



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

Christine Todd Whitman  
Governor

Peter Verniero  
Attorney General

Paul H. Zoubek, Director  
Division of Criminal Justice

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## **Table of Contents**

	<b><u>Page</u></b>
<b><i>I. Introduction</i></b>	<b>1</b>
<b><i>II. Overview of The Basic Approach of These Guidelines</i></b>	<b>3</b>
A. How to Determine An Authorized Plea Offer	4
B. Relevant Conduct	5
C. Structuring Plea Agreements	7
D. Disputed Facts	8
E. Graduated Plea Policy and Timing of the Plea	9
F. Post-Conviction Waivers	13
G. Departures from the Prescribed Authorized Disposition	14
H. Prohibition of Separate County Plea Policies	15
I. Lagares Extended Term Applications	16
J. Expiration and Modification of Plea Offers	16
K. Restrictions on Relevant Factors	17
L. Defense Input	18
M. Scope of Guidelines and Applicability to Non-Drug Cases	19
N. Questions and Controversies	19
O. Periodic Review and Revisions	19
P. Repealer	20
<b><i>III. Summary of Instructions for Determining an Authorized Plea Offer Under N.J.S.A. 2C:35-12</i></b>	<b>21</b>
<b><i>IV. Selecting the Appropriate Offense Description</i></b>	<b>24</b>
A. Application of Special Offense Characteristics	24
1. Offenses Involving Weapons	24
2. Offenses Involving Amounts Above the Statutory Threshold	24
3. Offenses Involving First-Degree Amounts of Methamphetamine and Marijuana	26
4. Age Differential in “Using a Juvenile” Cases	26
<b><i>V. Determination of Appropriate Criminal History Category</i></b>	<b>28</b>
<b><i>VI. Schedule of Aggravating and Mitigating Factors</i></b>	<b>31</b>
A. Aggravating Factors	31
B. Mitigating Factors	32
<b><i>VII. Description and Commentary for Aggravating and Mitigating Factors</i></b>	<b>34</b>
A. Aggravating Factors	34
1. Community Impact	34
2. Bail Violations	36

3.	Threatened Violence	36
4.	Organization	36
B.	Mitigating Factors	38
1.	Non-Pecuniary Distribution	38
2.	Defendant's Role in Scheme	39
3.	Voluntary Renunciation	40
4.	Drug Treatment	40
5.	No Prior Court Involvement	42
C.	Calculation of Grand Total of Aggravating/Mitigating Points	42
<b>VIII.</b>	<b><i>Downward Adjustment for Trial Proof Issues</i></b>	<b>44</b>
<b>IX.</b>	<b><i>Special Application and Enhancement Features</i></b>	<b>48</b>
A.	Booby Traps and Fortifications	48
B.	Violence	48
C.	Offense Committed While Under Supervision	49
D.	Offenses Occurring on School Property	49
E.	Distribution to a Juvenile or Pregnant Female	50
F.	Offenses Committed in or Around Correctional or Treatment Facilities	50
G.	Anti-Drug Profiteering Penalty	51
<b>X.</b>	<b><i>Downward Departure for Substantial Cooperation</i></b>	<b>52</b>
<b>XI.</b>	<b><i>Tables of Authorized Plea Offers</i></b>	<b>56</b>
	Table 1	
	Offenses Under <u>N.J.S.A.</u> 2C:35-7 (Drug-Free School Zone)	57
	Table 2	
	Offenses Under <u>N.J.S.A.</u> 2C:35-5* (Where Defendant Is Subject to an Extended Term Under <u>N.J.S.A.</u> 2C:43-6f (Repeat Offender))	58
	Table 3	
	Offenses Under <u>N.J.S.A.</u> 2C:35-6 (Using a Juvenile in a Drug-Distribution Scheme)	59
	Table 4	
	Offenses Under <u>N.J.S.A.</u> 2C:35-4 (Drug Production Facility)	60
	Table 5	
	Offenses Under <u>N.J.S.A.</u> 2C:35-5 (1st Degree)* (First-Degree Distribution or Possession with Intent)	61
	Table 6	
	Offenses Under <u>N.J.S.A.</u> 2C:35-3* (Leader of Narcotics Trafficking Network)	62

## *I. Introduction.*

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 the mandatory minimum sentence. In that event, the court may not impose a lesser sentence than that agreed to by the prosecutor. This provision ensures that the State, no less than the defendant, receives the full benefit of its bargain.

The 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 review for arbitrary and capricious action. 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 and that could include "standardized" plea offers that could be 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.

It should be noted that the specific plea offers authorized by these Guidelines are based on the Interim Plea Negotiation Policy established by Attorney General Verniero on February 26, 1998. Thus, for example, a person with no prior criminal history who commits the offense of distributing a third-degree quantity of illicit drugs in a drug-free school zone, in the absence of other recognized aggravating or mitigating circumstances, will receive the same plea offer under these Guidelines as would have been required to be offered under the Interim Plea Negotiation Policy, that is, twelve (12) months of parole ineligibility if the plea is entered before indictment, and eighteen (18) months of parole ineligibility if the plea is entered shortly after indictment.

Rather than pursue a piecemeal approach, Attorney General Verniero determined to undertake a complete review of all aspects of existing drug prosecution guidelines and policies to ensure strict, uniform, and fair enforcement of our laws. The Attorney General consulted with the county prosecutors as well as professionals in the Division of Criminal Justice, including Assistant Attorney General Ronald Susswein of the Division's Policy Bureau. The results of this comprehensive effort are reflected in these Guidelines and in Attorney General Executive Directive 1998-1, which makes these Guidelines binding on all prosecutors.

## ***II. Overview of The Basic Approach of These Guidelines.***

The following plea negotiation Guidelines govern how prosecutors handle cases arising under the Comprehensive Drug Reform Act that are subject to a waivable mandatory term of imprisonment and parole ineligibility. These Guidelines are designed to establish a unified statewide plea negotiation system that is both strict and rational, 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.

The new plea negotiation system combines 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, which establishes 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”). The vertical axis of the matrix depicts the Offense Description, which accounts for certain offense characteristics and 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.

These Guidelines apply to all cases under the Comprehensive Drug Reform Act that are subject to the waiver provisions of N.J.S.A. 2C:35-12, whether brought by a county prosecutor or the Division of Criminal Justice. The term “prosecutor” as used in these Guidelines refers to the county prosecutor and his or her assistants, and also

includes the Director of the Division of Criminal Justice and assistant and deputy attorneys general.

A. How to Determine An Authorized Plea Offer.

Although the statewide plea negotiation system established by these Guidelines appears 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 have heretofore existed, the process of determining the appropriate plea offer is straightforward, and the procedures are actually less complex than those used in the Federal Sentencing Guidelines.

The system relies on a grid-like Table of Authorized Plea Offers. (These are reproduced in Part XI.) It is expected 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 charge and must consider certain "offense characteristics," such as whether the defendant was armed 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, 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. To ensure uniformity at this point in the process, each relevant factor is carefully defined and is pre-assigned a point value. These point values are totalled to determine whether the prosecutor may tender a plea offer above or below the presumptive offer displayed in the table. (See Parts VI and VII.)

Next, the prosecutor, considering the proofs available for trial and the likelihood of obtaining a guilty verdict, must determine whether to make a "Downward Adjustment" within the authorized range of plea offers or up to three (3) months below the minimum term in the range in certain circumstances. (See Part VIII.)

At this point, the prosecutor must apply “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 sentence that would otherwise apply, or where the present offense was committed while the defendant was on parole or probation. (See Part IX.)

Finally, prosecutors are authorized to make a “Downward Departure” from the plea offer that must otherwise be tendered pursuant to these Guidelines only if the defendant provides “substantial cooperation” to law enforcement. (See Part X.)

It should be noted that this basic approach represents a continuation and refinement of the plea policies that had been adopted in a number of counties. Several county prosecutors, for example, had promulgated specialized standardized plea offers that accounted for the timing of the plea, the presence or use of weapons, the amount of drugs involved, and/or the defendant’s criminal history. However, no county prosecutor had established a policy that permitted all of these critical factors to be accounted simultaneously and cumulatively.

*B.     Relevant Conduct.*

This system requires that a plea offer reflect the actual conduct of the defendant. A prosecutor is therefore 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 Adjustment or 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 will be implemented through the use of a specially-designed worksheet that includes a checkoff box for each authorized Special Enhancement Feature and aggravating and mitigating factor, thus indicating to the court whether or not the defendant’s “relevant conduct” implicates that feature or factor. The completed worksheet should be submitted as part of the written plea offer pursuant to R. 3:9-1b.

Accordingly, 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 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 preserves 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 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 § J, *infra*.)

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 a careful evaluation by the Division of Criminal Justice of the impact of this new plea negotiation system on the state prison population, 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. 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).

C. Structuring Plea Agreements.

Given the accumulative nature of this system, which is designed to account for all relevant aggravating circumstances in determining the defendant's culpability, 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 or enhanced punishment pursuant to N.J.S.A. 2C:35-8. 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 and the third-degree 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, 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) 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 indicated by the Table of Authorized Plea Offers, then the prosecutor, so as to provide some incentive for the defendant to plead guilty, shall, except as provided in Special Application and Enhancement Feature D1, 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.

D. Disputed Facts.

These Guidelines are designed, pursuant to the Supreme Court's directive in State v. Brimage, 153 N.J. 1 (1998), 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 an offense characteristic, a Special Application and Enhancement Feature, a Downward Adjustment for Trial Proof Issues, or an Aggravating or Mitigating Factor. 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 that 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 gang 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 determination of an appropriate plea offer. Recall that pursuant to § B, a prosecutor is required to consider the defendant's actual conduct, whether the defendant acknowledges such conduct or not, and also to disclose fully to the court all facts and circumstances that are deemed relevant under these Guidelines. (As noted in § B, the prosecutor also has the option to indicate on the 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 to apply a Special Offense Characteristic, Special Application and Enhancement Feature, Aggravating or Mitigating Factor, or Downward Adjustment of Departure. Moreover, the 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 the application or scoring of a Special Offense Characteristic, Special Application and Enhancement Feature, Aggravating or Mitigating Factor, or Downward Adjustment or 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 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 to articulate a clear and reasonably specific explanation for their legitimate reason for applying a Special Offense Characteristic, Special Application and Enhancement Feature, Aggravating or Mitigating Factor, or Downward Adjustment or 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 § O, *infra*, 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.

*E.     Graduated Plea Policy and Timing of the Plea.*

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 criminal justice process. These Guidelines continue the policy that had been used in most counties (and that was recently required

to be used in all counties pursuant to the Attorney General's post-Brimage Interim Plea Policy) that accounts for the timing of the plea and that specifically provides for a longer sentence if 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.

These Guidelines extend this principle by establishing a three-step graduated plea system that distinguishes pleas taken before indictment, those taken within twenty (20) days of the issuance of the prosecutor's initial post-indictment plea offer, and those taken more than twenty (20) days after issuance of the initial post-indictment plea offer. While the Attorney General has not heretofore required county prosecutors to establish such a formal escalating plea policy, several counties have successfully employed such a system, which is premised on the principle that the prosecutor's "best" offer (from the defendant's perspective) should be provided at the outset of the process and that, thereafter, plea offers generally should become progressively more stern as a case proceeds through the system.

This system is designed to promote rehabilitation of the defendant as well as to achieve systemic benefits, including the conservation of judicial and prosecutorial resources. It is based not only on New Jersey practice and experience, but also on § 3E1.1 of the Federal Sentencing Guidelines Manual (1998 Ed.), 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."

The New Jersey Supreme Court in State v. Shaw, 131 N.J. 1 (1993), recognized 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.

Accordingly, as reflected in the Tables of Authorized Plea Offers that appear in Part XI, these Guidelines establish a uniform statewide graduated plea system where the range of authorized plea offers and the presumptive plea offer in each cell reflects the timing of the plea as follows:

1. Pleas taken before indictment;

2. Pleas taken after indictment but within twenty (20) days of the issuance by the prosecutor of the initial post-indictment plea offer; and,
3. Pleas taken more than twenty (20) days after 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”)

To achieve the rehabilitative and systemic benefits of this graduated plea system, the 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, to require the prosecution to prove its case beyond a reasonable doubt, to confront State witnesses, and 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.

The 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 choose to do so, thereby breaching his 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 return 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 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.

It should be noted, however, that several counties do not have in place formal pre-indictment case disposition programs to take full advantage of this graduated plea policy. (Such programs cannot be established unilaterally by the prosecutor; rather, they 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 a drug-free school zone offense 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 taken prior to some event other than an indictment that reflects an 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 does not tender a plea offer prior to the return of an indictment to an offense that carries a mandatory term of imprisonment subject to waiver pursuant to N.J.S.A. 2C:35-12, 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. Any such plea offer shall automatically expire if it is not executed or accepted in writing within seventy-five (75) days of the arrest and, thereafter, the appropriate plea offer shall be the applicable post-indictment plea offer determined in accordance with the provisions of these Guidelines. 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 75-day substitute.

Notwithstanding the provisions of the foregoing paragraph, 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. For the purposes of these Guidelines, a defendant is a "fugitive" if he 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 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.

Notwithstanding any other provision of this section, 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.

*F. Post-Conviction Waivers.*

These Guidelines and the Table of Authorized Plea Offers in Part XI apply to pretrial 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 Part X of these Guidelines.

G. Departures from the Prescribed Authorized Disposition.

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.

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, the revised plea negotiation system established in these Guidelines prescribes 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. These criteria are adapted from federal practice described in § 5K 1.1 in the Federal Sentencing Guidelines Manual (1998 Ed.).

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. 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., reduced term of imprisonment) offered to a defendant by reason of his or her substantial cooperation.

It must be noted that these Guidelines allow for only one true departure factor, that is, a Downward Departure for Substantial Cooperation. The term “departure” means only that the prosecutor is authorized to tender any plea offer, as the facts and circumstances warrant, including a recommendation of a non-custodial sentence. Under

the prior Attorney General guidelines, the existence of trial proof problems could also be considered as a Downward Departure Factor. Under these Guidelines, the existence of trial proof problems is deemed instead to be a downward “adjustment,” meaning that the prosecutor is authorized only to tender a plea offer at the bottom of the applicable range of authorized dispositions. (The Guidelines make an exception where the prosecutor would already be required to tender an offer below the presumptive term. In that event, the prosecutor is authorized to reduce the term of parole ineligibility by up to an additional three (3) months.) (See Part VIII.)

This approach is designed to ensure the appropriate and uniform application of the trial proof problem adjustment and to avoid the reintroduction of intercounty disparity. In effect, this system ensures that all county prosecutors’ offices will be making these case-by-case adjustments from the same starting points. This system also recognizes that where a prosecution is plagued with too many trial proof problems, a prosecutor would be expected as a matter of professional ethics to dismiss the problematic count or counts outright, and it is assumed, especially in view of case screening systems that have been established in all counties, that a case would not be presented to a grand jury unless the prosecutor expects to be able to prove the case at trial beyond a reasonable doubt.

Finally, it should be noted that the system established in these Guidelines includes no provision for an “upward” departure from the authorized plea offer, because the facts and circumstances of the offense and the offender that would ordinarily result in a longer sentence (i.e., the severity of the defendant’s conduct or criminal history) are already integrated within the structure of these Guidelines. Notwithstanding the foregoing, where, as a result of double jeopardy considerations or the requirements of the mandatory joinder rule codified in R. 3:15-1b, tendering a plea offer determined in accordance with these Guidelines would compromise the prosecution of a more serious non-drug offense that involves a direct victim or that would likely result in greater punishment than provided by 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 drug charges. (See also § M, infra.)

#### *H. Prohibition of Separate County Plea Policies.*

The Supreme Court in Brimage directed the Attorney General in formulating new guidelines to eliminate provisions that would authorize county prosecutors to adopt their own standardized plea offers and policies. 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 drug cases subject to N.J.S.A. 2C:35-12 to tender a plea offer in accordance with the provisions of these Guidelines. Nothing herein should 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, or to require a prosecutor to tender a plea offer where the effect would be to prejudice or compromise the prosecution of a more serious non-drug offense based upon double jeopardy or mandatory joinder considerations. (See § M, infra.)

*I. Lagares Extended Term Applications.*

One of the key benefits of this revised plea negotiation system is to incorporate, consolidate, and streamline the procedures and policies used by prosecutors for determining whether to apply for or waive an extended term of imprisonment pursuant to 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. (See Table of Authorized Plea Offers #2.) The New Jersey Supreme Court in State v. Lagares, 127 N.J. 20 (1992), established a rule that not only required statewide uniformity in implementing N.J.S.A. 2C:43-6f, but also acknowledged the legislative intent to make extended term sentencing of repeat drug offenders the norm rather than the exception. The revised system established in these Guidelines replaces and supersedes the Attorney General's April 20, 1992 Directive implementing guidelines for determining whether to apply for an extended term pursuant to N.J.S.A. 2C:43-6f.

*J. Expiration and Modification of Plea Offers.*

All plea offers must include a date or event at which the offer will expire and will be automatically withdrawn. The expiration can be based upon the passage of time (e.g., after 20 days from issuance of the offer, or at the expiration of 75 days from the date of the arrest), an event (e.g., the return of an indictment, or the imposition of a plea cut-off pursuant to R. 3:9-3g), or can be based on a material change in circumstances, such as the receipt or availability of new information that would materially affect the calculation of the authorized disposition and that would result in a different authorized plea offer.

When the State becomes aware of such new information, the prosecutor may withdraw any outstanding plea offer and tender a replacement plea offer that accounts for the newly-discovered facts or circumstances. As noted in § B, a prosecutor is expected to disclose fully and accurately to the court 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 would fall under a different Criminal History Category or that the defendant is subject to a Special Application and Enhancement Feature 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. If the court sentences the defendant in accordance with the plea agreement, the prosecutor shall notify the Director of the Division of Criminal Justice in writing so that the discrepancy can be accounted for in the Division's analysis and evaluation of the implementation of these Guidelines. Nothing in this paragraph shall be construed to preclude the prosecutor from moving to vacate the plea in these circumstances.

*K.     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 specifically described in these Guidelines. There is no provision in these Guidelines for extending "leniency," except by the application of the enumerated Mitigating Factors. Nor is there a provision 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 Factors, the enumerated Aggravating and Mitigating Factors, the Downward Adjustment 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 these factors are explicitly set forth in and authorized by these Attorney General Guidelines. 153 N.J. at 24. After careful consideration, it appears 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 an offense characteristic, Criminal History Category, Special Application and Enhancement Feature, or Aggravating or Mitigating Factor, relate to the defendant's relevant conduct or prior record and thus help to determine the defendant's culpability. Even the Quality of Life Aggravating Factor, which might be said to be based on localized conditions, focuses ultimately on the risk of harm posed by the defendant's 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 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, providing an incentive for guilty defendants to plead at the earliest opportunity, is designed to promote efficiency in handling and disposing these cases without creating, reinforcing, or institutionalizing disparity between counties.

*L.     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 Adjustment for Trial Proof Issues, as well as information concerning the non-applicability or appropriate scoring of offense characteristics, Special Application and Enhancement Features, and Aggravating Factors. However, as noted in § D, this plea negotiation system is not designed to provide a forum to conduct mini-trials to resolve factual disputes. To the contrary, where there is no "meeting of the minds" necessary to consummate a negotiated agreement, the prosecutor must, as specifically provided in § D, object to any defense tactic to request an evidentiary hearing to decide issues that are appropriately and traditionally resolved at trial.

*M.     Scope of Guidelines and Applicability to Non-Drug Cases.*

These Guidelines are designed to ensure statewide uniformity in implementing N.J.S.A. 2C:35-12, which applies only to certain drug distribution-type offenses under the Comprehensive Drug Reform Act and which authorizes what the Supreme Court in State v. Brimage described as an “atypical grant of sentencing power to the prosecutor.” 153 N.J. at 10. Nothing in these Guidelines shall be construed to require a prosecutor to dismiss or “package” as part of a plea agreement any count charging a non-drug offense that may be pending against the defendant, whether or not the non-drug offense was committed contemporaneously with or during the course of committing the drug distribution-type offense. (A negotiated disposition of a drug distribution-type charge would, of course, also dispose of all lesser included offenses.) Except as provided in Special Application and Enhancement Features A and B, or as may be necessary to comply with the requirements of § C (Structuring Plea Agreements), a prosecutor’s discretion in charging, negotiating, and disposing of any such non-drug offense(s) is unaffected by these Guidelines.

Notwithstanding any other provision of these Guidelines, where as a result of double jeopardy considerations or the requirements of the mandatory joinder rule codified in R.3:15-1b, the disposition of drug charges in accordance with these Guidelines could preclude or otherwise compromise the prosecution of more serious non-drug charges that involve one or more direct victims or that would likely result in a longer term of imprisonment and parole ineligibility than provided in 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 drug charges.

*N.     Questions and Controversies.*

All questions by county 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 the county 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.

*O.     Periodic Review and Revisions.*

The Director of the Division of Criminal Justice shall establish 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.

*P.     Repealer.*

These Guidelines supersede all pre-existing Attorney General guidelines for implementing N.J.S.A. 2C:35-12, which are hereby repealed. These Guidelines are based on statutory law in effect as of May 20, 1998, and may from time to time be revised to reflect changes in the statutory law. The present Guidelines shall remain in full force and effect until such time as they may be amended or superseded by order of the Attorney General.

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### ***III. Summary of Instructions for Determining an Authorized Plea Offer Under N.J.S.A. 2C:35-12***

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To determine the 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 below:

1. The prosecutor must determine the appropriate Offense Description for a provable charge that is subject to a waivable minimum term of parole ineligibility pursuant to N.J.S.A. 2C:35-12. (See Part IV.) 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. Where 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 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. Where 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 the Guidelines.

2. 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 Part VI.)

3. Using the applicable Table of Authorized Plea Offers (see Part X), 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, 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.

4. The prosecutor, using the plea negotiation worksheet, 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 shall count the aggravating or mitigating factor within the category that has the highest point value. (See Parts VI and VII.)

If the sum of all aggravating and mitigating factors results in a positive point total of 3 or more, the prosecutor will be required to tender a plea offer above the presumptive term determined pursuant to step #6. 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 will be 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.

5. The prosecutor must determine whether there is a basis for a Downward Adjustment within the range of authorized plea offers based upon trial proof issues. (See Part VIII.)

6. The prosecutor must determine whether any Special Application and Enhancement Features(s) apply to the defendant’s conduct. (For example, in the event that the defendant’s conduct involved distribution of controlled dangerous substances 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.) (See Part IX.)

7. The prosecutor must determine whether there is a basis for a Downward Departure based upon the defendant’s substantial cooperation. Any such Downward Departure must be approved by a designated senior assistant prosecutor, or designated assistant or deputy attorney general in cases prosecuted by the Division of Criminal Justice, and must comply with the criteria established in Part X.

8. 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. 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) 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), (See Part II, § C.) Note that while the prosecutor should 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 Feature A, described in Part IX.

9. The prosecutor must provide a copy of the completed worksheet and attached schedules to the defendant's attorney and to the court, and shall also forward a copy with the attached schedules to the Division of Criminal Justice for statistical analysis. Where the 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 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).

#### **IV. Selecting the Appropriate Offense Description.**

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.

##### **A. Application of Special Offense Characteristics.**

##### **1. Offenses Involving Weapons.**

An 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, while in the course of committing, attempting to commit, or conspiring to commit the drug distribution-type offense (1) had in his possession any firearm, or (2) used or threatened the immediate use of any weapon other than a firearm. Possession of a firearm may be actual, joint, or constructive. Where 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, the drug offense shall not be deemed to be one that involves weapons unless the defendant knew or had reason to know that his partner would possess a firearm or would use or threaten the immediate use of a weapon other than a firearm, or 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.

##### **2. Offenses Involving Amounts Above the Statutory Threshold.**

In 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), 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 Table #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 charts 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.	5 oz.	50 oz.
Cocaine	.5 oz.	5 oz.	50 oz.
LSD	any amount under 100 mg.	100 mg.	1 g.
PCP	any amount under 10 g.	10 g.	100 g.
Methamphetamine*	.5 oz.	5 oz.	50 oz.
Marijuana*	5 lbs. or 10 plants	25 lbs. or 50 plants	250 lbs. or 500 plants

*\*See Special Offense Characteristic #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, \_\_\_ N.J. Super. \_\_\_ (1998); State v. Gosa, 263 N.J. Super. 527, 536 (App. Div. 1993), certif. den. 134 N.J. 477 (1993).

3. Offenses Involving First-Degree Amounts of Methamphetamine and Marijuana.

By adoption of P.L. 1997, c. 186 (effective August 4, 1997), the Legislature established new first-degree crimes for manufacturing, distributing, or possessing with intent to distribute large quantities of methamphetamine, see now N.J.S.A. 2C:35-5b(8), and marijuana, see now N.J.S.A. 2C:35-5b(10)(a). These new 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. 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 one of the new first-degree methamphetamine or marijuana crimes under N.J.S.A. 2C:35-5, 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 Part II, § C (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, use Table #5, Rows A or B (depending on whether weapons were involved).

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, use Columns IV or V of Table #5 and the appropriate Row of Table #5, reflecting whether weapons were involved 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).

4. Age Differential in “Using a Juvenile” Cases.

In Table #3 (Using a Juvenile in a Drug-Distribution Scheme), 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, then the age differential is irrelevant and the prosecutor must use Row C in Table #3.

V. Determination of Appropriate Criminal History Category.

A defendant falls under the highest Criminal History Category for which he 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 been 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><i>Examples:</i></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>

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 all of 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

The prosecutor shall not count prior convictions or adjudications of delinquency that have been expunged; nor shall convictions or adjudications of delinquency be included 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.

Where the 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. 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 Part II, § J.)

Prior convictions or adjudications of delinquency that were merged for sentencing purposes shall be treated as a single conviction/adjudication.

Prior convictions/adjudications that resulted in sentences that were imposed on different dates shall be treated as separate convictions/adjudications, unless the subsequently-imposed sentence was ordered to be served concurrently with the previously-imposed sentence.

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

Prior convictions/adjudications that resulted in separate sentences imposed on the same date that were 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.

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 Part II, § J.)

### A. Aggravating Factors.

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 <u>N.J.S.A. 2C:35-8</u> or <u>2C:35-6</u> applies); 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); 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 own recognizance for another offense.</p>	<p>+3 or +4 if the offense was committed while the defendant was a fugitive or under warrant for bail jumping</p>
<p>3. <u>Threatened Violence.</u></p> <p>The offense involved the threatened use of violence not otherwise accounted for in Special Application and Enhancement Features A or B.</p>	<p>+3 to +4</p>

Factor	Point Value
4. <u>Organization.</u> (Do not use if defendant is charged with being a leader of a narcotics trafficking network.)	
a. The offense was committed as part of a sophisticated drug-distribution operation involving a hierarchial 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,	+3 to +4
b. There is a substantial likelihood that the defendant is involved in organized criminal activity (e.g., a gang, “set” or “LCN”); or,	+3 to +4
c. The criminal conduct provided a substantial source of income or livelihood for the defendant; or,	+3 or +4 if the defendant’s primary occupation or source of income was drug distribution rather than legitimate employment.
d. The defendant served as a middle or upper-echelon participant in a drug-distribution scheme; or,	+3 to +4
e. The defendant directed or substantially influenced another person in committing the offense. (do not use if defendant is charged with hiring or using a juvenile in violation of <u>N.J.S.A. 2C:35-6</u> ); or,	+3
f. The defendant contributed special skills to the criminal conduct.	+3

B. Mitigating Factors.

Factor	Point Value
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.	-3
2. <u>Defendant’s Role in Scheme.</u> a. The defendant was only a minimal or minor participant in the criminal conduct (e.g., 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).	-3 if minimal participant -2 if minor participant  -2
3. <u>Voluntary Renunciation.</u> Defendant voluntarily terminated participation in the scheme before arrest or police intervention; or,	-4
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> )	-2 if outpatient program -3 if residential program
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.	-3

**VII. Description and Commentary for Aggravating and Mitigating Factors.**

**A. Aggravating Factors.**

**1. Community Impact.**

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 E, (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 (effective January 9, 1998). By adoption of this law, which creates a new 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. Note that the use of this factor would not preclude the prosecutor from also requiring the defendant to plead guilty to the offense defined in N.J.S.A. 2C:35-7.1 in addition to a count charging the school zone offense. (See Part II, § C concerning the structuring of plea agreements to achieve the sentence contemplated by an authorized plea offer.)

Factor #1c applies where the offense occurred in a designated “Quality of Life” Special Enforcement Zone. Pursuant to Governor Whitman’s Drug Enforcement, Education and Awareness Program, 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, and 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.

Pursuant to the Governor’s explicit instructions, 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, the Governor has declared that 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 this Aggravating Factor to apply, the county prosecutor must have designated the specific area constituting the Special Enforcement Zone based upon the criteria established in the Attorney General’s Model Quality of Life Program, and must provide to the Division of Criminal Justice a map or description of all such areas. These procedural safeguards will help to ensure that this Aggravating Factor is not applied in a arbitrary or capricious manner, and these procedural requirements are 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.” Slip op. at 30.

2. Bail Violations.

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. Committing a drug-distribution offense under these circumstances 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.

The point value for this factor is +3 unless at any time during the course of the offense the defendant was a fugitive and was under warrant for a bail violation or failure to appear, in which event the point value is +4.

3. Threatened Violence.

This Aggravating Factor 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 conduct is not otherwise subject to Special Application and Enhancement Features A or B. (See also Part II, § M, explaining when a prosecutor may elect not to tender an offer to dispose of drug charges pursuant to these Guidelines as a result of double jeopardy or mandatory joinder considerations.) 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, the offense characteristic of 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 use or threatened use of a weapon other than a firearm. In that event, the prosecutor must apply the Special Offense Characteristic rather than this Aggravating Factor.

4. Organization.

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, since that offense already accounts for the nature of the defendant's role and participation in a drug-distribution conspiracy.

Factor #4a applies where the offense was committed as part of a sophisticated drug-distribution operation that involves a hierarchial 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 on the basis of the degree of sophistication, hierarchial 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.

Factor #4b applies where 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). This factor would apply where the offense conduct involved membership in or the activities of a gang, a "set" (i.e., a loose affiliation of persons engaged in drug-distribution or other criminal activities), traditional "La Cosa Nostra" organized crime groups, or so-called nontraditional organized crime groups, including, but not limited to, recently-formed criminal organizations comprised of persons from the former Soviet Union or former Soviet Bloc nations.

Factor #4c applies where 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, § 3B1.2 (1998 Ed.). 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 is +4.

Factor #4d applies where 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 would be determined 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 the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

Factor #4e applies where 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 the Mitigating Factor #2b by virtue of having been substantially influenced by another person more mature than that defendant, the person who substantially influenced that other defendant would be subject to this Aggravating Factor.

Factor #4f 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 (1998 Ed.), 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.

*B.     Mitigating Factors.*

*1.     Non-Pecuniary Distribution.*

Mitigating Factor #1 applies where the offense involved the distribution of controlled dangerous 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 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 which he or she expended in procuring the substance involved. Note that this factor deals with a defendant who essentially is acting alone, whereas Mitigating Factor #2a addresses a less culpable defendant who is operating within a commercial drug-distribution scheme involving other more culpable offenders.

## 2. Defendant's Role in Scheme.

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 (1998 Ed.). This factor 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.

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, to have served as a courier or "mule" for a single or isolated smuggling transaction, or served as a "lookout" to warn other, more culpable drug distributors of the impending approach of law enforcement officers. The -3 point award would not be 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 would it be appropriate 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 as 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 #4c.) A defendant who distributes drugs to ultimate consumers, or who used or threatened the use of violence,

would not be classified as a minor participant and would not be entitled to points under this Mitigating Factor.

Mitigating Factor #2b applies where the conduct of the defendant was substantially influenced by another person more mature than the defendant. This factor 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 #4e.) As with Mitigating Factor #2b, 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.

3. Voluntary Renunciation.

Mitigating Factor #3 applies where 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 immediate apprehension or in anticipation of the imminent discovery of drugs in his possession by a search to be conducted by law enforcement authorities. Rather, this factor would apply only in the case of a self-initiated, complete, and voluntary termination of the defendant's participation in the criminal conduct.

4. Drug Treatment.

This Mitigating Factor 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, factor #4 applies where 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 C, 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). 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 residential drug treatment in lieu of imprisonment.

This factor only applies where the defendant is a "drug-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-dependent person and that he or she has enrolled in and is participating in an approved drug-treatment program.

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 adjustment point value is -2. If the defendant is enrolled in a residential (inpatient) treatment program, the point value of the 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 Part II, § J.)

5. No Prior Court Involvement.

This Mitigating Factor applies if the defendant has not previously been convicted of or adjudicated delinquent for an offense 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.

For purposes of this factor, the term “offense” includes all crimes, disorderly persons and petty disorderly persons offenses. 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 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.”)

C. Calculation of Grand Total of Aggravating/Mitigating Points.

The completed 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 combined point total is between -3 and +3 (e.g., -2, +2, etc.), the prosecutor must tender the appropriate presumptive plea offer, except as provided in Part VIII (Downward Adjustment for Trial Proof Issues) or Part X (Downward Departure for Substantial Cooperation), and subject to the provisions of Part IX (Special Application and Enhancement Features).

Subject to the provisions of Parts VIII, IX, and X of these Guidelines, where the combined point total is greater than +3, 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. If the combined negative point total is greater than -3 (e.g., -4, -5, -6 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 greater than 7 (e.g., -8, -9, +8, +9 etc.), the prosecutor must tender the plea offer fixed at the top (or bottom) of the appropriate range, except as provided in Part VIII (Downward Adjustment for Trial Proof Issues) or Part X (Downward Departure for Substantial Cooperation), and subject to the provisions of Part IX (Special Application and Enhancement Features).

***VIII. Downward Adjustment for Trial Proof Issues.***

The Downward Adjustment for Trial Proof Issues, which is separate and distinct from the calculation of aggravating and mitigating points described in Parts VI and VII, allows the prosecutor to tender a plea offer below the offer otherwise prescribed in these Guidelines. Specifically, this adjustment affords the 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 calculate the strengths and weaknesses of their respective cases and gauge the likelihood of prevailing at trial. Often, these factual and legal assessments by counsel become the subject of face-to-face negotiation, 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 logistical issues that bear on the likelihood of prevailing at trial, including: (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 possession with the requisite “intent to distribute” based upon the type, quantity, purity, and packaging of drugs involved or the 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) whether an important witness is refusing to cooperate or may otherwise be unavailable for trial; (5) legal and logistical complications inherent in a multi-defendant trial; (6) the possibility that an important State witness may not be believed by the jury based upon his criminal record or cooperation agreement, or was found not to be credible by other juries in related trials; or, (7) 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”).

The decision whether to tender a reduced offer under this Downward Adjustment 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. Note that these Guidelines only apply to *provable* charges that carry a mandatory term of parole ineligibility subject to waiver under N.J.S.A. 2C:35-12. Accordingly, a prosecutor is not required under these Guidelines to employ this Downward Adjustment where the prosecutor believes in good faith that the defendant would ultimately be convicted at trial.

Because 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 period of parole ineligibility under N.J.S.A. 2C:35-12, a prosecutor must note on the worksheet whether this Downward Adjustment feature is being used and must also indicate the extent to which this adjustment has resulted in a reduction in the term of parole ineligibility that would otherwise apply. However, the prosecutor is not required to describe on the worksheet the specific factual or legal issues that give rise to the Downward Adjustment. It is thought that prosecutors might be chilled from making appropriate use of this feature if they were required to highlight in writing potential weaknesses in the State’s proofs, since to do so during the course of ongoing plea negotiations 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 overestimate his 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 obligations to comply with the rules of discovery, including the prosecutor’s legal and ethical duty to disclose exculpatory information.)

These Guidelines recognize that the application of this Downward Adjustment is extremely fact-sensitive and must necessarily be done on a case-by-case basis. To achieve the objective of statewide uniformity, the Guidelines therefore impose definitive limits on the ambit of prosecutorial discretion. Whereas prior Attorney General guidelines authorized a true “departure” based upon an assessment of trial proof sufficiency, meaning that a prosecutor had unlimited discretion to reduce or even waive altogether the term of parole ineligibility on this ground, the present Guidelines only permit the prosecutor to reduce the recommended sentence by a discrete amount. Specifically, a prosecutor using this adjustment generally must tender a plea offer within

the applicable range of authorized offers and must also account for any Special Application and Enhancement Feature, described in Part IX, that may be applicable. To ensure the fair as well as uniform application of this Downward Adjustment, however, if the prosecutor would have been required to tender an offer below the presumptive offer (i.e., where the combined total of Aggravating and Mitigating Factors in Part VII is -3 points or more), then the prosecutor may reduce the term of parole ineligibility by an additional three (3) months below the minimum term in the applicable range of authorized offers. The extent of the reduction within the range, or up to three months below the minimum term in the range, is vested in the reasoned discretion of the prosecutor considering the nature and extent of the trial proof issues.

The following examples illustrate how the Downward Adjustment operates. Assume that the applicable range is for an initial post-indictment offer under Table #1, Row C, Column II (18-24-30 months). Assume further that the combined point total of the Aggravating and Mitigating Factors is +5, meaning that the prosecutor is required to tender a plea offer above the presumptive offer of 24 months. If on these facts the prosecutor determines to apply the Downward Adjustment for Trial Proof Issues, he or she would be permitted (putting aside for the moment any Special Application and Enhancement Features that might apply) to tender a plea offer fixed at between 18 and 30 months of parole ineligibility.

If the facts were such that the grand total of Aggravating and Mitigating Factors is -4 points, meaning that the prosecutor would be required to tender a plea offer below the presumptive term, he or she could, subject to a consideration of the Special Application and Enhancement Features, tender a downward adjusted plea offer ranging from less than 24 months to as low as 15 months (3 months less than the bottom of the applicable range).

This unified statewide system, imposing definitive boundaries on the ambit of prosecutorial discretion, is premised on the notion that where a prosecutor faces too many significant trial proof problems, he or she would be expected as a matter of professional responsibility to dismiss the problematic count(s) outright. See also Attorney General Directive 1998-1, § 5, which authorizes a negotiated disposition in which the defendant pleads guilty to conspiracy in exchange for the prosecutor's agreement to dismiss a substantive drug-distribution charge, but only where the prosecutor represents to the court on the record that there is insufficient evidence to warrant a conviction for the substantive offense defined in Chapter 35 of Title 2C. This system thus seeks to achieve a fair balance between the need for statewide uniformity (by establishing a single policy that must be used by all prosecutors, thereby precluding institutionalized or "formalized" local disparity in violation of *State v. Brimage*, 153 N.J.

1 (1998)) and the need to preserve flexibility to permit assistant prosecutors on a case-by-case basis to account for the myriad of trial proof problems that can arise during the course of a prosecution. Note that under this system, all county prosecutors' offices will be making these fact-sensitive, case-by-case adjustments from uniformly determined starting points, in contrast to the system found to be deficient in Brimage, where county prosecutors could establish their own "standardized" plea offers that became the starting points for the application of upward and downward departures.

**IX. Special Application and Enhancement Features.****A. Booby Traps and Fortifications.**

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), the defendant shall be required to plead guilty to the appropriate drug-distribution 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. The plea agreement must provide that the sentence imposed upon the conviction for the booby trap and/or fortification offense will be served consecutively with the sentence imposed upon the predicate drug-distribution offense. Where the defendant is alleged to be an accomplice, this Special Application and Enhancement Feature shall not apply unless 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 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 law enforcement officers. 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.

**B. Violence.**

1. 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 violent crime, as defined in the No Early Release Act, N.J.S.A. 2C:43-7.2, while in the course of committing a drug distribution-type offense, the defendant shall be required to plead guilty to the appropriate drug-distribution charge and to the violent crime, unless the prosecutor states on the record that there is insufficient evidence to warrant a conviction for the violent crime. Where the defendant is alleged to be an accomplice, this Special Application and Enhancement Feature shall not apply unless the defendant knew or had reason to know that his partner would commit a violent crime, or that the defendant had the purpose to promote or facilitate the commission of such violent crime. The plea agreement shall comply with the Attorney General's Directive for Enforcing The No Early Release Act.

2. 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 (e.g., no weapons were involved), the authorized plea offer shall be six months greater than that otherwise provided in the applicable Table of Authorized Plea Offers in the case of bodily injury, and twelve 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 defendant knew or had reason to know that his 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. (See also Part II, § M, explaining when a prosecutor may decline to dispose of the drug charges pursuant to these Guidelines.)

C. Offense Committed While Under Supervision.

If the defendant committed the drug distribution-type offense while under the supervision of the Department of Corrections, Juvenile Justice Commission, or a probation department (e.g., while on parole, ISP, JISP, probation, PTI, conditional discharge, or any other program of supervised release), the authorized plea offer shall be six 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 2C:29-5b (Absconding From Parole), the authorized plea offer shall be twelve (12) months greater than that otherwise provided.

D. Offenses Occurring on School Property.

1. 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, except as may be provided in Part X (Downward Departure for Substantial Cooperation). 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 Table of Authorized Plea Offers.

2. If the defendant committed a violation of N.J.S.A. 2C:35-6 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 Table of Authorized Plea Offers in the case of a second-degree crime, or eighteen (18) months greater than that otherwise provided in the Table of Authorized Plea Offers in the case of a first-degree crime.

3. Nothing in this section shall preclude the imposition of an additional enhancement pursuant to Special Application and Enhancement Feature E.

*E. Distribution to a Juvenile or Pregnant Female.*

If the offense involved distribution of a controlled dangerous 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. 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.

Where the defendant is alleged to be an accomplice, this Special Application and Enhancement Feature shall not apply unless the defendant knew or had reason to know that his partner would distribute a controlled dangerous substances 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 Substantial Cooperation in accordance with Part X of these Guidelines.

*F. Offenses Committed in or Around Correctional or Treatment Facilities.*

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 dangerous 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.

Nothing in this Section shall preclude the imposition of an additional enhancement pursuant to Special Application and Enhancement Feature E. Where the defendant is alleged to be an accomplice, this Special Application and Enhancement Feature shall not apply unless the defendant knew or had reason to know that his partner would introduce or attempt to introduce a controlled dangerous substance into a correctional or drug treatment facility or would distribute or attempt to distribute a controlled dangerous 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 Substantial Cooperation in accordance with Part X of these Guidelines.

This Special Application and Enhancement Feature addresses the special dangers inherent in the introduction of illicit drugs into correctional and drug treatment facilities. Recently, the President instructed the United States Attorney General to address the vexing issue of illegal drug use in prisons and jails and directed the Attorney General, in consultation with the states, to draft legislation that requires the states to enact stiffer penalties for drug trafficking into and within correctional 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.

*G.     Anti-Drug Profiteering Penalty.*

Where the defendant is eligible for imposition of an Anti-Drug Profiteering penalty pursuant to Chapter 35A of Title 2C (P.L. 1997, c. 187, effective August 4, 1997), 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 eligibility determined pursuant to these Guidelines. The term of imprisonment and parole ineligibility shall not be reduced in exchange for imposition of the cash penalty.

**X. Downward Departure for Substantial Cooperation.**

Notwithstanding any other provision of these Guidelines, a prosecutor is authorized to tender a plea offer for a sentence below that otherwise determined pursuant to the 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, and 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.

The nature, extent, and significance of cooperation and assistance can involve a broad spectrum of conduct that must be evaluated by the prosecutor on an individual 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. 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) more culpable than the defendant;
4. Any injuries suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance; and,

5. The timeliness of the defendant's assistance.

All Downward Departures authorized pursuant to this section must be approved by a designated senior assistant prosecutor who is authorized in writing by the county prosecutor to approve such departures, or in cases prosecuted by the Division of Criminal Justice, by a designated assistant or deputy attorney general authorized in writing by the Director of the Division of Criminal Justice to approve such 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 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 paragraph 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 pursuant to these Guidelines, 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.

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 authorized pursuant to these Guidelines is based upon a defendant's anticipated future cooperation or assistance, the plea agreement should 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 family. All written documentation concerning the cooperation agreement, including the worksheet indicating that the prosecutor has made a Downward Departure for Substantial Cooperation, should therefore be deemed confidential.

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).

**XI. Tables of Authorized Plea Offers.**

The Tables of Authorized Plea Offers are reproduced below. Authorized plea offers are stated in terms of months of parole ineligibility (or years of parole ineligibility in Table #6) as a part of a state prison sentence unless otherwise noted. County jail terms imposed as a condition of probation ("split sentences") are authorized only in Table #1, Row A, as indicated by numbers marked with an asterisk. If an authorized Downward Adjustment under Part IX or a Downward Departure under Part X results in a plea offer of less than nine (9) months, such term shall be a term of parole ineligibility imposed as part of a state prison sentence.

1. Table 1 Offense Under N.J.S.A. 2C:35-7  
(Drug Free School Zone).
2. Table 2 Offenses Under N.J.S.A. 2C:35-5  
(Extended Term Under N.J.S.A. 2C:43-6f (Repeat Offender)).
3. Table 3 Offenses Under N.J.S.A. 2C:35-6  
(Using a Juvenile in a Drug-Distribution Scheme).
4. Table 4 Offenses Under N.J.S.A. 2C:35-4  
(Drug Production Facility).
5. Table 5 Offenses Under N.J.S.A. 2C:35-5 (First Degree)  
(First Degree Distribution or Possession with Intent).
6. Table 6 Offenses Under N.J.S.A. 2C:35-3  
(Leader of Narcotics Trafficking Network).

<p align="center"><b>TABLE 1</b>  <b>OFFENSES UNDER N.J.S.A. 2C:35-7</b>  <b>(DRUG-FREE SCHOOL ZONE)</b></p>							
Criminal History Category							
	OFFENSE DESCRIPTION	TIMING	I Minor	II Significant	III Serious	IV Extended Term	V Enhanced Extended Term
A.	2C:35-7 less than 1 oz. of marijuana no weapons	Pre-Indictment	270* 364* 9	364* 9 12	9 12 18	18 24 30	24 30 36
		Initial Post-Indictment	364* 9 12	9 12 18	12 18 24	24 30 36	30 36 42
		Final Post-Indictment	9 12 15	12 15 21	15 21 27	27 33 39	33 39 45
B.	2C:35-7 less than 1 oz. of marijuana weapons	Pre-Indictment	9 12 18	12 18 24	18 24 30	30 36 42	36 42 48
		Initial Post-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54
		Final Post-Indictment	15 21 27	21 27 33	27 33 39	39 45 51	45 51 57
C.	2C:35-7 other than less than 1 oz. of marijuana no weapons	Pre-Indictment	9 12 18	12 18 24	18 24 30	30 36 42	36 42 48
		Initial Post-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54
		Final Post-Indictment	15 21 27	21 27 33	27 33 39	49 45 51	45 51 57
D.	2C:35-7 other than less than 1 oz. of less marijuana weapons	Pre-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54
		Initial Post-Indictment	18 24 30	24 30 36	30 36 42	42 48 54	48 54 60
		Final Post-Indictment	21 27 33	27 33 39	33 39 45	45 51 57	51 57 63
E.	2C:35-7 2nd degree amount no weapons	Pre-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54
		Initial Post-Indictment	18 24 30	24 30 36	30 36 42	42 48 54	48 54 60
		Final Post-Indictment	21 27 33	27 33 39	33 39 45	45 51 57	51 57 63
F.	2C:35-7 2nd degree amount weapons	Pre-Indictment	18 24 30	24 30 36	30 36 42	42 48 54	48 54 60
		Initial Post-Indictment	24 30 36	30 36 42	36 42 48	48 54 60	54 60 66
		Final Post-Indictment	27 33 39	33 39 45	39 45 51	51 57 63	57 63 69

\*Denotes days in county jail as a condition of probation (no parole ineligibility). If the offense involves a first-degree amount of methamphetamine or marijuana, use Table #5 (See Special Offense Characteristic #3 in Part IV.)

<p align="center"><b>TABLE 2</b>  <b>OFFENSES UNDER N.J.S.A. 2C:35-5*</b>  <b>(WHERE DEFENDANT IS SUBJECT TO AN EXTENDED TERM UNDER N.J.S.A. 2C:43-6f (REPEAT OFFENDER))</b></p>							
Criminal History Category							
	OFFENSE DESCRIPTION	TIMING	I Minor	II Significant	III Serious	IV Extended Term	V Enhanced Extended Term
A.	2C:35-5 4th degree no weapons	Pre-Indictment	n/a	n/a	n/a	9 12 18	12 18 24
		Initial Post-Indictment	n/a	n/a	n/a	12 18 24	18 24 30
		Final Post-Indictment	n/a	n/a	n/a	15 21 27	21 27 33
B.	2C:35-5 4th degree weapons	Pre-Indictment	n/a	n/a	n/a	12 18 24	18 24 30
		Initial Post-Indictment	n/a	n/a	n/a	18 24 30	24 30 36
		Final Post-Indictment	n/a	n/a	n/a	21 27 33	27 33 39
C.	2C:35-5 3rd degree no weapons	Pre-Indictment	n/a	n/a	n/a	18 24 30	24 30 36
		Initial Post-Indictment	n/a	n/a	n/a	24 30 36	30 36 42
		Final Post-Indictment	n/a	n/a	n/a	27 33 39	33 39 45
D.	2C:35-5 3rd degree weapons	Pre-Indictment	n/a	n/a	n/a	24 30 36	30 36 42
		Initial Post-Indictment	n/a	n/a	n/a	30 36 42	36 42 48
		Final Post-Indictment	n/a	n/a	n/a	33 39 45	39 45 51
E.	2C:35-5 2nd degree no weapons	Pre-Indictment	n/a	n/a	n/a	30 36 42	36 42 48
		Initial Post-Indictment	n/a	n/a	n/a	36 42 48	42 48 54
		Final Post-Indictment	n/a	n/a	n/a	39 45 51	45 51 57
F.	2C:35-5 2nd degree weapons	Pre-Indictment	n/a	n/a	n/a	36 42 48	42 48 54
		Initial Post-Indictment	n/a	n/a	n/a	42 48 54	48 54 60
		Final Post-Indictment	n/a	n/a	n/a	41 51 57	51 57 63

\*If the offense involves a first-degree amount of methamphetamine or marijuana, use Table #5. (See Special Offense Characteristic #3 in Part IV.)

<b>TABLE 3</b> <b>OFFENSES UNDER N.J.S.A. 2C:35-6</b> <b>(USING A JUVENILE IN A DRUG-DISTRIBUTION SCHEME)</b>							
Criminal History Category							
	OFFENSE DESCRIPTION	TIMING	I Minor	II Significant	III Serious	IV Extended Term	V Enhanced Extended Term
A.	2C:35-6 no weapons defendant less than 3 years older than juvenile used/employed	Pre-Indictment	12 18 24	18 24 30	24 30 36	36 42 48	42 48 54
		Initial Post-Indictment	18 24 30	24 30 36	30 36 42	42 48 54	48 54 60
		Final Post-Indictment	21 27 33	27 33 39	33 39 45	45 51 57	51 57 63
B.	2C:35-6 no weapons	Pre-Indictment	24 30 36	30 36 42	36 42 48	48 54 60	54 60 66
		Initial Post-Indictment	30 36 42	36 42 48	42 48 54	54 60 66	60 66 72
		Final Post-Indictment	33 39 45	39 45 51	45 51 57	57 63 69	63 69 75
C.	2C:35-6 weapons	Pre-Indictment	30 36 42	36 42 48	42 48 54	54 60 66	60 66 72
		Initial Post-Indictment	36 42 48	42 48 54	48 54 60	60 66 72	66 72 78
		Final Post-Indictment	39 45 51	45 51 57	51 57 53	63 69 75	69 75 81

<p align="center"><b>TABLE 4</b>  <b>OFFENSES UNDER N.J.S.A. 2C:35-4</b>  <b>(DRUG PRODUCTION FACILITY)</b></p>							
Criminal History Category							
	OFFENSE DESCRIPTION	TIMING	I Minor	II Significant	III Serious	IV Extended Term	V Enhanced Extended Term
A.	2C:35-4 not 1st degree amount no weapons	Pre-Indictment	24 30 36	30 36 42	36 42 48	48 54 60	54 60 66
		Initial Post-Indictment	30 36 42	36 42 48	42 48 54	54 60 66	60 66 72
		Final Post-Indictment	33 39 45	39 45 51	45 51 57	57 63 69	63 69 75
B.	2C:35-4 not 1st degree amount weapons	Pre-Indictment	30 36 42	36 42 48	42 48 54	54 60 66	60 66 72
		Initial Post-Indictment	36 42 48	42 48 54	48 54 60	60 66 72	66 72 78
		Final Post-Indictment	39 45 51	45 51 57	51 57 63	63 69 75	69 75 81
C.	2C:35-4 1st degree amount no weapons	Pre-Indictment	36 42 48	42 48 54	48 54 60	60 66 72	66 72 78
		Initial Post-Indictment	42 48 54	48 54 60	54 60 66	66 72 78	72 78 84
		Final Post-Indictment	45 51 57	51 57 63	57 63 69	69 75 81	75 81 87
D.	2C:35-4 1st degree amount weapons	Pre-Indictment	42 48 54	48 54 60	54 60 66	66 72 78	72 78 82
		Initial Post-Indictment	48 54 60	54 60 66	60 66 72	72 78 84	78 84 90
		Final Post-Indictment	51 57 63	57 63 69	63 69 75	71 81 87	81 87 93

<p align="center"><b>TABLE 5</b>  <b>OFFENSES UNDER N.J.S.A. 2C:35-5 (1st DEGREE)*</b>  <b>(FIRST-DEGREE DISTRIBUTION OR POSSESSION WITH INTENT)</b></p>							
Criminal History Category							
	OFFENSE DESCRIPTION	TIMING	I Minor	II Significant	III Serious	IV Extended Term	V Enhanced Extended Term
A.	2C:35-5 (1st degree) no weapons	Pre-Indictment	24 30 36	30 36 42	36 42 48	48 54 60	54 60 66
		Initial Post-Indictment	30 36 42	36 42 48	42 48 54	54 60 66	60 66 72
		Final Post-Indictment	33 39 45	39 45 51	45 51 57	57 63 69	63 69 75
B.	2C:35-5 (1st degree) weapons	Pre-Indictment	30 36 42	36 42 48	42 48 54	54 60 66	60 66 72
		Initial Post-Indictment	36 42 48	42 48 54	48 54 60	60 66 72	66 72 78
		Final Post-Indictment	39 45 51	45 51 57	51 57 63	63 69 75	69 75 78
C.	2C:35-5 (1st degree) <u>Substantial quantity</u> no weapons	Pre-Indictment	48 54 60	54 60 66	60 66 72	72 78 84	78 84 90
		Initial Post-Indictment	54 60 66	60 66 72	66 72 78	78 84 90	84 90 96
		Final Post-Indictment	57 63 69	63 69 75	69 75 81	81 87 93	87 93 99
D.	2C:35-5 (1st degree) <u>Substantial quantity</u> weapons	Pre-Indictment	54 60 66	60 66 72	66 72 78	78 84 90	84 90 96
		Initial Post-Indictment	60 66 72	66 72 78	72 78 84	84 90 96	90 96 102
		Final Post-Indictment	63 69 75	69 75 81	75 81 87	87 93 99	93 99 105

*\*If the offense involves a school zone violation and a first-degree amount of methamphetamine or marijuana, use Row A or B. (See Special Offense Characteristic #3 in Part IV.)*

<p align="center"><b>TABLE 6</b>  <b>OFFENSES UNDER N.J.S.A. 2C:35-3*</b>  <b>(LEADER OF NARCOTICS TRAFFICKING NETWORK)</b></p>							
Criminal History Category							
	OFFENSE DESCRIPTION	TIMING	I Minor	II Significant	III Serious	IV Extended Term	V Enhanced Extended Term
A.	2C:35-3 no weapons	Pre-Indictment	8 10 12	10 12 14	12 14 16	16 18 20	18 20 22
		Initial Post-Indictment	10 12 14	12 14 16	14 16 18	18 20 22	20 22 24
		Final Post-Indictment	11 13 15	13 15 17	15 17 19	19 21 23	21 23 25
B.	2C:35-3 weapons	Pre-Indictment	10 12 14	12 14 16	14 16 18	18 20 22	20 22 24
		Initial Post-Indictment	12 14 16	14 16 18	16 18 20	20 22 24	22 24 26
		Final Post-Indictment	13 15 17	15 17 19	17 19 21	21 23 25	23 25 27
C.	2C:35-3 <u>Substantial quantity</u> no weapons	Pre-Indictment	12 14 16	14 16 18	16 18 20	20 22 24	22 24 26
		Initial Post-Indictment	14 16 18	16 18 20	18 20 22	22 24 26	24 26 28
		Final Post-Indictment	15 17 19	17 19 21	19 21 23	23 25 27	25 27 29
D.	2C:35-4 (1st degree) <u>Substantial quantity</u> weapons	Pre-Indictment	14 16 18	16 18 20	18 20 22	22 24 26	24 26 28
		Initial Post-Indictment	16 18 20	18 20 22	20 22 24	24 26 28	26 28 30
		Final Post-Indictment	17 19 21	19 21 23	21 23 25	25 27 29	27 29 31

\*All numbers refer to years of parole ineligibility.