

BRIMAGE GUIDELINES 2
(2004 Revisions)



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

Effective for Offenses Committed On or After September 15, 2004

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JAMES E. MCGREEVEY
Governor

PETER C. HARVEY
Attorney General

July 15, 2004

TO: All County Prosecutors

SUBJECT: Attorney General Law Enforcement Directive 2004-2

Dear Prosecutor:

I am pleased to provide you with a signed copy of Attorney General Law Enforcement Directive 2004-2, which promulgates revised "Brimage" Guidelines (which are appended) that will apply to all Brimage-eligible offenses committed on or after September 15, 2004. I am greatly appreciative of the contributions from all of the county prosecutors. Your significant input and support in developing these revised plea bargaining Guidelines were invaluable.

The updated plea negotiation system will continue to satisfy the requirements of statewide uniformity established by the New Jersey Supreme Court in State v. Brimage, 153 N.J. 1 (1998). As importantly, the revised Guidelines will help to ensure that sentences imposed under New Jersey's drug laws are fair and proportionate, reflecting the nature and seriousness of the offense and reserving the sternest punishment for the most culpable and dangerous drug offenders. The revised Brimage Guidelines will allow us to focus our prosecution efforts and make the best use of our limited correctional resources with a view toward achieving our ultimate objective to protect the public from the ravages of drug-related crime.

Once again, I want to thank all of you for your significant and helpful contributions to this vitally important project. I also wish to thank the Conference of Criminal Presiding Judges for raising important issues concerning sentencing fairness. Their guidance and encouragement are much appreciated.

Peter C. Harvey
Attorney General

cc: Mariellen Dugan, First Assistant Attorney General
Vaughn L. McKoy, Director, Division of Criminal Justice
Ron Susswein, Deputy Director Major Crimes, Division of Criminal Justice
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ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2004-2

REVISED “BRIMAGE” GUIDELINES

WHEREAS, the New Jersey Supreme Court in State v. Brimage, 153 N.J. 1 (1998), instructed the Attorney General to promulgate guidelines for use by county prosecutors to ensure statewide uniformity in tendering plea offers pursuant to N.J.S.A. 2C:35-12 that waive or reduce an otherwise mandatory term of imprisonment and parole ineligibility imposed upon conviction of certain drug offenses defined in Chapter 35 of Title 2C; and

WHEREAS, the Attorney General on May 14, 1998 issued plea negotiation guidelines pursuant to the Supreme Court’s instructions in State v. Brimage (which are hereinafter referred to as the “original Brimage Guidelines”); and

WHEREAS, the Division of Criminal Justice at the request of the Attorney General has conducted a comprehensive review of the original Brimage Guidelines, and has received helpful commentary and input from the county prosecutors, the Administrative Office of the Courts and the Conference of Criminal Presiding Judges, the Public Defender’s Office, and the New Jersey Association of Criminal Defense Lawyers concerning the need to revise and update the original Brimage Guidelines; and

WHEREAS, it is appropriate at this time to revise and update the original Brimage Guidelines to ensure not only that sentences imposed on convictions for Brimage-eligible offenses are uniform in accordance with the Supreme Court’s ruling in Brimage, but also to ensure that such sentences are fair, cost-effective and proportionate, reflecting to the greatest extent possible the actual culpability and dangerousness of convicted drug distributors so as to make the best possible use of available correctional resources and to promote the general and special deterrence of serious drug offenses;

NOW, THEREFORE, I, PETER C. HARVEY, Attorney General of the State of New Jersey, by virtue of the authority vested in me by the Constitution and by the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 et seq., do hereby **DIRECT** the following:

1. The revised Brimage Guidelines that are appended hereto and incorporated by reference herein shall be used by all county prosecutors and the Division of Criminal Justice to determine authorized plea offers in all cases involving offenses arising under Chapter 35 of Title 2C that carry a mandatory minimum term of imprisonment and parole ineligibility subject to waiver or reduction pursuant to the provisions of N.J.S.A. 2C:35-12 (which offenses are hereinafter referred to as “Brimage-eligible offenses”) that are committed on or after September 15, 2004. The revised Brimage Guidelines appended hereto shall be deemed to be part of this Directive and shall be binding on all county prosecutors and the Division of Criminal Justice.

2. The original Brimage Guidelines, any supplemental Directive amending the original Brimage Guidelines and all Application Notes interpreting the original Guidelines and supplemental Directives shall remain in effect and shall continue to be binding on all county prosecutors and the Division of Criminal Justice with respect to the handling of Brimage-eligible offenses that were committed before September 15, 2004.

3. No case involving a provable violation of a Brimage-eligible offense shall be dismissed, downgraded, or disposed of by means of a negotiated disposition except in accordance with the requirements of either the original Brimage Guidelines (in the case of Brimage-eligible offenses committed before September 15, 2004) or the revised Brimage Guidelines appended hereto (in the case of Brimage-eligible offenses committed on or after September 15, 2004).

4. The provisions of Attorney General Directive 1998-1 and any supplemental Directive interpreting or amending Attorney General Directive 1998-1 shall remain in full force and effect, provided, however, that any provision of Attorney General Directive 1998-1 or supplemental Directive interpreting or amending Attorney General Directive 1998-1 that is inconsistent with the provisions of the revised Brimage Guidelines appended hereto shall be deemed to be superseded by this Directive with respect to any offense committed on or after September 15, 2004. Correspondingly, the provisions of the revised Brimage Guidelines appended hereto that are not inconsistent with Attorney General Directive 1998-1 and the original Brimage Guidelines shall be construed as a continuation of such Attorney General Directive and original Guidelines.

5. This Directive shall remain in effect until such time as it may be revised or repealed by the Attorney General.

GIVEN, under my hand and seal this 15th day of July, in the year of our Lord, Two Thousand and Four, and of the Independence of the United States, the Two Hundred and Twenty-Eighth.

Peter C. Harvey
Attorney General

Attest:

Mariellen Dugan
First Assistant Attorney General

HIGHLIGHTS OF THE 2004 BRIMAGE GUIDELINES REVISIONS*

- The revised Guidelines apply only to cases where the Brimage-eligible offense occurred on or after September 15, 2004. Cases involving Brimage-eligible offenses committed before this date remain subject to the original Brimage Guidelines. **See Section 1.2.**

- The revised Guidelines employ a new numbering system designed to make it easier to locate and cite to applicable provisions and features. The revised Guidelines also incorporate all relevant Application Notes that had interpreted the original Brimage Guidelines. These original Application Notes need not be consulted with respect to any case that is subject to the provisions of the revised Guidelines.

- The revised Guidelines are designed to focus law enforcement, prosecutorial and correctional resources on the most culpable drug offenders, ensuring the sternest punishment for the most dangerous and predatory drug traffickers. Most significantly, the revised Guidelines exempt certain “school zone” cases involving less culpable offenders from the regular Brimage calculation scheme. **See Section 6.** In these cases, prosecutors are instead required to tender either a standardized “flat” (no parole disqualifier) offer or a standardized “open” offer (sentence to be determined in the discretion of the court). It is expected that a significant number of low level school zone offenders will be eligible for one of these “standardized” plea offers and will be sentenced to a State Prison term without a period of parole or Intensive Supervision Program (ISP) ineligibility, a county jail term imposed as a condition of probation, or a noncustodial probationary sentence.

- The revised Guidelines authorize a trial-proof downward “departure” based on the prosecutor’s assessment of the likelihood of obtaining a conviction at trial, rather than the limited “adjustment” that was authorized by the original Brimage Guidelines. **See Section 12.** A prosecutor using this downward departure feature is permitted to reduce a plea offer otherwise required by the Guidelines to any extent, and could even recommend a noncustodial sentence. However, if the reduction based upon 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 designated supervisor. This downward departure feature 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). The preexisting downward adjustment for “complex and protracted litigation” has become superfluous and has been eliminated.

* The following paragraphs merely highlight significant substantive and procedural changes to the original Brimage Guidelines. Consult the actual text of the revised Guidelines for a complete description of these new features.

- The revised Guidelines create a new “Street Gang” Special Application and Enhancement Feature, providing for an additional term of parole ineligibility ranging from one to nine months, or six to eighteen months if the underlying offense is a first-degree crime. **See Section 11.1.** This new feature implements the policy of ensuring the sternest punishment for those offenders who, by virtue of their participation in certain forms of organized criminal activity, pose the greatest danger to public safety. To help ensure the uniform implementation of this enhancement, eligibility for the “Street Gang” Special Application and Enhancement Feature and the extent of the increase in the plea offer must be approved by a designated supervisor.

- The revised Guidelines provide for especially stern punishment for those drug dealers who choose to use or carry firearms in the course of their drug distribution activities. Specifically, the revised Guidelines provide that a prosecutor in certain circumstances must require a defendant to plead guilty to the weapons offense defined in N.J.S.A. 2C:39-4.1 in addition to pleading guilty to the underlying drug distribution-type offense, thereby resulting in the imposition of consecutive sentences on the two convictions. **See Section 11.4.** This option must be used in all cases where the defendant has brandished, displayed, discharged or threatened the use of a firearm at any time during the course of committing a drug distribution-type offense, or if a firearm was on the person or in the immediate control of the defendant at the time of the offense or arrest. The prosecutor must also invoke the consecutive sentencing feature of N.J.S.A. 2C:39-4.1 in all cases where the defendant was found to be in actual, joint or constructive possession of an assault firearm or a machine gun. In all other circumstances, the prosecutor continues to retain the discretion to require the defendant to plead guilty to the offense defined in N.J.S.A. 2C:39-4.1, or may instead account for the possession of weapons by means of the “Special Offense Characteristic” found in the original Guidelines, although in certain circumstances, the prosecutor may or in some cases must use *both* enhancement features in order to fully account for defendant’s relevant conduct. **See Section 7.1.**

- The revised Guidelines create a new Special Application and Enhancement Feature where the defendant has 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. **See Section 11.6.** When this enhancement feature applies, the increase in the term of parole ineligibility ranges from three to nine months, as determined by the prosecutor considering the nature of the violation. Other non-D.O.R.O. types of bail violations continue to be treated as an aggravating factor worth three or four points. **See Section 10.1.2.** The revised Guidelines also make clear that the bail violations aggravating factor is not limited to circumstances where the present Brimage-eligible offense was committed while the defendant was on bail for another offense, but is also triggered if the defendant commits a bail violation while awaiting disposition of the present Brimage-eligible offense (e.g., the defendant fails to appear at sentencing).

- The revised Guidelines recognize a prosecutor’s authority to withhold tendering an authorized plea offer where to do otherwise could compromise or jeopardize the investigation or prosecution of the defendant or any other person for a more serious offense. **See Section 1.1.** This feature will ensure that prosecutors retain the leverage necessary to convince offenders to cooperate with law enforcement authorities in investigating and successfully prosecuting their superiors in the drug trafficking network and other more culpable criminals.

- The revised Guidelines redesignate the “Threatened Violence” Aggravating Factor Category as “Risk of Injury to Officers or Others.” Within this expanded category, new specific aggravating factors have been created for “resisting arrest,” “flight or eluding” and “attempted destruction of evidence/hindering investigation.” **See Section 10.1.3.**

- The revised Guidelines create a new Aggravating Factor Category entitled “Profiteering” to account for the commercial, profit-minded nature of a defendant’s drug distribution activities. **See Section 10.1.5.** The preexisting aggravating factor that applies when the defendant’s criminal conduct provided a substantial source of income or livelihood is retained and has been moved into the new Aggravating Factor Category. A new specific aggravating factor has been created to address “actual distribution for money.” This factor accounts for observed illicit drug transactions, sales to undercover officers, and “controlled buys” to cooperating informants. Another new aggravating factor entitled “Anti-Drug Profiteering Penalty” applies when the defendant would be subject to an Anti-Drug Profiteering Penalty pursuant to N.J.S.A. 2C:35A-1 et seq.

- The revised Guidelines create a new Mitigating Factor Category entitled “Youthful Offender,” which applies when the defendant at the time of the present offense was less than 26 years of age. **See Section 10.2.6.** This mitigating factor is not available to a defendant who falls into Criminal History Category IV or V, who is subject to the new “Street Gang” Special Application and Enhancement Feature, or who has committed the offense of using or employing a juvenile in a drug distribution scheme.

- The “graduated” plea policy established in the original Brimage Guidelines has been amended to afford greater discretion to prosecutors to account for unforeseen or changed circumstances with a view toward providing defendants with a reasonable opportunity to consider a plea offer. **See Section 4.10.** The escalation from an initial post-indictment offer to a final post-indictment offer is now linked to a scheduled court event so as to provide the defendant with an opportunity in court to accept or reject the initial post-indictment offer. The revised Guidelines retain the current rules set forth in the 1999 Supplemental Directive that provide that escalation to a final post-indictment plea offer occurs automatically on the date when the State’s pretrial motion brief is filed or is required to be filed. **See Section 4.8.** The Brimage

Guidelines have nonetheless been modified to authorize a prosecutor to suspend the automatic escalation to the next plea offer 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, the revised Guidelines authorize a prosecutor to “turn back” a 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 justify “turning back the clock” to a previously tendered plea offer that would otherwise have expired. **See Section 4.10.** It is expected that the authority to reissue an expired plea offer will be used sparingly and must be approved by a designated supervisor. Furthermore, the revised Guidelines make clear that once a pretrial hearing involving the testimony of witnesses is convened to decide a pretrial motion (such as a motion to suppress evidence), the prosecutor must calculate and tender a final post-indictment offer.

- The revised Guidelines incorporate rules formerly set forth in an Application Note that explain when and under what circumstances a prosecutor may consent to a defendant’s application for pretrial intervention (P.T.I.) when the defendant is charged with a violation of N.J.S.A. 2C:35-7 or any second degree crime under Chapter 35 of Title 2C. **See Section 3.12.** The revised Guidelines eliminate the requirement that the prosecutor provide case-specific notification to the Division of Criminal Justice of the basis for a prosecutor’s decision to consent to pretrial intervention in these cases. Instead, prosecutors are only required to provide aggregate statistical notification to the Division of Criminal Justice of the total number of cases where a defendant charged with these offenses has been admitted to the PTI program.

- The revised Guidelines expressly incorporate the provisions of an earlier Attorney General Directive that authorizes prosecutors to consent to a defendant’s application to be sentenced to drug or alcohol treatment in lieu of imprisonment pursuant to N.J.S.A. 2C:35-14. **See Section 3.13.** Prosecutors are generally authorized to issue “conditional” Brimage plea offers that would afford a defendant the option to select treatment or imprisonment; however, in order to support New Jersey’s Drug Court Program, limitations are placed on the prosecutor’s authority to tender a conditional standardized “open” offer. Any such offer must include a condition that the addicted offender will agree to participate in any treatment program that may be ordered by the court. Furthermore, prosecutors are instructed to object to the treatment in lieu of imprisonment sentencing option if the T.A.S.C. program or other court-appointed treatment professional conducts a diagnostic assessment and finds that the defendant is not a drug or alcohol dependent person or is otherwise not a suitable candidate for available treatment services.