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

FROM: John J. Hoffman, Acting Attorney General

DATE: May 29, 2014

SUBJECT: Uniform Plea Negotiation Guidelines to Implement the Jessica Lunsford Act, P.L.
2014, c. 7

On May 15, 2014, Governor Christie signed into law the Jessica Lunsford Act as P.L. 2014, c. 7 (Assembly Bill No. 892). A copy of the Act, which took effect immediately upon its adoption, is appended. Named for a nine-year-old girl who was kidnapped, raped, and murdered by a registered sex offender in Florida, the new law increases the punishment for a defendant convicted of aggravated sexual assault of a victim who is less than 13 years old. The new mandatory minimum sentence is not limited to crimes involving kidnapping or murder, and applies without regard to whether the defendant previously was convicted of a sex offense. Rather, the enhanced sentence applies to any conviction for violation of the sexual penetration crime set forth in N.J.S.A. 2C:14-2a(1).

Specifically, the new law requires the court to impose a sentence fixed by the court between 25 years and life imprisonment of which the defendant must serve 25 years before becoming eligible for parole unless a longer term is otherwise provided by law. Recognizing the need to provide an incentive for guilty defendants to plead guilty to spare the victim from having to participate in a trial, the Act authorizes the prosecutor to offer a negotiated plea agreement that reduces the mandatory minimum term of imprisonment and parole ineligibility. Any such negotiated sentence must be for a term of imprisonment and parole ineligibility not less than 15 years. If the court accepts the negotiated disposition, it must impose the term of parole ineligibility as provided in the plea agreement; the court is prohibited from imposing a lesser term of imprisonment and parole ineligibility than the one set forth in the plea agreement.

The statutory provision authorizing a prosecutor to reduce the 25-year term of parole ineligibility is different from other mandatory minimum waiver/reduction statutes, such as N.J.S.A.



2C:35-12 (authorizing waiver/reduction of mandatory minimum sentences under the Comprehensive Drug Reform Act), in two important respects. First, the Jessica Lunsford Act establishes an absolute minimum sentence on conviction for a violation of N.J.S.A. 2C:14-2a(1) – 15 years without parole – that cannot be reduced by the prosecutor or the court under any circumstances. Second, the Act makes clear that any reduction negotiated by the prosecutor must be done in consideration of the interests of the victim.

To ensure the uniform exercise of prosecutorial discretion, the Act requires the Attorney General to develop guidelines regarding the negotiated reduction in the term of imprisonment and parole ineligibility. The following Guidelines are promulgated pursuant to that statutory requirement. These Guidelines are binding on all County Prosecutors and the Division of Criminal Justice when handling a case involving a violation of N.J.S.A. 2C:14-2a(1) committed on or after May 15, 2014, and no plea offer shall be tendered to a defendant charged with a violation of N.J.S.A. 2C:14-2a(1) committed after the Act's effective date except in accordance with these Guidelines.

1. Relevant Factors.

In deciding whether to offer a plea agreement that reduces the 25-year stipulated sentence, the prosecutor shall consider the following factors and circumstances¹ in consideration of the interests of the victim:

- a. The degree of physical and emotional harm suffered by the victim and members of the victim's immediate family;
- b. The interest of the victim and members of the victim's immediate family in avoiding the need to testify at trial or a pretrial hearing;
- c. The interest of the victim and members of the victim's immediate family in avoiding the need to listen to testimony recounting the crime and/or its impact;
- d. The immediate and long-term interest of the victim and members of the victim's immediate family in not having details of the crime and its impact publicized at a trial;
- e. The interest of the victim and members of the victim's immediate family in the swiftest possible resolution of the criminal matter;

¹ Note that a defendant's substantial cooperation is addressed separately in Section 6.

- f. The interest of the victim and members of the victim's immediate family in the certainty of conviction resulting from a guilty plea;
- g. the position of the victim, where appropriate given his or her age, and the victim's parent(s)/legal guardian(s) regarding the plea agreement; and
- h. the prosecutor's assessment of the likelihood of obtaining a guilty verdict at a trial, recognizing that an acquittal on the aggravated sexual assault charge or adverse rulings in pretrial motions would impact adversely the interests of the victim and members of the victim's immediate family.

2. Amount of Reduction.

Subject to the limitations set forth in Sections 3 and 4, the amount of the reduction in the stipulated 25-year term of parole ineligibility shall be determined by the prosecutor considering all of the factors listed in Section 1. The determination of an appropriate reduction necessarily is vested in the reasoned discretion of the prosecutor and latitude therefore is afforded to reduce the stipulated sentence based upon variable factors considering the interests of the victim.

3. Maximum (10-Year) Reduction Reserved For Pre-Indictment Plea Offer.

In order to provide the greatest possible incentive for a defendant to plead guilty as expeditiously as possible and before the expenditure of significant judicial and prosecutorial resources, the prosecutor may offer a plea agreement providing for a 15-year term of parole ineligibility (*i.e.*, the maximum allowable reduction) only if the defendant agrees to plead guilty before indictment. Any such pre-indictment plea offer shall expire automatically upon the return of an indictment. After indictment a prosecutor shall not offer a plea agreement providing for a term of parole ineligibility less than 18 years (a three-year minimum increase as required by Section 4) unless the County Prosecutor, or Director of the Division of Criminal Justice in cases prosecuted by the Division, determines in writing that there has been a material change in circumstances that, considering the factors listed in Section 1, justifies a post-indictment plea offer that provides for a term of parole ineligibility between 15 and 18 years.

4. Escalating Plea Policy.

When a prosecutor makes a plea offer that reduces the stipulated 25-year sentence, the offer shall include a date or event at which the offer will expire and will be withdrawn automatically. In

the case of a pre-indictment offer, the offer shall expire automatically upon the return of an indictment unless the prosecutor specifies an earlier date or event. After the expiration of a plea offer, the prosecutor may make a new plea offer in which event the new offer shall provide for a term of parole ineligibility that is not less than three (3) years longer than the term of parole ineligibility provided in the expired offer unless the County Prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the Division, determines in writing that a material change in circumstances justifies relaxation of the general escalation principle established in the Guidelines that negotiated reductions in the stipulated parole ineligibility term shall be less generous as the case progresses toward a trial date. A prosecutor may indicate in a written plea offer that when the current offer expires, it will be replaced automatically with another specific plea offer pursuant to the graduated plea system required by these Guidelines. For example, a pre-indictment plea offer may indicate that the offer is 15 years of parole ineligibility and expires upon return of an indictment, at which point the next graduated plea offer will be 20 years of parole ineligibility. If the prosecutor elects to specify a replacement plea offer, the prosecutor also shall specify the date or event at which that replacement offer will expire.

5. Approval Procedure When Victim/Parent(s) Objects to Reduction.

In accordance with N.J.S.A. 52:4B-36 (victims' bill of rights), the prosecutor shall not make a plea offer that reduces the stipulated 25-year term of parole ineligibility without first consulting with the victim's parent(s)/legal guardian(s). If he/she/they object to the proposed sentence reduction, the prosecutor shall not tender the plea offer to defendant/defense counsel unless the County Prosecutor, or Director of the Division of Criminal Justice in cases prosecuted by the Division, determines in writing that the plea offer is appropriate and in the best interests of the victim notwithstanding the objection. As required by N.J.S.A. 52:4B-36(o), the prosecutor shall advise the court of the victim's objection.

6. Cooperation Agreements.

It is expected that cooperation agreements with defendants charged with aggravated sexual assault will occur less frequently than with crimes involving drug trafficking or other offenses that tend to involve conspiracies and multiple defendants. There may, however, be circumstances where it is necessary and appropriate to reduce the mandatory minimum sentence in order successfully to prosecute more culpable defendants involved in the offense, or to solve and successfully prosecute other violent crimes committed by this defendant or another for the benefit of other crime victims and their families. Accordingly, notwithstanding any other provision of these Guidelines, a prosecutor is authorized to make a plea offer that reduces the 25-year term of parole ineligibility in

exchange for the defendant's substantial cooperation subject to the following limitations:

- a. the County Prosecutor or the Director of the Division of Criminal Justice determines that the cooperation agreement is necessary to solve or successfully prosecute a violent crime subject to the No Early Release Act, N.J.S.A. 2C:43-7.2; and
- b. The reduction in the stipulated 25-year parole ineligibility term in exchange for defendant's substantial cooperation does not exceed 10 years.

7. Supersedure of Inconsistent Directives/Guidelines.

To the extent that any provision of the Attorney General's Directive for Enforcing the "No Early Release Act" (April 24, 1998) (hereinafter: "NERA Directive") is inconsistent with the provisions of these Guidelines, these Guidelines govern and shall be construed to supersede such inconsistent provisions. Nothing herein shall be construed, however, to supersede or revise provisions of the NERA Directive that are not inconsistent with the mandatory sentencing provisions of the Jessica Lunsford Act, including the provisions in the NERA Directive regarding charging/downgrading decisions. See, e.g., NERA Directive Sections A and C. Those provisions of the No Early Release Act Directive remain in full force and effect.

8. Required Appeals and Notification of Adverse Rulings.


If a court for any reason imposes a lesser term of imprisonment and parole ineligibility than provided in the plea agreement, a term or parole ineligibility less than 15 years, or a sentence that is otherwise illegal, the County Prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the Division, shall appeal the illegal sentence and, where necessary, shall seek to stay the imposition of sentence to permit the appeal. In addition, the County Prosecutor shall immediately notify the Director, or his designee, of any such adverse ruling. If a defendant challenges the constitutionality or application of any provision of the Act or these Guidelines, the County Prosecutor shall advise the Director or his designee of the challenge.

9. Questions.

All questions by County Prosecutors concerning the interpretation and implementation of the Jessica Lunsford Act or these Guidelines shall be addressed to the Director of the Division of Criminal Justice, or his designee.

10. Effective Date.

These Guidelines shall take effect immediately and apply to all cases involving a violation of N.J.S.A. 2C:14-2a(1) committed on or after May 15, 2014. These Guidelines shall remain in force and effect unless and until repealed, revised, or superseded by Order of the Attorney General.



John J. Hoffman
Acting Attorney General

Dated: May 29, 2014

P.L.2014, CHAPTER 7, *approved May 15, 2014*
Assembly, No. 892

1 **AN ACT** concerning certain sexual assaults, designated the “Jessica
2 Lunsford Act,” and amending N.J.S.2C:14-2.

3
4 **BE IT ENACTED** by the Senate and General Assembly of the State
5 of New Jersey:

6
7 1. N.J.S.2C:14-2 is amended to read as follows:
8 2C:14-2. Sexual assault. a. An actor is guilty of aggravated
9 sexual assault if he commits an act of sexual penetration with
10 another person under any one of the following circumstances:

- 11 (1) The victim is less than 13 years old;
12 (2) The victim is at least 13 but less than 16 years old; and
13 (a) The actor is related to the victim by blood or affinity to the
14 third degree, or
15 (b) The actor has supervisory or disciplinary power over the
16 victim by virtue of the actor's legal, professional, or occupational
17 status, or
18 (c) The actor is a resource family parent, a guardian, or stands
19 in loco parentis within the household;
20 (3) The act is committed during the commission, or attempted
21 commission, whether alone or with one or more other persons, of
22 robbery, kidnapping, homicide, aggravated assault on another,
23 burglary, arson or criminal escape;
24 (4) The actor is armed with a weapon or any object fashioned in
25 such a manner as to lead the victim to reasonably believe it to be a
26 weapon and threatens by word or gesture to use the weapon or
27 object;
28 (5) The actor is aided or abetted by one or more other persons
29 and the actor uses physical force or coercion;
30 (6) The actor uses physical force or coercion and severe
31 personal injury is sustained by the victim;
32 (7) The victim is one whom the actor knew or should have
33 known was physically helpless or incapacitated, intellectually or
34 mentally incapacitated, or had a mental disease or defect which
35 rendered the victim temporarily or permanently incapable of
36 understanding the nature of his conduct, including, but not limited
37 to, being incapable of providing consent.

38 Aggravated sexual assault is a crime of the first degree.
39 Except as otherwise provided in subsection d. of this section, a
40 person convicted under paragraph (1) of this subsection shall be
41 sentenced to a specific term of years which shall be fixed by the
42 court and shall be between 25 years and life imprisonment of which

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

1 the person shall serve 25 years before being eligible for parole,
2 unless a longer term of parole ineligibility is otherwise provided
3 pursuant to this Title.

4 b. An actor is guilty of sexual assault if he commits an act of
5 sexual contact with a victim who is less than 13 years old and the
6 actor is at least four years older than the victim.

7 c. An actor is guilty of sexual assault if he commits an act of
8 sexual penetration with another person under any one of the
9 following circumstances:

10 (1) The actor uses physical force or coercion, but the victim
11 does not sustain severe personal injury;

12 (2) The victim is on probation or parole, or is detained in a
13 hospital, prison or other institution and the actor has supervisory or
14 disciplinary power over the victim by virtue of the actor's legal,
15 professional or occupational status;

16 (3) The victim is at least 16 but less than 18 years old and:

17 (a) The actor is related to the victim by blood or affinity to the
18 third degree; or

19 (b) The actor has supervisory or disciplinary power of any
20 nature or in any capacity over the victim; or

21 (c) The actor is a resource family parent, a guardian, or stands
22 in loco parentis within the household;

23 (4) The victim is at least 13 but less than 16 years old and the
24 actor is at least four years older than the victim.

25 Sexual assault is a crime of the second degree.

26 d. Notwithstanding the provisions of subsection a. of this
27 section, where a defendant is charged with a violation under
28 paragraph (1) of subsection a. of this section, the prosecutor, in
29 consideration of the interests of the victim, may offer a negotiated
30 plea agreement in which the defendant would be sentenced to a
31 specific term of imprisonment of not less than 15 years, during
32 which the defendant shall not be eligible for parole. In such event,
33 the court may accept the negotiated plea agreement and upon such
34 conviction shall impose the term of imprisonment and period of
35 parole ineligibility as provided for in the plea agreement, and may
36 not impose a lesser term of imprisonment or parole or a lesser
37 period of parole ineligibility than that expressly provided in the plea
38 agreement. The Attorney General shall develop guidelines to ensure
39 the uniform exercise of discretion in making determinations
40 regarding a negotiated reduction in the term of imprisonment and
41 period of parole ineligibility set forth in subsection a. of this
42 section.

43 (cf: P.L.2013, c.214, s.3)

44

45 2. This act shall take effect immediately.

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Enacts the "Jessica Lunsford Act"; imposes mandatory term of imprisonment; provides for negotiated reduction of mandatory term under certain circumstances.