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TO: All County Prosecutors

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FROM: Jeffrey S. Chiesa, Attorney General *JSC*

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SUBJECT: Implementation of Drug Court Reforms

On July 19, Governor Christie signed into law Senate Bill No. 881 (Sixth Reprint), which is codified as L. 2012, c. 23. A copy of the new law is attached. This legislation will eventually expand New Jersey's nationally-acclaimed Drug Court program by authorizing judges to order addicted non-violent offenders to participate in court-supervised drug treatment. Until now, defendants had to apply for admission to Drug Court, and could choose to avoid treatment. The new law will prompt important reforms, but will no doubt pose challenges for prosecutors and courts, who must implement the statutory changes while still preserving key features of the present Drug Court program that are responsible for its success.

The purpose of this memorandum is to announce a number of action steps that are designed to ensure the appropriate implementation of the new law. Importantly, this memorandum provides immediate guidance to prosecutors to ensure the uniform statewide implementation of significant revisions to N.J.S.A. 2C:35-14 – the statute that authorizes special probation and treatment in lieu of imprisonment for certain drug dependent offenders. The revisions to N.J.S.A. 2C:35-14 technically do not take effect for six months, but will for practical reasons have immediate impact on pending cases.



I. THE EVOLVING GATEKEEPER ROLE OF THE DRUG COURT PROSECUTOR

As part of the process of enlarging judicial sentencing authority, the new statute eliminates what had been known colloquially as the prosecutor's power to "veto"¹ Drug Court admission for certain offenders who are subject to a presumption of imprisonment or who have previously been convicted of certain offenses. The deletion of N.J.S.A. 2C:35-14c and the resultant elimination of prosecutorial control over the decision to sentence certain defendants to special probation does *not* mean that prosecutors can now stand back as idle spectators to the Drug Court admissions process. To the contrary, now more than ever, prosecutors will be expected to carefully review cases and articulate their concerns when they believe that a particular defendant's participation in Drug Court poses a public safety risk or is otherwise inappropriate. Prosecutors, in other words, will continue to exert considerable influence as gatekeepers, not by wielding *de facto* veto power, but rather through the strength of their case-specific arguments, and the credibility that they earn with Drug Court Judges through their active involvement in all aspects of the program.

It is critical to note in this regard that for many years, prosecutors have served an important role with respect to Drug Court applicants over whom prosecutors have never enjoyed the power to veto admission. The current Drug Court program features two distinct "Tracks." See State v. Meyer, 192 N.J. 421 (2007). Track 1 has been used for offenders who were subject to the prosecutor's *de facto* veto power. Track 2 has been used to admit defendants who were not subject to the prosecutor's veto. Henceforth, all defendants who are legally and clinically eligible for Drug Court under N.J.S.A. 2C:35-14 will be treated as if they were Track 2 cases for purposes of the prosecutor's role in the admissions process. See Section III(1), *infra*. The critical point is that prosecutors have always been fully engaged in the process of vetting and monitoring Track 2 Drug Court participants, and prosecutors must continue to be engaged in the admissions process under the new statutory scheme.

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Technically, the law that is presently in effect does not give prosecutors absolute "veto" power, since the prosecutor's decision to preclude treatment in lieu of imprisonment pursuant to N.J.S.A. 2C:35-14c is subject to judicial review. Since 2000, a judge could use N.J.S.A. 2C:35-14 to overcome the presumption of imprisonment and sentence the defendant to special probation over the prosecutor's objection, provided that the court finds that the prosecutor's objection constitutes a gross and patent abuse of prosecutorial discretion.

II. EXPANSION OF DRUG COURT ELIGIBILITY

The new law will for the first time make it theoretically possible for persons convicted of second-degree robbery² and second-degree burglary (not involving a firearm³) to be sentenced under N.J.S.A. 2C:35-14. Offenders will no longer be subject to an automatic, categorical exclusion from the treatment-in-lieu-of-imprisonment feature by virtue of their second-degree robbery or burglary conviction. It is critical to note, however, that persons who have previously been convicted of or adjudicated delinquent for, or who have a pending charge of certain other specified crimes continue to be categorically ineligible for special probation. Specifically, the list of disqualifying offenses set forth in N.J.S.A. 2C:35-14a(7), as amended by L. 2012, c. 23, includes: murder, aggravated manslaughter, kidnapping, aggravated assault,⁴ aggravated sexual assault, and sexual assault.

The revision to N.J.S.A. 2C:35-14 to permit certain persons convicted of second-degree robbery or burglary to be sentenced to special probation proceeds from the premise that to the extent that the defendant committed such offense as a direct result of an addiction,⁵ treating that addiction may break the cycle and prevent the defendant from committing similar crimes in the future. This relaxation of the ineligibility criteria in N.J.S.A. 2C:35-14 need not endanger public safety, and it is our responsibility to make certain that it does not.

It is critical to note in this regard that admission to Drug Court is based upon criteria and standards that are established by the Judiciary, not by the Comprehensive Drug Reform Act. Drug

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Persons convicted of any first-degree crime are automatically ineligible for special probation pursuant to N.J.S.A. 2C:35-14b(1). N.J.S.A. 2C:35-14b establishes a second set of disqualifying circumstances in addition to the disqualifying circumstances set forth in N.J.S.A. 2C:35-14a(5),(6), and (7).

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N.J.S.A. 2C:35-14a(5) continues to preclude use of the treatment-in-lieu-of-imprisonment feature unless the court finds on the record that, “the person did not possess a firearm at the time of the present offense and did not possess a firearm at the time of any pending charge.”

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It is especially important to note that a pending charge of aggravated assault automatically disqualifies a person from special probation, regardless of the degree of the aggravated assault charge. Prosecutors in exercising their charging and plea negotiation discretion must make certain that a defendant who has committed any act constituting the offense of aggravated assault under any paragraph of N.J.S.A. 2C:12-1b is charged as appropriate. Such a charge will have the effect of precluding eligibility for special probation and Drug Court.

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N.J.S.A. 2C:35-14a(3) continues to require that the court make an affirmative finding on the record that, “the present offense was committed while the person was under the influence of a controlled dangerous substance, controlled substance analog or alcohol or was committed to acquire property or monies in order to support the person’s drug or alcohol dependency.” In other words, the treatment-in-lieu-of-imprisonment feature can only be used when the court finds on the record that there is a direct link between the addiction and the criminal act.

Court is not a statute, but rather a program administered by the Judiciary that links qualified candidates to court-supervised and state-funded treatment and aftercare services. The Drug Court program uses N.J.S.A. 2C:35-14 as a legal tool that allows a Judge at sentencing to overcome the penal code's strictly-enforced presumption of imposing a State Prison term. See N.J.S.A. 2C:44-1d. Without this statutory feature to avoid the presumption of imprisonment, Drug Court as we know it would not be possible, at least with respect to prison-bound offenders. But eligibility to be sentenced to special probation under N.J.S.A. 2C:35-14 does not guarantee admission to the Drug Court program, which has its own admission criteria and procedures that are independent of and supplementary to the statutory criteria codified in N.J.S.A. 2C:35-14.

Accordingly, the fact that a defendant may not be categorically ineligible to be sentenced to special probation under N.J.S.A. 2C:35-14 does not mean that he or she has a right to be admitted to Drug Court. Rather, a person convicted of second-degree robbery or second-degree burglary at most has the right to have the court consider at sentencing whether it is appropriate to use N.J.S.A. 2C:35-14 as a means to avoid the presumption of imprisonment that otherwise applies to such serious crimes, assuming that the defendant is not categorically precluded from being sentenced to special probation based on some other statutory ineligibility criterion. The decision whether to admit a defendant to the Drug Court Program is by no means foreordained simply because the defendant is not automatically ineligible to be sentenced under N.J.S.A. 2C:35-14. Rather, the actual admission decision will account for numerous factors to be considered on a case-by-case basis by the Drug Court team and the Judge.

It must be kept firmly in mind, moreover, that the Drug Court program is meant for *non-violent* offenders. It is therefore incumbent upon prosecutors to apprise the court of the exact circumstances of both the present offense and any past offenses, whether actual violence was employed, the nature of any threatened violence and its impact on the victim(s), and whether the defendant is involved in gang activity that ought not be introduced into a drug treatment facility. *Prosecutors, in other words, will be expected to argue forcefully against the admission of any defendant who might pose a risk of harm to a victim, the general public, or to other Drug Court participants or treatment provider staff.*

Prosecutors will also be expected to safeguard the rights of crime victims, including their right to be apprised of and have input in all sentencing decisions, including the decision whether to admit a defendant to Drug Court. It is important to note in this regard that on August 7, 2012, Governor Christie signed L. 2012, c. 27, which amends the victim's bill of rights codified at N.J.S.A. 52:4B-36. The new law, which takes effect on October 6, 2012, confirms that a victim has a right to be present at any judicial proceeding involving a crime, and creates a right "to appear in any court before which a proceeding implicating the rights of the victim is being held." The new law also guarantees victims a right to have the opportunity to consult with the prosecutor prior to the conclusion of any plea negotiations, and to have the prosecutor advise the court of the consultation and the victim's position regarding the plea agreement.

III. ACTION STEPS

The legislation expressly authorizes the Attorney General to “take such anticipatory administrative action in advance [of the effective dates] as shall be necessary for the implementation of this act.” See L. 2012, c. 23, Sec. 7. Accordingly, and pursuant to my authority to ensure the uniform and efficient administration of the criminal laws under the Criminal Justice Act, N.J.S.A. 52:17B-98, I hereby direct that the following steps be taken to facilitate the implementation of the new law:

1. Immediate Implementation of Revisions to N.J.S.A. 2C:35-14

The amendments to N.J.S.A. 2C:35-14 that eliminate a prosecutor’s “veto” authority and that make second-degree robbers and burglars potentially eligible for special probation technically do not take effect until six months after enactment. However, it is appropriate as a matter of sound prosecutorial policy to begin implementing these provisions before the official effective date in order to avoid unnecessary Law Division and Appellate Division litigation, to preclude any possibility that an appellate court might someday order a remand hearing sought by a State Prison inmate whose application for Drug Court was vetoed by a prosecutor after July 19, and to prevent persons charged with second-degree robbery and/or second-degree burglary from delaying resolution of their cases so that they can submit Drug Court applications after the official effective date.

a. Effective Advocacy in Lieu of Veto Authority

Effective immediately, in any case where a defendant’s application to Drug Court has not already been heard and rejected by the Drug Court Judge, a prosecutor should not invoke N.J.S.A. 2C:35-14c to effectively veto the defendant’s application to be sentenced to special probation. Rather, in any case where the defendant is not categorically ineligible for special probation, if the prosecutor believes that the defendant should not be admitted to Drug Court, the prosecutor must present an argument to the trial court explaining the case-specific reasons why the court should exercise its own discretion and authority to deny the defendant’s application.

Henceforth, a prosecutor shall not argue that a court cannot sentence the defendant to special probation over the prosecutor’s objection without first finding that the prosecutor’s objection constitutes a gross and patent abuse of prosecutorial discretion. Rather, the prosecutor should present the State’s arguments against admission with the clear understanding that the court must make its own assessment, and that the court is no longer required by statute to give substantial deference to the prosecutor’s decision to object. In essence, the prosecutor should henceforth present the reasons for his or her objections, and the objections of the Drug Court team where applicable, as if the matter were a “Track 2” Drug Court application, rather than a “Track 1” application. The prosecutor should make certain that the record clearly indicates that if the Judge denies admission, that decision was based on the court’s own assessment of the relevant factors and circumstances, and

not because the court was required by N.J.S.A. 2C:35-14c to defer to the prosecutor's position.

b. Drug Court Applications Involving Defendants Charged with Second-Degree Robbery or Second-Degree Burglary

Effective immediately, a prosecutor should proceed as if a person facing a charge of second-degree robbery or second-degree burglary is not categorically ineligible to be sentenced to special probation under N.J.S.A. 2C:35-14 by virtue of any such pending robbery or burglary charge. However, the prosecutor in these cases must determine whether the defendant is categorically ineligible for special probation based on the manner in which the second-degree robbery or burglary was committed. Consistent with the Legislature's clear and unwavering mandate that persons facing a pending charge of any form of aggravated assault cannot be sentenced to special probation, see note 4 and accompanying text, supra, the prosecutor must carefully review the circumstances of the robbery or burglary, and any other criminal episode involving the defendant, to determine whether the defendant has committed any act constituting the crime of aggravated assault under any paragraph of N.J.S.A. 2C:12-1b, or has committed any other disqualifying offense, in which event the prosecutor shall be expected to bring or pursue such charge(s), as appropriate, and not dismiss any such disqualifying charge(s) pursuant to a negotiated plea disposition.

In any case where the defendant is charged with second-degree robbery or second-degree burglary and he or she is not categorically ineligible for special probation, if the prosecutor believes that defendant's admission to Drug Court would jeopardize public safety or the safety of a victim, or the safety of other Drug Court participants or treatment provider staff, or if the prosecutor believes for any other reason that defendant's admission to Drug Court would be inappropriate, the prosecutor shall argue that, considering the specific circumstances of the offense and the offender, the court in the exercise of its discretion and authority should reject the defendant's application.

Furthermore, whether the prosecutor objects to the defendant's admission to Drug Court or not, whenever a person charged with second-degree robbery or second-degree burglary applies to Drug Court and he or she is not otherwise ineligible to be sentenced to special probation pursuant to N.J.S.A. 2C:35-14, the prosecutor must advise the court of the exact factual circumstances of the present and past offenses. The prosecutor shall also advise the court if the defendant is believed to be involved in gang activity that ought not be introduced into a drug treatment facility, or that might preclude successful rehabilitation.

Prosecutors will also be expected to safeguard the statutory and constitutional rights of robbery and burglary victims, including their right to appear before any court before which a proceeding implicating the rights of the victim is being held, the right to consult with the prosecutor prior to the conclusion of any plea negotiations, and the right to have the prosecutor advise the court of the consultation and the victim's position regarding the plea agreement. See L. 2012, c. 27 (amending N.J.S.A. 52:4B-36, effective October 6, 2012). Prosecutors shall advise the victim(s)

regarding the Drug Court admissions process, and will safeguard the victim's right to appear at any court hearing concerning Drug Court admission.

c. Scope and Effect

Nothing in this memorandum shall be construed in any way to limit a prosecutor's authority and responsibility to take all appropriate steps, including an appeal when necessary, to ensure that a defendant is not admitted to Drug Court where the defendant is ineligible for special probation pursuant to any provision of N.J.S.A. 2C:35-14 that is not deleted or amended by the new law (e.g., where the offense involved the use or possession of a firearm, where the defendant's criminal record disqualifies him or her from special probation, etc.), or where the court has failed to make any required finding on the record (e.g., that the present offense was committed while the person was under the influence of a controlled substance, or to acquire property or monies to support the person's drug dependency).

Nor shall anything in this memorandum be construed in any way to constitute a concession that any form of retroactive application of any provision of L. 2012, c. 23 is required as a matter of legislative intent or constitutional imperative. Rather, the Attorney General policy decision to instruct prosecutors to proceed as if the revisions to N.J.S.A. 2C:35-14 apply to persons whose applications to Drug Court are pending at the time of the new law's enactment, but prior to the official effective date of those revisions, is done as a matter of prosecutorial discretion and in the interests of efficiency and statewide uniformity, to reduce administrative and workload burdens on prosecutors and courts, and to avoid creating practical incentives for defendants to delay resolution of their cases until after the revisions to N.J.S.A. 2C:35-14 officially take effect.

2. Drug Court Prosecutors Manual

The Division of Criminal Justice, working in consultation with the County Prosecutors, will develop, maintain, and periodically update a Manual to be used by assistant prosecutors and deputy and assistant attorneys general who handle cases that involve defendants who may be eligible for Drug Court participation. The Drug Court Prosecutor Manual should complement the Drug Court Manual developed by the Administrative Office of the Courts, but should be geared to address the specific needs of prosecutors in implementing N.J.S.A. 2C:35-14, as amended by L. 2012, c. 23. The Manual should prescribe standards for reviewing cases and objecting to Drug Court admission, and include sample forms, briefs, and other materials to assist prosecutors handling Drug Court cases.

3. Training Materials

The Division of Criminal Justice, working in consultation with the County Prosecutors, will develop and periodically update training materials to explain the Drug Court process and relevant

legal issues to assistant prosecutors and deputy and assistant attorneys general.

4. Cooperation with the AOC

The Division of Criminal Justice and County Prosecutors must continue to work with the Administrative Office of the Courts and local judiciary in implementing the Drug Court program. The County Prosecutors Association and Division will each continue to designate a representative to serve on the Supreme Court Drug Court Advisory Committee. That Supreme Court Committee will play a key role in the implementation of the new law, and it is vital that the interests and practical needs of prosecutors be forcefully articulated.

5. Committee/Association of Drug Court Assistant Prosecutors

The Division of Criminal Justice will convene and coordinate regular meetings of the assistant prosecutors who are assigned by their offices to Drug Court. These assistant prosecutors should be consulted on all significant issues involving implementation of the expanded Drug Court program.

6. Standing Committee of County Prosecutors

The County Prosecutors Association is requested to form a standing committee to address legal and policy issues related to the implementation of the Drug Court program, and to advise the Association on these important issues.

7. Coordination of Drug Court-Related Litigation

In order to ensure the uniform interpretation and implementation of N.J.S.A. 2C:35-14, prosecutors will be expected to advise the Director of the Division of Criminal Justice, or his designee, of all legal challenges to N.J.S.A. 2C:35-14 and any Appellate Division or Supreme Court litigation involving the interpretation or application of that statute. The Division may from time to time issue guidance to prosecutors on how to respond to legal issues.