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**TO:** Elie Honig, Director, Division of Criminal Justice  
All County Prosecutors

**FROM:** John J. Hoffman, Acting Attorney General

**DATE:** March 1, 2016

**RE:** Uniform Guidelines on the Pretrial Intervention Program

On August 10, 2015, Governor Christie signed into law an Act, P.L. 2015, c. 98 (Senate Bill No. 2559), which changed the terms of admission into Supervisory Treatment, known as Pretrial Intervention ("PTI"), by amending N.J.S.A. 2C:43-12. PTI provides defendants with an alternative to traditional prosecution. The PTI program is designed for first-time offenders who will benefit from early rehabilitative services to deter future criminal conduct. N.J.S.A. 2C:43-12a(1). While any defendant charged with an indictable offense can apply to PTI, there are admission criteria. The Court's referral of a defendant to PTI is conditioned upon the recommendation of the Administrative Office of the Court's PTI program director, with the consent of the prosecutor and defendant. N.J.S.A. 2C:43-12e.

This new legislation provides a presumption against admission into PTI for certain domestic violence offenders. N.J.S.A. 2C:43-12b(2)(b). Additionally, the new law requires the court and prosecutor to consider the victim's input on a defendant's PTI application. N.J.S.A. 2C:43-12b(2)(e). The new law further requires that certain defendants enter a guilty plea before admission into PTI. This includes defendants: (1) charged with a first or second degree crime; (2) charged with a third or fourth degree crime involving domestic violence; (3) charged with a disorderly persons or petty disorderly persons offense involving domestic violence while subject to a temporary or final restraining order; or (4) who have a prior first or second degree conviction. N.J.S.A. 2C:43-12g(3). The new law provides that these guilty pleas will be held in inactive status pending defendant's completion of PTI. Id. The new law affects all PTI applicants, not just those charged with domestic violence offenses.

In addition, the new law requires the Attorney General to develop guidelines to promote the uniform exercise of discretion in formulating recommendations on participation in a supervisory treatment program by an applicant charged with a crime or offense involving



domestic violence. N.J.S.A. 2C:43-12. The following Guidelines are promulgated pursuant to that requirement, and are binding on all County Prosecutors and the Division of Criminal Justice when handling PTI applications.

## **1. Presumption Against Admission into PTI**

Prior to the enactment of P.L. 2015, c. 98, the only presumption against admission into PTI applied to defendants who were public officers or public employees whose offenses involved or touched upon their public office or employment. N.J.S.A. 2C:43-12b(2)(a). Additionally, while not establishing a presumption against admission, public policy ordinarily limits PTI to persons with no prior convictions. N.J.S.A. 2C:43-12a. Similarly, those who previously entered into PTI, or who had received a conditional discharge (N.J.S.A. 2C:36A-1) or a conditional dismissal (N.J.S.A. 2C:43-13.1 et al.), are not eligible for PTI. N.J.S.A. 2C:43-12g(1).

The new law expands the presumption against admission into PTI where: (1) a defendant is charged with any crime or offense involving domestic violence, as enumerated in N.J.S.A. 2C:25-19a<sup>1</sup>, while subject to a temporary or permanent restraining order issued pursuant to the provisions of the “Prevention of Domestic Violence Act of 1991”; or (2) a defendant is charged with a crime or offense involving violence or the threat of violence. N.J.S.A. 2C:43-12b(2)(b).

To determine whether a crime involves “violence or the threat of violence” pursuant to this statute, one of the following must be present:

- (1) the victim sustains serious or significant bodily injury as defined in N.J.S.A. 2C:11-1b or d<sup>2</sup>; or

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<sup>1</sup> Pursuant to N.J.S.A. 2C:25-19a(1) through (18), domestic violence offenses include homicide, assault, terroristic threats, kidnapping, criminal restraint, false imprisonment, sexual assault, criminal sexual contact, lewdness, criminal mischief, burglary, criminal trespass, harassment, stalking, criminal coercion, robbery, contempt (N.J.S.A. 2C:29-9b), and any other crime involving risk of death or serious bodily injury to a person protected under the “Prevention of Domestic Violence Act of 1991.”

<sup>2</sup> N.J.S.A. 2C:11-1b defines serious bodily injury as “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” N.J.S.A. 2C:11-1d defines significant bodily injury as “bodily injury which creates a temporary loss of the function of any bodily member or organ or temporary loss of any one of the five senses.”

- (2) the actor is armed with and uses a deadly weapon or threatens by word or gesture to use a deadly weapon as defined in N.J.S.A. 2C:11-1c<sup>3</sup>; or
- (3) the actor threatens to inflict serious or significant bodily injury.<sup>4</sup>

In any of these circumstances, the presumption is against defendant's admission into PTI. N.J.S.A. 2C:43-12b(2)(b).

## 2. Overcoming the Presumption Against Admission

Prosecutors have discretion whether to support or oppose a defendant's PTI application. When reviewing a defendant's application where a presumption against admission exists, the prosecutor must carefully weigh all factors<sup>5</sup> and consider the statutory presumption against PTI. A prosecutor cannot categorically deny defendant's PTI application, but must review each application individually and proceed with a weighing of all factors. See State v. Caliguiri, 158 N.J. 28 (1999). If the prosecutor believes that the factors weigh in favor of overcoming the statutory presumption, he or she must consult with the County Prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the Division. The County Prosecutor or Director, or his or her designee who has supervisory authority, shall make the final recommendation as to whether PTI is appropriate. The basis for that recommendation shall be placed on the record.

The victim's position in favor of PTI can be a factor to consider in overcoming the presumption against admission, and should be placed on the record. However, the victim's position alone ordinarily should not overcome the presumption.

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<sup>3</sup> N.J.S.A. 2C:11-1c defines deadly weapon as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury or which in the manner it is fashioned would lead the victim reasonably to believe it to be capable of producing death or serious bodily injury."

<sup>4</sup> See footnote 2.

<sup>5</sup> These factors are addressed separately in Section 3, infra.

### 3. Factors to Consider in Formulating PTI Recommendations

A defendant's "amenability to correction, responsiveness to rehabilitation and the nature of the offense" are all considerations to be measured for determining admission into PTI. N.J.S.A. 2C:43-12b(1). In addition, in formulating a recommendation for an applicant's participation in PTI, the prosecutor and PTI program director shall consider seventeen statutory criteria pursuant to N.J.S.A. 2C:43-12e:

- (1) The nature of the offense;
- (2) The facts of the case;
- (3) The motivation and age of defendant;
- (4) The desire of the complainant or victim to forego prosecution;
- (5) The existence of personal problems and character traits that may be related to defendant's crime and for which services are unavailable within the criminal justice system, or that may be provided more effectively through supervisory treatment and the probability that the causes of criminal behavior can be controlled by proper treatment;
- (6) The likelihood that defendant's crime is related to a condition or situation that would be conducive to change through participation in supervisory treatment;
- (7) The needs and interests of the victim and society;<sup>6</sup>
- (8) The extent to which defendant's crime constitutes part of a continuing pattern of anti-social behavior;
- (9) Defendant's record of criminal and penal violations and the extent to which he or she may present a substantial danger to others;
- (10) Whether or not the crime is of an assaultive or violent nature, whether in the criminal act itself or in the possible injurious consequences of such behavior;
- (11) Consideration of whether or not prosecution would exacerbate the social problem that led to defendant's criminal act;

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<sup>6</sup> See Section 4, infra, for consideration of the victim's position.

- (12) The history of the use of physical violence toward others;
- (13) Any involvement of defendant with organized crime;
- (14) Whether or not the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution;
- (15) Whether or not defendant's involvement with other people in the crime charged or in other crime is such that the interest of the State would be best served by processing his or her case through traditional criminal justice system procedures;
- (16) Whether or not defendant's participation in pretrial intervention will adversely affect the prosecution of codefendants; and
- (17) Whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program.

#### **4. Due Consideration to the Victim's Position**

Under the new law, and in accordance with N.J.S.A. 52:4B-36 ("Crime Victims' Bill of Rights"), the prosecutor and the court must give "due consideration to the victim's position on whether the defendant should be admitted" into PTI. N.J.S.A. 2C:43-12e. Consistent with common practice, if the victim objects to defendant's participation, the case should be reviewed by the County Prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the Division. The County Prosecutor or Director, or his or her designee who has supervisory authority, shall make the final recommendation as to whether PTI is appropriate and in the best interests of the victim notwithstanding the victim's objection. This final recommendation shall be placed on the record, including the victim's objection, akin to the requirement of notifying the court of the victim's consultation and position regarding a plea agreement. N.J.S.A. 52:4B-36o. If the victim supports defendant's application, that support should be placed on the record.

**5. PTI Admission Contingent Upon a Guilty Plea in Certain Circumstances**

PTI has been available to defendants regardless of whether they contested their guilt on the charges against them. N.J.S.A. 2C:43-12g(2). Under the new law, certain defendants may be admitted into PTI only after entering a guilty plea to the charge(s) against them:

- (1) A defendant charged with a first or second degree crime; or
- (2) A defendant charged with any crime if defendant had previously been convicted of a first or second degree crime; or
- (3) A defendant charged with a third or fourth degree crime involving domestic violence as defined in N.J.S.A. 2C:25-19a<sup>7</sup>; or
- (4) A defendant charged with any disorderly persons or petty disorderly persons offense involving domestic violence as defined in N.J.S.A. 2C:25-19a<sup>8</sup> if defendant committed the offense while subject to a temporary or permanent restraining order issued pursuant to the provisions of the “Prevention of Domestic Violence Act of 1991.”

N.J.S.A. 2C:43-12g(3). The requirement that a defendant enter a guilty plea for the above mentioned offenses cannot be waived by the prosecutor. Further, when considering such a defendant’s application for admission into PTI, the prosecutor must consider any presumptions against admission and weigh all seventeen factors in determining whether defendant should be recommended for PTI. Prosecutors must follow the procedures outlined above in Sections 1 through 4, supra.

As with the entry of all guilty pleas, the prosecutor must place on the record all terms and conditions of the plea agreement for those defendants who will be admitted into PTI under the terms of the new law. The prosecutor should ensure that pleas are taken in accordance with Rule 3:9-2 and Rule 3:9-3b, and the judge should question the defendant to demonstrate that the defendant is entering a knowing, intelligent, and voluntary guilty plea. The defendant should provide a complete factual basis for the underlying charge(s) to support the guilty plea, and the prosecutor must ensure that each element of the offense is supported by that factual basis.

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<sup>7</sup> See footnote 1.

<sup>8</sup> See footnote 1.

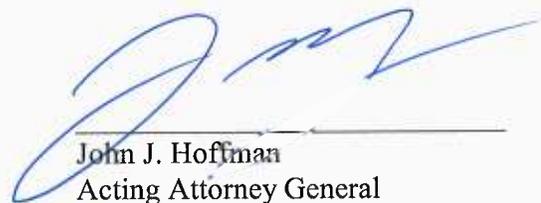
Once a guilty plea is entered, it is held on “inactive” status pending successful completion of PTI. Therefore, the guilty plea has no force or effect, unless PTI is violated. It is neither a judgment of conviction nor an adjudication. If a defendant successfully completes the program, the charges are dismissed. N.J.S.A. 2C:43-12g(3); N.J.S.A. 2C:43-13d. A defendant should be advised that if he or she violates any conditions of PTI after entering a guilty plea: (1) PTI will be terminated; (2) the defendant’s case will be returned to the trial list for purposes of sentencing; and (3) the defendant will be sentenced pursuant to the plea agreement. Accordingly, when pleading guilty, a defendant must be advised of his or her penal exposure if terminated from PTI.

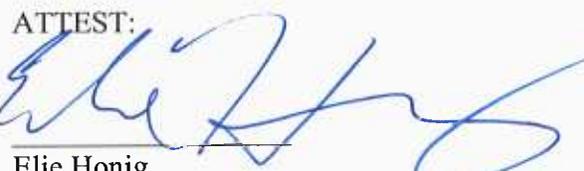
**6. Effective Date**

These Guidelines shall take effect immediately and apply to all applications for PTI filed on or after August 10, 2015 (the effective date of the law), regardless of the offense date for the underlying charge(s).<sup>9</sup> PTI applications that were filed prior to August 10, 2015, are not subject to these Guidelines.

These Guidelines shall remain in force and effect unless and until repealed, revised, or superseded by Order of the Attorney General. Any litigation challenging this new legislation or these Guidelines should be brought to the immediate attention of the Director of the Division of Criminal Justice.

Dated: March 1, 2016

  
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John J. Hoffman  
Acting Attorney General

ATTEST:  
  
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Elie Honig  
Director, Division of Criminal Justice  
Issued on: March 1, 2016

<sup>9</sup> If so required pursuant to Section 5, supra, a defendant must enter a guilty plea for admission into PTI if defendant’s application was filed after August 10, 2015, for an offense committed prior to that date.