LEGAL BASIS FOR PROMULGATION OF ATTORNEY
GENERAL GUIDELINES**

Persons convicted of certain violations of the Comprehensive Drug Reform Act, N.J.S.A. 2C:35-1 et seq., are subject to a mandatory minimum term of imprisonment and parole ineligibility. Under N.J.S.A. 2C:35-12, a prosecutor may, through a negotiated plea agreement or post-conviction agreement with the defendant, waive or reduce the mandatory minimum sentence. In that event, the court may not impose a lesser sentence than that agreed to by the prosecutor. This statutory provision ensures that the State, no less than the defendant, receives the full benefit of its bargain.

The New Jersey Supreme Court has recognized on several occasions that the primary purpose of N.J.S.A. 2C:35-12 is to provide an incentive for defendants, especially lower and middle-level drug offenders, to cooperate with law enforcement agencies in the war against drugs. Another distinct goal of N.J.S.A. 2C:35-12 is to encourage guilty defendants to plead guilty rather than to demand jury trials and thus overburden and backlog the system.

To satisfy constitutional requirements and to ensure an appropriate separation of powers between the Executive and Judicial branches, the New Jersey Supreme Court in State v. Vasquez, 129 N.J. 189 (1992), held that the exercise of prosecutorial discretion under N.J.S.A. 2C:35-12 must be subject to judicial scrutiny under an arbitrary and capricious standard of review. To make that review possible, the Court held that prosecutors must adhere to written guidelines governing plea offers and must state on the record their reasons for waiving or not waiving the mandatory minimum term of parole ineligibility in any given case.

In response to State v. Vasquez, the Attorney General in 1992 promulgated Plea Agreement Guidelines, which were subsequently amended by the Attorney General's 1997 Supplemental Directive, and then again by the Uniformity Directive issued on January 15, 1998. While prescribing statewide minimum plea offers, these earlier Attorney General guidelines permitted each county prosecutor's office to adopt its own written plea agreement policy to account for local concerns, caseloads, and enforcement priorities. Some of these local policies included "standardized" plea offers that were significantly more stringent than the statewide minimums prescribed by the Attorney General.

In State v. Brimage, 153 N.J. 1 (1998), the New Jersey Supreme Court held that allowing each county to adopt its own standardized plea offers and policies permits intercounty disparity, thus violating the dominant goal of uniformity in sentencing and threatening the balance between prosecutorial and judicial

discretion that is required under State v. Vasquez. The prior guidelines, the Court held, did not appropriately channel prosecutorial discretion, leading to arbitrary and unreviewable differences between different localities. The Court held that to meet the requirements of the Vasquez line of cases, the Attorney General's plea agreement guidelines for implementing N.J.S.A. 2C:35-12 must be consistent throughout the State. "Just as with sentencing guidelines under the Code, which guide judicial sentencing discretion on a statewide basis, prosecutors must be guided by specific, universal standards in their waiver of mandatory minimum sentences under the CDRA." 153 N.J. at 23.

The Supreme Court in Brimage directed the Attorney General to promulgate new plea offer guidelines that all counties must follow. The Court re-emphasized the "dominance, if not paramountcy, of uniformity as one of the Code's premier sentencing goals." 153 N.J. at 21 (citation to earlier Supreme Court cases omitted). As in all plea offers, the Court added, the individual characteristics of the crime and of the defendant, such as whether the defendant is a first or second-time offender, must be considered. Finally, the Court held that to permit effective judicial review, prosecutors must state on the record their reasons for choosing to waive or not to waive the mandatory minimum period of parole ineligibility specified by the statute.

In May 1998, the Attorney General issued the original Brimage Guidelines along with Attorney General Executive Direction 1998-1, which made the original Brimage Guidelines binding on all prosecutors. In the intervening years, twenty-one "Application Notes" were issued by the Division of Criminal Justice in response to questions regarding the interpretation of the original Brimage Guidelines.

On July 15, 2004, the Attorney General signed Attorney General Law Enforcement Directive 2004-2 (reproduced on pp. ix-x), promulgating the present set of Brimage Guidelines, replacing and superseding the original version. (Hereinafter: "revised Guidelines") The revised Guidelines are designed to address concerns that have been raised by prosecutors, judges, corrections officials, public defenders and private defense counsel. The revised Guidelines were prepared by the Division of Criminal Justice in consultation with the county prosecutors, and after receiving helpful input from the Conference of Criminal Presiding Judges, the Public Defender's Office and the New Jersey Association of Criminal Defense Lawyers. The revised Guidelines are designed to ensure fairness and proportionality in the application of New Jersey sentencing laws, while complying with the requirement for statewide uniformity mandated by the New Jersey Supreme Court's ruling in State v. Brimage.

1.1 Scope of Guidelines

For the purposes of these Guidelines, the term “prosecutor” refers to a county prosecutor and his or her assistants and also includes the Director of the Division of Criminal Justice and assistant and deputy attorneys general.

These Guidelines are designed to channel the exercise of a prosecutor’s discretion in formulating and tendering negotiated plea offers to resolve charges for offenses arising under Chapter 35 of Title 2C that carry a mandatory minimum term of imprisonment and parole ineligibility that are subject to waiver and reduction pursuant to the provisions of N.J.S.A. 2C:35-12. These specified drug distribution-type offenses (including but not limited to the “drug-free school zone” offense defined in N.J.S.A. 2C:35-7) are hereinafter referred to as “Brimage-eligible offenses.” (Note that not all drug distribution-type offenses¹ defined in Chapter 35 of Title 2C carry a mandatory term of imprisonment and parole ineligibility; certain serious drug crimes are therefore not “Brimage-eligible offenses” within the meaning of these Guidelines. Such offenses are hereinafter referred to as “non-Brimage-eligible offenses.”)

When a prosecutor has a factual and legal basis to charge a defendant with a Brimage-eligible offense, the prosecutor shall be required to charge the most serious provable Brimage-eligible offense, and the prosecutor shall not dismiss, downgrade, or dispose of such charge except in accordance with the provisions and requirements of these Guidelines. A prosecutor is not permitted to circumvent these Guidelines by instead charging a non-Brimage-eligible offense, such as conspiracy in violation of N.J.S.A. 2C:5-2, or by downgrading a provable Brimage-eligible offense to a non-Brimage-eligible offense. For the purposes of these Guidelines, the phrase “most serious Brimage-eligible offense” means the Brimage-eligible offense that carries the longest term of parole ineligibility.

A prosecutor’s discretion in charging, downgrading, dismissing, negotiating or otherwise resolving or disposing a non-Brimage-eligible offense (other than for violation of N.J.S.A. 2C:39-4.1, N.J.S.A. 2C:35-4.1, or an offense subject to the No Early Release Act, N.J.S.A. 2C:43-7.2) is unaffected by these Guidelines and nothing in these Guidelines shall be construed, for example, to require a prosecutor to dismiss or “package” as part of a plea agreement any count charging a non-Brimage-eligible offense that may be pending against the defendant.

¹ As used throughout these Guidelines, the phrase “drug distribution-type offense” refers to drug distribution, the unlawful manufacturing of controlled substances, and unlawful possession of a controlled substance with intent to distribute.

Notwithstanding any other provision of these Guidelines, when as a result of double jeopardy considerations or the requirements of the mandatory joinder rule codified in R. 3:15-1b, or for any other reason, the disposition of a Brimage-eligible charge in accordance with these Guidelines could preclude or otherwise compromise or jeopardize the investigation or prosecution of charges against the defendant or any other person that involve one or more direct victims, or charges against the defendant or any other person that would likely result in a longer term of imprisonment and parole ineligibility than provided in the plea offer that would be tendered pursuant to these Guidelines, the prosecutor may elect not to tender a plea offer pursuant to these Guidelines, provided that the prosecutor explains to the court the reasons for not tendering a plea offer to dispose of the Brimage-eligible charge(s). See also Section 3.10 (authorizing conditional pleas contingent upon co-defendants pleading guilty).

1.2 Effective Date and Transition Cases

These Guidelines shall apply to all Brimage-eligible cases (i.e., all cases arising under Chapter 35 of Title 2C that involve a mandatory term of imprisonment and parole ineligibility waivable pursuant to N.J.S.A. 2C:35-12) committed on or after September 15, 2004. These Guidelines supersede all pre-existing Attorney General Guidelines for implementing N.J.S.A. 2C:35-12, provided, however, that the original Brimage Guidelines shall remain in full force and effect and shall be used to determine the appropriate plea offer in all Brimage-eligible cases where the offense was committed prior to September 15, 2004. Except as otherwise expressly authorized by this Section, offenses committed prior to the effective date of these revised Guidelines shall not be subject to the provisions of these Guidelines and shall not be eligible, for example, for a standardized plea offer pursuant to Section 6.

When a defendant is subject to prosecution for Brimage-eligible offenses occurring both before and after September 15, 2004, the prosecutor may, in the exercise of discretion, negotiate a “packaged” disposition of all pending charges in accordance with these Guidelines. By way of example, if a defendant has been charged with two separate school zone offenses, one committed prior to September 15, 2004 and the other committed after September 15, 2004, a prosecutor would be authorized, but not required, to simultaneously dispose of both cases by means of a negotiated disposition by tendering a “standardized” plea offer pursuant to Section 6 of these Guidelines (provided, of course, that the defendant satisfies all of the eligibility criteria for the “standardized” plea offer).

These revised Guidelines shall remain in full force and effect until such time as they may be amended or superceded by order of the Attorney General.

1.3 Prohibition on Separate County Plea Policies

The New Jersey Supreme Court in Brimage directed the Attorney General in formulating new Guidelines to eliminate provisions that would authorize county prosecutors to adopt their own plea policies and standardized plea offers. Accordingly, county prosecutors may not promulgate their own plea policies that are inconsistent with or diverge from these Guidelines, or that would result in a plea offer that is not authorized pursuant to these Guidelines. In order to comply with the Court's directive in Brimage and to ensure statewide uniformity, a prosecutor is required in all Brimage-eligible cases to tender a plea offer in accordance with the provisions of these Guidelines.

Nothing herein shall be construed to preclude the appropriate enforcement of the "plea cut off rule" established by the Supreme Court and codified in R. 3:9-3g. Nor is a prosecutor's office precluded from adopting and enforcing its own plea cut off policy, provided, however, that the prosecutor must afford a defendant a reasonable opportunity to accept a "final post-indictment offer" calculated pursuant to these Guidelines before that final offer expires and is withdrawn. Nothing herein shall be construed to authorize a prosecutor to refrain from tendering a pre-indictment, an initial post-indictment, or final post-indictment offer as may be required by these Guidelines.

SECTION 2 OVERVIEW OF BASIC APPROACH OF THESE GUIDELINES**2.1 Essential Features of the Brimage Guidelines**

These Guidelines govern how prosecutors are to handle cases arising under Chapter 35 of Title 2C that are subject to a waivable mandatory term of imprisonment and parole ineligibility (“Brimage-eligible offenses”). These Guidelines are designed to establish a unified statewide plea negotiation system that is uniform, rational and proportionate, giving fair warning to would-be drug dealers and differentiating the culpability of offenders based upon objective criteria that can be uniformly assessed and applied by prosecutors in all counties.

This plea negotiation system employs basic features from the New Jersey Code of Criminal Justice, as well as from the Federal Sentencing Guidelines. The system adopts one of the central principles of the sentencing provisions of the New Jersey Code of Criminal Justice by establishing a range of permissible sentencing outcomes with a “presumptive” term fixed at or around the midpoint of the range. Prosecutors will be permitted to extend a plea offer other than the presumptive offer only after considering carefully-defined aggravating and mitigating factors. This system complies with the Supreme Court’s directive in State v. Brimage, 153 N.J. 1 (1998), that, “the [Attorney General] guidelines should specify permissible ranges of plea offers for particular crimes and should be more explicit regarding permissible bases for upward and downward departures.” 153 N.J. at 25. To ensure the greatest possible degree of uniformity, the system assigns point values for each aggravating or mitigating factor. A prosecutor is authorized to extend a plea offer above or below the presumptive plea offer displayed in the appropriate cell in the Table of Authorized Plea Offers only where a numeric calculation of all applicable aggravating and mitigating points exceeds an established threshold.

The system borrows from the Federal Sentencing Guidelines the use of a matrix of offense conduct and criminal history (“Table of Authorized Plea Offers”). See Appendix II. The vertical axis of the matrix depicts the Offense Description, which accounts for the specific charge and certain Special Offense Characteristics. This vertical axis corresponds to the Offense Level of the Federal Sentencing Table. Criminal History Categories, which account for a defendant’s record of prior adult convictions and juvenile adjudications of delinquency, form the horizontal axis of the table. The intersection of the applicable Offense Description and Criminal History Category creates a “cell” that displays the range of authorized plea offers.

2.2 How to Determine An Authorized Plea Offer²

Although the statewide plea negotiation system established by these Guidelines is far more structured (by design and pursuant to the Supreme Court's directive in State v. Brimage, 153 N.J. 1 (1998)) than the plea negotiation policies that had existed before Brimage was decided, the process for determining an authorized plea offer is straightforward, and the procedures are far less complex than those used in the Federal Sentencing Guidelines.

A prosecutor must first determine whether the defendant is eligible for one of the two "standardized waivers" that are described more fully in Section 6. When a defendant is not eligible for either the standardized "flat" plea offer or a standardized "open" plea offer, the prosecutor must initiate a calculation procedure to determine the nonstandardized case-specific authorized plea offer. This calculation system relies on grid-like Tables of Authorized Plea Offers, which are reproduced in Appendix II. Experience has shown that most cases will use Table 1 (for a drug-free school zone offense) or Table 2 (for a non-school zone case where the defendant is subject to a waivable mandatory term of imprisonment only because he or she has previously been convicted of a drug distribution-type offense).

To use the Table, the prosecutor must identify the appropriate drug distribution-type charge and must consider certain "Special Offense Characteristics," such as whether the offense involved weapons or whether the offense involved an especially large amount of drugs. The prosecutor must then look at the defendant's criminal history. The Table compares the seriousness of the offense (the vertical axis) and the extent of the defendant's criminal history (the horizontal axis) and displays at the intersection a box or "cell" that shows a range of authorized plea offers (a minimum offer, a "presumptive" offer which is highlighted, and a maximum offer) for pre-indictment pleas, initial post-indictment pleas, and final post-indictment pleas.

The prosecutor must use the "presumptive" plea offer displayed in the applicable cell of the Table unless there is a basis for moving up or down within the range. This requires the prosecutor to consider aggravating and mitigating circumstances. See Section 10. To ensure uniformity at this point in the calculation process, each relevant factor is carefully defined and is pre-assigned a point value or range of point values. These point values are totaled (usually

² This Section concisely summarizes the basic steps that a prosecutor must follow to determine an appropriate and authorized plea offer. Consult specific Sections for a more complete description of all applicable rules and criteria. See also Section 5 for more thorough outline of the specific steps used to calculate an authorized offer.

referred to as “the grand total”) to determine whether the prosecutor may tender a plea offer above or below the presumptive offer displayed in the Table. See Section 10.3.

At this point in the calculation process, the prosecutor must apply any applicable “Special Application and Enhancement Features,” such as the one based on N.J.S.A. 2C:35-8, which requires that adult defendants who distribute drugs to children receive twice the custodial sentence that would otherwise apply, or where the present offense was committed while the defendant was on parole or probation. See Section 11.

Next, the prosecutor must determine whether to make a “downward departure” considering the proofs available for trial and the likelihood of obtaining a guilty verdict. See Section 12.

Finally, prosecutors are authorized to make a “downward departure” from the plea offer that must otherwise be tendered pursuant to these Guidelines where the defendant provides “substantial cooperation” to law enforcement. See Section 13.

By following the preceding steps, a prosecutor can determine an authorized plea offer, which (except for certain cases involving a small amount of marijuana) will be expressed as a specific term of parole ineligibility. Note that these Guidelines generally do not determine the maximum sentence to be imposed by the court. Rather, these Guidelines focus on the minimum term of imprisonment during which the defendant will be ineligible for parole.

Note also that while the Guidelines will in many cases afford the prosecutor some discretion in selecting an appropriate plea offer from within a given range of authorized dispositions (e.g., discretion as to the extent of an adjustment from the Presumptive Offer based on the grand total of Aggravating and Mitigating Factor points; discretion as to the extent of a Downward Departure for Trial Proof Issue or Substantial Cooperation, etc.), the plea offer tendered by the prosecutor generally must be a specific term of parole ineligibility. The prosecutor may not tender a plea offer that provides for a variable range of possible terms of parole ineligibility except as part of a cooperation agreement in accordance with the requirements of State v. Gerns, 145 N.J. 216, 230-31 (1996), where the extent of a Downward Departure is to be based on the nature and quality of a defendant’s *future* cooperation (*i.e.*, cooperation or assistance given by the defendant between the date of the plea agreement and the date set for the sentencing hearing.) See Section 13.2.

SECTION 3 GENERAL PROVISIONS APPLICABLE TO ALL CASES**3.1 Relevant Conduct**

A plea offer under these Guidelines should reflect the *actual conduct* of the defendant, and not just the specific episode, event or transaction constituting the specific offense to which the defendant will plead guilty, recognizing that drug distribution activity, and especially commercially motivated activity, typically involves conduct of an ongoing and repetitive nature. A prosecutor in implementing these Guidelines is not permitted to ignore relevant offense characteristics or enumerated aggravating or mitigating circumstances. By the same token, a prosecutor shall not apply a Special Offense Characteristic, Special Application and Enhancement Feature, Aggravating or Mitigating Factor, or Downward Departure unless there is a good faith basis to do so based upon the information available to the prosecutor and reasonable inferences that can be drawn from such information.

This system is implemented through the use of specially-designed worksheets. The Brimage Standardized Waiver Plea Form (see Appendix IA) uses checkoff boxes to indicate a defendant's eligibility for a standardized "flat" or "open" plea offer. The regular Brimage Plea Negotiation Worksheet (see Appendices IB and IC) includes a checkoff box for each authorized Special Offense Characteristic, Special Application and Enhancement Feature, and Aggravating and Mitigating Factor, thus indicating to the court whether or not the defendant's "relevant conduct" implicates that characteristic, feature or factor. The completed Standardized Waiver Plea Form or regular Brimage Plea Negotiation Worksheet must be submitted to the defense counsel and court as part of the written plea offer tendered pursuant to R. 3:9-1(b). (Note, in contrast, that a draft or unapproved worksheet is confidential attorney workproduct.)

It is the responsibility of a prosecutor in negotiating and structuring a plea agreement to make certain that the plea offer presented to the court reflects the seriousness of the defendant's offense behavior and does not undermine the purposes of the Comprehensive Drug Reform Act, the Court's decision in State v. Brimage, 153 N.J. 1 (1998), or the provisions of these Guidelines. A prosecutor is expected to disclose fully and accurately to the court all facts and circumstances pertaining to the defendant's conduct so that the court can properly discharge its responsibilities and appropriately determine whether the proposed disposition of the case is in accordance with the policies established in these Guidelines and the requirements of the Court's decision in State v. Brimage, 153 N.J. 1 (1998).

By submitting a completed Standardized Waiver Plea Form or regular Brimage Plea Negotiation Worksheet to the defendant and to the court as part of the written plea offer, the prosecutor would be representing to the court the existence or non-existence of all relevant facts and circumstances described in these Guidelines based upon the information available to the prosecutor at that time. The worksheet includes space for the prosecutor to indicate to the court that there are insufficient facts available to determine the applicability of a given fact or circumstance, in which event that fact or circumstance would not be included in the calculation or determination of the appropriate plea offer. However, by indicating that there are insufficient facts available to make a reasoned determination of the applicability of any such fact or circumstance, the prosecutor expressly reserves the State's right to recalculate and redetermine the appropriate plea offer if additional information becomes available or subsequent investigation reveals the applicability (or inapplicability) of the fact or circumstance. (Note that even if the prosecutor does not check the "insufficient facts" box on the worksheet, he or she would be permitted and in some cases required to recalculate the plea offer if new information is obtained during the pendency of the case that would result in a different authorized plea offer. See Section 3.7.)

By using a uniform worksheet to document the calculation, application, and balancing of appropriate facts and circumstances, this system will best ensure uniformity and will allow trial courts to review the exercise of prosecutorial discretion for arbitrariness and capriciousness by explaining exactly how the prosecutor arrived at the plea offer. This approach will also permit the Division of Criminal Justice to evaluate the impact of this plea negotiation system on the State Prison population, county jail populations, plea rates, and the average amount of time elapsed between arrest and the final disposition of charges. Note that where the worksheet indicates that the prosecutor has made a Downward Departure for Substantial Cooperation, the worksheet must be treated as confidential for the safety of the defendant, and care must be taken not to include the worksheet in a file to which members of the public might have access. See Appendix IC. It is strongly recommended that the copy provided to the court be treated in the same manner as a presentence investigation report. See State v. DeGeorge, 113 N.J. Super. 542 (App. Div. 1971) (presentence reports should not be a matter of public record).

3.2 Structuring Plea Agreements

These Guidelines are designed to account for all relevant aggravating circumstances in determining the defendant's culpability. Because these aggravating circumstances may accumulate in a single case, the authorized disposition may in some cases exceed the maximum term of parole ineligibility

that could actually be imposed as a matter of law upon conviction of a single count. In that event, the prosecutor is required, where possible, to “structure” the plea agreement to permit imposition of the sentence prescribed by the Table of Authorized Plea Offers and these Guidelines.

This might require, for example, that the prosecutor formally apply for an extended term pursuant to N.J.S.A. 2C:43-6f (Repeat Offender) or 2C:44-3h (Street Gang Related Activity) and/or enhanced punishment pursuant to N.J.S.A. 2C:35-8 (Distribution to Minor or Pregnant Female). This might also require that the defendant plead guilty to additional counts. Note that in State v. Dillihay, 127 N.J. 42 (1992), the New Jersey Supreme Court held that where a defendant is convicted of a second-degree offense under N.J.S.A. 2C:35-5 (a non-Brimage-eligible offense) and the third-degree school zone offense under 2C:35-7, the defendant is subject to a mandatory term of parole ineligibility prescribed by the school zone offense, which is to be applied to the range of sentence appropriate to a second-degree conviction. The same principle would apply where a defendant is convicted of the third-degree school zone offense and the second-degree crime of distributing or possessing with intent to distribute controlled substances while in a drug-free public housing, public park, or public building zone in violation of N.J.S.A. 2C:35-7.1. In fact, applying the analysis of the Court in Dillihay, convictions for violation of N.J.S.A. 2C:35-7 (school zone) and 2C:35-7.1 (public housing, park, or building zone) involving the same illicit transaction would not even merge, because each offense requires proof of an additional fact that the other does not, and neither offense is a lesser included offense of the other. 127 N.J. at 50-52.

In sum, the plea agreement must provide that the defendant will plead guilty to as many counts as may be necessary to permit imposition of the sentence prescribed in the Table of Authorized Plea Offers and these Guidelines. If, in rare cases, it is not possible for the prosecutor to structure the plea agreement so as to require imposition of the sentence determined pursuant to these Guidelines, then the prosecutor, so as to provide some practical incentive for the defendant to plead guilty, shall, except as provided in Special Application and Enhancement Feature G (offense committed while actually *on* school property), tender a plea offer that requires the defendant to serve six (6) months less parole ineligibility than the maximum term of parole ineligibility that can be imposed as a matter of law.

It should be noted, finally, that in some circumstances, because aggravating circumstances can accumulate, the authorized disposition calculated pursuant to the Guidelines may exceed the minimum term of parole ineligibility required to be imposed by statute. By way of example, a defendant convicted of a first-degree crime under N.J.S.A. 2C:35-5 could, in theory, be sentenced to a term of parole

ineligibility fixed at as little as at one-third of the minimum sentence applicable to a first-degree crime (*i.e.*, one-third of ten years or three years, four months). Whenever the Brimage Guidelines require a prosecutor to tender a plea offer that is greater than the minimum term of parole ineligibility that the court is required to impose by law, then the Brimage offer becomes, in essence, a non-binding sentencing recommendation to the court, which the court would be free to accept or reject. In these circumstances, a defendant would be free to plead “open” to an indictment. A prosecutor in these circumstances is not authorized to reduce the plea offer otherwise required pursuant to the Brimage calculation process set forth in these Guidelines.

3.3 Disputed Facts

These Guidelines are designed to channel prosecutorial discretion, not to eliminate it. It is expected that courts in reviewing whether a plea offer is arbitrary and capricious, reflecting a gross and patent abuse of prosecutorial discretion, will generally defer to prosecutors as to whether there is a good faith basis to support a determination that a defendant is ineligible for a standardized waiver offer based upon one or more specific eligibility criteria, or to support a prosecutor’s use of a Special Offense Characteristic, an Aggravating or Mitigating Factor, a Special Application and Enhancement Feature, or a Downward Departure for Trial Proof Issues or for Substantial Cooperation. See State v. Vasquez, 129 N.J. 189, 196 (1992) (the standard of judicial review of a prosecutor’s decision under N.J.S.A. 2C:35-12 requires a defendant to show by clear and convincing evidence that the prosecutor’s decision was arbitrary or capricious to be entitled to relief). Compare State v. Nwobu, 139 N.J. 236 (1995) (discussing the patent and gross abuse of discretion standard for judicial review of a prosecutor’s decision to deny pretrial intervention, reaffirming that a prosecutor’s decision is entitled to “great deference” and explaining that the issue under such a standard of review is whether the prosecutor considered irrelevant facts or failed to consider relevant ones or committed a clear error of judgment) and State v. Gilmore, 103 N.J. 508 (1986) (holding that on the issue of whether a prosecutor violated defendant’s right to an impartial jury by excluding jurors on the basis of race, the defense must first establish a prima facie case of discrimination that may be overcome if the State articulates clear and reasonably specific explanations of its legitimate reasons for exercising its peremptory challenges and the court is satisfied that the State exercised such peremptory challenges on grounds that are reasonably relevant to the particular case).

It must be expected that defense counsel will not always agree with or stipulate to all relevant facts and circumstances, and there may be contested facts or circumstances that were used by a prosecutor pursuant to these Guidelines in determining an appropriate plea offer. For example, a defendant may deny

possessing firearms, resorting to the use of violence, or participating in organized crime or street gang related activity.

While good faith negotiation is certainly permissible, the appropriate response in the event of such a dispute is not to exclude relevant factors from the prosecutor's determination of an appropriate plea offer. Recall that pursuant to § 3.1, a prosecutor is required to consider the defendant's actual conduct, whether the defendant acknowledges such conduct or not, and is also required to disclose fully to the court all facts and circumstances that are deemed relevant under these Guidelines. (As noted in § 3.1, the prosecutor also has the option to indicate on the Plea Negotiation Worksheet that there are insufficient facts available to determine the applicability of a given fact or circumstance.)

The overriding goal of uniformity would be seriously undermined if prosecutors were chilled by the prospect of time-consuming pretrial litigation from exercising reasoned judgment in deciding whether and how to apply a Special Offense Characteristic, Aggravating or Mitigating Factor, Special Application and Enhancement Feature, or Downward Departure. Moreover, the critical objective of promoting the efficient and expeditious disposition of cases, and of conserving prosecutorial and judicial resources, would be lost if pretrial evidentiary hearings were held to resolve factual disputes as to the defendant's relevant conduct and culpability. Such a dispute during the course of plea negotiations would only reveal that there is no "meeting of the minds" necessary to consummate an agreement between the parties.

Accordingly, so as to promote the uniform and efficient implementation of these Guidelines, a prosecutor shall object to a defense motion to convene an evidentiary hearing to resolve factual disputes between the defendant and the prosecutor as to eligibility for a standardized waiver or the application or scoring of a Special Offense Characteristic, Aggravating or Mitigating Factor, Special Application and Enhancement Feature, or Downward Departure. The prosecutor shall immediately notify the Director of the Division of Criminal Justice in the event that the prosecutor is ordered by a court to participate in any such pretrial evidentiary hearing. While prosecutors are required at all times to act in good faith in implementing these Guidelines, and could reasonably be expected and should be prepared at a status conference or other nonplenary proceeding to articulate a clear and reasonably specific explanation for their legitimate reasons for applying (or not applying) a Special Offense Characteristic, Aggravating or Mitigating Factor, Special Application and Enhancement Feature, or Downward Departure, prosecutors must vigorously and uniformly resist efforts by a defendant to use these Guidelines to interpose delay, to provide a new avenue for discovery not provided for in the Court Rules, or to afford an opportunity to cross-examine prosecution witnesses in a "test" trial.

The Standing Committee established pursuant to Section 3.16 shall report to the Attorney General on any recurring implementation problems that may arise with respect to the resolution of factual disputes, and shall, as appropriate, make recommendations to remedy any such problems with a view toward ensuring the most uniform and efficient disposition of cases.

3.4 Post-Conviction Waivers

These Guidelines and the Table of Authorized Plea Offers in Appendix II apply to *pre*trial plea offers. A prosecutor shall not tender a *post*-conviction offer to waive or reduce a mandatory term of imprisonment pursuant to N.J.S.A. 2C:35-12 except in exchange for a defendant's substantial cooperation in accordance with the criteria and provisions of Section 13 of these Guidelines.

3.5 "Departures" from the Prescribed Authorized Dispositions (See also Sections 12 and 13)

As the Supreme Court has repeatedly recognized, the primary purpose of N.J.S.A. 2C:35-12 is to provide practical incentives for defendants, especially lower and middle-level drug offenders, to cooperate with law enforcement agencies in identifying, apprehending, prosecuting, and convicting other, more culpable drug offenders. Accordingly, this plea negotiation system continues the policy established in earlier Attorney General directives to allow a downward "departure" where the defendant is able and willing to provide substantial cooperation leading to positive and tangible law enforcement and prosecution results. Under this system, a prosecutor may, in appropriate circumstances, extend a plea offer that permits a defendant to receive a reduced or even non-custodial sentence in exchange for the defendant's substantial cooperation. See Section 13.

As with the Federal Sentencing Guidelines, this system does not attempt to prescribe a precise formula for determining the extent and value of a defendant's substantial cooperation. The issues are simply too complex and fact-sensitive to permit a numeric calculation. However, these Guidelines prescribe the criteria that must be used and relied upon by the prosecutor in determining the extent and value of the defendant's cooperation in relation to his or her culpability. See Section 13.1. These criteria are adapted from federal practice described in § 5K 1.1 in the Federal Sentencing Guidelines Manual.

In addition, procedural safeguards are established so that, for example, a substantial cooperation agreement must be approved by a designated senior assistant prosecutor, or a specifically-designated deputy or assistant attorney general in cases prosecuted by the Division of Criminal Justice, and must be reduced to writing with sufficient clarity so that a court or the Attorney General

could review the exercise of prosecutorial discretion for arbitrariness. See Section 13.2. To further permit meaningful review of the exercise of prosecutorial discretion, a Downward Departure for a defendant's substantial cooperation may be applied only after the prosecutor has determined the appropriate plea offer that would otherwise apply in the absence of the defendant's substantial cooperation. This practice is designed to allow the parties and the court to determine the actual benefit (*i.e.*, the extent of the reduction in the term of imprisonment and parole ineligibility) offered to a defendant by reason of his or her substantial cooperation.

In addition to a Downward Departure for Substantial Cooperation, prosecutors are authorized to make a Downward Departure for Trial Proof Issues. See Section 12. It should be noted that under the original Brimage Guidelines, prosecutors were only authorized to make a downward "adjustment" for trial proof issues, meaning that the extent of the downward adjustment was limited. Under the revised Guidelines, in contrast, prosecutors are authorized to make a true downward "departure" based on an assessment of the strengths and weaknesses of the case, and may tender any plea offer, as the facts and circumstances warrant, including a recommendation for a noncustodial sentence. The criteria and procedural safeguards for exercising prosecutorial discretion in making a Downward Departure for Trial Proof Issues are more fully described in Section 12.

Finally, it should be noted that there is no provision in these Guidelines for an "upward" departure from an authorized plea offer, since the facts and circumstances of the offense and the offender that would ordinarily result in a longer sentence (for example, the severity of the defendant's conduct or defendant's criminal history) are already integrated within the structure of these Guidelines. Notwithstanding the foregoing, and as expressly noted in Section 1.1, where for any reason the tendering of a plea offer determined in accordance with these Guidelines would compromise or jeopardize the investigation or prosecution of a more serious offense that involves one or more direct victims or that would likely result in greater punishment than provided by these Guidelines, the prosecutor may in the exercise of reasoned discretion elect not to tender a plea offer pursuant to these Guidelines, provided that the prosecutor explains to the court the reasons for not tendering a plea offer to dispose of a Brimage-eligible offense.

3.6 Extended Term ("Lagares") Applications for Repeat Offenders

The New Jersey Supreme Court in State v. Lagares, 127 N.J. 20 (1992), established a rule requiring statewide uniformity in implementing N.J.S.A. 2C:43-6f, which provides that a defendant convicted of a drug distribution-type offense who has previously been convicted of a similar offense under State or Federal law is subject to a mandatory extended term of imprisonment, on application of the

prosecutor, which must include a term of parole ineligibility that is subject to waiver or reduction only pursuant to N.J.S.A. 2C:35-12. These Guidelines are designed to incorporate and streamline the procedures, policies and criteria used by prosecutors for determining whether to apply for or to waive an extended term of imprisonment pursuant to N.J.S.A. 2C:43-6f. Specifically, this statutory sentencing feature is automatically accounted for when a defendant falls under Criminal History Categories IV or V, or where the prosecutor uses Table 2 of the Table of Authorized Plea Offers. See also Attorney General Directive 1998-1, Section 4.

3.7 Expiration and Modification of Plea Offers (See also Section 4)

All plea offers must include a date or event at which the offer will expire and will be automatically withdrawn. Plea offers may be withdrawn and modified at any time based on a material change in circumstances, such as the receipt or availability of new information that would materially affect a defendant's eligibility for a standardized waiver or the calculation of the authorized disposition and that would result in a different authorized plea offer than the one previously calculated. When the State becomes aware of such new information, the prosecutor in the exercise of reasoned discretion may withdraw any outstanding plea offer and tender a replacement plea offer that accounts for the newly-discovered facts or circumstances. As noted in Section 3.1, a prosecutor is expected to disclose fully and accurately to the court all pertinent information so that the court can properly discharge its responsibilities in deciding whether to accept, reject or vacate a negotiated disposition.

If, after the plea is taken but before sentence is imposed, the prosecutor becomes aware of new information that shows that the defendant is not eligible for a standardized waiver, or that shows that the defendant would fall under a higher Criminal History Category, or that the defendant is subject to a Special Application and Enhancement Feature or an Aggravating Factor that was not accounted for in the plea offer (e.g., the presentence investigation report discloses additional prior convictions or adjudications of delinquency, or reveals that the present offense was committed while the defendant was on parole or probation), the prosecutor may, in the exercise of reasoned discretion and in order to promote the interests of finality and the efficient disposition of the case, elect to permit the defendant to be sentenced in accordance with the plea offer previously accepted by the court, provided that the prosecutor at or before the sentencing proceeding alerts the court to the discrepancy so that the court can decide pursuant to R. 3:9-3(d) whether on its own motion to vacate the plea on the grounds that the interests of justice would not be served by effectuating the agreement reached by the prosecutor and defense counsel. Nothing in this paragraph shall be construed in any way to preclude the prosecutor from moving to vacate the plea in these

circumstances.

If the defendant commits a new bail violation after the plea is taken but before sentence is imposed (e.g., defendant commits another offense, or fails to appear at the sentencing hearing), the prosecutor may move to vacate the plea and withdraw and replace the plea offer to account for additional aggravating points under Aggravating Factor #2. See Section 10.1.2.

All plea offers shall include a notice that the offer is subject to withdrawal and modification based upon new information about the offense or offender, or based upon defendant's conduct occurring after the offer was issued (e.g., committing a new offense or failing to appear in court).

3.8 Restrictions on Relevant Factors

In order to prevent the re-introduction of disparity in the unified statewide system for determining appropriate plea offers under N.J.S.A. 2C:35-12, a prosecutor may only consider those facts and circumstances that are specifically described in these Guidelines. There is no provision in these Guidelines for extending "leniency," except by the tendering of a "standardized waiver" to an eligible defendant, or by the application of mitigating factors enumerated in these Guidelines, or by withholding an objection to a defendant's application to be sentenced in accordance with the provisions of N.J.S.A. 2C:35-14 (treatment in lieu of imprisonment). Nor is there a provision in these Guidelines for a prosecutor to consider an aggravating or mitigating circumstance of a kind or to a degree not accounted for in the Offense Description, the Special Application and Enhancement Features, the enumerated Aggravating and Mitigating Factors, the Downward Departure for Trial Proof Issues, or the Downward Departure for Substantial Cooperation.

In State v. Brimage, 153 N.J. 1 (1998), the Supreme Court suggested that differences in available county resources as well as varying backlog and caseload situations could be legitimate factors that prosecutors may consider, but only if those factors are explicitly set forth in and authorized by Attorney General Guidelines. 153 N.J. at 24. After careful consideration, it has been determined that there is no practical way to account for local resource, caseload, and criminal calendar conditions without reintroducing institutionalized disparity between counties in contravention of the principle rule established by the Court in Brimage.

The relevant facts and circumstances accounted for in these Guidelines, whether as a Special Offense Characteristic, Criminal History Category, Special Application and Enhancement Feature, or Aggravating or Mitigating Factor, relate

to the defendant's own relevant conduct or prior record and thus help to determine the defendant's culpability. Even the Quality of Life Aggravating Factor, see Section 10.1.1, which might be said to be based on localized conditions, focuses ultimately on the risk of harm posed by the defendant's own actual conduct given the special vulnerability of law-abiding residents in these carefully-selected locations due to the cumulative, negative effect of open and notorious drug trafficking activities. Countywide case backlog problems, in contrast, are unrelated to a defendant's culpability or an assessment of the harm caused or threatened by the defendant's own conduct.

The Supreme Court's willingness to permit the Attorney General to specifically authorize prosecutors to consider local case backlog conditions was undoubtedly based on the perceived practical need to move cases efficiently. However, other provisions of these Guidelines are designed to accomplish the salutary and necessary objective of providing guilty defendants a practical incentive to plead guilty and thereby to waive their right to a jury trial. Notably, the graduated plea system established in these Guidelines, see Section 4, providing an incentive for guilty defendants to plead at the earliest opportunity, is designed to promote efficiency in handling and disposing cases without creating, reinforcing, or institutionalizing disparity between counties.

3.9 Defense Input

The defendant through his or her counsel may provide the prosecutor with timely information concerning the applicability of Mitigating Factors and the Downward Departure for Trial Proof Issues, as well as information concerning the non-applicability or appropriate scoring of Special Offense Characteristics, Special Application and Enhancement Features, and Aggravating Factors. However, as noted in Section 3.3, these Guidelines are not designed to provide a forum to conduct mini-trials to resolve factual disputes. To the contrary, when there is no "meeting of the minds" necessary to consummate a negotiated agreement, the prosecutor must, as specifically provided in Section 3.3, object to any defense tactic to request an evidentiary hearing to decide issues that are appropriately and traditionally resolved at trial.

3.10 Conditional Pleas Involving Multiple Defendants

Prosecutors are permitted under these Guidelines to continue the well-accepted practice of tendering a "conditional" plea offer to a defendant under circumstances where that offer does not become operative unless one or more other co-defendants also agree to plead guilty. This practice for handling multiple defendants is designed to promote the interests of judicial economy and finality, providing incentives for all guilty defendants to plead guilty, as well as to achieve

the important goal of disrupting entire drug trafficking conspiracies. Indeed, as noted in Section 1.1, nothing in these Guidelines should be construed to require a prosecutor to tender a plea offer to any defendant where to do so would undermine or jeopardize the successful investigation or prosecution of one or more other defendants. Accordingly, and notwithstanding any other provision of these Guidelines, a prosecutor may refrain from tendering a standardized waiver or regular plea offer in these circumstances, or may tender a standardized waiver or regular plea offer that is subject to the condition that the case(s) involving co-defendants are also disposed of by guilty plea.

In order to comply with the rule reaffirmed in State v. Brimage that prosecutors must state on the record their reasons for choosing to waive or not to waive a statutorily-prescribed mandatory minimum term of parole ineligibility, a prosecutor in these circumstances involving multiple defendants must explain to the court the reasons for not tendering a plea offer, or for tendering an offer that is subject to the condition that other defendant(s) also plead guilty.

Furthermore, to ensure fairness, where any such conditional plea offer is tendered before indictment and the defendant indicates in writing or in open court a willingness to accept the offer but is precluded from effectuating the plea agreement because of a co-defendant's refusal to plead guilty, the plea offer shall be deemed to be "frozen" for the purposes of determining the "timing" of the plea under the graduated plea system established in these Guidelines, and if the case against the remaining co-defendant(s) is disposed of by guilty plea, the defendant who indicated in writing or in open court a willingness to accept the initial plea offer shall be permitted to plead guilty to the pre-indictment offer, notwithstanding that the defendant has since been indicted and would otherwise be required to plead guilty to an initial or final post-indictment offer calculated under the Guidelines. See also Section 4.10. (It should be noted that the prosecutor also retains the authority pursuant to Section 13 at any time to make a Downward Departure for Substantial Cooperation based, for example, on a defendant's assistance in prosecuting co-defendants.)

3.11 Dismissal of School Zone Cases as Part of a "Package" Deal

Nothing in these Guidelines should be construed to limit the authority of a prosecutor to dismiss one or more counts under N.J.S.A. 2C:35-7 (Drug-Free School Zone) as part of a negotiated disposition where the defendant will plead guilty in accordance with the Guidelines to another 2C:35-7 or other Brimage-eligible charge. It should be noted in this regard that under current law, when a defendant is subject to prosecution for multiple drug-free school zone counts involving separate transactions, the decision to impose consecutive or concurrent terms of imprisonment and parole ineligibility is generally vested in the discretion

of the court pursuant to N.J.S.A. 2C:44-5a, and a prosecutor arguably has no authority under N.J.S.A. 2C:35-12 to require the court to impose consecutive sentences.

A prosecutor is *not* required by these Guidelines to “package” multiple drug counts involving separate and distinct transactions. When the defendant has been charged with more than one offense subject to a waivable minimum term of parole ineligibility, the prosecutor should calculate the appropriate authorized offer for each such charge involving a separate and distinct offense or transaction unless the prosecutor employs the aggregation of amounts feature established in N.J.S.A. 2C:35-5c. A prosecutor retains the discretion, subject to the rules governing the joinder of offenses (see R. 3:15-1), to refuse to dismiss provable charges as part of a plea agreement. Because the prosecutor cannot compel the court to impose consecutive as opposed to concurrent sentences, the prosecutor’s exercise of discretion in refusing to “package” separate pending charges cannot result in formalized intercounty disparity within the meaning of State v. Brimage, 153 N.J. 1 (1998).

3.12 Reasons for Denying Pretrial Intervention Applications

Pursuant to the rule established in State v. Caliquiri, 158 N.J. 28 (1999), prosecutors are prohibited from “categorically” denying PTI applications on the grounds that the defendant is charged with a violation of N.J.S.A. 2C:35-7 (Drug-Free School Zone) and thus faces a mandatory minimum sentence subject only to waiver pursuant to N.J.S.A. 2C:35-12. However, where a defendant would be subject pursuant to these Guidelines to a Special Offense Characteristic, Aggravating Factor, or Special Application and Enhancement Feature, the prosecutor should cite those case-specific circumstances as further bolstering the general presumption against PTI admission established by the Court in Caliquiri. In doing so, the prosecutor should frame the legal/factual arguments in terms of the PTI criteria that are set forth in N.J.S.A. 2C:43-12e and in R. 3:28.

For example, if the charged school zone offense involved the possession of firearms or the use or threatened use of other weapons (Special Offense Characteristic #1, or else the basis for Special Application and Enhancement Feature D), those facts and circumstances would be relevant in bolstering the presumption against PTI admission under a number of statutory PTI criteria, including but not limited to: the nature of the offense (criterion #1); the facts of the case (criterion #2); the needs and interests of society (criterion #7); the extent to which the defendant may present a substantial danger to others (criterion #9); the possible injurious consequences of the defendant’s behavior (criterion #10); whether the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution (criterion #14); and that

the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling the defendant into a supervisory treatment program (criteria #17).

It should be noted that the PTI Guidelines promulgated by the Supreme Court permit defendants to apply for PTI even though they were on parole or probation at the time of the offense, provided that the chief probation officer or district parole supervisor is consulted. See PTI Guideline 3(f) following R. 3:28.

The Brimage Guidelines establish in Section 11.5 a Special Enhancement and Application Feature where the present offense was committed while the defendant was under parole or probation supervision. Accordingly, and so as to reconcile the requirements of the Brimage Guidelines and the Rules of Court governing PTI applications, the prosecutor in these circumstances should argue, for example, that the fact that the present offense was committed while the defendant was under supervision indicates that there is a low probability that the causes of the defendant's criminal behavior can be controlled by proper treatment (statutory criterion #5); that the defendant would not be conducive to change through his or her participation in supervisory treatment (criterion #6); that the defendant's crime constitutes part of a continuing pattern of anti-social behavior (criterion #8); and that the defendant's record of criminal violations (criterion #9) militates against overcoming the presumption that his or her PTI application should be rejected.

It should be noted, finally, that prosecutors under the revised Brimage Guidelines are no longer required to advise the Director of the Division of Criminal Justice in writing of the specific bases for a prosecutor's decision to consent to the pretrial intervention application of any defendant charged with a violation of N.J.S.A. 2C: 35-7 or any second-degree crime under Chapter 35 of Title 2C. Instead, prosecutors are now only required to provide aggregate statistical notification on a quarterly basis to the Division of Criminal Justice, specifying the aggregate number of cases in the reporting period where defendants charged with these offenses have been admitted to the PTI program with the prosecutor's consent.

3.13 Drug Courts and Applications for Treatment in Lieu of Imprisonment Under N.J.S.A. 2C:35-14

Attorney General Directive 1998-1, § 12 expressly authorizes prosecutors to agree to a defendant's application to be sentenced to treatment in lieu of imprisonment pursuant to N.J.S.A. 2C:35-14, provided that the prosecutor is satisfied that all of the criteria and conditions specified in that statute have been met. That statutory provision is the legal cornerstone for New Jersey's Drug Court

Program, which is among the most important and promising initiatives designed ultimately to protect public safety by helping to break the vicious cycle of crime and addiction.

If a defendant charged with a Brimage-eligible offense has been found to be clinically ineligible for sentencing pursuant to N.J.S.A. 2C:35-14 by a TASC (Treatment Assessment Services to the Courts) evaluator or other person or entity assigned by the court to perform the diagnostic assessment required by N.J.S.A. 2C:35-14a(1) (i.e., a determination by the court-appointed assessor that the defendant is not a drug or alcohol dependent person, or that the defendant would not benefit from treatment services that are actually available), the prosecutor must interpose an objection pursuant to N.J.S.A. 2C:35-14, which objection may only be overruled by a court upon a finding of a gross and patent abuse of prosecutorial discretion, unless the prosecutor is satisfied that the court-appointed diagnostic assessor was unqualified to make the determination, or otherwise made a clear error in judgment.

When a defendant is found to be eligible for rehabilitative treatment pursuant to N.J.S.A. 2C:35-14 by satisfying all of the statutory criteria, the prosecutor may tender a “conditional” offer under these Guidelines, affording the defendant the option to choose either the Brimage offer or to be sentenced to rehabilitative treatment pursuant to N.J.S.A. 2C:35-14. Notwithstanding the foregoing, when a defendant is eligible for a standardized “open” plea offer pursuant to Section 6, a prosecutor shall not tender a conditional offer that would give the defendant the option to accept the “open” offer instead of offered treatment pursuant to N.J.S.A. 2C:35-14 unless the standardized “open” offer includes as a condition that the defendant will participate in any treatment program that may be ordered by the court. See Section 6.5.4 (encouraging prosecutors to empower sentencing courts to use the leverage of the criminal justice system to convince addicted offenders to accept the rigors of clinically appropriate treatment interventions).

If the prosecutor for any reason objects to a Brimage-eligible defendant being sentenced pursuant to N.J.S.A. 2C:35-14 and the court admits the defendant to special probation over the prosecutor’s objection, the prosecutor shall immediately notify the Director of the Division of Criminal Justice or his designee, and shall, unless the Director instructs otherwise, appeal the court’s decision and shall seek to stay the imposition of the sentence in order to permit the appeal. See N.J.S.A. 2C:35-14c. See also Attorney General Executive Directive 1998-1, Sections 12 and 13b.

3.14 Questions and Controversies

All questions by prosecutors concerning the interpretation and implementation of these Guidelines shall be addressed to the Director of the Division of Criminal Justice or his designee. The Director shall from time to time advise prosecutors concerning the resolution of issues that may arise in interpreting and implementing these Guidelines with a view toward ensuring their uniform application throughout the State. The Director shall, as appropriate, publish "Application Notes" interpreting these Guidelines and shall make these Application Notes available to judges and defense counsel by means of the Division of Criminal Justice website.

3.15 Reporting to Division of Criminal Justice

In order to permit the Division of Criminal Justice to monitor the implementation and impact of these Guidelines with a view toward ensuring statewide uniformity, each county prosecutor shall on not less than a quarterly basis transmit to the Division a copy of every Brimage Worksheet or Standardized Plea Form tendered within the applicable reporting period. This reporting obligation may be satisfied by delivering hard copies of these worksheets and plea forms, or by transmitting the information electronically by means of Brimage calculation software developed by the Division.

3.16 Periodic Review and Revisions

The Director of the Division of Criminal Justice shall request the County Prosecutors Association to maintain a standing committee to review the enforcement and implementation of these Guidelines and to recommend to the Attorney General on not less than an annual basis the need for revisions or refinements.

SECTION 4 GRADUATED PLEA POLICY AND TIMING OF THE PLEA**4.1 Purpose of Escalating Plea Policy**

These Guidelines firmly embrace the concept of a graduated or “escalating” plea policy, recognizing the need to provide practical incentives for guilty defendants to plead guilty at the earliest possible stage within the unfolding criminal justice process. These Guidelines continue the policy to account for the timing of the plea by providing for a longer sentence if, for example, the plea is taken after indictment. Providing practical incentives for defendants to plead guilty before indictment, or as soon as possible thereafter, is necessary to ensure the efficient administration of the criminal justice system and to provide swift as well as certain punishment in order to enhance the deterrent impact of New Jersey’s criminal drug laws. This system is based not only on New Jersey practice and experience, but also on § 3E1.1 of the Federal Sentencing Guidelines Manual, which awards a benefit to a defendant who “clearly demonstrates acceptance of responsibility” by “timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently.”

This graduated or escalating plea system is designed to promote rehabilitation of the defendant as well as to conserve judicial and prosecutorial resources. The New Jersey Supreme Court in State v. Shaw, 131 N.J. 1 (1993), recognized in this regard that early disposition is “an important law-enforcement objective, thus harnessing the most efficient use of prosecutor, defense, and judge time.” The Court added, “[n]ot only does early disposition maximize efficiency, it also furthers a second goal of the [Comprehensive Drug Reform] Act, rehabilitation.” 131 N.J. at 13.

4.2 Three-Tiered System

As reflected in the Tables of Authorized Plea Offers that are reproduced in Appendix II, these Guidelines establish a uniform, three-step graduated plea system where the range of authorized plea offers and presumptive plea offer in each cell reflects the timing of the plea as follows:

1. Pleas taken before indictment or initial pleas offered following an indictment in counties that do not have a pre-indictment program or where a non-fugitive defendant has not been afforded an opportunity to review and accept or reject an initial plea offer prior to being indicted. (This is referred to in the Tables as the “Pre-Indictment Offer”);

2. Pleas taken after indictment but within twenty (20) days of the issuance by the prosecutor of the initial post-indictment plea offer or at the next scheduled court event following the expiration of the twenty day period. (This is referred to in the Tables as the “Initial Post-Indictment Offer”); and

3. Pleas taken after the next scheduled court event occurring twenty (20) or more days following the issuance by the prosecutor of the initial post-indictment plea offer. (This is referred to in the Tables as the “Final Post-Indictment Offer”).

4.3 Required Waiver of Pretrial Motions (See also Section 4.8)

To achieve the rehabilitative and systemic benefits of the graduated plea system, any pre-indictment or initial post-indictment plea offer must include a condition that the defendant waive the right to file or further litigate any pretrial motions. This is consistent with current statewide practice in pre-indictment disposition programs, where defendants in exchange for a reduced sentence routinely agree to accept responsibility for their offenses and thereby waive the right, for example, to file or pursue a motion to suppress physical evidence.

This graduated plea system acknowledges that the gravamen of plea bargaining is that a defendant, motivated by self-interest, will knowingly and voluntarily waive constitutionally-based rights (including the right to trial by jury, the right to require the prosecution to prove its case beyond a reasonable doubt, the right to confront State witnesses, and the right to call favorable witnesses) in exchange for the opportunity to receive a reduced sentence. The State, in turn, will agree to the reduced sentence in exchange for the certainty of the early disposition and to conserve limited prosecutorial and judicial resources.

This pragmatic approach is firmly rooted in New Jersey criminal practice. Rule 3:9-3(g), for example, expressly authorizes a prosecutor to tender a plea offer that includes a provision that the defendant will not appeal. Although the defendant in those circumstances retains the right to appeal, should he or she choose to do so, thereby breaching the agreement, “the plea agreement may be annulled at the option of the prosecutor, in which event all charges shall be restored to the same status as immediately before the entry of the plea.” Compare R. 3:5-7(d), which affords a defendant an automatic right to appeal the denial of a motion to suppress evidence on Fourth Amendment grounds notwithstanding that the defendant pleaded guilty, but which presupposes that the trial court denied the motion to suppress after a hearing pursuant to R. 3:5-7(c). (The rule establishing the automatic right to appeal the denial of a Fourth Amendment suppression motion was intended to correct what has been described by one commentator as the “wasteful” practice under the predecessor rule, which

required a defendant “to stand trial for the sole purpose of preserving his right to an appellate attack upon the search.” Pressler, Current N.J. Court Rules, Comment R. 3:5-7(d). This rule is thus designed to promote efficiency by avoiding needless trials — a goal completely consistent with the objectives of a graduated plea system.)

In sum, under this graduated plea system, a defendant would retain the right to file and fully litigate pretrial motions, but is offered the opportunity to waive this right in consideration for the added benefits provided by a pre-indictment or initial post-indictment plea offer.

Moreover, the approach taken in these Guidelines is a logical adjunct to the plea cut-off rule, codified at R. 3:9-3g, which provides that in order to achieve a systemic benefit, at some point in the criminal proceedings, a trial court is generally prohibited from accepting a negotiated plea, so that the defendant must plead guilty to all open counts of the indictment and without a recommendation of a reduced sentence by the prosecutor. In effect, the plea cut-off rule constitutes the absolute final step in the graduated plea system, at which point the defendant must plead to the indictment without the benefit of a negotiated reduction in sentence.

4.4 Fugitive Status as Constituting a Waiver of the Right to a Pre-Indictment Offer

Notwithstanding any other provision of these Guidelines, if the defendant is a fugitive at the time that the prosecutor would ordinarily tender or make available a pre-indictment offer under the county’s pre-indictment disposition program, or if the defendant is a fugitive at the time that an indictment is returned, the prosecutor shall not be required by these Guidelines to tender or make available a pre-indictment plea offer, or the functional equivalent of a pre-indictment plea offer pursuant to Section 4.5. For the purposes of these Guidelines, a defendant is a “fugitive” if he or she has been arrested and released on bail or recognizance for any offense and is in violation of N.J.S.A. 2C:29-7, or otherwise has failed to appear at any court appearance where his or her presence was required, or where it appears that the defendant has left the State or gone into hiding to avoid pretrial supervision by a probation department imposed as a condition of bail or release on recognizance.

4.5 The Functional Equivalent of Pre-Indictment Offer

Some counties do not have in place formal pre-indictment case disposition programs that would allow defendants a reasonable opportunity to review and accept or reject a pre-indictment offer tendered pursuant to the graduated plea

policy established in these Guidelines. (Pre-indictment programs are cooperative ventures established by the courts with the concurrence and participation of the prosecutor and the Public Defender's office.) Consequently, in these jurisdictions, defendants charged with Brimage-eligible offenses might be denied a meaningful opportunity to enter an early guilty plea pursuant to the "pre-indictment" offer authorized pursuant to these Guidelines, even though many of these defendants might be willing to accept such an offer.

The underlying purpose of the graduated plea system established in these Guidelines is to encourage guilty defendants to enter guilty pleas as soon as possible after their arrest. In jurisdictions that do not have a formal pre-indictment program, the same systemic benefits could be achieved if the guilty pleas were to be entered prior to some event other than an indictment that reflects a roughly equivalent amount of elapsed time since the defendant's arrest.

Accordingly, and to ensure statewide uniformity as required by State v. Brimage, 153 N.J. 1 (1998), where there is no pre-indictment case disposition program, or in any case where the prosecutor for any reason other than the defendant's fugitive status does not tender a plea offer prior to the return of an indictment to a Brimage-eligible offense, the prosecutor will be required pursuant to these Guidelines to tender the applicable "pre-indictment" plea offer, notwithstanding that the defendant has already been indicted, provided that the defendant pleads guilty or indicates in writing a willingness to accept the prosecutor's plea offer within seventy-five (75) days of his or her arrest, or at the next scheduled court event following the expiration of the seventy-five day period. Any such plea offer (which is referred to throughout these Guidelines as the "functional equivalent" of a pre-indictment plea offer) shall automatically expire if it is not executed or accepted in writing within seventy-five (75) days of the arrest or at the next scheduled court event following expiration of the seventy-five day period and, thereafter, the appropriate plea offer shall be the applicable post-indictment plea offer determined in accordance with the provisions of these Guidelines.

It should be noted that this rule is designed to ensure that the first plea offer is tied to a scheduled court event, such as the arraignment/status conference, in order conserve judicial and prosecutorial resources. For the purpose of complying with these Guidelines, a defendant will not be deemed to have had a meaningful opportunity to consider and to accept or reject the initial plea offer unless (1) the defendant is represented by an attorney or has expressly waived the right to be represented by an attorney with the approval of the court (see R. 3:4-2a); (2) the defendant has had an opportunity to receive discovery material or, in cases before indictment, an opportunity to inspect discoverable materials in accordance with the provisions of R. 3:13-3; (3) the defendant had

been advised of the specific court event or date at which the first offer would expire; and (4) the defendant has had an opportunity to advise the prosecutor in writing, or orally at a court event, whether he or she is accepting the offer, or has had an opportunity to request the prosecutor in writing, or orally at a court event, to extend the deadline within which the defendant must announce his or her decision to accept or reject the initial offer.

In accordance with the provisions of Section 4.4, if the defendant is a fugitive at the time that an indictment is returned, the prosecutor is not required by these Guidelines to tender or make available a pre-indictment offer or the functional equivalent of a pre-indictment offer. A fugitive defendant will be deemed to have waived any expectation or right to receive a pre-indictment plea offer or its functional equivalent and, in such cases, the return of an indictment will automatically result in escalation to the applicable initial post-indictment plea offer.

The county prosecutor shall notify the Attorney General in writing where the county does not have a pre-indictment case disposition program and where the prosecutor will rely instead on the provisions of this Section to issue on a routine basis the functional equivalent of pre-indictment plea offers.

4.6 Compliance with Pre-Indictment Program Rules and Procedures

Notwithstanding any other provision of these Guidelines, if the county pre-indictment disposition program provides that a defense attorney must affirmatively request the prosecutor to tender a pre-indictment plea offer, the prosecutor shall not be required to tender a pre-indictment plea offer or the functional equivalent of a pre-indictment offer under these Guidelines unless the defense attorney has made such affirmative request in accordance with the rules and procedures for the county pre-indictment disposition program.

4.7 Anticipatory Plea Offers Contingent on Future Events

In order to conserve resources and avoid filing unnecessary forms with the court and the Division of Criminal Justice, a prosecutor may indicate on the Brimage Plea Negotiation Worksheet or Brimage Standardized Waiver Plea Form that when the current plea offer expires, it will automatically be replaced with another specific plea offer pursuant to the graduated plea system. For example, the pre-indictment plea offer may indicate that the offer is “twelve (12) months of parole ineligibility and expires upon return of an indictment, at which point the plea offer will be eighteen (18) months of parole ineligibility.”

This practice would obviate the need for the prosecutor to prepare and file a second or subsequent plea worksheet. Similarly, a prosecutor may choose on a single initial worksheet to announce in advance all three steps of the graduated plea system, alerting the defendant specifically as to when each offer will expire and what the next plea offer will be. This approach, besides conserving resources, may also help to convince guilty defendants that it is in their best interests to plead guilty before the plea offer is automatically increased in accordance with the graduated plea system of these Guidelines.

It should be noted, of course, that any such anticipatory plea offer is subject to change and does not in any way create an entitlement or right of the defendant to effectuate an anticipatory plea offer that has not yet ripened. If new information becomes available that would lead the prosecutor to tender a different offer than the one originally expected to be tendered, then a second or subsequent worksheet, accounting for the changed circumstances, must be prepared and provided to the defendant. See Section 3.7.

4.8 Triggering Event for Escalating to a Final Post-Indictment Plea Offer

The escalation to a final post-indictment plea offer can be triggered in either of two ways. Escalation may occur based on the passage of time where the defendant does not indicate a willingness to accept the initial post-indictment offer at the first scheduled court event that takes place following the expiration of at least twenty (20) days from the time that the prosecutor had tendered the initial post-indictment offer. (Example: On January 1, the prosecutor issues an initial post-indictment offer. The next scheduled court event is a status conference on January 25. The initial post-indictment offer would expire and be replaced by a final post-indictment offer at the conclusion of the January 25 conference unless the defendant indicated a willingness to accept the outstanding offer.) Note that the 20-day period is designed to afford the defendant a reasonable opportunity to consider the plea offer. If defense counsel indicates in writing or in open court that the defendant has decided to *reject* the initial post-indictment offer, that offer may be withdrawn and replaced with a final offer even if the 20-day period has not yet expired. In other words, the defendant, through counsel, may essentially waive the right to have at least twenty days to consider the initial post-indictment offer.

The second means by which a final post-indictment offer may be triggered is based not on the passage of time, but rather on the expenditure of prosecutorial and judicial resources. Specifically, escalation of a final plea offer may be triggered by the prosecutor's filing of a pretrial brief required by Court Rule or a scheduling order fixed by the court, or by the convening of an evidentiary hearing.

The expenditure of prosecutorial and judicial resources in litigating a pretrial motion to suppress evidence is comparable to the resources that would be expended at a trial on the merits of the drug distribution-type charge, since the pretrial hearing and any ensuing trial will often involve the same witnesses describing the same events and transactions. Moreover, a significant proportion of prosecutorial resources are expended before a pretrial hearing date (i.e., e.g., reviewing reports and interviewing police witnesses, researching legal issues, and preparing formal briefs in response to a defendant's pretrial motion).

Accordingly, prosecutors are required to tender a "*final* post-indictment offer" on the date when the State's brief is filed or required to be filed pursuant to R. 3:5-7(b) or pursuant to a scheduling order fixed by the court. This general rule is subject to relaxation pursuant to Section 4.10, provided that a pretrial hearing involving the testimony of witnesses has not been convened to decide a pretrial motion, such as a motion to suppress evidence under R. 3:5-7. In the event that any such evidentiary hearing has been convened, the prosecutor shall be required to prepare and tender a *final* post-indictment plea offer, and this rule shall not be subject to relaxation pursuant to Section 4.10.

Ordinarily, pretrial motions involving evidentiary hearings, including motions to suppress physical evidence, are convened only after an indictment has been returned. On rare occasions, courts have convened evidentiary hearings on pretrial motions to suppress prior to indictment. In the event that such a hearing is convened prior to indictment, the defendant shall be deemed to have waived the right pursuant to these Guidelines to a pre-indictment plea offer or its functional equivalent, or an initial post-indictment offer. In these circumstances, the initial offer tendered to the defendant must be calculated as a *final* post-indictment offer.

4.9 Authority to Modify "Final" Plea Offers

The use of the term "final" in these Guidelines with respect to the timing of a plea offer in the graduated plea system should not be construed to mean that the offer is fixed and immutable. Prosecutors are permitted and in some cases may be required to modify the "final" offer to account for changed circumstances.

See Section 3.7. For example, a final post-indictment plea offer may be reduced in accordance with these Guidelines where new circumstances make it appropriate to make a Downward Departure for Trial Proof Issues or to make a greater downward departure than previously calculated (e.g., a prosecution witness becomes uncooperative or unavailable). So too, the final offer may be withdrawn and replaced with a higher offer when new circumstances suggest, for example, that the defendant belongs in a higher Criminal History Category than previously believed, that a previously unaccounted-for Aggravating Factor or Special Application and Enhancement Feature applies, or where the strength of

the State's case and the likelihood of conviction has improved, requiring a reconsideration of a previously accounted-for trial proof downward departure (e.g., where a co-defendant pleads guilty and agrees to cooperate, or a guilty verdict is obtained in a related case involving the same witnesses, or a pre-trial motion to dismiss the case or suppress evidence is denied, etc.).

4.10 Relaxation of the Strictures of the Automatic Escalation Scheme and Authority to "Turn Back the Clock"

Except as may otherwise be expressly required by these Guidelines, the graduated, escalating plea policy scheme should be interpreted in a way to afford prosecutors with a residuum of discretion to account for unforeseen or changed circumstances with a view toward providing defendants with a reasonable opportunity to consider and accept a plea offer. Accordingly, a prosecutor is generally authorized to suspend the automatic escalation to the next plea offer in the graduated system when the tolling of the automatic escalation is necessary to afford the defendant a reasonable opportunity to accept or reject an outstanding plea offer.

In addition, prosecutors are authorized to "turn back" the plea offer (i.e., e.g., tender or re-instate a pre-indictment offer notwithstanding that a grand jury has returned an indictment) where the prosecutor determines that there has been a significant change in circumstances to warrant "turning back the clock" to a previously-tendered plea offer that would otherwise have expired. (Note that the authority to "turn back the clock" is separate and distinct from the prosecutor's authority at any time to make a Downward Departure for Trial Proof Issues to account for new developments in the case. See Section 12.) It is expected, however, that this authority to reissue an expired plea offer will be used sparingly, and in order to ensure statewide uniformity in the application of this form of prosecutorial discretion, the decision to reinstate an expired plea offer or to "turn back the clock" under the graduated plea system must be approved by a supervisor designated by the county prosecutor or the Director of the Division of Criminal Justice.

Notwithstanding the foregoing, as noted in Section 4.8, once a pretrial hearing involving the testimony of witnesses is convened to decide a pretrial motion (such as a motion to suppress evidence under R. 3:5-7), the prosecutor shall be required to prepare and tender a final post-indictment offer, subject only to the provisions of Section 3.10 (requiring a conditional plea involving multiple co-defendants to be "frozen" when a defendant indicates a willingness to accept the plea but is precluded from effectuating the plea because of a co-defendant's refusal to plead guilty). While a prosecutor in these circumstances retains the discretion to modify a "final" plea offer, see Section 4.9, any such plea offer must

be calculated and determined applying the applicable range of authorized dispositions in the appropriate Table for a final post-indictment offer.

In order to permit judicial review of the exercise of prosecutorial discretion and to further ensure statewide uniformity in accordance with the requirements of the Supreme Court's decision in State v. Brimage, 153 N.J. 1 (1998), the prosecutor's reasons for relaxing the general requirements of the graduated plea system or for "turning back the clock" shall be provided to the court and shall be subject to the approval of the court. Nothing herein shall be construed to require a prosecutor to provide general or specific reasons for making a Downward Departure for Trial Proof Issues pursuant to Section 12.

**SECTION 5 SUMMARY OF INSTRUCTIONS FOR DETERMINING AN
AUTHORIZED PLEA OFFER UNDER N.J.S.A. 2C:35-12**

To determine an authorized plea offer pursuant to N.J.S.A. 2C:35-12 and State v. Brimage, 153 N.J. 1 (1998), a prosecutor must follow the steps and procedures outlined below:

1. The prosecutor must first determine whether the defendant is eligible for a “standardized waiver” in the form of either a “flat offer” or an “open offer.” (See Section 6). If the defendant meets all of the eligibility criteria for an “open” standardized plea offer, the prosecutor is required to tender that offer, subject only to the provisions of Section 1.1 (general authority to refrain from tendering an offer that would compromise or jeopardize certain other investigations or prosecutions) and Section 3.10 (Conditional Pleas Involving Multiple Defendants). If the defendant does not meet all of the eligibility criteria for an “open” standardized plea offer, but does meet all of the criteria for a “flat” standardized plea offer, the prosecutor is required to tender such a “flat” offer, subject only to the provisions of Sections 1.1 and 3.10. If the prosecutor is not satisfied that the defendant meets all of the eligibility criteria for either an “open” or “flat” standardized plea offer, the prosecutor must calculate a “regular” plea offer in accordance with the provisions of these Guidelines.

2. The prosecutor must determine the appropriate Offense Description for the Brimage-eligible offense(s). (See Section 7.) This step requires the prosecutor to determine not only the appropriate charge and citation, but also whether the defendant, or a person acting in concert with the defendant, possessed or used weapons during the course of the offense, and also to determine the aggregate amount of all drugs involved in multiple transactions. (These circumstances are referred to as Special Offense Characteristics. See Section 7.) When the defendant has been charged with more than one Brimage-eligible offense, the prosecutor should calculate the appropriate authorized plea offer for each such charge involving a separate and distinct offense or transaction unless the prosecutor employs the aggregation of amounts feature established in N.J.S.A. 2C:35-5c, or unless the prosecutor intends to dismiss one or more Brimage-eligible offenses in exchange for the defendant pleading guilty to the most serious Brimage-eligible offense. When amounts involved in separate transactions are aggregated, those transactions should be considered as part of a single offense for the purposes of determining an authorized plea offer under these Guidelines.

3. The prosecutor must calculate the criminal history points for each of the defendant’s prior convictions or adjudications of delinquency, and must determine the appropriate Criminal History Category reflecting the defendant’s adult and juvenile criminal record. (See Section 8.)

4. Using the applicable Table of Authorized Plea Offers (see Appendix II), the prosecutor must identify the appropriate “cell” that accounts for the Offense Description (vertical axis) and applicable Criminal History Category (horizontal axis). Taking into account the timing of the plea, see Section 4, the prosecutor must then determine the “presumptive” authorized plea offer for the appropriate cell. This number appears in boldface at or near the midpoint of the range of authorized plea offers for the appropriate cell. Unless otherwise expressly noted, all numbers in the Tables of Authorized Plea Offers refer to months (or years in the case of Table #6) of parole ineligibility imposed as part of a state prison sentence.

5. The prosecutor, using the Brimage Worksheet, see Appendices IB and IC, must document whether each authorized Aggravating and Mitigating Factor applies to the defendant’s conduct, and must determine the appropriate point value for each such factor. Only one factor from each numbered category of related factors (e.g., “Community Impact,” “Organization,” “Defendant’s Role in Scheme,” etc.) may be counted. Where a defendant is subject to more than one factor within a given numbered category, the prosecutor must count the aggravating or mitigating factor within the category that has the highest point value. (See Section 10.)

If the sum of all aggravating and mitigating factors results in a positive point total of 3 or more, the prosecutor is required to tender a plea offer above the presumptive term determined pursuant to step #4. If the positive point total is 7 or more, the prosecutor must tender a plea offer fixed at the upper range of the appropriate cell.

If the sum of all aggravating and mitigating factors results in a negative point total of 3 or more, the prosecutor is required to extend a plea offer below the presumptive term. If the negative point total is 7 or more, the prosecutor must tender a plea offer at the bottom of the range in the appropriate cell.

6. The prosecutor must determine whether any Special Application and Enhancement Features(s) apply to the defendant’s conduct. See Section 11. (For example, in the event that the defendant’s conduct involved distribution of a controlled dangerous substance to a minor or to a pregnant female, the prosecutor must tender a plea offer fixed at twice that otherwise prescribed pursuant to the preceding steps in the calculation. If the defendant committed the present offense while on probation, the prosecutor must add six (6), or in some cases twelve (12), months of parole ineligibility to the plea offer. See Section 11.5. Special Application and Enhancement Features are cumulative and a prosecutor must account for all such features that apply to the offense or offender.

7. The prosecutor must determine whether there is a basis for a Downward Departure based upon a consideration of trial proof issues. (See Section 12). Depending on the extent of the reduction, the Downward Departure for Trial Proof Issues may have to be approved by a supervisor designated by the county prosecutor or by the Director of the Division of Criminal Justice in cases prosecuted by the Division.

8. The prosecutor must determine whether there is a basis for a Downward Departure based upon the defendant's substantial cooperation. (See Section 13). Any such Downward Departure for Substantial Cooperation must be approved by a supervisor designated by the county prosecutor or by the Director of the Division of Criminal Justice in cases prosecuted by the Division and must comply with the criteria established in Section 13.

9. The prosecutor must structure the plea offer so as to require the defendant to plead guilty to such count or counts as may be necessary to ensure that the sentence to be imposed by the court is consistent with the authorized plea offer determined pursuant to the preceding steps. See Section 3.2. This may require the defendant to plead guilty to multiple counts, and may require the prosecutor to file an application for an extended term pursuant to N.J.S.A. 2C:43-6f (Repeat Offenders) or 2C:44-3h (Street Gangs) and/or to file an application for enhanced punishment pursuant to N.J.S.A. 2C:35-8 (Distribution to a Minor or Pregnant Female). Note that while the prosecutor may determine the authorized plea offer for each separate charge that carries a mandatory term of imprisonment, the decision to impose consecutive or concurrent sentences is generally vested in the discretion of the court, rather than the prosecutor. See N.J.S.A. 2C:44-5. Compare Special Application and Enhancement Features B and D (see Sections 11.2 and 11.4).

10. The prosecutor must provide a copy of the completed Standardized Waiver Plea Form or regular Brimage Plea Negotiation Worksheet and attached schedules to the defendant's attorney and to the court, and shall also transmit a copy with the attached schedules on not less than a quarterly reporting basis to the Division of Criminal Justice for statistical analysis. The completed worksheet may serve as the written plea offer within the meaning of R. 3:9-1(b). Note that a draft or unapproved worksheet shall be deemed to be confidential attorney workproduct and shall not be disclosed. When a completed worksheet indicates that the prosecutor has made a Downward Departure for Substantial Cooperation, it should be treated as confidential for the safety of the defendant and to protect the integrity of any ongoing investigation, and care must be taken to ensure that this document is not included in a file that is accessible to members of the public or any person who might further disclose the existence of a cooperation agreement to others who might attempt to intimidate the defendant or retaliate against the

defendant or his or her family. It is strongly recommended that the copy provided to the court be treated in the same manner as a presentence investigation report. See State v. DeGeorge, 113 N.J. Super. 542, 544 (App. Div. 1971) (presentence reports should not be a matter of public record and should be filed with a notation that they are for the confidential use of the court). The worksheet reproduced in Appendix IC bears a “confidential” watermark and this form should be used whenever a Downward Departure for Substantial Cooperation is made. The Brimage software issued by the Division of Criminal Justice will automatically include a “confidential” watermark on the computer generated worksheet when this feature is used.

Finally, it should be noted that the worksheets and appended schedules are designed to facilitate the process of determining an authorized plea offer. The worksheets concisely summarize some, but not necessarily all, of the rules, procedures, criteria, conditions and definitions set forth in these Guidelines. The worksheets are provided for the convenience of prosecutors and do not in any way amend or supersede the provisions of these Guidelines. These Guidelines should be consulted to resolve any questions concerning how to complete a worksheet and determine an authorized plea offer.

SECTION 6 STANDARDIZED WAIVERS

6.1 General Description of Standardized Waivers

These Guidelines establish two **standardized waivers** of the otherwise statutorily prescribed mandatory term of imprisonment and parole ineligibility. These standardized waivers are reserved for certain less culpable persons convicted of distribution or possession with intent to distribute controlled substances within a drug-free zone in violation of N.J.S.A. 2C:35-7. The first such standardized plea offer involves a waiver only of the term of parole ineligibility, so that the defendant would still be required to serve a State Prison term. This type of waiver is referred to as a **“flat offer.”** The second type of standardized waiver, which is reserved for even less culpable school zone offenders, involves a complete and unrestricted waiver under N.J.S.A. 2C:35-12, so that the sentence imposed upon these defendants will be determined in the discretion of the court. This type of waiver is referred to as an **“open offer.”**

When a defendant is eligible for an open offer, the sentencing court is authorized but not required to impose a State Prison term, and can instead sentence the defendant to probation, in which event the court would be authorized but not required to impose a term of incarceration in county jail as a condition of probation. When an open offer is tendered, the prosecutor reserves the right to argue for a State Prison sentence or a specified term of incarceration in county jail, but does not control the sentencing decision, which is instead determined by the sentencing court applying the ordinary aggravating and mitigating factors outlined in the New Jersey Code of Criminal Justice.

When a defendant is eligible for either type of standardized waiver offer, the prosecutor need not calculate a “regular” Brimage offer or prepare a regular Brimage Plea Negotiation Worksheet. Instead, the prosecutor will use a new short form (with check off boxes), known as a Brimage Standardized Waiver Plea Form, see Appendix IA, to document that the defendant satisfies all of the eligibility criteria for the applicable standardized offer.

If the defendant is for any reason ineligible for a standardized waiver, the prosecutor need not prepare a Brimage Standardized Waiver Plea Form. If defense counsel requests in writing the reason(s) why the defendant is not eligible for a standardized waiver, the prosecutor may prepare a Brimage Standardized Waiver Plea Form indicating the reason(s) for the defendant’s ineligibility (represented by one or more “No” selections on the Form). Note that the facts or circumstances that made the defendant ineligible for a standardized waiver offer (e.g., the offense involved a second-degree amount of drugs; the defendant’s criminal history; the involvement of firearms, etc.) will in any event be documented

in a “regular” Brimage Plea Negotiation Worksheet that will be tendered to defense counsel.

6.2 Standardized Offers are Available Only Pre-indictment or the Functional Equivalence of Pre-indictment

In order to encourage defendants to accept responsibility and plead guilty before the expenditure of significant prosecutorial or judicial resources, both the flat standardized offer and the open standardized offer may only be tendered pre-indictment. However, in counties that do not have a pre-indictment disposition program, a standardized waiver must be made available to an otherwise eligible, non-fugitive defendant after indictment for a prescribed period of time so as to afford the defendant a reasonable opportunity to take advantage of the standardized waiver. Notwithstanding any other provision of these Guidelines, if the defendant at any time files a pre-trial motion that necessitates the filing of a brief by the prosecutor or that results in an evidentiary hearing, the standardized offer would automatically expire upon the filing by the prosecutor of the brief or the convening of the evidentiary hearing, and the prosecutor at that point would be required to calculate and tender a final post-indictment Brimage plea offer in accordance with the general requirements of the graduated plea system established in these Guidelines. See Section 4.8.

6.3 Ineligibility Based Upon Fugitive Status and Authority to Refrain from Tendering a Standardized Waiver

The prosecutor shall not tender a standardized offer to any defendant who is a fugitive. See also Section 4.4.

In addition, a prosecutor in the exercise of discretion may refrain from tendering a standardized offer to a defendant when there are multiple defendants who are alleged to be involved in a common drug distribution scheme, and in that event, the prosecutor may make the standardized offer contingent upon all other co-defendants agreeing to plead guilty. See Section 3.10. To ensure fairness, however, when any such conditional standardized offer is tendered and the defendant indicates in writing or in open court a willingness to accept the offer but is precluded from effectuating the plea agreement because of a co-defendant’s refusal to plead guilty, the standardized plea offer shall be deemed to be “frozen” and if the case against the remaining co-defendant(s) is disposed of by a guilty plea, the defendant who indicated a willingness to accept the standardized offer will be permitted to plead guilty pursuant to that standardized offer, notwithstanding that the defendant has since been indicted and would otherwise have been required to plead guilty to a post-indictment “regular” plea offer calculated pursuant to these Guidelines.

Finally, a prosecutor shall have the authority to refrain from tendering a standardized offer where to do so would compromise or jeopardize an investigation or prosecution as determined by the prosecutor in accordance with the provisions of Section 1.1.

6.4 Waiver of Parole Ineligibility (“Flat Offer”)

Subject to the provisions of Section 6.3, in all cases where the defendant is eligible for a standardized “flat offer,” the prosecutor shall agree to waive the statutorily prescribed term of parole ineligibility and must tender a plea offer of three years imprisonment, except that when the defendant is charged with a violation of N.J.S.A. 2C:35-7 involving less than one ounce of marijuana, the standardized “flat offer” will be a county jail term of 180 days imposed as a condition of probation. It should be noted that under regular parole laws, a defendant sentenced to a “flat” three-year State Prison term would ordinarily be eligible for parole in approximately nine months, and might be eligible for even earlier release pursuant to the Intensive Supervision Program (ISP).

6.4.1 Eligibility Criteria for a “Flat” Offer

A standardized flat offer shall be tendered only where the prosecutor is satisfied that *all* of the following criteria or conditions exist:

(1) The most serious Brimage-eligible offense charged is the school zone offense (N.J.S.A. 2C:35-7) involving a third-degree (or less) amount of drugs. If the present offense involves a second-degree amount of drugs as determined pursuant to N.J.S.A. 2C:35-5, including the aggregation provisions of that section, the defendant shall be ineligible for a standardized “flat” offer. However, the defendant shall remain eligible for a standardized flat offer notwithstanding that he or she has been charged with a second degree crime defined in N.J.S.A. 2C:35-7.1 (drug-free public park, building or housing facility zone), provided that that offense does not involve a second degree amount of drugs as determined pursuant to N.J.S.A. 2C:35-5 (See also Section 6.5.3);

(2) The defendant is not eligible for an extended term of imprisonment pursuant to N.J.S.A. 2C:43-6f by virtue of having previously been convicted of manufacturing, distribution or possession with intent to

distribute a controlled substance;

(3) The defendant has not previously been convicted of a first or second degree crime, a crime of any degree involving the use or possession of a firearm, or a third degree crime other than for a violation(s) of N.J.S.A. 2C:35-10 (simple possession, use or being under the influence of a controlled substance). (Consult Section 8.7 to determine the equivalent degree of a conviction under federal law or the laws of another State);

(4) The defendant has not previously been adjudicated delinquent for an offense that if committed by an adult would constitute a first or second degree crime, or a crime of any degree involving the use or possession of a firearm;

(5) The defendant at the time of the present offense was not subject to official supervision (i.e., e.g., parole, probation, ISP, etc.), and has not at any time violated a Drug Offender Restraining Order (D.O.R.O.) issued pursuant to N.J.S.A. 2C:35-5.4 et seq. (Note that a standardized flat offer would be available notwithstanding that the defendant at the time of the present offense was on bail pending the disposition of another charge, provided that the bail violation did not constitute a violation of a Drug Offender Restraining Order);

(6) The current offense was not committed while actually on school grounds;

(7) The defendant is not eligible for enhanced punishment pursuant to N.J.S.A. 2C:35-8 by virtue of distributing a controlled dangerous substance to a juvenile or to a pregnant female;

(8) The current offense was not committed while the defendant was knowingly involved in criminal street gang related activity as defined in Section 11.1. (The decision to disqualify a defendant for a standardized waiver based upon this eligibility criterion must be

approved by a supervisor designated by the county prosecutor, or by the Director of the Division of Criminal Justice in cases prosecuted by the Division (i.e., one or more assistant prosecutors or deputy or assistant attorneys general determined by the county prosecutor or Director to be knowledgeable about local street gang activities.) If information in the arrest report or other police report reasonably suggests that the defendant is involved in street gang related activity, a standardized waiver offer may not be tendered without first consulting with a designated supervisor); **and**

(9) The defendant:

(a) did not actually or jointly or constructively possess a firearm in the present case,

(b) has no pending indictable charge involving a weapon, and has no pending indictable charge involving any crime that is subject to the provisions of the No Early Release Act, N.J.S.A. 2C:43-2, **and**

(c) has no pending charge for a violation of N.J.S.A. 2C:29-2b (eluding while operating a motor vehicle).

6.5 Standardized Unrestricted Waiver of N.J.S.A. 2C:35-12 (“Open” Offer)

6.5.1 Eligibility Criteria for an “Open” Offer

Subject to the provisions of Section 6.3, a prosecutor shall be required to waive both the mandatory term of imprisonment and term of parole ineligibility and thereby authorize the defendant to be sentenced in the unrestricted discretion of the court in all cases where the defendant meets all of the eligibility criteria set forth in Section 6.4.1 for a standardized waiver of parole ineligibility (“flat” offer) and the prosecutor is satisfied that all of the following *additional* mitigating circumstances exist:

(1) The defendant's conduct did not involve distribution of a controlled substance to a law enforcement officer (i.e., an "undercover buy"), or distribution to an informant or cooperating witness acting under the direction or at the request of a law enforcement officer (i.e., a "controlled buy")³;

(2) The defendant at the time of the present offense was not on bail or released on personal recognizance while pending disposition of another charge constituting an indictable crime or disorderly persons offense;

(3) The defendant at the time of the present offense was less than 26 years of age, or the current offense involved an aggregate amount of controlled substances less than one-quarter of the amount needed to establish a second-degree crime pursuant to N.J.S.A. 2C:35-5 (e.g., less than one-eighth ounce (3.54 grams) of heroin,

³ This eligibility criterion may be based upon the defendant's actual conduct and not just the specific offense or transaction to which the defendant will plead guilty. See Section 3.1. This criterion is premised on a recognition that an undercover "sting" operation is an essential investigative tool that can help to deter drug distribution activities. These types of transactions by their nature pose direct and immediate risks to the safety of law enforcement officers and private citizens acting as law enforcement agents, and these risks should be accounted for in determining an appropriate plea offer.

This criterion should not be interpreted or applied in a manner that might require the prosecutor to disclose the otherwise undisclosed identity of a confidential informant to whom the defendant distributed a controlled substance. See N.J.R.E. 516. Cf. State v. Williams, 364 N.J. Super. 23 (App. Div. 2003)(whether disclosure of the identity of an informant will be required depends on a balancing of the public's interest in protecting the flow of information in aid of law enforcement with a defendant's right to effectively prepare his case; courts consider, among other things, whether the informant actively participated in the crime for which defendant is charged).

cocaine or methamphetamine);⁴

(4) The defendant has not been convicted on two or more separate occasions for a fourth-degree crime or a third-degree crime defined in N.J.S.A. 2C:35-10 (simple possession, use or being under the influence of a controlled substance). Any combination of prior adult convictions (e.g., one fourth-degree theft and one third-degree simple possession drug offense) would make the defendant ineligible for an “open” offer. Note that a defendant previously convicted on multiple occasions for fourth-degree crimes (other than an offense involving a firearm) and/or third-degree simple possession drug crimes would be eligible for a standardized “flat” offer, but would not be eligible for a standardized “open” offer)). (Consult Section 8.7 for determining the equivalent degree of a conviction under federal law or the laws of

⁴ The following chart may be used by prosecutors to quickly determine whether the amount of drugs involved satisfies this eligibility criterion:

Type of Drug	Amount Needed to Establish Second Degree Crime	Maximum Amount Allowed Under Eligibility Criterion (One-Quarter Amount Needed to Establish Second Degree)
Heroin	.5 oz.	0.125 oz. (3.54 g.)
Cocaine	.5 oz.	0.125 oz. (3.54 g.)
LSD	any amount under 100 mg.	25 mg.
PCP	any amount under 10 g.	2.5 grams
Methamphetamine	.5 oz.	0.125 oz. (3.54 g.)
Marijuana	5 lbs. or 10 plants	1.25 lbs. (567 g.) or 2 plants
Other Narcotic Drugs in Schedule I or II	1 oz.	0.25 oz. (7.08 g.)

another State); **and**

(5) The defendant at the time of arrest did not precipitate a police foot chase by fleeing or attempting to flee the scene.

6.5.2 Restoration of Judicial Sentencing Discretion

When a standardized “open” offer is tendered, the sentencing court is free in the exercise of its discretion to impose a State Prison sentence, or may instead impose a sentence of probation. N.J.S.A. 2C:43-2b(2) authorizes a court to impose a county jail term of up to 364 days as a condition of probation. This option is sometimes described as a “split sentence.” When a standardized “open” offer is tendered, the court would be authorized but not required pursuant to the plea agreement to impose a county jail term. The decision whether to impose a county jail term as a condition of probation, and if so, the length of any such county jail term, is left to the discretion of the sentencing judge, considering ordinary aggravating and mitigating factors set forth in the New Jersey Code of Criminal Justice.

When a prosecutor tenders a standardized “open” offer, the prosecutor shall be deemed to have reserved the right of allocution and remains free to argue for imposition of a State Prison term or for imposition of a particular county jail sentence with the understanding that when a standardized “open” offer is tendered, the prosecutor’s recommendation for a term of imprisonment or for a specified term in county jail as a condition of probation is not binding upon the sentencing court.

This form of unrestricted or complete waiver of prosecutorial authority under N.J.S.A. 2C:35-12 is authorized by the Official Commentary to N.J.S.A. 2C:35-12, which explains that:

. . . Although the State and the defendant under this section are free to stipulate a specific prison term, period of parole ineligibility or fine to be imposed, the plea agreement need not do so. Rather, a plea agreement could remain silent as to any or all such terms and conditions, in which event the court would retain its discretion, subject only to the requirements of this Act, to impose any sentence deemed appropriate.

While this type of waiver might conceivably result in various forms of disparity (whether in the form of disparity between counties, or disparity between

cases within a county), such variability would be attributed entirely to the discretionary decisions made by judges, rather than by prosecutors. This type of disparity would therefore not raise the separation of powers issues that were at the heart of the New Jersey Supreme Court's decision in Brimage, which construed the atypical sentencing scheme set forth in N.J.S.A. 2C:35-12 that had transferred a significant amount of sentencing authority and discretion from judges to prosecutors.

6.5.3 Pending Charge Under N.J.S.A. 2C:35-7.1

A defendant shall not be deemed to be ineligible for a standardized "open" plea offer on the grounds that the conduct constituting the school zone offense to which the defendant will plead guilty also constitutes a violation of N.J.S.A. 2C:35-7.1 (distribution or possession with intent to distribute while within 500 feet of a public park, public housing facility or public building). It should be noted that the crime defined in N.J.S.A. 2C:35-7.1 is not a Brimage-eligible offense, that is, one that carries a mandatory term of imprisonment and parole ineligibility subject to waiver pursuant to N.J.S.A. 2C:35-12. However, this offense is designated as a second-degree crime and is therefore subject to the presumption of imprisonment set forth in N.J.S.A. 2C:44-1d, so that a court upon conviction for this crime would generally be precluded from imposing a probationary sentence (including one where the defendant is incarcerated in county jail as a condition of probation) unless the court finds that imposition of a State Prison term would constitute a serious injustice which overrides the need to deter such conduct by others.

Consistent with the general provisions of Section 1.1, nothing in this Section or any other provision of these Guidelines shall be construed to require a prosecutor to refrain from charging a violation of N.J.S.A. 2C:35-7.1, or to require a prosecutor to dismiss or downgrade any such provable charge. Rather, the prosecutor retains the discretion to dismiss or to decline to dismiss any non-Brimage-eligible offense (including but not limited to a violation of N.J.S.A. 2C:35-7.1) in exchange for defendant agreeing to plead guilty pursuant to a standardized "open" offer.

6.5.4 Special Drug Diagnostic Assessment and Treatment Condition

When a prosecutor has an objectively reasonable basis for believing that a defendant who is otherwise eligible for a standardized "open" offer is drug or alcohol dependent and may be eligible for or in need of rehabilitative treatment pursuant to the provisions of N.J.S.A. 2C:35-14, the prosecutor shall notify the court of the basis for this belief, and the plea agreement in these circumstances

must provide, as a condition of the standardized “open” offer, that the defendant submit to a drug or alcohol diagnostic assessment unless the court in the exercise of its discretion determines that there is no basis for ordering the defendant to undergo such an assessment. In addition, the standardized “open” offer shall include the condition that in the event that the defendant is sentenced by the court to a probationary term, the defendant must agree to participate in any drug or alcohol treatment or counseling program deemed by the court to be appropriate, whether pursuant to N.J.S.A. 2C:35-14 or any other law, or the court’s inherent authority. The plea offer shall include an express condition that if the defendant should refuse to undergo a drug or alcohol diagnostic assessment ordered by the court, or if the defendant refuses to accept or participate in any drug or alcohol counseling program deemed to be appropriate by the court as a condition of probation, the standardized “open” offer shall automatically be nullified and withdrawn, and the prosecutor in these circumstances shall reserve and retain all rights and authority pursuant to N.J.S.A. 2C:35-12.

Furthermore, so as to preserve the viability and integrity of the Drug Court Program, in any case where the defendant is found to be clinically and legally eligible for the rehabilitative sentencing option set forth in N.J.S.A. 2C:35-14, the prosecutor shall be prohibited from tendering any form of “conditional” plea offer in which the defendant would be afforded the option to forego offered treatment under N.J.S.A. 2C:35-14 in favor of accepting a standardized “open” offer, unless the standardized offer includes an express condition that the defendant will participate in any treatment program that may be ordered by the court. See Section 3.13.

In determining whether there is an objective basis for the prosecutor to believe that a defendant is suffering from an untreated addiction, the prosecutor may consider all relevant circumstances, included but not limited to the following:

(a) Any prior drug possession arrests or convictions (including a defendant’s prior admission to pre-trial intervention, or conditional discharge pursuant to N.J.S.A. 2C:36A-1);

(b) Whether the defendant has previously received alcohol or other drug treatment, or has at any time been diagnosed or determined to be drug or alcohol dependent or in need of treatment;

(c) Whether the defendant appeared to be under the influence of a controlled substance or alcohol at the time of the offense, or has admitted to being a drug user;

and

(d) Whether the defendant has at any time in the past refused to participate in a diagnostic assessment pursuant to N.J.S.A. 2C:35-14.

The special drug diagnostic, assessment and treatment condition set forth in this Section of the Guidelines is designed to address the concern that the prospect of a probationary or county jail sentence may be insufficient to provide the sentencing court with the leverage necessary to convince an addicted defendant to overcome denial and accept the rigors of clinically-appropriate treatment, such as the treatment provided pursuant to N.J.S.A. 2C:35-14 (treatment in lieu of imprisonment). That statutory provision is the legal cornerstone of New Jersey's Drug Court Program, which is one of the most promising criminal justice initiatives in the State. It is imperative that the Drug Court Program not be undermined by provisions of these Guidelines that might otherwise reflexively require a prosecutor to offer drug or alcohol dependent offenders a deceptively attractive alternative to clinically-appropriate treatment in the form of a regular probationary sentence pursuant to a standardized "open" plea offer.

From a public policy perspective, it is inappropriate for a prosecutor to extend the false and cynical promise of "leniency" to drug dealers who are reasonably believed to be drug or alcohol dependent and who may have committed the present offense in order to raise revenues to support their drug habit, since this would allow these offenders to receive a brief county jail sentence or even a non-custodial sentence under circumstances where they are not likely to have an opportunity to receive the clinically-appropriate treatment that they need. These defendants in those circumstances would be almost certain to relapse and return to a life of crime. Such defendants would face greatly enhanced punishment upon their eventual if not inevitable re-arrest, while leaving more victims in their wake. Of special concern to law enforcement authorities, any such practice would eventually put police officers needlessly at risk of injury or death when officers are called upon to re-arrest these defendants.

The special drug diagnostic assessment and treatment condition to a standardized "open" plea offer set forth in this section is carefully designed to respect the separation of powers between the executive and judicial branches of government. In essence, this special condition, while initially required to be invoked by the prosecutor, would ultimately be contingent upon a case-specific *judicial* determination that the defendant should submit to a diagnostic assessment, or should participate in clinically-appropriate treatment. In other words, the defendant's eligibility to receive a standardized "open" offer on this

ground would ultimately be determined by the judge, not the prosecutor. The prosecutor's role would simply be to bring to the attention of the court any known objective facts warranting a reasonable belief that the defendant may be drug or alcohol dependent and in need of diagnostic treatment assessment and treatment services. This portion of the Guidelines is designed ultimately to empower the court to use *its* statutory and inherent authority to identify and leverage addicted offenders to participate in clinically-appropriate, court-supervised treatment and counseling programs.

SECTION 7 SELECTING THE APPROPRIATE OFFENSE DESCRIPTION

“Special Offense Characteristics” are used to determine the appropriate “row” in the matrix grid of authorized plea offers. In selecting the appropriate Table of Authorized Plea Offers and the applicable row (vertical axis) within the Table, the prosecutor shall not be limited to considering the complaints filed by police agencies, but shall consider the defendant’s actual conduct. See Section 3.1.

7.1 Offenses Involving Weapons (Special Offense Characteristic #1)**7.1.1 Election Between Special Offense Characteristic #1 and Special Application and Enhancement Feature D**

These Guidelines provide two distinct means by which a prosecutor may account for the use or possession of weapons during the course of the underlying Brimage-eligible offense or at the time of the defendant’s arrest. (In certain circumstances, *both* options may or must be used in order to fully account for defendant’s relevant conduct.) One option that may be available is to treat weapons involvement as a Special Offense Characteristic, which is then used to determine the appropriate row within the applicable Table of Authorized Plea Offers. (The practical effect of treating weapons involvement as a Special Offense Characteristic in most cases is to increase the term of parole ineligibility by six months.)

The second option that may be used, and that in some cases is required to be used, is to treat the weapons circumstance pursuant to Special Application and Enhancement Feature D under Section 11.4 by requiring the defendant to plead guilty to at least one applicable Brimage-eligible offense and also to plead guilty to the second-degree crime defined in N.J.S.A. 2C:39-4.1. That statute provides that the sentence imposed on the second-degree drug-related weapons offense must be served consecutively to the sentence imposed on any underlying drug distribution-type conviction. (When this option is used, the practical effect, taking into account ordinary parole laws, is to increase the time actually served by the defendant by approximately fourteen months, as compared to the automatic six-month increase resulting from the use of the Special Offense Characteristic #1.)

When a prosecutor is required or otherwise elects to account for weapons involvement as a Special Application and Enhancement Feature pursuant to Section 11.4, the prosecutor is prohibited from “double counting” the weapons circumstance by also using the Special Offense Characteristic based upon the same conduct, event or episode that was used to establish the basis for the Special Application and Enhancement Feature. In other words, if a prosecutor in

a school zone case uses Special Application and Enhancement Feature D to account for a specific weapons-related circumstance, the prosecutor may not use rows B, D, or F in Table 1 in determining the authorized plea offer to account for the same specific conduct. However, a prosecutor shall use *both* Special Offense Characteristic #1 and Special Application and Enhancement Feature D based upon separate and distinct conduct, episodes or events. Thus, for example, if a defendant during the commission of a drug distribution-type offense brandishes a firearm, and when arrested several days later is found to be in possession of illicit drugs and a firearm (which may be the same firearm that had been previously brandished), the prosecutor must use Special Application and Enhancement Feature D, and shall also use Special Offense Characteristic #1, since the two firearms incidents occurred at different times and thus involved different conduct. (Other examples of “separate and distinct” conduct are described in Section 11.4.)

As more fully explained in Section 11.4, a prosecutor is generally required by these Guidelines to use Special Application and Enhancement Feature D and must tender a plea offer that would require the defendant to plead guilty to an underlying Brimage-eligible offense and to the second-degree crime defined in N.J.S.A. 2C:39-4.1 whenever: (1) defendant’s conduct involved the actual or constructive possession of an *assault firearm* as defined in N.J.S.A. 2C:39-1(w) or a *machine gun* as defined in N.J.S.A. 2C:39-1(i); or (2) the defendant actually used or threatened the use of a firearm of any type (*i.e.*, *e.g.*, brandished, displayed or discharged a firearm) at any time during the course of committing a Brimage-eligible offense, or (3) a firearm of any type was found on the person or in the immediate control of the defendant at the time of the offense or arrest (*e.g.*, in the defendant’s clothing, in a container being carried by the defendant, or in the passenger cabin of the defendant’s vehicle).⁵

In all other firearms-related cases (*e.g.*, cases involving the constructive, non-immediate possession of a firearm other than an assault firearm or machine gun), the prosecutor is afforded the discretion to use either Special Application and Enhancement Feature D defined in Section 11.4 or Special Offense Characteristic #1 defined in this Section. It should be noted that Special Application and Enhancement Feature D is invoked only in cases involving firearms. N.J.S.A. 2C:39-4.1(b) also makes it a second-degree crime for a defendant during the course of committing a drug distribution-type offense to have in his or her possession “any weapon, *except a firearm*, with a purpose to use such weapon unlawfully against the person or property of another.” Where there

⁵ It should be noted that as a matter of policy, Special Application and Enhancement Feature D is not automatically triggered by all conduct that constitutes a violation of N.J.S.A. 2C:39-4.1a. See footnote 11, infra, in Section 11.4.

is a factual basis to prosecute a defendant for violation of N.J.S.A. 2C:39-4.1(b), the prosecutor may, in the exercise of discretion, require the defendant to plead guilty to both the nonfirearm weapons offense and the Brimage-eligible offense, in which event the court must sentence the defendant to consecutive terms. See Section 1.1 (explaining that these Guidelines generally do not limit the authority of prosecutors with respect to the prosecution of nonBrimage-eligible offenses). As noted in Section 7.1.2, where the prosecutor tenders a plea offer that requires the defendant to plead guilty to both a Brimage-eligible offense and a weapons offense defined in N.J.S.A. 2C:39-4.1(a) or (b), the prosecutor may not “double count” the weapons circumstance by using Special Offense Characteristic #1 for conduct involving the same specific conduct, event or episode that constitutes the factual basis for the conviction under N.J.S.A. 2C:39-4.1. See also Section 10.1.3 (explaining that Aggravating Factor #3a (threatened use of violence) should not be used in addition to Special Offense Characteristic #1 if the basis for applying that characteristic is the same specific conduct that constituted the use or threatened use of a weapon other than a firearm).

7.1.2 Criteria for Using Special Offense Characteristic #1

For the purposes of determining the applicability of the “Offenses Involving Weapons” Special Offense Characteristic, a Brimage-eligible offense will be deemed to involve weapons if the defendant, or another with whom the defendant was acting as an accomplice within the meaning of N.J.S.A. 2C:2-6, at the time of arrest or while in the course of committing, attempting to commit, or conspiring to commit the Brimage-eligible offense: (1) had in his or her possession any firearm other than an assault firearm or machine gun,⁶ or (2) used or threatened the immediate use of any weapon other than a firearm, or (3) had in his or her possession any weapon, other than a firearm, with the purpose to use such weapon unlawfully against the person or property of another at the time of arrest or while in the course of committing, attempting to commit or conspiring to commit a Brimage-eligible offense. For the purposes of this Special Offense Characteristic, possession of a firearm or other weapon may be actual, joint or constructive.

When the defendant is an accomplice of another who actually possessed a firearm, or used or threatened the immediate use of a weapon other than a firearm, or possessed any weapon other than a firearm with a purpose to use such weapon unlawfully against the person or property of another at the time of arrest or while in the course of committing, attempting to commit, or conspiring to commit a Brimage-eligible offense, the Brimage-eligible offense shall not be

⁶ If the firearm involved is an assault firearm or machine gun, the prosecutor must use Special Application and Enhancement Feature D pursuant to Section 11.4.

deemed to be one that involves weapons for purpose of this Special Offense Characteristic unless the prosecutor has a reasonable basis to believe that the defendant knew or had reason to know that his or her partner would possess a firearm or would use or threaten the immediate use of a weapon other than a firearm, or has a reasonable basis to believe that the defendant had the purpose to promote or facilitate an offense involving the possession of a firearm or the use or threat to immediately use a weapon other than a firearm.

As noted in Section 11.4, in order to avoid the inappropriate “double counting” of the weapons involvement circumstance, where a defendant pleads guilty to a Brimage-eligible offense pursuant to these Guidelines and also pleads guilty to a violation of an offense defined at N.J.S.A. 2C:39-4.1 involving the same specific conduct, event or episode as the drug distribution-type charge, the prosecutor shall not account for the Special Offense Characteristic of weapons involvement in determining the appropriate row to be used in calculating the authorized plea offer for the Brimage-eligible offense. When, in contrast, the prosecutor is authorized pursuant to Section 11.4 and agrees as part of a packaged disposition to dismiss (or to refrain from charging) a provable N.J.S.A. 2C:39-4.1 weapons charge, then the Special Offense Characteristic of weapons involvement must be accounted for in determining the authorized disposition of the Brimage-eligible offense.

Nothing herein shall be construed to authorize a prosecutor to dismiss all Brimage-eligible charges in exchange for the defendant’s agreement to plead guilty to a violation of N.J.S.A. 2C:39-4.1. Prosecutors are also reminded that if a defendant is convicted of both a drug distribution-type offense and a crime defined in N.J.S.A. 2C:39-4.1, the court must impose consecutive sentences. The prosecutor has no discretion under this statutory scheme to waive the mandatory consecutive sentencing requirement, and if the court for any reason fails to impose consecutive sentences, the prosecutor must notify the Director of the Division of Criminal Justice and appeal any such illegal sentence. In order to assure uniformity in responding to legal issues, if a defendant challenges the constitutionality of N.J.S.A. 2C:39-4.1 or the implementation of the provisions of this Section or Section 11.4 (defining Special Application and Enhancement Feature D), the prosecutor must immediately notify the Division of Criminal Justice pursuant to Section 13 of Attorney General Directive 1998-1.

7.2 Offenses Involving Amounts Above the Statutory Threshold (Special Offense Characteristic #2)

Table 1 (Drug-Free School Zone), Rows C and D (“other than less than 1 oz. of marijuana”) apply to the basic violation of N.J.S.A. 2C:35-7 involving any substance, other than marijuana in an amount less than one ounce, provided that

the amount of drugs involved would not constitute a second-degree crime under N.J.S.A. 2C:35-5. It is expected that these rows will be the most commonly used, and would apply to third-degree amounts of heroin, cocaine, methamphetamine, and marijuana. If the amount of drugs involved would constitute a second-degree crime (e.g., a quantity of .5 oz. or more but less than 5 oz. of heroin, cocaine, or methamphetamine, or 1 oz. or more of another narcotic drug in Schedule I or II), the prosecutor must use Row E or F.

In Tables 1 (Drug-Free School Zone) and 2 (Extended Term Under Lagares), the offense shall be deemed to involve a “second-degree amount” where the aggregate amount of all drugs involved exceeds the amount threshold defining a second-degree offense pursuant to N.J.S.A. 2C:35-5.

In Table 4 (Drug Production Facility), the offense shall be deemed to involve a “first-degree amount” where the aggregate amount of all drugs involved exceeds the amount threshold defining a first-degree offense pursuant to N.J.S.A. 2C:35-5. The phrase “not 1st degree amount” refers to any lesser amount of drugs.

In Tables 5 (First-Degree Distribution or Possession with Intent) and 6 (Leader of Narcotics Trafficking Network), the offense shall be deemed to involve a “substantial quantity” of controlled dangerous substances where the aggregate amount of all drugs involved is ten (10) or more times the amount necessary to establish a first-degree crime pursuant to the provisions of N.J.S.A. 2C:35-5.

The following chart may be used by prosecutors to quickly determine whether and to what extent these offense characteristics apply with respect to offenses under N.J.S.A. 2C:35-5 that are subject to a mandatory term of imprisonment and parole ineligibility:

Type of Drug	Amount Needed to Establish Second Degree	Amount Needed to Establish First Degree	Amount Needed to Establish “Substantial Quantity”
Heroin	.5 oz. (14.17 g.)	5 oz. (141.75 g.)	50 oz. (1.42 kg.)
Cocaine	.5 oz. (14.17 g.)	5 oz. (141.75 g.)	50 oz. (1.42 kg.)
LSD	any amount under 100 mg.	100 mg.	1 g.
PCP	any amount under 10 g.	10 g.	100 g.
Methamphetamine*	.5 oz. (14.17 g.)	5 oz. (141.75 g.)	50 oz. (1.42 kg.)

Type of Drug	Amount Needed to Establish Second Degree	Amount Needed to Establish First Degree	Amount Needed to Establish "Substantial Quantity"
Marijuana*	5 lbs. (2.27 kg.) or 10 plants	25 lbs. (11.34 kg.) or 50 plants	250 lbs. (113.4 kg.) or 500 plants

*See *Special Offense Characteristic #3 (Section 7.3)* for special rules for structuring plea offers in first-degree methamphetamine and marijuana cases.

In determining the aggregate amounts of drugs involved for purposes of these Guidelines, the prosecutor shall consider the quantity involved in all individual acts of manufacturing, distribution, dispensing, or possessing with intent to distribute, whether distribution or dispensing is to the same person or several persons, provided that each individual act of manufacturing, distribution, dispensing, or possessing with intent to distribute was committed within the applicable statute of limitations. It is not necessary for the prosecutor to establish that the separate acts or transactions were part of a common plan or scheme. See N.J.S.A. 2C:35-5c. Furthermore, any adulterants or dilutants shall be included in determining the weight of the drug. See State v. Williams, 310 N.J. Super. 92 (App. Div. 1998), certif. den. 156 N.J. 426 (1998); State v. Gosa, 263 N.J. Super. 527, 536 (App. Div. 1993), certif. den. 134 N.J. 477 (1993).

7.3 Offenses Involving First-Degree Amounts of Methamphetamine and Marijuana (Special Offense Characteristic #3)

By adoption of P.L. 1997, c. 186, the Legislature amended the original Comprehensive Drug Reform Act by establishing first-degree crimes for manufacturing, distributing, or possessing with intent to distribute large quantities of methamphetamine, see N.J.S.A. 2C:35-5b(8), and marijuana, see N.J.S.A. 2C:35-5b(10)(a). These first-degree crimes do not automatically carry a mandatory term of imprisonment and parole ineligibility subject to waiver under N.J.S.A. 2C:35-12, and thus are not Brimage-eligible offenses within the meaning of these Guidelines. However, applying the principle established in State v. Dillihay, 127 N.J. 42 (1992), if a defendant is convicted of both the third-degree offense under N.J.S.A. 2C:35-7 (Drug-Free School Zone) and a first-degree methamphetamine or marijuana crime under N.J.S.A. 2C:35-5 (i.e., the first degree methamphetamine or marijuana crime happened to occur in a school zone), the defendant would be subject to a mandatory term of parole ineligibility prescribed by the school zone offense, which must be applied to the range of sentence appropriate to a first-degree conviction. Accordingly, pursuant to Section 3.2 (Structuring Plea Agreements), where a defendant commits a violation of N.J.S.A. 2C:35-7 involving a first-degree quantity of methamphetamine or marijuana, the plea offer must provide that the defendant plead guilty to *both*

counts. If the school zone offense involves a first-degree amount of either methamphetamine or marijuana, a prosecutor must use Table 5, Rows A or B (depending on whether the weapons Special Offense Characteristic applies).

If the defendant is charged with a first-degree methamphetamine or marijuana offense and is eligible for an extended term under N.J.S.A. 2C:43-6f as a repeat offender, a prosecutor must use Columns IV or V of Table 5 and the appropriate Row of Table 5, reflecting whether the weapons Special Offense Characteristic applies and/or whether the offense involved a “substantial quantity” of methamphetamine or marijuana (*i.e.*, ten or more times the amount necessary to established the first-degree violation). See Section 7.2.

7.4 Age Differential in “Using a Juvenile” Cases (Special Offense Characteristic #4)

In Table 3 (Using a Juvenile in a Drug-Distribution Scheme), a prosecutor must use Row A if the defendant is less than three years older than the juvenile who the defendant used or employed in a drug-distribution scheme in violation of N.J.S.A. 2C:35-6. Note that this Special Offense Characteristic applies only if the offense did not involve weapons. If weapons were involved in the offense within the meaning of Special Offense Characteristic #1 or Special Application and Enhancement Factor D, then the age differential is irrelevant and the prosecutor must use either Row B or C, depending on whether the prosecutor elects (or is required) to use Special Offense Characteristic #1 (Row C) or Special Application and Enhancement Feature D (Row B).

**SECTION 8 DETERMINATION OF APPROPRIATE CRIMINAL HISTORY
CATEGORY**

8.1 General Description of Criminal History Categories

A defendant falls under the highest Criminal History Category for which he or she is eligible pursuant to the following table:

Criminal History Category	Criminal History Points or Criteria
I (Minor)	0 to 9
II (Significant)	10 to 19
III (Serious)	20 or more
IV (Extended Term)	Defendant is eligible for an extended term of imprisonment pursuant to <u>N.J.S.A. 2C:43-6f</u> by virtue of having previously been convicted of distributing or possessing with intent to distribute CDS, regardless of the degree of the prior drug distribution-type offense or the number of criminal history points.
V (Enhanced Extended Term)	<p>Defendant is eligible for an extended term of imprisonment pursuant to <u>N.J.S.A. 2C:43-6f</u> <i>and</i> has 10 or more criminal history points, not counting the least serious prior drug distribution-type offense used to establish the defendant's eligibility for an extended term pursuant to <u>N.J.S.A. 2C:43-6f</u>.</p> <p>Examples:</p> <p><i>The defendant has two separate prior convictions for violation of <u>N.J.S.A. 2C:35-5</u> imposed at different times — a 2nd-degree conviction, and a 3rd-degree conviction. The 3rd-degree prior conviction is used to establish eligibility for an extended term pursuant to <u>N.J.S.A. 2C:43-6f</u>. The 2nd-degree prior conviction is worth 12 criminal history points. Thus, this defendant would fall under Criminal History Category V (Enhanced Extended Term).</i></p> <p><i>The defendant has two separate prior convictions for violation of <u>N.J.S.A. 2C:35-5</u>, both graded as 3rd-degree crimes. One of these prior convictions is used to establish the defendant's eligibility for an extended term pursuant to <u>N.J.S.A. 2C:43-6f</u>. The remaining 3rd-degree prior conviction is worth 6 points. If the defendant has no other record of criminal convictions, he would fall under Criminal History Category IV (Extended Term).</i></p>

8.2 Criminal History Points

The applicable Criminal History Category (CHC) is determined by considering the defendant's record of prior adult convictions and juvenile adjudications of delinquency and by adding the criminal history points, which are to be awarded to each such prior conviction or adjudication as follows:

Degree	Adult Conviction (points)	Juvenile Adjudication (points)
First	20	10
Second	12	6
Third	6	3
Fourth	4	2
Disorderly Persons	2	1

When the defendant has been convicted of two or more separate drug distribution-type offenses, a prosecutor shall not award points for the least serious prior drug distribution-type offense, since that offense will be used to establish the defendant's eligibility for an extended term pursuant to N.J.S.A. 2C:43-6f.

Note that while sentencing courts are permitted to consider prior arrests that did not result in convictions, these Guidelines as a matter of policy and convenience make no provision to award criminal history points for arrests that did not result in a conviction or an adjudication of delinquency.

8.3 Effect of Remote Prior Convictions

For the purposes of calculating criminal history points, a prosecutor shall not award points based upon prior convictions or adjudications of delinquency that have been expunged; nor shall convictions or adjudications of delinquency be counted if ten or more years has passed since the sentence or disposition was imposed, or since the defendant was released from confinement, whichever is later, provided that the defendant was not subsequently convicted of an offense. If the defendant was at any time subsequently convicted of an offense, the points for an otherwise temporally remote conviction or adjudication of delinquency shall be counted.

It should be noted that the "remoteness" exclusion set forth in this Section applies only to the calculation of criminal history points, and not to a determination of whether a defendant is eligible for an extended term of imprisonment pursuant to N.J.S.A. 2C:43-6f. That statute unambiguously

provides in pertinent part that:

For the purpose of this subsection, a previous conviction exists where the actor has *at any time* been convicted under chapter 35 of this title or Title 24 of the Revised Statutes or under any similar statute of the United States, this State, or any other State for an offense that is substantially equivalent to N.J.S. 2C:35-3, N.J.S. 2C:35-4, N.J.S. 2C:35-5, N.J.S. 2C:35-6, or section 1 of P.L. 1987, c. 101(C. 2C:35-7). (Emphasis added.)

It is clear from the text of this statute that the Legislature did not create an exception for temporally remote prior convictions, even though the Legislature on other occasions has done so and has thus indicated its awareness of this issue. Cf., e.g., N.J.S.A. 2C:43-7.1 (the “three strikes” statute, which includes an express remoteness exemption). Accordingly, for purposes of determining whether a defendant falls under Criminal History Category IV or V, the date of the prior drug distribution-type conviction is irrelevant.

8.4 Extended Term of Imprisonment for Repeat Drug Offenders Charged with a Present Violation of N.J.S.A. 2C:35-7.1 (500 Foot Drug-Free Public Park/Housing Zone)

These Guidelines and Attorney General Directive 1998-1 make clear that a prosecutor must seek an extended term under N.J.S.A. 2C:43-6f in all cases where that statute applies unless there is a basis for waiver in accordance with these Guidelines. Technically, the second-degree crime defined in N.J.S.A. 2C:35-7.1 (public park/housing/building zone offense) is not one of the predicate crimes expressly listed in N.J.S.A. 2C:43-6f. (The mandatory extended term feature was part of the original Comprehensive Drug Reform Act and was adopted years before the public park/housing/building offense was enacted; this sentencing feature was never amended to incorporate the new 500 foot zone offense.) However, the basic drug distribution-type offense defined in N.J.S.A. 2C:35-5 is always a lesser-included offense of N.J.S.A. 2C:35-7.1; one cannot violate the public park/housing/building zone offense without also violating the basic offense of manufacturing, distribution, or possessing with intent to distribute a controlled substance in violation of N.J.S.A. 2C:35-5, which offense *is* expressly referenced in the extended term statute.⁷

⁷ When a defendant is charged with a violation of N.J.S.A. 2C:35-7.1 under circumstances where he or she is not subject to these Guidelines (*i.e.*, the defendant is not eligible for an extended term under N.J.S.A. 2C:43-6f and is not charged with any other Brimage-
(continued...)

Accordingly, when a defendant who has previously been convicted of a drug distribution-type offense is charged with a violation of N.J.S.A. 2C:35-7.1, the prosecutor must tender a plea offer that requires the defendant to plead guilty to a violation of N.J.S.A. 2C:35-5 or, where applicable, to a more serious offense expressly listed in N.J.S.A. 2C:43-6f (e.g., N.J.S.A. 2C:35-3, 2C:35-4 or 2C:35-6) so as to invoke the repeat offender extended term sentencing feature. Note that if the underlying 2C:35-5 offense is graded as a third-degree crime based on the type and amount of controlled substances involved, the prosecutor in calculating an appropriate plea offer must use Table 2, Rows C or D of these Guidelines. In other words, the extended term of imprisonment must be calculated in these circumstances as if the most serious present offense is a *third*-degree crime, notwithstanding that the defendant is also charged with a second-degree crime under N.J.S.A. 2C:35-7.1, since the latter offense technically is not a predicate for an extended term and because penal statutes are construed strictly. The prosecutor in these circumstances will usually be required to formally apply for an extended term under N.J.S.A. 2C:43-6f so as to permit imposition of the period of parole ineligibility prescribed by the applicable Table of Authorized Plea Offers. (See Section 3.2, explaining how plea offers must be “structured” to ensure that courts impose sentences in accordance with these Guidelines.)

It should be noted that a prosecutor is generally authorized but not required in these circumstances to dismiss the second-degree 2C:35-7.1 charge as part of a “package” deal. See Section 1.1 (generally authorizing dismissal of non-Brimage-eligible drug offenses when a defendant pleads guilty to the most serious Brimage-eligible offense). If the prosecutor chooses to tender a plea offer that requires the defendant to plead guilty to the 2C:35-7.1 offense and a drug-free school zone offense for conduct involving the same event or transaction, the prosecutor in determining the authorized disposition for the school zone offense may not count aggravating factor points under Aggravating Factor #1b. See Section 10.1.1.

8.5 Prior Sentences That Were Merged or Imposed on the Same Date

Prior convictions or adjudications of delinquency that were merged for

⁷(...continued)

eligible offense), the prosecutor in resolving the matter by a negotiated agreement is strongly encouraged to require the defendant to plead guilty to a violation of N.J.S.A. 2C:35-5 in addition to if not in lieu of pleading guilty to the 2C:35-7.1 offense. While the two convictions may be “merged for sentencing purposes,” the prosecutor should make certain that the court records the two convictions separately on the judgment of conviction so that if the defendant should re-offend in the future, the defendant’s criminal history will document a prior conviction for violation of N.J.S.A. 2C:35-5, thereby subjecting the defendant to an extended term under N.J.S.A. 2C:43-6f if the defendant is convicted of a new drug distribution-type crime.

sentencing purposes shall be treated as a single conviction/adjudication.

Prior convictions/adjudications that resulted in separate sentences imposed on the same date that were ordered to be served consecutively shall be treated as separate convictions/adjudications.

Prior convictions/adjudications that resulted in separate sentences imposed on the same date that were ordered to be served concurrently shall be treated as a single conviction/adjudication unless the offenses were separated by an intervening arrest. Where the offenses were separated by an intervening arrest (*i.e.*, the defendant was arrested for the first offense prior to committing the second offense), the convictions/adjudications shall be treated as separate convictions/adjudications notwithstanding that they were ordered to be served concurrently. In other words, when convictions/adjudications are separated by an intervening arrest (*i.e.*, the defendant was arrested for the earlier offense prior to committing the subsequent offense), the convictions should be treated as separate convictions, without regard to the date when sentences were imposed and notwithstanding that the subsequently-imposed sentence was ordered to be served concurrently with the previously-imposed sentence. See Federal Sentencing Guidelines Manual, Application Note 3 to § 4A1.2.

Notwithstanding the foregoing, if the prosecutor cannot determine from the information readily at hand (*i.e.*, the “rap” sheet) whether multiple sentences imposed on the same day were to be served concurrently or consecutively, or whether the offenses were separated by an intervening arrest, the prosecutor may proceed in determining the appropriate criminal history point totals and the applicable Criminal History Category as if the sentences imposed on the same day were to be served concurrently, and, in the absence of reliable information to the contrary, the prosecutor may treat such multiple convictions as a single conviction. In the event that information is subsequently obtained that shows, for example, that the prior offenses were to be served consecutively or were separated by an arrest, the prosecutor may recalculate the criminal history points if this new information would result in placing the defendant in a different Criminal History Category. See Section 3.7.

8.6 Prior Sentences Imposed on Different Dates

Prior convictions/adjudications that resulted in sentences that were imposed on different dates shall be treated as separate convictions/adjudications. However, if the subsequently-imposed sentence was ordered to be served concurrently with the previously-imposed sentence, it should be treated as a single conviction/adjudication unless the underlying offenses were separated by an arrest (*i.e.*, the defendant was arrested for the first offense prior to committing the second offense).

Where convictions/adjudications were imposed on different dates and the “rap” sheet does not indicate whether the subsequently-imposed sentence was ordered to be served concurrently or consecutively, the prosecutor should treat the convictions/adjudications as separate offenses for the purposes of calculating the criminal history points. If it is later determined that the sentences were actually ordered to be served concurrently, and that the offenses were not separated by an arrest, the prosecutor must recalculate the criminal history points where this would redound to the defendant’s benefit and result in placing the defendant in a lower Criminal History Category.

8.7 Extrajurisdictional Prior Convictions

Where a defendant’s prior conviction or adjudication of delinquency was under federal law or the law of another State, the prosecutor shall attempt to determine the congruent or equivalent degree of offense under New Jersey law for the purposes of assigning an appropriate criminal history point value, or for the purposes of determining the defendant’s eligibility for a standardized waiver plea offer under Section 6. If for any reason it is not possible or practicable to determine the equivalent New Jersey offense, the prosecutor shall treat the prior federal or out-of-state conviction or adjudication as if it were a fourth-degree crime, provided that a sentence of imprisonment in excess of six months was authorized under the law of the other jurisdiction, notwithstanding that the sentence imposed on the prior conviction or adjudication was suspended or a probationary sentence or lesser term of imprisonment was actually imposed. If the maximum authorized sentence of imprisonment under the law of the other jurisdiction was six months or less, the prior out-of-state conviction or adjudication shall be treated as a prior disorderly persons offense.

If the defendant was convicted or adjudicated delinquent for an offense that could be designated as one of several degrees (e.g., robbery, theft, drug distribution under N.J.S.A. 2C:35-5, etc.) and the prosecutor cannot reliably determine the degree of the prior conviction/adjudication from the information readily at hand (i.e., the “rap” sheet), the prosecutor may proceed as if the prior offense was of the lowest of the possible degrees. In the event that information is subsequently obtained that establishes that the prior conviction/adjudication was of a higher degree, the prosecutor may recalculate the criminal history points if this new information would result in placing the defendant in a different Criminal History Category. See Section 3.7.

SECTION 9 SCHEDULE OF AGGRAVATING AND MITIGATING FACTORS
 (See Section 10 for Explanations and Definitions)

9.1 Aggravating Factors

Aggravating Factor	Point Value
<p>1. <u>Community Impact</u></p> <p>a. One or more children were present in the premises where the drugs were stored, manufactured, or distributed (Do not use if Special Application and Enhancement Feature H applies for distributing to a juvenile, or if defendant is pleading guilty to <u>N.J.S.A. 2C:35-6</u>); or,</p> <p>b. The offense occurred in a drug-free park, public housing, or public building zone in violation of <u>N.J.S.A. 2C:35-7.1</u> (Do not use if the zone is based only on a library, playground or recreational facility owned by a school; do not use if defendant also pleads guilty to <u>N.J.S.A. 2C:35-7.1</u>); or,</p> <p>c. The offense occurred in a designated “Quality of Life” special enforcement zone.</p>	<p>+2</p> <p>+2</p> <p>+3</p>
<p>2. <u>Bail Violations</u></p> <p>The offense was committed while the defendant was released on bail or on his/her own recognizance for another offense, or the bail violation occurred after arrest in the present case. (Bail violations that constitute violations of a Drug Offender Restraining Order (D.O.R.O.) are to be accounted for by means of Special Application and Enhancement Feature #F and should not be double-counted under this aggravating factor.)</p>	<p>+3 or +4 if the offense was committed while the defendant was a fugitive or under warrant for bail jumping, or is based on a failure to appear in court in the present matter</p>
<p>3. <u>Risk of Injury to Officers or Others</u></p> <p>a. The offense involved the threatened use of violence not otherwise accounted for in Special Application and Enhancement Features C1, C2 or D; or,</p> <p>b. The defendant resisted arrest; or,</p> <p>c. The defendant at the time of arrest or an attempted arrest engaged in flight or committed the offense of eluding; or,</p> <p>d. The defendant attempted to destroy evidence or otherwise hinder an investigation in violation of <u>N.J.S.A. 2C:29-1</u> or 3.</p>	<p>+3 to +4</p> <p>+3 to +5</p> <p>+4 to +5</p> <p>+3</p>

Aggravating Factor	Point Value
<p>4. <u>Organization</u> (Do not use any of the factors in this Category if defendant is charged with being a leader of a narcotics trafficking network or is subject to Special Application and Enhancement Feature A (Street Gang Involvement)).</p> <p>a. The offense was committed as part of a sophisticated drug-distribution operation involving a hierarchical structure, or a division of responsibilities, or the use of a corporation or a legitimate business to conduct or conceal the conduct or to launder the proceeds; or,</p> <p>b. There is a substantial likelihood that the defendant is involved in organized criminal activity; or,</p> <p>c. The defendant served as a middle or upper-echelon participant in a drug-distribution scheme; or,</p> <p>d. The defendant directed or substantially influenced another person in committing the offense. (Do not use if defendant is charged with using or employing a juvenile in violation of <u>N.J.S.A. 2C:35-6</u>); or,</p> <p>e. The defendant contributed special skills to the criminal conduct.</p>	<p>+3 to +4</p> <p>+3 to +4</p> <p>+3 to +4</p> <p>+3</p> <p>+3</p>

Aggravating Factor	Point Value
<p>5. <u>Profiteering</u> (Do not use any of the factors in this Category if defendant is charged with being a leader of a narcotics trafficking network.)</p> <p>a. The criminal conduct provided a substantial source of income or livelihood for the defendant; or,</p> <p>b. The criminal conduct involved actual distribution of illicit drugs for money (<u>e.g.</u>, observed or recorded transactions, undercover sales or “controlled buys”); or,</p> <p>c. The defendant is subject to an Anti-Drug Profiteering Penalty pursuant to <u>N.J.S.A. 2C:35A-1 et seq.</u></p>	<p>+3 or +4 if the defendant’s <u>primary</u> occupation or source of income was drug distribution rather than legitimate employment.</p> <p>+2 or +3 if the offense involved the actual sale of a controlled substance to a sworn law enforcement officer acting in an undercover capacity or to an informant acting under the direction of law enforcement</p> <p>+4</p>

9.2 Mitigating Factors

Mitigating Factor	Point Value
<p>1. <u>Non-Pecuniary Distribution</u> The offense involved the distribution of controlled substances only to friends/relatives (other than minors) without remuneration or pecuniary gain.</p>	-3
<p>2. <u>Defendant's Role in Criminal Scheme</u> a. The defendant was only a minimal or minor participant in the criminal conduct (<u>e.g.</u>, was a courier or "mule," "off-loader," or "lookout"); or, b. The conduct of the defendant was substantially influenced by another person more mature than the defendant (must identify the more culpable co-defendant).</p>	<p>-3 if minimal participant -2 if minor participant</p> <p>-2</p>
<p>3. <u>Voluntary Renunciation</u> Defendant voluntarily terminated participation in the scheme before arrest or police intervention.</p>	-4
<p>4. <u>Drug Treatment</u> Defendant has enrolled and is participating in an approved drug treatment program. (Defendant must continue participating in program up to date of sentencing proceeding. Note: Drug dependency is <i>not</i> a mitigating circumstance and may be addressed only pursuant to this factor or pursuant to <u>N.J.S.A. 2C:35-14.</u>)</p>	<p>-2 if outpatient program -3 if residential program</p>
<p>5. <u>No Prior Court Involvement</u> Defendant has never been convicted of or adjudicated delinquent for an offense and has never been admitted to pretrial intervention or conditional discharge.</p>	-3
<p>6. <u>Youthful Offender</u> Defendant was less than 26 years of age at the time of the present offense and does not fall into Criminal History Categories IV or V, does not have a pending charge under <u>N.J.S.A. 2C:35-6</u> (using or employing a juvenile in a drug distribution scheme), and is not subject to Special Application and Enhancement Feature A (Street Gang Involvement).</p>	<p>-2 if the defendant at the time of the offense was less than 21 years of age; -1 if the defendant at the time of the offense was at least 21 years of age but less than 26 years of age</p>

**SECTION 10 DESCRIPTION AND COMMENTARY FOR AGGRAVATING
AND MITIGATING FACTORS**

Plea offers, and especially those tendered before indictment, are typically based upon the information contained in the initial police report and a “rap” sheet. These Guidelines are not intended in any way to impede the orderly disposition of cases or to require prosecutors to conduct supplemental investigations to obtain information that is not readily available in the case file. Rather, prosecutors are expressly permitted to tender plea offers based upon a good faith assessment of the facts and circumstances then known to the prosecutor. Prosecutors are permitted to indicate on the worksheet that there are insufficient facts available to determine the applicability of a given fact or circumstance, in which event that fact or circumstance would not be used in the determination of the appropriate plea offer.

As noted in Section 5, ¶5, in determining the total number of aggravating and mitigating points, a prosecutor may only count the points from one Aggravating Factor within each numbered category of related factors (*e.g.*, “Risk of Injury to Officers or Others,” “Organization,” etc.). This is necessary to avoid the inappropriate “double counting” of aggravating or mitigating circumstances, since the specific factors defined in a single Aggravating or Mitigating Factor Category are, by definition, closely related and will often overlap.

When more than one specific factor within a given numbered category applies, the prosecutor shall count the points for the specific aggravating or mitigating factor within the category that has the highest point value. For example, if the defendant will be pleading guilty to a Brimage-eligible school zone offense for conduct that occurred within 500 feet of a public park and also within a designated “Quality of Life” Special Enforcement Zone, the defendant’s conduct would be subject to both Aggravating Factors 1b and 1c in the “Community Impact” Aggravating Factor Category. The prosecutor in these circumstances would not be permitted to combine the point values for these two applicable aggravating factors, but rather would be required to add +3 points to the grand total based on the point value assigned to Aggravating Factor 1c (which is greater than the +2 point value assigned to Aggravating Factor 1b).

A prosecutor may nonetheless consider multiple factors within a single numbered category when the prosecutor is authorized to assign a point value within a given range, rather than a fixed, predetermined point value. For example, if the defendant attempted to destroy evidence at the time of arrest (Aggravating Factor 3d, which is worth +3 points) and also physically resisted the arrest (Aggravating Factor 3b, worth +3 to +5 points), the prosecutor would not be permitted to add point values for these two related aggravating factors together, but *would* be permitted to consider the lower-valued aggravating factor (the

defendant attempted to destroy evidence) in deciding whether to award +3, +4 or +5 points for the higher-valued Aggravating Factor 3b (Resisting Arrest). The prosecutor in these circumstances, in other words, could in the exercise of discretion award +5 points under this Aggravating Factor Category even though the nature of the defendant's resistance to arrest, considered in isolation from the defendant's attempt to destroy evidence, might not otherwise have justified awarding points at the upper end of the range authorized for Aggravating Factor 3b.

10.1 Aggravating Factors

10.1.1 Community Impact (Aggravating Factor Category #1)

This category of Aggravating Factors addresses offense conduct that poses a special risk of harm to law-abiding residents of households, neighborhoods, and communities that are adversely affected by drug-distribution activities and the violence that is associated with and attracted to such activities.

Factor #1a applies if one or more children were present in the premises where the drugs were stored, manufactured, or distributed at any time during the course of the conduct constituting the offense. Compare N.J.S.A. 2C:35-7 (foreclosing the private residence affirmative defense if a child was present). The presence of children around drug-distribution activities poses special risks that deserve consideration in determining an appropriate plea offer. This Aggravating Factor would not apply, however, if the defendant is charged with and will plead guilty to a violation of N.J.S.A. 2C:35-6 (Hiring or Using a Juvenile in a Drug-Distribution Scheme), or where the defendant will be subject to Special Application and Enhancement Feature H, (implementing N.J.S.A. 2C:35-8, which mandates an enhanced term of imprisonment if the act of distribution was to a minor), since these two statutory provisions already account for the special dangers inherent in having children involved in drug-distribution activities.

Factor #1b applies where the offense occurred in a drug-free park, public housing, or public building zone in violation of N.J.S.A. 2C:35-7.1. By adoption of this law, which creates a second-degree crime, the Legislature emphasized the importance of protecting these areas from drug-distribution activities. This Aggravating Factor would not apply if the drug-free park, public housing, or public building zone exists solely by reason of the presence of a library, playground, or recreational facility that is owned by a school. This Aggravating Factor would apply, however, if the offense occurred at a location that falls within both a drug-free school zone and drug-free park zone, provided that school property was not used to establish the existence or boundaries of the drug-free zone created pursuant to N.J.S.A. 2C:35-7.1.

Prosecutors are not required to delay the pre-indictment disposition of a case by initiating a supplemental investigation to determine whether the offense occurred in a public park, public housing, or public building zone where the jurisdiction in which the offense was committed has not produced an approved map depicting the location and boundaries of any such zones. It is expected that a prosecutor's ability to determine the applicability of this aggravating factor would be greatly facilitated by the creation of such maps and their approval by local or county ordinance, and prosecutors are strongly encouraged to work with local and county engineers and governing bodies to develop and update these maps as appropriate.

Under these Guidelines, prosecutors are permitted but are not required to dismiss a count charging a violation of non-Brimage-eligible drug offenses, including a count charging a violation of the second-degree crime defined in N.J.S.A. 2C:35-7.1, in exchange for the defendant agreeing to plead guilty to a violation to the offense defined at N.J.S.A. 2C:35-7. See Sections 1.1 and 3.2. A prosecutor is not permitted, however, to dismiss the drug-free school zone charge even where that charge is graded only as a crime of the third degree as compared to the N.J.S.A. 2C:35-7.1 offense, which is automatically graded as a crime of the second-degree. It is understandable that a prosecutor might want the defendant's criminal record to reflect a second-degree conviction should it be necessary in the future to calculate criminal history points if the defendant were to recidivate. Accordingly, prosecutors may in the exercise of their discretion require the defendant to plead guilty to *both* offenses, thereby ensuring that the defendant's criminal record includes a second-degree conviction. (Note that the decision to impose consecutive as opposed to concurrent terms of imprisonment on these two convictions would be vested in the discretion of the court, and not the prosecutor.)

In order to avoid the inappropriate "double counting" of a single aggravating circumstance (*i.e.*, the fact that a school zone offense also occurred within 500 feet of a public park, public housing facility, museum or library), where the prosecutor tenders a plea offer that requires the defendant to plead guilty to both 2C:35-7 and 2C:35-7.1 charges involving the same event/transaction, the prosecutor in calculating the authorized plea offer under these Guidelines for the school violation may not count the two points that would otherwise be applicable under aggravating factor #1b. See also Section 8.4. Note, however, that if some other aggravating factor defined in the "Community Impact" Aggravating Factor Category applies (*i.e.*, *e.g.*, if children were present, or if the offense occurred in a designated "Quality of Life" Special Enforcement Zone), then those aggravating factors points must be calculated. Furthermore, if two or more counts that the defendant pleads guilty to involve separate events or transactions, then the aforesaid prohibition against "double counting" would not apply, and the prosecutor must award points under aggravating factor #1b.

Factor #1c applies where the offense occurred in a designated “Quality of Life” Special Enforcement Zone. The Attorney General has established a Model Quality of Life Program designed to focus law enforcement and prosecutorial resources to eradicate, displace, and deter all forms of crime, including drug trafficking, at specified locations that are especially vulnerable and that face an especially acute drug problem.

Too many street corners and neighborhoods, especially in the State’s urban centers, are plagued with open and notorious drug-distribution activities that adversely affect the lives and well-being of law-abiding residents, many of whom are virtual prisoners within their own homes by reason of the violence associated with and attracted to brazen drug dealers. Children, senior citizens, and other law-abiding residents in these drug-infested communities are often forced to run the gauntlet of drug dealers. These drug “hot spots” also attract out-of-town residents who come for the sole purpose to purchase illicit drugs. The myriad of criminal activities occurring in these open-air marketplaces significantly erode the quality of life, interfere with legitimate commerce and business activities, and contribute to the economic and social decline of these neighborhoods.

The Attorney General’s Model Quality of Life Program includes procedures to ensure that crimes committed in Special Enforcement Zones are subject to especially strict scrutiny, full prosecution, and stern punishment. Because offenses committed in these targeted areas cause proportionately more harm to law-abiding residents and legitimate businesses, it is appropriate that this conduct result in especially stern punishment. This approach is consistent with State law and policy that recognizes the vulnerability of victims as a legitimate factor to be considered at sentencing, and that soundly rejects the notion that drug trafficking is a “victimless” crime.

For Aggravating Factor 1c to apply, the county prosecutor must have designated the specific area constituting the Special Enforcement Zone. To accomplish the designation process for purposes of these Guidelines, a prosecutor must provide the Director of the Division of Criminal Justice with a letter that specifically describes the boundaries and locations of the Special Enforcement Zone. A map depicting the zone should be appended. The prosecutor’s letter should describe the nature of the drug distribution problem within each zone and should document that the designation by the county prosecutor was made in consultation with the local police department. The letter should also explain the steps that were taken to solicit the views and opinions of representatives of the communities and neighborhoods where these zones are located. These procedural safeguards are designed to ensure that this aggravating factor is not applied in an arbitrary or capricious manner; these procedural requirements are thus designed to comply with the Supreme Court’s requirement in Brimage that any consideration of local (as opposed to statewide) conditions be “explicitly detailed”

and “precisely and distinctly enumerated.” State v. Brimage, *supra*, 153 N.J. at 24 (1998).

The Attorney General’s Model Quality of Life Program is designed to focus law enforcement and prosecutorial resources and attention on specific neighborhoods and locations, sometimes referred to as “hot spots,” where drug distribution activity is open and notorious. Accordingly, prosecutors are not authorized pursuant to these Guidelines to designate an entire county or municipal jurisdiction. Nothing in these Guidelines, however, should be interpreted in any way to limit Special Enforcement Zones to open air locations, and certainly, these Guidelines should not be interpreted to mean that these zones can only be designated in urban or inner city locations. Rather, any and all unabated drug nuisances could be designated as Special Enforcement Zones, including buildings and adjacent areas where drug buyers and sellers congregate to engage in unlawful activity. By way of example, a bar, club, restaurant, or other establishment that caters to persons who routinely congregate to buy, sell, or use so-called “club” or “party” drugs such as “Ecstasy, GHB or GBL” are appropriate locations for designation as Special Enforcement Zones.

10.1.2 Bail Violations (Aggravating Factor Category #2)

This Aggravating Factor recognizes that it is a legitimate aggravating circumstance that the offense was committed while the defendant was released on bail or on his or her own recognizance for another offense, or where the defendant commits a bail violation following his or her arrest for the present Brimage-eligible offense. Such conduct mocks the authority of the court and deprecates public confidence in the criminal justice system, which is too often perceived as a “revolving door” that allows persons arrested for serious offenses to be released and to return almost immediately to their drug-selling haunts to go about their illicit business.

In order to avoid the inappropriate “double counting” of a single aggravating circumstance, this aggravating factor shall not be used where the defendant is subject to the D.O.R.O. violation Special Application and Enhancement Feature defined in Section 11.6 for the same conduct constituting the bail violation. When a defendant has at any time violated a Drug Offender Restraining Order issued by a court pursuant to N.J.S.A. 2C:35-5.4 et seq., the prosecutor must use Special Application and Enhancement Feature F. If the present Brimage-eligible offense was committed while the defendant was on bail, and defendant thereafter violates a Drug Offender Restraining Order issued following the defendant’s arrest in the present case, the prosecutor shall award points for Aggravating Factor #2 and shall also apply the D.O.R.O. Special Application and Enhancement Feature.

The point value for the bail violation aggravating factor is +3, except that the

point value is +4 if at any time during the course of committing the present offense the defendant was a fugitive or under warrant for a bail violation or failure to appear, or if the defendant failed to appear for a court proceeding in the present matter.

While most of the aggravating factors recognized in these Guidelines relate to the circumstances in which the present Brimage-eligible offense was committed, Aggravating Factor #2, like D.O.R.O. Special Application and Enhancement Feature F defined in Section 11.6, includes consideration of the defendant's conduct occurring *after* the present Brimage-eligible offense has been completed and following the defendant's arrest for that offense. (Compare also Mitigating Factor #4 defined in Section 10.2.4, which credits the defendant for beneficial post-arrest conduct in the form of pretrial alcohol or other drug treatment.) A consideration of post-arrest conduct is appropriate, since recent bail violations provide insight into the defendant's respect for the authority of the court and bear directly on the likelihood that the defendant will commit future offenses.

If the defendant commits a bail violation after the prosecutor has tendered a plea offer, the prosecutor in accordance with the provisions of Section 3.7 may in the exercise of reasoned discretion withdraw the offer and issue a new offer that accounts for the bail violation using Aggravating Factor #2. If the prosecutor elects in these circumstances not to withdraw an outstanding offer and the offer thereafter expires, the next plea offer in the graduated system must account for the bail violation.

If the defendant commits a bail violation after a guilty plea has been entered but before sentence is imposed (*e.g.*, the defendant fails to appear at the sentencing hearing), the prosecutor may move to vacate the plea and withdraw and replace the plea offer to account for the additional aggravating points under Aggravating Factor #2. *Cf. State v. Rolex*, 165 N.J. 447 (2001) (*per curiam*), affirming 329 N.J. Super. 220 (App. Div. 2000) (suggesting the need for statewide uniformity concerning how prosecutors treat a defendant's failure to appear at sentencing). Note that pursuant to this Section, a defendant's failure to appear is treated as an aggravating circumstance but is not treated as the basis for unilaterally rescinding the previously tendered plea offer altogether and requiring the court to sentence the defendant to the full term of imprisonment and parole ineligibility prescribed by statute for the Brimage-eligible offense. Note also that the decision to grant or deny a prosecutor's motion to vacate the plea is vested in the discretion of the court.

10.1.3 Risk of Injury to Officers and Others (Aggravating Factor Category #3)

Aggravating Factor #3a is meant to address circumstances involving the threatened use of violence by the defendant or by another person acting in concert with the defendant where such specific conduct is not otherwise subject to Special Application and Enhancement Features C1, C2 or D. The point value for this factor ranges from +3 to +4, which should reflect the seriousness and immediacy of the threatened use of violence. Note that this factor is in addition to, not in lieu of, Special Offense Characteristic #1 (possessing a firearm during the course of committing the drug distribution-type offense), since it is possible to possess a firearm without actually threatening to use it. However, this Aggravating Factor should not be used in addition to Special Offense Characteristic #1 if the basis for applying that characteristic is the same conduct, incident or episode involving the use or threatened use of a weapon other than a firearm that was used to establish the basis for the Special Offense Characteristic. In that event, the prosecutor must apply the Special Offense Characteristic rather than this Aggravating Factor. (Note that it is possible to threaten future violence without possessing or brandishing a weapon. Some drug traffickers or organizations repeatedly and consistently threaten to use violence to protect their turf on an ongoing basis. In those circumstances, the prosecutor must use both Special Offense Characteristic #1 and this Aggravating Factor.) Similarly, Aggravating Factor #3a may not be used where the specific conduct constituting the basis for applying this factor also constitutes the basis for applying Special Application and Enhancement Feature D, which takes precedence.

Aggravating Factor #3b applies when the defendant in the present case resisted arrest in violation of N.J.S.A. 2C:29-2. The point value for this aggravating factor ranges from +3 to +5, which should be determined by the prosecutor based upon the nature of the resistance and the threat of injury posed to the law enforcement officer(s) who made the arrest or attempted to make the arrest, and the threat of injury posed to any other persons.

Aggravating Factor #3c applies when the defendant at the time of the arrest or attempted arrest engaged in flight, or eluding in violation of N.J.S.A. 2C:29-2b. Note that this aggravating factor is not limited to circumstances involving a motor vehicle pursuit, but would also include any circumstance where the defendant's conduct precipitated a police foot chase. The point value for this aggravating factor ranges from +4 to +5, depending on the nature of the flight or eluding, and the threat of injury posed to the law enforcement officer(s) and to any other persons.

Aggravating Factor #3d applies where the defendant during the course of committing the offense or at the time of arrest or execution of a search attempted to destroy evidence or otherwise engaged in conduct constituting the offense of hindering apprehension, investigation or prosecution in violation of N.J.S.A. 2C:29-1 or 2C:29-3. The point value for this aggravating factor is +3.

10.1.4 Organization (Aggravating Factor Category #4)

This category of Aggravating Factors addresses the special dangers and harms associated with organized or sophisticated drug-distribution activities, which tend to be of a commercial, prolific, and ongoing nature. It is expected that at least one of the following factors in this category would ordinarily apply if the defendant or others with whom the defendant was acting in concert had been targeted for investigation by the Statewide Narcotics Task Force or a county narcotics task force, or the case involved the use of sophisticated investigative techniques (e.g., obtaining telephone billing records, electronic surveillance, confidential informants, etc.), although these factors could certainly also apply, as the facts and circumstances warrant, to cases resulting from patrol interdiction or street-level drug enforcement activities. This category of Aggravating Factors should not be used if the defendant is charged with and will plead guilty to the offense of being a leader of a narcotics trafficking network as defined at N.J.S.A. 2C:35-3, since that offense already accounts for the nature of the defendant's role and participation in a drug-distribution conspiracy. Similarly, this category of Aggravating Factors should not be used where the defendant is subject to Special Application and Enhancement Feature A (Street Gang Involvement), since that feature, which takes precedence over this Aggravating Factor Category, accounts for the defendant's participation, rank and role in organized criminal activity.

Aggravating Factor #4a applies when the offense was committed as part of a sophisticated drug-distribution operation that involves a hierarchical structure, or a division of responsibilities, or the use of a corporation or a legitimate business to conduct or conceal the criminal conduct or to launder the proceeds of such conduct. The point value for this Aggravating Factor ranges from +3 to +4, which should be determined by the prosecutor on the basis of the degree of sophistication, hierarchical structure, or exploitation of a corporate structure or legitimate business, as well as the scope and magnitude of the operation, the number of persons involved in various levels within the operation, and the length of time during which the operation existed.

Aggravating Factor #4b applies when there is a substantial likelihood that the defendant is involved in organized criminal activity. This factor is derived substantially verbatim from the aggravating circumstance defined in N.J.S.A. 2C:44-1a(5). As noted above, this factor shall not be used when the defendant is subject to Special Application and Enhancement Feature A set forth in Section 11.1 ("Street Gang Involvement"). When those circumstances exist, the prosecutor shall be required to apply the "Street Gang Involvement" Special Application and Enhancement Feature, and shall be prohibited from counting aggravating points under Factor #4b so as to avoid the inappropriate "double counting" of this aggravating circumstance. However, when the prosecutor has a reasonable basis to believe that the defendant was part of some drug distribution organization but

does not believe there is a sufficient factual basis to establish all of the elements of Special Application and Enhancement Feature A, which are derived from N.J.S.A. 2C:44-3h, the prosecutor shall award points under Aggravating Factor 4b and shall not apply the Special Application and Enhancement Feature.

Aggravating Factor #4b should not be invoked routinely merely because certain kinds of illicit drugs, such as heroin or cocaine, are necessarily imported into this country by means of sophisticated criminal enterprises. It is not intended that this aggravating factor apply to every profit-minded drug case. It is true that this aggravating factor is derived substantially verbatim from the aggravating circumstance defined in N.J.S.A. 2C:44-1a(5) and that a sentencing court is authorized to consider the organized crime aggravating circumstance set forth in N.J.S.A. 2C:44-1a(5) in virtually any commercially-motivated drug case, and especially those involving substances such as cocaine and heroin that are produced abroad. In State v. Toro, 227 N.J. Super. 215 (App. Div. 1998), cert. denied, 118 N.J. 215 (1989), for example, the court held:

The trial judge also properly identified the likelihood that defendant was involved in organized criminal activity as an aggravating factor. As noted by the trial judge, most cocaine is grown in Central America and the importation, processing, and distribution of the drug in this country involves an elaborate criminal network. The amount of cocaine found in defendant's possession provides ample support for the trial judge's finding that defendant was a participant in that organized distribution network. [229 N.J. Super. at 227.]

See also State v. Varona, 242 N.J. Super. 474, 491-92 (App. Div. 1990), cert. denied, 122 N.J. 386 (1990); State v. Velez, 229 N.J. Super. 305, 316 (App. Div. 1988), *modified and aff'd*, 119 N.J. 185 (1990) (*per curiam*) ("It was abundantly clear to the trial judge, as it is to us, that [defendant] had to be obtaining the cocaine from other sources and was not manufacturing it himself. This is sufficient to support the judge's reasoning [to consider the organization crime aggravating factor].")

Notwithstanding this decisional law, for purposes of applying these Guidelines, the organized crime aggravating factor should not be used automatically or routinely based merely upon the fact that the controlled dangerous substances involved were likely to have been grown, produced, imported, manufactured, or otherwise handled by others, or were originally produced in foreign countries so as to depend upon sophisticated methods of importation and distribution to regional and local markets. Nor should this aggravating factor be invoked merely because others were necessarily involved in

the distribution scheme, or because the defendant acted for profit. Rather, it is intended that Aggravating Factor #4b would only be used where the prosecutor is aware of facts and reasonable inferences that can be drawn therefrom that provide a good faith basis to believe that the defendant is directly and knowingly involved in organized criminal activities.

The degree of participation in organizational activities necessary to trigger Aggravating Factor #4b ordinarily would not be established merely by the fact that the defendant is a low-level employee of a criminal enterprise, or served solely as a kind of “independent contractor” (e.g., a drug courier or so-called “mule”) of a commercial drug distribution enterprise. Accordingly, before invoking Aggravating Factor #4b, the prosecutor should be aware of facts that reasonably suggest that the defendant was a direct participant or stakeholder in the illicit commercial enterprise. The fact that a defendant was paid a fixed fee for services (e.g., \$500 to transport a shipment of drugs from a source state to New Jersey), rather than receiving a percentage of profits or proceeds of illicit drug transactions, would ordinarily suggest that the defendant was merely a “mule” or courier and thus not subject to Aggravating Factor #4b. So too, these Guidelines explain in describing Mitigating Factor #2a that a “defendant’s lack of knowledge or understanding of the scope and structure of the criminal enterprise and the activities of others is highly relevant in determining the applicability of this [mitigating] factor.” Accordingly, a defendant’s lack of knowledge or understanding of the scope and structure of the criminal activity would also militate strongly against a finding that Aggravating Factor #4b applies.

As a general proposition, the organized crime aggravating factor should not be invoked in any case where the defendant is entitled to mitigating points as a “minor” or “minimal” participant under Mitigating Factor #2a. These Guidelines clearly establish that it is a mitigating circumstance that a defendant played only a “minor” or “minimal” role in the criminal scheme. The defendant would be entitled to mitigating points under Mitigating Factor #2a, for example, if his or her involvement in the commercial criminal enterprise was limited to transporting drugs. This mitigating factor would apply even to defendants who repeatedly provide this illicit transportation service for pecuniary gain. (It should be noted that if a “mule” earned a substantial source of livelihood from providing such illicit services, he or she would be entitled to two mitigating points under Mitigating Factor #2a, but would also be subject to Aggravating Factor #5a in the “Profiteering” Aggravating Factor Category.) The Guidelines expressly provide in this regard that, “defendants who serve as couriers, off-loaders, or lookouts on a repetitive or professional basis would fall into this category [i.e., would be classified as “minor” participants].” Section 10.2.2.

The same facts used to establish Mitigating Factor #2a (e.g., that the defendant is a professional courier employed by an ongoing or sophisticated

enterprise) should not be used to establish Aggravating Factor #4b, since this would have the practical effect of automatically negating the mitigating circumstance. This is not to suggest that a person serving as a courier or off-loader might not be subject to Aggravating Factor #4b by being a member, for example, of a criminal organization. The prosecutor in deciding whether to award points under any of the aggravating factors grouped under the “Organization” Aggravating Factor Category should consider the defendant’s actual involvement and participation in organizational activities, and not just the specific task that the defendant was engaged in at the time of his or her arrest. The Guidelines clearly require that all “relevant conduct” be considered in determining the defendant’s culpability. See Section 3.1. However, Aggravating Factor #4b should not be applied unless the prosecutor is aware of facts that reasonably suggest that the defendant was more than a low-level employee or was not just serving as the functional equivalent of an “independent contractor” of a commercial distribution scheme.

Aggravating Factor #4c applies when the defendant served as a middle or upper-echelon participant in a drug-distribution scheme. The point value for this Aggravating Factor ranges from +3 to +4, which should be determined by the prosecutor based upon the defendant’s level within the drug-distribution hierarchy, considering the extent of the defendant’s decision-making authority, the nature and participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the proceeds of the criminal activity, the degree of participation, planning, or organizing of the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Aggravating Factor #4d applies when the defendant directed or substantially influenced another person in committing the offense. This factor should not be used if the defendant is charged with and will plead guilty to the offense of hiring or using a juvenile in a drug-distribution scheme in violation of N.J.S.A. 2C:35-6. For this Aggravating Factor to apply, the prosecutor should be able to identify the person or persons who were directed or substantially influenced by the defendant. Note, moreover, that where another person charged with an offense would benefit from Mitigating Factor #2b by virtue of having been substantially influenced by another person more mature than that defendant, see Section 10.2.2, the person who substantially influenced that other defendant would be subject to Aggravating Factor 4d.

Aggravating Factor #4e applies where the defendant contributed special skills to the criminal conduct or operation. This Aggravating Factor is based upon § 3B1.3 of the Federal Sentencing Guidelines Manual, which applies to a defendant who used a special skill in a manner that significantly facilitated the commission or concealment of the offense. The term “special skill” refers to a skill

not possessed by members of the general public and usually requiring substantial education, training, or licensing. Examples would include pilots, lawyers, doctors, accountants, chemists, and demolition experts.

10.1.5 Profiteering (Aggravating Factor Category #5)

This category of Aggravating Factors addresses the commercial, profit-minded nature of some drug distribution-type offenses. No aggravating factor points shall be awarded for any factor in the “Profiteering” Aggravating Factor Category when the defendant pleads guilty to a violation of the offense of leader of narcotics trafficking network defined in N.J.S.A. 2C:35-3, since that offense includes a commercial element and, by its nature, involves profiteering.

Aggravating Factor #5a applies when the criminal conduct provided a substantial source of income or livelihood for the defendant, and is adapted from the provisions of the Anti-Drug Profiteering Act, N.J.S.A. 2C:35A-1 et seq., and from N.J.S.A. 2C:44-3b (professional criminal). See also Federal Sentencing Guidelines Manual, § 3b 1.2. The point value for this factor is +3, unless the defendant’s *primary* occupation or source of income was drug distribution rather than regular legitimate employment, or where the defendant’s legitimate employment was merely a front for his or her criminal conduct, in which event the point value for this aggravating factor is +4.

Aggravating Factor #5b applies when defendant’s conduct involved actual distribution of controlled dangerous substance to any person for money or other thing of value. New Jersey’s current drug laws generally do not distinguish between actual distribution and “possession with intent to distribute” for purposes of determining the degree of the crime committed. Nor does current law generally require that the transaction be for commercial gain. It is nonetheless appropriate for purposes of determining a proportionate plea offer to account for the fact that the offense involved actual distribution as part of commercial, profit-minded activity. This aggravating factor can be established by many different means. Circumstances where this factor would apply include, but are not limited to, illicit drug transactions that were observed or electronically recorded by police, transactions that can be proved by statements made by the defendant or by co-defendants or other witnesses, sales to undercover officers, and so-called “controlled buys” where drugs are sold to informants who are acting under the direct supervision and direction of a law enforcement officer.⁸

⁸ This factor should be based upon the defendant’s actual conduct and not just the specific offense or transaction to which the defendant will plead guilty. See Section 3.1. This factor should not be interpreted or applied in a manner that might require the prosecutor to disclose the otherwise undisclosed identity of a confidential informant to whom the defendant

The point value for this aggravating factor is +2, except that the point value is +3 if the offense involved the actual sale of a controlled substance to a sworn law enforcement officer acting in an undercover capacity, or involved the actual sale of a controlled substance to an informant who was acting under the supervision and direction of a law enforcement officer. See footnote 3, supra.

Aggravating Factor #5c applies when the defendant is subject to imposition of an Anti-Drug Profiteering penalty pursuant to N.J.S.A. 2C:35A-1 et seq. (When this aggravating factor applies, a prosecutor would be expected pursuant to Special Application and Enhancement Feature J to apply for an appropriate Anti-Drug Profiteering penalty in addition to counting points for Aggravating Factor #5c. See Section 11.10. The use of this aggravating factor in addition to pursuing the imposition of an Anti-Drug Profiteering penalty shall not be deemed to constitute inappropriate “double counting” of this circumstance. The point value for this aggravating factor is +4.

10.2 Mitigating Factors

10.2.1 Non-Pecuniary Distribution (Mitigating Factor #1)

Mitigating Factor #1 applies when the offense involved the distribution of controlled substances only to friends or relatives of the defendant, other than minors, without remuneration or any pecuniary gain to the defendant. This factor recognizes that New Jersey statutory law generally does not distinguish between a commercial drug sale and the non-commercial sharing of controlled substances, given the broad definition of the term “distribution” as used in the Comprehensive Drug Reform Act and State v. Roach, 222 N.J. Super. 122 (App. Div. 1987), certif. den. 110 N.J. 317 (1988). This mitigating factor shall not apply if any person to whom the defendant distributed drugs was a minor, if the defendant is charged with a first-degree crime, or where the defendant received any remuneration above the actual costs that he or she expended in procuring the substance involved. Note that this mitigating factor deals with a defendant who essentially is acting alone, whereas Mitigating Factor #2a addresses a lower-echelon, less culpable defendant who is operating within a commercial drug-distribution scheme involving other more culpable offenders.

10.2.2 Defendant’s Role in Criminal Scheme (Mitigating

⁸(...continued)
distributed a controlled substance. See N.J.R.E. 516. Cf. State v. Williams, 364 N.J. Super. 23 (App. Div. 2003) (whether disclosure of the identity of an informant will be required depends on a balancing of the public’s interest in protecting the flow of information in aid of law enforcement with a defendant’s right to effectively prepare his case; courts consider, among other things, whether the informant actively participated in the crime for which defendant is charged).

Factor Category #2)

Mitigating Factor #2a applies where the defendant was only a “minor” or “minimal” participant in the criminal conduct. This factor is patterned after § 3B1.2 in the Federal Sentencing Guidelines Manual, and is intended to apply only to defendants who are plainly among the least culpable of those involved in the conduct of a group. The defendant’s lack of knowledge or understanding of the scope and structure of the criminal enterprise and the activities of others is highly relevant in determining the applicability of this factor. A defendant who distributes drugs to ultimate consumers, or who used or threatened the use of violence, would not be classified as either a minimal or minor participant and is not entitled to points under this Mitigating Factor.

The point value for this Mitigating Factor ranges from -2 to -3, depending upon the nature of the defendant’s role and his or her contributions to the operations of the criminal scheme. Note that this factor presupposes that the defendant was acting in concert with others who are more culpable.

A mitigating point value of -3 is reserved for defendants who are only *minimal* participants in the drug-distribution scheme and who played no other role than to off-load part of a drug shipment, who served as a courier or “mule” for a single or isolated smuggling transaction, or who served as a “lookout” to warn other, more culpable drug distributors of the impending approach of law enforcement officers. The -3 point award is not appropriate if the defendant’s role as a courier or “off-loader” was on a repetitive or persistent basis, or where any payments received by the defendant for the criminal conduct constituted a primary or substantial source of the defendant’s livelihood. Nor are prosecutors authorized to award -3 points if the defendant while serving as a lookout provided notice of the approach of a law enforcement officer who was injured as a direct or indirect result of any such warning signal.

A mitigating award of -2 points would be appropriate for someone who is substantially less culpable than most other participants, but whose role could not be described a minimal. Defendants who serve as couriers, off-loaders, or lookouts on a repetitive or professional basis would fall into this category. (Note that if the defendant's performance of such services provides a substantial source of income or livelihood, he or she would also be subject to Aggravating Factor #5a.)

Mitigating Factor #2b applies when the conduct of the defendant was substantially influenced by another person more mature than the defendant. This factor, which is worth -2 points, is patterned after the mitigating circumstance defined in N.J.S.A. 2C:44-1b(13). For this factor to apply, the prosecutor must be aware of the specific identity of the more culpable co-defendant(s). (Note that those persons would be subject to Aggravating Factor #4d.) As with Mitigating Factor #2a, this factor is intended to apply to defendants who are plainly among the least culpable of those involved in the conduct of a group, and the defendant's lack of knowledge or understanding of the scope and structure of the criminal enterprise and the activities of others is highly relevant.

10.2.3 Voluntary Renunciation (Mitigating Factor #3)

Mitigating Factor #3 applies when the defendant voluntarily and completely terminated participation in the criminal conduct before arrest or police intervention. This factor would not apply where the defendant's renunciation was in anticipation of his or her immediate apprehension or in anticipation of the imminent discovery of drugs in his or her possession by a search to be conducted by law enforcement authorities. Rather, this factor, which is worth -4 points, would apply only in the case of a self-initiated, complete, and voluntary termination of the defendant's participation in the criminal conduct.

10.2.4 Drug Treatment (Mitigating Factor #4)

Mitigating Factor #4 addresses circumstances that suggest reduced culpability by virtue of the defendant's willingness to accept responsibility for the illegal conduct and to take affirmative steps that will make it less likely that the defendant would return to a life of crime. Specifically, Mitigating Factor #4 applies when the defendant has enrolled and is participating in an approved drug treatment program. This factor is designed to provide strong practical incentives for drug or alcohol dependent offenders to overcome denial and to accept responsibility by engaging in the treatment process prior to conviction and sentencing. This scheme is designed to provide both an opportunity and incentive for drug or alcohol dependent offenders to break the cycle of crime and addiction, thereby reducing the likelihood that these offenders would commit future offenses and endanger the public safety.

This factor would apply notwithstanding that the decision to participate in treatment was not self-initiated or truly voluntary, as where the defendant had been ordered to participate in treatment by a judge as a condition of bail or release on recognizance for the present offense, or is participating in a drug-treatment program pursuant to a court order, order of a probation department, or order of the Parole Board imposed upon an earlier conviction. (Note, however, that if the present offense was committed while the defendant was subject to supervisory treatment, he or she would be subject to Special Application and Enhancement Feature E, and where the present offense was committed while the defendant was on bail for a prior offense, he or she would be subject to Aggravating Factor #2.)

Note that under these Guidelines, and consistent with the rule established in prior Attorney General plea negotiation directives, drug or alcohol dependency is *not* a mitigating circumstance that reduces or minimizes the seriousness of the defendant's conduct or his or her culpability. Indeed, an untreated addiction is more properly viewed as an *aggravating* circumstance in that drug-dependent defendants are especially likely to commit future offenses. Compare N.J.S.A. 2C:44-1a(3) (considering the risk that the defendant will commit another offense) with N.J.S.A. 2C:44-1b(8) (considering that the defendant's conduct was the result of circumstances unlikely to recur). It is the fact of participation in treatment, not the underlying addiction, that constitutes the mitigating circumstance for purposes of these Guidelines. Accordingly, drug or alcohol dependency may only be considered under these Guidelines pursuant to this Mitigating Factor and pursuant to the provisions of N.J.S.A. 2C:35-14, which permits a prosecutor in certain carefully-prescribed circumstances to consent to a defendant's application to be sentenced to drug or alcohol treatment in lieu of otherwise statutorily mandated imprisonment. See Section 3.13.

Mitigating Factor #4 only applies when the defendant is a "drug or alcohol dependent person" within the meaning of N.J.S.A. 2C:35-2. It is expected that the defendant's counsel would bear responsibility for providing information to the prosecutor that establishes that the defendant is a drug or alcohol dependent person and that he or she has enrolled in and is participating in an approved drug-treatment program. See Section 3.9.

For the purposes of these Guidelines, a drug-treatment program is "approved" only if the treatment regimen has been ordered or approved by a court or probation department, or is provided by a drug-treatment facility that is licensed by the State to provide inpatient or outpatient drug or alcohol treatment services.

If the defendant is participating in an outpatient (non-residential) treatment program, the mitigating point value is -2. If the defendant is enrolled in a residential (inpatient) treatment program, the point value for this mitigating factor is -3.

In order to qualify for any mitigating points pursuant to this factor, the defendant must continue to participate in the course of treatment up to the date of the sentencing proceeding. If for any reason the defendant's participation in the treatment program is discontinued, whether because the defendant withdrew from the program or because he or she was expelled from the program by the treatment provider, the defendant will be deemed to have forfeited the mitigating points and, in that event, the prosecutor may recalculate the appropriate plea offer, excluding consideration of this mitigating factor, where such recalculation would result in a different authorized plea offer than the one previously tendered. See Section 3.7.

10.2.5 No Prior Court Involvement (Mitigating Factor #5)

Mitigating Factor #5 applies if the defendant has not previously been convicted of or adjudicated delinquent for an offense⁹ and has never been admitted to pretrial intervention under N.J.S.A. 2C:43-12 or conditional discharge under N.J.S.A. 2C:36A-1. The point value for this mitigating factor is -3.

Although the defendant's criminal record is already accounted for in the determination of the appropriate Criminal History Category, it is possible for a defendant to fall under Criminal History Category I (Minor) even though he or she has previously been convicted of one third-degree crime, or two fourth-degree crimes, or multiple disorderly persons offenses. This Mitigating Factor thus allows the prosecutor to distinguish those defendants who have a "minor" criminal record from those who have no record at all. Compare N.J.S.A. 2C:44-1b(7), which establishes a mitigating circumstance where the defendant has no history of prior delinquency or criminal activity, and N.J.S.A. 2C:44-1e, which establishes a presumption of non-imprisonment for a person convicted of third and fourth-degree crimes (excluding the drug-free school zone offense) who "has not previously been convicted of an offense."

⁹ As used throughout these Guidelines, the term "offense" includes crimes (indictable offenses) and disorderly persons offenses. For the purposes of these Guidelines, the term does not include petty disorderly persons offenses or motor vehicle offenses.

10.2.6 Youthful Offenders (Mitigating Factor #6)

Mitigating Factor #6 applies when the defendant at the time of the present offense was less than 26 years of age. This age threshold is derived from N.J.S.A. 2C:43-5 (Young Adult Offender). The point value for this mitigating factor is -2 if the defendant at the time of the offense was less than 21 years of age, and is -1 if the defendant at the time of the present offense was at least 21 years of age, but less than 26 years of age. This mitigating factor shall not apply, however, to a defendant, regardless of age, who falls into Criminal History Category IV or V, or who has a pending charge for violation of the offense defined in N.J.S.A. 2C:35-6 (using or employing a juvenile in a drug-distribution scheme), or who is subject to Special Application and Enhancement Feature A (“Street Gang Involvement”). See Section 11.1.

10.3 Calculation of Grand Total of Aggravating/Mitigating Points

The completed Brimage Worksheet should indicate for each Aggravating and Mitigating factor whether the factor applies, does not apply, or that there are insufficient facts presently available to determine whether the factor applies.

The prosecutor must add up all of the aggravating (positive) and mitigating (negative) points. If the grand point total ranges from -2 to +2 (*i.e.*, -2, -1, 0, +1 or +2), the prosecutor must tender the appropriate presumptive plea offer, subject to the provisions of Section 11 (Special Application and Enhancement Features), and except as provided in Section 12 (Downward Departure for Trial Proof Issues) or Section 13 (Downward Departure for Substantial Cooperation).

Subject to the provisions of Sections 11, 12 and 13 of these Guidelines, when the combined point total is +3 or more (*e.g.*, +3, +4, +5, etc.), the prosecutor must tender an offer within the applicable range that is greater than the presumptive offer. The offer may be at the upper end of the range. Subject to the provisions of Section 11, 12 and 13, if the combined point total is less than -2 (*e.g.*, -3, -4, -5, etc.), the prosecutor must tender an offer within the applicable range that is less than the presumptive offer. The offer may be at the lower end of the range.

If the absolute value of the grand point total is 7 or more (*e.g.*, -7, -8, -9, +7, +8, +9, etc.), the prosecutor must tender a plea offer fixed at the top (or bottom) of the appropriate range, except as provided in Sections 11, 12 or 13.

SECTION 11 SPECIAL APPLICATION AND ENHANCEMENT FEATURES¹⁰**11.1 Street Gang Involvement (Special Application and Enhancement Feature A)**

If the present offense was committed while the defendant was knowingly involved in criminal street gang related activity, the plea offer tendered by the prosecutor shall provide for a period of parole ineligibility ranging from one to nine (1-9) months greater than the term of parole ineligibility than that otherwise provided in the Table of Authorized Plea Offers, except that the additional term of parole ineligibility shall be between six to eighteen (6-18) months greater if the present Brimage-eligible offense is a first-degree crime.

For the purposes of this Special Application and Enhancement Feature, the phrase “knowingly involved in criminal street gang related activity” shall have the same meaning as that found in N.J.S.A. 2C:44-3h. Specifically, the crime shall be deemed to have been committed while the defendant was knowingly involved in criminal street gang related activity if the prosecutor is satisfied that the Brimage-eligible offense was committed for the benefit of, at the direction of, or in association with a criminal street gang. The phrase “criminal street gang” shall have the same meaning as that found in N.J.S.A. 2C:44-3h, to wit, three or more persons associated in fact. Individuals are associated in fact if (1) they have in common a group name or identifying sign, symbol, tattoo or other physical marking, style of dress or use of hand signs or other indicia of association or common leadership, and (2) individually or in combination with other members of a criminal street gang, while engaging in gang-related activity, have committed, conspired or attempted to commit within the preceding three years, two or more offenses of robbery, carjacking, aggravated assault, assault, aggravated sexual assault, arson, burglary, kidnapping, extortion, or a violation of chapter 11, section 3, 4, 5, 6 or 7 of chapter 35 or chapter 39 of Title 2C of the New Jersey Statutes regardless of whether the prior offenses have resulted in convictions.

A prosecutor need not apply for an extended term of imprisonment pursuant to the provisions of N.J.S.A. 2C:44-3h for a defendant to be subject to this Special Application and Enhancement Feature. (Note, however, that in accordance with the provisions of Section 3.2, a prosecutor may be required to formally apply for an extended term of imprisonment pursuant to N.J.S.A. 2C:44-3h where this is necessary in order to “structure” the plea offer so that the court could impose a sentence consistent with the term of parole ineligibility determined

¹⁰ Special Application and Enhancement Features are cumulative. Except as provided in Section 13.1 (Cooperation Agreements), a prosecutor must account for all such features that apply to the offense or offender.

pursuant to these Guidelines.)

When used, this Special Application and Enhancement Feature would replace and supersede any Aggravating Factor contained in Aggravating Factor Category #4 (Organization). In other words, “double counting” of this aggravating circumstance is prohibited. If the prosecutor has a reasonable basis to believe that the defendant was part of some drug distribution organization within the meaning of Aggravating Factors #4a (offense was part of a sophisticated hierarchical organization) or #4b (involvement in organized criminal activity), but does not believe there is a sufficient factual basis to establish all of the elements of this Special Application and Enhancement Feature, the prosecutor shall award points under the appropriate Aggravating Factor in Aggravating Factor Category #4 and shall not apply this Special Application and Enhancement Feature.

This Special Application and Enhancement Feature is designed to emphasize the importance of protecting neighborhoods from predatory street gangs and is designed to complement and support the Attorney General’s “Guns, Gangs and Drugs” law enforcement initiative. This feature is consistent with the notion of ensuring the sternest punishment for those offenders who, by virtue of their participation in organized criminal activities, pose the greatest danger to public safety.

The extent of the increase in the plea offer based upon the street gang involvement Special Application and Enhancement Feature shall be determined by the prosecutor (with appropriate supervisory approval) based on an assessment of the defendant’s role within the gang (rank and leadership status, and the nature of the tasks performed by the defendant) and the nature and impact of the gang’s overall activities.

Nothing in this Section shall preclude a Downward Departure for Trial Proof Issues in accordance with Section 12 or a Downward Departure for Substantial Cooperation in accordance with Section 13.

To help ensure the uniform implementation of this Special Application and Enhancement Feature, eligibility for this feature and the extent of the increase of the plea offer within the authorized range (i.e., one to nine months, or six to eighteen months in the case of a first-degree crime), must be approved by a supervisor designated by the county prosecutor or Director of the Division of Criminal Justice. The county prosecutor and Director are hereby authorized to designate one or more persons to review and approve the use of this Special Application and Enhancement Feature who should be selected based upon their knowledge about local street gang activities and the impact of such gang activities on public safety and quality of life within the applicable jurisdiction.

A prosecutor calculating an authorized plea offer under these Guidelines is encouraged and expected to consult with a designated supervisor or, as appropriate, with the county narcotics task force Commander, Division of Criminal Justice Major Narcotics Bureau or the New Jersey State Police Gang Unit to determine whether the defendant is a member of a recognized street gang before tendering the plea offer. When information in an arrest report or other police report reasonably suggests that the defendant is involved in street gang related activity, no plea offer shall be tendered without consulting with a designated supervisor to determine whether or not this Special Application and Enhancement Feature applies.

11.2 Booby Traps and Fortifications (Special Application and Enhancement Feature B)

If the defendant, acting as a principal or as an accomplice within the meaning of N.J.S.A. 2C:2-6, has committed the offense defined in N.J.S.A. 2C:35-4.1b (booby traps) or 2C:35-4.1c (fortified structures) (which are not Brimage-eligible offenses), the defendant shall be required to plead guilty to the most serious Brimage-eligible charge *and* to the appropriate offense(s) defined in N.J.S.A. 2C:35-4.1b or c, unless the prosecutor states on the record that there is insufficient evidence to warrant a conviction for the booby trap and/or fortification offense, or unless the prosecutor agrees to refrain from requiring the defendant to plead guilty to the 2C:35-4.1 charge as part of a cooperation agreement pursuant to Section 13. The plea agreement must provide that the sentence imposed upon a conviction for the booby trap and/or fortification offense will be served consecutively with the sentence imposed upon the predicate drug-distribution offense.

When the defendant is alleged to be an accomplice, this Special Application and Enhancement Feature shall not apply unless the prosecutor has a reasonable basis to believe that the defendant knew or had reason to know of the existence of the booby trap or fortification, or had the purpose to promote or facilitate the offense defined in N.J.S.A. 2C:35-4.1b (Booby Traps) or 2C:35-4.1c (Fortified Structures). A defendant shall not be deemed to have committed the fortification offense for the purposes of this Special Application and Enhancement Feature unless he or she maintained the fortification (e.g., steel doors, wooden planking, cross-bars, alarm systems, dogs, or lookouts) with the purpose to prevent, impede, delay, or provide warning of the entry into a structure by a law enforcement officer. The plea offer for a booby trap offense shall comply with all applicable requirements of the Attorney General Directive for Enforcing the No Early Release Act, N.J.S.A. 2C:43-7.2.

11.3 Violence

11.3.1 No Early Release Act Offense (Special Application and Enhancement Feature C1)

If the defendant, acting as a principal or as an accomplice within the meaning of N.J.S.A. 2C:2-6, has committed a crime that is subject to the No Early Release Act, N.J.S.A. 2C:43-7.2, while in the course of committing a Brimage-eligible offense, the defendant shall be required to plead guilty to the most serious drug distribution-type charge *and* to the No Early Release Act crime, unless the prosecutor states on the record that there is insufficient evidence to warrant a conviction for the No Early Release Act crime, or unless the prosecutor agrees to refrain from requiring the defendant to plead guilty to both the Brimage-eligible and No Early Release Act offense as part of a cooperation agreement pursuant to Section 13 and in accordance with the Attorney General's Directive for Enforcing the No Early Release Act and Section 1.1 of these Guidelines. Where the defendant is alleged to be an accomplice, this Special Application and Enhancement Feature shall not apply unless the prosecutor has a reasonable basis to believe that the defendant knew or had reason to know that his or her partner would commit the No Early Release Act crime, or that the defendant had the purpose to promote or facilitate the commission of such crime. The plea agreement shall comply with the Attorney General's Directive for Enforcing the No Early Release Act.

11.3.2 Causing Bodily Injury (Special Application and Enhancement Feature C2)

If in the course of committing the drug distribution-type offense the defendant or another with whom the defendant was acting in concert or as an accomplice within the meaning of N.J.S.A. 2C:2-6 caused bodily injury or significant bodily injury to any person and the circumstances are such that the offense is not subject to the provisions of the No Early Release Act, the authorized plea offer shall be six (6) months greater than that otherwise provided in the applicable Table of Authorized Plea Offers in the case of bodily injury, and twelve (12) months greater than that otherwise provided in the table in the case of significant bodily injury. Where the defendant is alleged to be an accomplice, this Special Application and Enhancement Feature shall not apply unless the prosecutor has a reasonable basis to believe that defendant knew or had reason to know that his or her partner would cause bodily injury or significant bodily injury to any person, or that the defendant had the purpose to promote or facilitate the commission of an offense resulting in bodily injury or significant bodily injury to any person.

Nothing in this Section shall preclude a Downward Departure for Trial Proof

Issues in accordance with Section 12 or a Downward Departure for Substantial Cooperation in accordance with Section 13.

11.4 Consecutive Sentence for Offenses Involving Certain Firearms (Special Application and Enhancement Feature D)

As noted in Section 7.1, these Guidelines afford two distinct options by which a prosecutor may account for the use or possession of firearms at the time of arrest or during the course of the underlying Brimage-eligible offense. (In some cases, *both* options may or must be used to fully account for defendant's relevant conduct.) In the following enumerated circumstances, unless the prosecutor determines that there is insufficient evidence to warrant a conviction for violation of N.J.S.A. 2C:39-4.1, and except as otherwise provided in Section 13 (Cooperation Agreement), a prosecutor shall be required to tender a plea offer that provides that the defendant will plead guilty to the most serious Brimage-eligible offense and also to an offense charging a violation of a second-degree crime defined in N.J.S.A. 2C:39-4.1(a), which would thereby require the court to impose consecutive sentences. This Special Application and Enhancement Feature shall apply whenever the defendant at the time of arrest or at any time during the course of committing the Brimage-eligible offense or an attempt or conspiracy to commit the Brimage-eligible offense:

- (1) was in possession, whether actual, joint or constructive, of an assault firearm as defined in N.J.S.A. 2C:39-1(w) or a machine gun as defined in N.J.S.A. 2C:39-1(i); or
- (2) brandished or openly displayed any firearm, pointed any type of firearm at another, discharged any type of firearm, or threatened to discharge any type of firearm; or
- (3) was in immediate personal control¹¹ of any type of firearm. For

¹¹ It should be noted that as a matter of policy, this Special Application and Enhancement Feature is not automatically triggered by all conduct that constitutes a violation of N.J.S.A. 2C:39-4.1a. In State v. Spivey, 179 N.J. 229 (2004), the New Jersey Supreme Court rejected the defendant's contention that N.J.S.A. 2C:39-4.1 requires proof that the defendant either be in actual possession of the weapon or else constructively possess it in close proximity to his person during the commission of the offense. It is therefore possible to commit a second-degree crime under N.J.S.A. 2C:39-4.1a under circumstances involving joint or constructive possession where a prosecutor would not be required pursuant to this Special Application and Enhancement Feature to tender a plea offer that provides that the defendant must plead guilty to both a drug distribution-type offense and the weapons offense. Rather, this mandatory enhancement feature must be applied only to selected 2C:39-4.1 violations that are deemed as a matter of policy pursuant to these Guidelines to pose an especially great risk to law enforcement officers and the public. As noted in this Section and in Section 7.1.1, a prosecutor nonetheless retains the discretion to use either the consecutive sentencing feature or Special Offense Characteristic # 1 in cases involving non-immediate (i.e., joint or constructive) possession (continued...)

the purposes of this criterion, the defendant shall be deemed to have been in immediate personal control of a firearm if the firearm was found on the defendant's person or was otherwise concealed in the defendant's clothing (i.e., e.g., in a holster, pocket or waistband), or was found in a container being carried by the defendant, or in the passenger cabin of the defendant's vehicle, or in the passenger cabin of another vehicle in which the defendant was traveling under circumstances where it reasonably appears that the defendant was aware of the existence of the weapon and had access to it (e.g., under the seat occupied by the defendant, or in a storage compartment adjacent and readily accessible to the defendant).

If more than one of the foregoing enumerated circumstances apply based upon separate and distinct conduct, events or episodes, the prosecutor shall, subject to the provisions of Section 13 (Cooperation Agreement), require the defendant to plead guilty to the most serious Brimage-eligible offense and also to an offense defined in N.J.S.A. 2C:39-4.1, and shall also apply Special Offense Characteristic #1 to the calculation of the authorized plea offer for the Brimage-eligible offense. (It should be noted that if defendant's relevant conduct involves different kinds of weapons (e.g., an assault firearm or machine gun and a nonassault semi-automatic firearm), the possession of these two types of weapons shall be deemed to constitute "separate and distinct conduct" for the purposes of these Guidelines, notwithstanding that the possession of the two distinct types of firearms occurred simultaneously. In other words, enumerated circumstance #1 is automatically deemed to be separate and distinct from enumerated circumstance #2.)

If Special Application and Enhancement Feature D is to be invoked based on the discovery of a firearm at the time of the defendant's arrest, the prosecutor before using this feature should be aware of facts constituting a reasonable basis to establish a "temporal and spacial link" between the possession of the firearm and the drugs that the defendant intended to distribute. See State v. Spivey, 179 N.J. 229 (2004). This link will invariably be established when the possession of drugs and a firearm is simultaneous, but may also be established if at the time of arrest the defendant is found to be in possession of a firearm but not drugs (many dealers carry firearms at all times, even when not carrying drugs), considering the ongoing nature of defendant's involvement in drug distribution

¹¹(...continued)
of a firearm other than an assault firearm or machine gun.

It should also be noted that this Special Application and Enhancement Feature applies only to the possession or use of firearms, and not other weapons. Compare N.J.S.A. 2C:39-5.1(b), and Section 7.1.

activity. See also Section 3.1 (authorizing a prosecutor to consider the defendant's actual conduct and not just the specific episode, event or transaction constituting the specific offense to which the defendant will plead guilty).

When a prosecutor employs this Special Application and Enhancement Feature, the prosecutor shall not "double count" the weapons-related circumstance by applying the Special Offense Characteristics described in Section 7.1 based on the same specific conduct, event or episode used to establish the basis for the Special Application and Enhancement Feature. As noted in Section 7.1, a prosecutor must use *both* features based upon separate and distinct conduct involving weapons. Note that "separate and distinct" conduct can occur during a single episode or event. Thus, for example, if a defendant is carrying a handgun on his or her person, and simultaneously is in constructive, nonimmediate possession of an assault firearm or machine gun, the prosecutor must use both Special Application and Enhancement Feature D and Special Offense Characteristic #1. In this example, the defendant's constructive possession of an assault firearm or machine gun should not be ignored or discounted in assessing his or her culpability, since the Legislature has established as a matter of policy that this kind of weapon poses special dangers separate and distinct from other types of firearms. In contrast, if defendant is in simultaneous possession of two or more firearms that are not machine guns or assault firearms, that circumstance would not be considered under these Guidelines to constitute separate and distinct conduct.

The same basic principle would apply if the defendant is carrying a firearm and at the same time possesses a knife with the purpose to actually use that knife against another. In these circumstances, the prosecutor must use both Special Application and Enhancement Feature D and Special Offense Characteristic #1, since otherwise, the possession of the nonfirearm weapon with the purpose to use it against the person or property of another (conduct more dangerous and than mere possession of a nonfirearm weapon) would not be accounted for.

Similarly, when Special Application and Enhancement Feature D is used based upon pointing a firearm at another or discharging or threatening to discharge a firearm, a prosecutor shall not award aggravating factor points under Aggravating Factor #3a (the offense involved the threatened use of violence not otherwise accounted for in Special Application and Enhancement Features C1, C2 or D) based on the same specific conduct, event or episode used to establish the Special Application and Enhancement Feature.

Nothing herein shall be deemed in any way to limit the authority of a prosecutor to tender a plea offer requiring the defendant to plead guilty to the Brimage-eligible offense and also to a violation of N.J.S.A. 2C:39-4.1 in circumstances where the prosecutor is not required by this Section to tender such an offer. Prosecutors in other words, retain the discretion to charge and pursue prosecution for a violation of N.J.S.A. 2C:39-4.1 (a non-Brimage-eligible offense) in cases involving the constructive, non-immediate possession of a firearm (other than an assault firearm or machine gun) during the course of committing a Brimage-eligible offense. See generally Section 1.1 (providing that these Guidelines do not limit the plea negotiation authority of prosecutors with respect to non-Brimage-eligible offenses). See also State v. Spivey, 179 N.J. 229 (2004) (Court reaffirmed the well-established principle that an individual can constructively possess an object even though he lacks physical or manual control provided he has knowledge of the object's presence and has the capacity to exercise either physical control or dominion over the object).

Nothing in this Section shall preclude a Downward Departure for Substantial Cooperation in accordance with Section 13, and a cooperation agreement may provide that the defendant need not plead guilty to an additional, non-Brimage-eligible offense under this Section.

11.5 Offenses Committed While Under Supervision (Special Application and Enhancement Feature E)

If the defendant committed the Brimage-eligible offense while under the supervision of the Department of Corrections, Juvenile Justice Commission, or a probation department (*i.e.*, *e.g.*, while on parole, ISP, JISP, probation, PTI, conditional discharge, or any other program of supervised release other than bail), the authorized plea offer shall be six (6) months greater than that otherwise provided in the applicable Table of Authorized Plea Offers, except that if the defendant at any time during the course of the offense was a fugitive or in violation of N.J.S.A. 2C:29-5a (Escape) or N.J.S.A. 2C:29-5b (Absconding From Parole), the authorized plea offer shall be twelve (12) months greater than that otherwise provided.

This Special Application and Enhancement Feature shall be applied notwithstanding that parole, probation or other form of supervised release has been revoked based upon the violation or the defendant has been charged or convicted of a new criminal offense based upon the violation, and the use of this Special Application and Enhancement Feature shall not be deemed to constitute the "double counting" of any such other remedy or charge resulting from the violation.

Nothing in this Section shall preclude a Downward Departure for Trial Proof

Issues in accordance with Section 12 or a Downward Departure for Substantial Cooperation in accordance with Section 13.

11.6 D.O.R.O. Violations (Special Application and Enhancement Feature F)

If the defendant at any time during the commission of the present Brimage-eligible offense, or while pending the disposition of such offense, has violated a Drug Offender Restraining Order (D.O.R.O.) issued pursuant to N.J.S.A. 2C:35-5.4 et seq., the plea offer tendered by the prosecutor shall provide for a period of parole ineligibility ranging from three to nine (3-9) months greater than that otherwise provided in the applicable Table of Authorized Plea Offers. The extent of the increase in the term of parole ineligibility within this range shall be determined by the prosecutor considering the nature of the violation. It should be noted that the D.O.R.O. violation need not have occurred during the course of the commission of the underlying Brimage-eligible offense, but rather may have occurred after completion of the present offense and after the defendant's arrest for that offense. When this Special Application and Enhancement Feature applies, the prosecutor shall not award aggravating factor points under Aggravating Factor #2 (bail violations) on the basis of the same conduct that constituted the violation of the Drug Offender Restraining Order (D.O.R.O.). See Section 10.1.2.

Nothing in this Section shall preclude a Downward Departure for Trial Proof Issues in accordance with Section 12 or a Downward Departure for Substantial Cooperation in accordance with Section 13.

11.7 Offenses Occurring on School Property (Special Application and Enhancement Feature G)

If the defendant committed a violation of N.J.S.A. 2C:35-7 while actually *on* school property, no plea offer shall be tendered or accepted that provides for less than three years of imprisonment during which the defendant shall be ineligible for parole, or one year of parole ineligibility in a case involving less than one ounce of marijuana. If the defendant falls under Criminal History Category IV (Extended Term) or V (Enhanced Extended Term), the authorized plea offer shall be twelve (12) months greater than that otherwise provided in the applicable Table of Authorized Plea Offers.

If the defendant committed a violation of N.J.S.A. 2C:35-6 (Using or Employing a Juvenile in a Drug Distribution Scheme), or a crime of the first degree under N.J.S.A. 2C:35-5 while actually on school property, the authorized plea offer shall be twelve (12) months greater than that otherwise provided in the applicable Table of Authorized Plea Offers in the case of a second-degree crime, or eighteen (18) months greater than that otherwise provided in the applicable Table

of Authorized Plea Offers in the case of a first-degree crime.

Nothing in this Section shall preclude the imposition of an additional enhancement pursuant to Special Application and Enhancement Feature H (Distribution to a Juvenile or Pregnant Female). See Section 11.8.

Nothing in this Section shall preclude a Downward Departure for Trial Proof Issues in accordance with Section 12 or a Downward Departure for Substantial Cooperation in accordance with Section 13.

11.8 Distribution to a Juvenile or Pregnant Female (Special Application and Enhancement Feature H)

If the Brimage-eligible offense involved distribution of a controlled substance by an adult to a juvenile or to a pregnant female, the authorized plea offer shall be twice that otherwise provided in the Table of Authorized Plea Offers or any other provision of this Directive. See N.J.S.A. 2C:35-8. As noted in footnote 10, this enhancement feature shall be in addition to and cumulative with any other Special Application and Enhancement Feature that may be applicable. Whenever an adult defendant is eligible for an enhanced term pursuant to N.J.S.A. 2C:35-8, the prosecutor shall file an application for such enhanced term and shall provide the defendant with written notice pursuant to R. 3:21-4e unless the prosecutor is unable to establish by a preponderance of the evidence that the defendant or another with whom the defendant was acting as an accomplice within the meaning of N.J.S.A. 2C:2-6 distributed a controlled dangerous substance to a minor or pregnant female.

When the defendant is alleged to be an accomplice, this Special Application and Enhancement Feature shall not apply unless the prosecutor has a reasonable basis to believe that the defendant knew or had reason to know that his or her partner would distribute a controlled dangerous substance to a minor or pregnant female, or that the defendant had the purpose to promote or facilitate such distribution to a minor or pregnant female.

Nothing in this Section shall preclude a Downward Departure for Trial Proof Issues in accordance with Section 12 or a Downward Departure for Substantial Cooperation in accordance with Section 13.

11.9 Offenses Committed in or Around Correctional or Treatment Facilities (Special Application and Enhancement Feature I)

If the offense occurred in or involved the introduction or attempted introduction of a controlled substance into a prison, jail, halfway house, juvenile detention facility, or residential or outpatient drug treatment facility, or involved the distribution or attempted distribution of a controlled substance to a person entering or leaving the premises of a residential or outpatient drug treatment facility, then the authorized plea offer shall be six (6) months greater than that otherwise provided in the applicable Table of Authorized Plea Offers.

This Special Application and Enhancement Feature addresses the special dangers inherent in the introduction of illicit drugs into correctional and drug treatment facilities. While detoxification is only the first step in treatment, it is absolutely essential that correctional and drug treatment facilities be kept drug-free if the criminal and juvenile justice systems can have any chance to break the cycle of addiction and crime. This feature also addresses the dangers posed by drug distributors who congregate around treatment facilities in order to prey upon drug rehabilitation patients. Note that this Feature applies to privately-run drug treatment facilities and not just to facilities that are operated by a governmental agency.

Nothing in this Section shall preclude the imposition of an additional enhancement pursuant to Special Application and Enhancement Feature H (Distribution to a Juvenile or Pregnant Female). See footnote 10, *supra*. When the defendant is alleged to be an accomplice, this Special Application and Enhancement Feature shall not apply unless the prosecutor has a reasonable basis to believe that the defendant knew or had reason to know that his or her partner would introduce or attempt to introduce a controlled substance into a correctional or drug treatment facility or would distribute or attempt to distribute a controlled substance to a person entering or leaving a drug treatment facility, or that the defendant had the purpose to promote or facilitate such introduction or attempted introduction or distribution or attempted distribution.

Nothing in this Section shall preclude a Downward Departure for Trial Proof Issues in accordance with Section 12 or a Downward Departure for Substantial Cooperation in accordance with Section 13.

11.10 Anti-Drug Profiteering Penalty (Special Application and Enhancement Feature J)

When the defendant is eligible for imposition of an Anti-Drug Profiteering penalty pursuant to Chapter 35A of Title 2C, the prosecutor shall provide notice to the court and the defendant and shall apply for such cash penalty unless the prosecutor cannot establish one or more grounds therefor by a preponderance of the evidence. The appropriate penalty shall be part of the plea offer and shall be in addition to, not in lieu of, any term of imprisonment and parole ineligibility determined pursuant to these Guidelines. The term of imprisonment and parole ineligibility shall not be reduced to any extent in exchange for imposition of a cash penalty.

The application for imposition of an Anti-Drug Profiteering penalty shall be in addition to the awarding of aggravating factor points under Aggravating Factor #5c, and the awarding of such points shall in no way be construed to preclude or preempt a prosecutor's application for imposition of this monetary penalty. See Section 10.1.5.

SECTION 12 DOWNWARD DEPARTURE FOR TRIAL PROOF ISSUES**12.1 Authority to Make a Downward Departure Based Upon an Assessment of the Likelihood of Obtaining a Conviction at Trial**

Notwithstanding any other provision of these Guidelines, a prosecutor in the exercise of reasoned discretion is authorized to tender a plea offer for a sentence below that otherwise determined pursuant to the applicable Table of Authorized Plea Offers and the provisions of these Guidelines based upon the prosecutor's assessment of the likelihood of obtaining a conviction at trial for the Brimage-eligible charge(s). The exercise of such prosecutorial discretion in reducing the plea offer otherwise required to be tendered pursuant to these Guidelines based upon trial proof issues may be used at any time and at any step in the graduated plea system (e.g., pre-indictment, initial post-indictment or final post-indictment).

With appropriate supervisory approval, see Section 12.3, the prosecutor making a Downward Departure for Trial Proof Issues is authorized to reduce the term of parole ineligibility otherwise prescribed by these Guidelines to any extent, and may offer, as appropriate, a county jail or non-custodial sentence. Under this system, all county prosecutors' offices will be making these fact-sensitive, case-by-case downward departures from uniformly determined starting points, in contrast to the plea negotiation system found by the New Jersey Supreme Court to be deficient in State v. Brimage, 153 N.J. 1 (1998), where county prosecutors could establish their own "standardized" plea offers that became the variable starting points for the application of upward and downward departures.

It should be noted that a Downward Departure for Trial Proof Issues is made only after the prosecutor has made any authorized adjustment within the applicable range based upon the grand total of Aggravating and Mitigating Factor points, and after the prosecutor has accounted for any increase in the term of parole ineligibility based upon all applicable Special Application and Enhancement Features. In this way, the court will know the exact extent of the reduction that is based upon the prosecutor's assessment of the strengths and weaknesses of the case.

Note also that a Downward Departure for Trial Proof Issues does *not* affect the requirement that a defendant plead guilty to additional, nonBrimage-eligible charges when Special Application and Enhancement Features B (Booby Traps and Fortifications), C1 (No Early Release Act Offense) or D (Certain Offenses Involving Firearms) apply. (This rule stands in contrast to the rule for a Downward Departure for Substantial Cooperation pursuant to Section 13, where a prosecutor is given the authority to refrain from requiring a defendant to plead guilty to an additional nonBrimage-eligible offense as part of a cooperation agreement.) The use of Special Application and Enhancement Features B, C1 and/or D

presupposes that the additional booby trap/fornication, No Early Release Act or weapons charges are provable, and that a prosecutor by invoking one of these Special Application and Enhancement Features has determined that there is not “insufficient evidence to warrant a conviction” for any such additional nonBrimage-eligible offense. See Sections 11.2, 11.3.1 and 11.4.

The Downward Departure for Trial Proof Issues is designed to afford a prosecutor some measure of flexibility in assessing the proofs available to sustain a conviction. This type of assessment is inherent in plea negotiations, where both the prosecutor and defense counsel gauge the strengths and weaknesses of their respective cases and the likelihood of prevailing at trial. Often, these factual and legal assessments by counsel become the subject of face-to-face negotiations, where each side attempts to convince the other of the merits of their respective positions.

A prosecutor when initially “screening” a case and throughout the course of plea negotiations and trial preparation must consider a number of legal, factual, and practical issues that bear on the likelihood of prevailing at trial, and that account for the costs associated with litigation. These relevant factors may include but need not be limited to: (1) whether in a school zone case the offense occurred near the outer boundaries of the zone and within the uncertainty of the map that will be used to establish the location element; (2) difficulties in proving that the defendant possessed the drugs found in his or her possession with the requisite “intent to distribute” based upon the type, quantity, purity and packaging of the drugs involved and the existence or relative absence of other indicia of drug-distribution activities, such as cash proceeds, scales, packaging materials, and other distribution paraphernalia, observed transactions, or incriminating statements; (3) whether there is a realistic possibility that essential physical evidence or inculpatory statements will be subject to the exclusionary rule; (4) problems associated with proving the chain of custody of physical evidence, or with the forensic analysis of seized controlled substances; (5) the effort expended and costs incurred in pretrial litigation and in providing discovery; (6) whether an important witness may refuse to cooperate or may otherwise be unavailable for trial; (7) legal and logistical complications inherent in a multi-defendant trial; (8) the possibility that an important State witness will not be believed by the jury based upon his or her criminal record or cooperation agreement, or was found not to be credible by another jury in a related trial; or (9) whether there is a realistic possibility that the identity of a confidential informant or the location of a surveillance site provided by a private citizen may be required to be disclosed if the prosecution proceeds to trial.

For practical reasons, prosecutors traditionally have made accommodations to defendants in the form of reducing the defendant's penal exposure where there is a legitimate question whether the State will be able to prove its case to a jury beyond a reasonable doubt. This is true even in cases for which the Legislature has prescribed a minimum term of imprisonment upon conviction. See, for example, the Supreme Court's April 27, 1981 Plea Bargaining Memorandum (explaining when a court may refrain from imposing a mandatory sentence under the Graves' Act and permitting a negotiated waiver of such mandatory sentence where, "the prosecutor represents on the record that there is insufficient evidence to warrant a conviction, or that the possibility of acquittal is so great that dismissal is warranted in the interests of justice").

It should be noted that the sole purpose of a Downward Departure for Trial Proof Issues is to account for anticipated litigation problems with respect to the prosecution of the specific count or counts for which the downward departure is made. A Downward Departure for Trial Proof Issues is not intended to provide a means for a prosecutor to extend "leniency" to a defendant, see Section 3.8, or otherwise to circumvent or undermine the uniform calculation process set forth in these Guidelines, which is designed to channel prosecutorial discretion and to ensure that the reasons for the exercise of such discretion are reviewable by courts pursuant to the requirements of State v. Brimage, 153 N.J. 1 (1998). If, for example, a defendant is charged with two separate Brimage-eligible offenses and a prosecutor determines that proof problems exist with respect to the prosecution of one of these charges but not the other, a Downward Departure for Trial Proof Issues may not be used to reduce the term of parole ineligibility for the specific Brimage-eligible offense that does not present litigation problems.

12.2 Explanation of Reasons for Exercising Prosecutorial Discretion

The decision whether to tender a reduced offer employing the Downward Departure for Trial Proof Issues feature is necessarily vested in the reasoned discretion of the prosecutor. Prior to trial, a prosecutor is in a unique position to gauge the strengths and weaknesses of the State's case, and a prosecutor is by no means required under these Guidelines to employ this Downward Departure feature where the prosecutor believes in good faith that the defendant would ultimately be convicted at trial.

The Court in State v. Brimage, 153 N.J. 1 (1998), made clear that prosecutors must provide their reasons for choosing to waive or not to waive the mandatory minimum term of parole ineligibility pursuant to N.J.S.A. 2C:35-12. Accordingly, a prosecutor must note on the Brimage Plea Negotiation Worksheet whether this Downward Departure feature is being used, and must also indicate the extent to which this departure has resulted in a reduction in the term of parole ineligibility that would otherwise apply.

It is critical to note, however, that a prosecutor is *not* required by these Guidelines to describe on the Worksheet or otherwise explain to the court the specific factual or legal issues that give rise to the downward departure. It is thought that prosecutors might be chilled from making appropriate use of this feature if they were required to specify and highlight potential weaknesses in the State’s proofs, since to do so during the course of ongoing plea negotiations, at which point there is no assurance that the defendant would accept the plea offer and plead guilty, might suggest possible theories for cross-examining prosecution witnesses, filing defense motions, or otherwise suggest a defense strategy, or might even lead a guilty defendant to overstate his or her chances for an acquittal and opt for a trial that might properly have been avoided by a guilty plea. (Note, of course, that these Guidelines in no way affect a prosecutor’s ongoing obligation to comply with the rules of discovery, including the prosecutor’s legal and ethical duty to disclose exculpatory information.)

12.3 Supervisor Approval Required in Certain Circumstances

In order to promote the uniform application of this feature, if the extent of the Downward Departure for Trial Proof Issues exceeds 6 months in the case of a fourth-degree crime, 9 months in the case of a third-degree crime, 12 months in the case of a second-degree crime, or 24 months in the case of a first-degree crime, the departure must be approved by a supervisor who is authorized in writing by the county prosecutor or Director of the Division of Criminal Justice to approve such departures. The county prosecutor and Director are authorized to designate one or more persons with sufficient experience and expertise to approve a Downward Departure for Trial Proof Issues that exceeds these thresholds.

Maximum Downward Departure for Trial Proof Issues Without Approval of a Designated Supervisor	
Degree of Offense	
1st	24 month reduction
2nd	12 month reduction
3rd	9 month reduction
4th	6 month reduction

To further promote the interests of uniformity, the prosecutor shall be required to provide aggregate statistical notification to the Division of Criminal Justice when the Downward Departure feature is used. Nothing in this paragraph shall be construed to require approval by the Division of Criminal Justice of the exercise of a prosecutor’s discretion to employ this Downward Departure feature.

SECTION 13 DOWNWARD DEPARTURE FOR SUBSTANTIAL COOPERATION**13.1 General Authority to Enter Into a Cooperation Agreement**

Notwithstanding any other provision of these Guidelines, a prosecutor in the exercise of reasoned discretion is authorized to tender a plea offer for a sentence below that otherwise determined pursuant to the applicable Table of Authorized Plea Offers and the provisions of these Guidelines in exchange for the defendant's substantial cooperation in assisting the prosecutor or another law enforcement agency in the identification, investigation, apprehension, or prosecution of collaborators, co-conspirators, suppliers, and superiors in a drug trafficking scheme, or other persons involved in any form of criminal activity, or leading to the seizure or forfeiture of property used in furtherance of or derived from criminal activity. A Downward Departure for Substantial Cooperation may be made at any time at any step in the graduated plea system (e.g., pre-indictment, initial post-indictment or final post-indictment), and may be made after conviction and original sentencing. See Section 3.4.

When a Downward Departure for Substantial Cooperation is made, the prosecutor may reduce the term of parole ineligibility otherwise prescribed by these Guidelines to any extent, and may offer, as appropriate a county jail or non-custodial sentence. Furthermore, unlike a Downward Departure for Trial Proof Issues, see Section 12, a prosecutor as part of a cooperation agreement may refrain from requiring the defendant to plead guilty to an additional, nonBrimage-eligible offense that would otherwise be required pursuant to Special Application and Enhancement Features B (Booby Traps and Fortifications), C1 (No Early Release Act Offense) or D (Certain Offenses Involving Firearms). (Note that in the case of Special Application and Enhancement Feature C1, the plea agreement must comply with the Attorney General's Directive for Enforcing the No Early Release Act. That Directive likewise authorizes a prosecutor to dismiss or downgrade a provable No Early Release Act offense where "[t]he prosecutor represents on the record, either *in camera* or in open court, that the plea agreement is essential to assure defendant's cooperation with the prosecution. . . ." Section C(5) at p. 6.)

The nature, extent, and significance of cooperation and assistance can involve a broad spectrum of conduct that must be evaluated by the prosecutor on a case-by-case basis. Latitude is therefore afforded to reduce a plea offer based upon variable relevant factors. To ensure uniformity and to permit meaningful judicial review, the prosecutor must, however, state the reasons for application of a Downward Departure under this section. The prosecutor may elect to provide the reasons for the Downward Departure to the defendant and the court in camera or in writing under seal for the safety of the defendant or to avoid disclosure of an ongoing or potential investigation.

Consistent with prior Attorney General plea directives, a defendant's cooperation agreement in consideration for a Downward Departure can be satisfied only if his or her efforts are of substantial value to the State. See State v. Gerns, 145 N.J. 216, 218 (1996).

The appropriate reduction in the plea offer otherwise prescribed by these Guidelines shall be determined by the prosecutor for reasons stated that may include the following criteria:

1. The prosecutor's evaluation of the nature, extent, significance, value, and usefulness of the defendant's assistance;
2. The truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
3. The extent to which the defendant's assistance concerns the criminal activity of other person(s) who are more culpable than the defendant;
4. Any injuries suffered, or any danger or risk of injury to the defendant or his or her family resulting from the assistance; and,
5. The timeliness of the defendant's assistance.

13.2 Approval and Documentation of Cooperation Agreements

All Downward Departures authorized pursuant to this Section must be approved by a supervisor who is authorized in writing by the county prosecutor or Director of the Division of Criminal Justice to approve such departures. The county prosecutor and Director are authorized to designate one or more persons with sufficient experience and expertise to approve these departures.

A cooperation agreement pursuant to these Guidelines must include the requirement that the person fully cooperate in disclosing all criminal activities known to the person, and by turning over or assisting in obtaining any records that corroborate criminal activities.

In State v. Gerns, 145 N.J. 216 (1996), the Court held that it is neither arbitrary nor capricious for a prosecutor to base the decision to recommend a waiver of a mandatory sentence under the Comprehensive Drug Reform Act on the value of the cooperation received from a defendant. The Court nonetheless cautioned that the plea agreement in that case should have spelled out more clearly what the defendant was expected to do. Although the defendant had executed a "Confidential Informer Contract of Cooperation," the term "cooperation"

was not defined in that document or anywhere else in the record. Accordingly, all plea agreements that are offered in exchange for a defendant's promise to provide future or ongoing cooperation must set forth the reasonable expectations and obligations of both the defendant and the State in sufficient detail so that those expectations and agreed-upon responsibilities are clearly understood and can be reviewed upon request by the Division of Criminal Justice and enforced by a court, if necessary.

Nothing in this Section shall be construed to require that any information concerning the existence, nature, or extent of a defendant's cooperation or future cooperation be made part of a record available to the public or be revealed in open court; rather, it is expected that such information, including but not limited to a completed worksheet indicating that the prosecutor has made a Downward Departure for Substantial Cooperation, should be provided to the court in camera and under seal so as to protect the defendant and to preserve the integrity of the process. See Appendix IC.

The Court in Gerns also held that the plea agreement in that case should have indicated more precisely the sentence the prosecutor would recommend to the court if defendant's cooperation was determined by the prosecutor, or the prosecutor's designee, to be of substantial value to the State. When a defendant is offered a reduction in a mandatory minimum sentence (*i.e.*, a downward departure) based on substantial cooperation that was provided to law enforcement prior to execution of the plea agreement, the prosecutor can and must state precisely the sentence recommendation. The Court noted that the problem arises in cases in which the plea agreement contemplates a waiver decision based on the extent and quality of a defendant's future cooperation, that is, cooperation or assistance to be given by the defendant between the date of the plea agreement and the date set for the sentencing hearing.

The Court in Gerns recognized that prosecutors need to retain flexibility in sentencing recommendations based on the substantiality and quality of the defendant's cooperation. The need to preserve prosecutorial discretion, however, must be weighed against a defendant's need to know at the time of his or her plea the outer limits of a prosecutor's conditional waiver decision. The Court thus ruled:

In an effort to balance those competing interests, we direct that the plea agreement must contain a range on the prosecutor's conditional recommendation. The actual recommendation at sentencing may not require a defendant to serve a longer minimum term than that specified in the plea or post-verdict agreement. Alternatively, the plea or post-verdict agreement may

specify the precise sentence if defendant provides cooperation to the satisfaction of the prosecutor or the prosecutor's designee. [145 N.J. at 230-31.]

Accordingly, where a Downward Departure for Substantial Cooperation is based upon a defendant's anticipated future cooperation or assistance, the plea agreement must specify the range of sentences (minimum and maximum) contemplated by the plea agreement based upon the extent and quality of the defendant's cooperation.

Except as otherwise required by law or Court Rule, the nature and terms of a defendant's past work and anticipated future cooperation with law enforcement authorities should not be disclosed to the public or any person who might further disclose that information to others who might then attempt to intimidate the cooperating witness or to retaliate against the witness or his or her family. All written documentation concerning the cooperation agreement, including the Plea Negotiation Worksheet indicating that the prosecutor has made a Downward Departure for Substantial Cooperation, see Appendix IC, should therefore be deemed confidential. (Note that the sample worksheet reproduced in Appendix IC bears a "confidential" watermark. The Brimage software provided by the Division of Criminal Justice will automatically include a "confidential" watermark on the computer-generated worksheet whenever a Downward Departure for Substantial Cooperation is made.)

The written memorialization of the terms of the cooperation agreement should nonetheless be kept on file to allow for review upon request by the Division of Criminal Justice, or to enable the terms of the agreement to be enforced by a court where necessary. The requirement that the cooperation agreement be in writing and be kept on file will also help to ensure that the State complies with any discovery obligations that may arise from the use of the cooperating defendant as a witness in the prosecution of another defendant. See e.g. State v. Taylor, 49 N.J. 440 (1967) (State has the duty to disclose a promise or agreement to recommend a specific sentence or leniency for the accomplice who is testifying for the State); State v. Satkin, 127 N.J. Super. 306 (App. Div. 1974) (State at the time of trial must reveal the existence of a promise or recommendation of leniency made to a material witness; a promise of leniency is not prosecutor's work product protected from disclosure under R. 3:13-3c).