

*ATTORNEY GENERAL DIRECTIVE
FOR ENFORCING
THE "NO EARLY RELEASE" ACT*

On June 9, 1997, Governor Christine Todd Whitman signed into law the "No Early Release Act," P.L. 1997, c.117. That law, codified at N.J.S.A. 2C:43-7.2 and N.J.S.A. 30:4-123.51b, provides that a person convicted of a first or second-degree offense that constitutes a "violent crime" as defined in the Act must serve a minimum of 85% of any custodial sentence imposed by the court before becoming eligible for parole. The Act further requires these defendants to serve a fixed period of parole supervision following their release from prison.

A violent crime is defined in the Act as any crime in which the actor causes death, causes serious bodily injury (as defined in subsection b of N.J.S.A. 2C:11-1), or uses or threatens the immediate use of a deadly weapon. The term violent crime also includes any aggravated sexual assault or sexual assault in which the actor uses or threatens the immediate use of physical force. The term "deadly weapon" is defined as any firearm or other weapon, device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury.

The Criminal Justice Act of 1970, N.J.S.A. 52:17B-98 et seq., provides that the Attorney General, as the chief law enforcement of the state, is responsible to ensure the uniform and efficient enforcement of the criminal laws. This Directive is hereby issued to the county prosecutors and to the Director of the Division of Criminal Justice to ensure that the No Early Release Act is enforced uniformly and in accordance with the clearly expressed intention of the Legislature and the Governor.

In implementing the No Early Release Act, it must be recognized that the overwhelming majority of criminal convictions in New Jersey are obtained pursuant to a negotiated agreement between the prosecution and the defense, rather than pursuant to a guilty verdict returned by a jury or by a judge sitting as the trier of fact. Many if not most negotiated dispositions involve a motion by the prosecutor to dismiss or downgrade one or more pending charges in consideration for the defendant's retraxit guilty plea on a remaining count or counts.

In order to maintain public confidence in the administration of justice, it is essential that prosecutors in the course of negotiating dispositions not inadvertently undermine or circumvent the clear policy recently established by the Legislature and the Governor to ensure that a defendant who commits a first or second-degree violent crime, as that term is defined in the new law, serves not less than 85% of the custodial sentence imposed by the court. It is especially noteworthy that the Legislature in adopting the No Early Release Act chose not to include an exception to the 85% parole ineligibility sentencing scheme, thus distinguishing the new law from the Graves' Act, which now includes an express exemption provision that is set forth at N.J.S.A. 2C:43-6.2. This demonstrates that the Legislature clearly intended that all persons who are convicted of first and second-degree crimes that are subject to the provisions of the No Early Release Act be required to serve not less than 85% of their custodial sentence before becoming eligible for parole. See also the Supreme Court's April 27, 1981 Plea Bargaining Memorandum, reprinted after N.J.S.A. 2C:43-6 (1995 West Ed.) (specifying procedures to be used by the courts "to assure that the recently passed mandatory three-year prison term [the Grave's Act] is strictly enforced in accordance with the Legislature's intent").

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 No Early Release Act or this Directive. A county prosecutor is expected to disclose fully and accurately to the court all facts and circumstances pertaining to the defendant's actual 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 this Directive and the requirements of the No Early Release Act.

A. *Pre-Indictment Dispositions and Consultation With Victims.*

Prosecutors have traditionally and appropriately been afforded a wide latitude of discretion in selecting and pursuing criminal charges. Prosecutors must consider the proofs that would be available for trial and the possibility of an acquittal. Prosecutors must also decide on a case-by-case basis, for example, whether the degree of injury caused by a defendant constitutes serious, significant or merely bodily injury as those terms are defined in N.J.S.A. 2C:11-1, whether the case is best prosecuted as an aggravated assault as compared to a simple assault, or whether the conduct constitutes aggravated sexual assault as compared to sexual assault.

Prosecutors must continue to have the flexibility to exercise reasoned charging discretion. Prosecutors must also be able to take into account the legitimate interests and expectations of crime victims, including the degree of trauma that a victim would experience in the event that the case were to result in a jury trial. The No Early Release Act, after all, was designed to respond to the legitimate concerns of crime victims, many of whom expressed frustration upon learning that their assailants would actually serve only a fraction of the sentence imposed by the court. It is therefore entirely appropriate that prosecutors, in deciding whether to initiate or pursue a given charge or to dismiss or downgrade a charge, consider the interests of the victim and the benefit in sparing the victim from the stress and ordeal of a public trial. See N.J.S.A. 52:4B-36 (the Victims' Bill of Rights).

Prosecutors have historically been afforded an especially wide latitude of discretion with respect to matters that have not yet been heard and acted upon by a grand jury. Pursuant to the Rules of Court, a prosecutor cannot unilaterally dismiss an indictment. Rather, an indictment or any count thereof may be dismissed only by a court upon motion of the prosecuting attorney. R. 3:25-1b. In contrast, a pre-indictment complaint may be administratively dismissed by the prosecutor without presentation to a grand jury, in which event no court order is necessary, although the prosecutor is required by court rule to report the dismissal and the basis therefor to the Assignment Judge. R. 3:25-1a.

In many counties, pre-indictment screening and disposition programs have been established to ensure the prompt, efficient, and appropriate handling of cases that can be justly disposed without having to present the matter to a grand jury. Although these centralized pre-indictment programs tend generally to involve less serious offenses that

would not in any event be subject to the provisions of the No Early Release Act, the fact remains that many cases, including serious ones, are resolved before indictment.

For the foregoing reasons, and consistent with the Legislature's intention that certain violent offenders serve 85% of their custodial sentence, a county prosecutor, or the Director of the Division of Criminal Justice in cases handled by the state, should consult with and take into consideration the interests of the victim in determining whether to seek an indictment for an offense that would be subject to the provisions of the No Early Release Act, and pursuant to N.J.S.A. 52:4B-36(m), the victim shall be afforded the opportunity to submit a written statement about the impact of the crime and to comment on any proposed pre-indictment disposition.

If the pre-indictment disposition involves the dismissal of a complaint, the prosecutor or Director shall comply with the requirements of R. 3:25-1a., and in reporting the basis of the dismissal to the Assignment Judge, the prosecutor or Director shall represent in writing that the offense charged in the complaint may have been subject to the provisions of the No Early Release Act and was dismissed in accordance with the policies established in this Attorney General Directive.

B. Notice to the Court and Defendant at Plea Hearing of Applicability of the No Early Release Act.

The assistant prosecutor or deputy or assistant attorney general handling the matter shall advise the court in writing at or before the time a plea is entered whether the facts and circumstances of the case are such that the defendant is subject to the provisions of the No Early Release Act (e.g., that during the course of the offense the defendant used or threatened to use a deadly weapon). See also § I, infra., discussing the procedures for establishing the grounds for imposing an enhanced sentence under the No Early Release Act. The failure to provide written notice to the defendant of the applicability of the provisions of the No Early Release Act shall not be deemed to be a waiver of the Act, and except as may otherwise be expressly provided in this Directive, the county prosecutor or Director of the Division of Criminal Justice shall have no authority to waive imposition of enhanced sentence required by the Act.

At the plea hearing, the defendant must be fully apprised of the consequences of his or her plea and of the mandatory nature of the 85% parole ineligibility term. See generally State v. Kovack, 91 N.J. 476 (1982) and State v. Bailey, 226 N.J. Super. 559 (App. Div. 1988). In addition, the defendant should be advised that he or she will be subject to a fixed period of parole supervision after serving 85% of the custodial

sentence, and that during such period of parole supervision, parole may be revoked upon a violation thereof and the defendant returned to prison to serve all or any portion of the remaining period of supervision, notwithstanding that the initial maximum term of imprisonment has expired. In effect, the Legislature, by adoption of the No Early Release Act, has established a new maximum term of custodial confinement representing the sum of the initial maximum term of imprisonment and the fixed period of supervision.

This intended deviation from the regular sentencing provisions of the New Jersey Code of Criminal Justice was recommended in the Report of the Study Commission on Parole (1996), and is patterned after the sanctioning system used in federal courts. The federal Sentencing Reform Act requires a defendant to serve not less than 85% of the initial sentence of imprisonment imposed by the court, which is then followed by a separate and distinct term of supervised release (the functional equivalent of parole). Throughout the term of supervised release, the defendant is subject to revocation and the imposition of a new sentence of imprisonment that cannot exceed the term of supervised release imposed at the original sentencing proceeding. See 18 U.S.C. § 3583.

This notification on the record can be accomplished (1) by means of an appropriate plea form, (2) by means of the colloquy in open court at the time of the plea and sentencing hearings, and/or (3) by means of an express provision of the written plea offer tendered by the prosecutor to the defendant pursuant to R. 3:9-1b. Nothing in this Directive shall be construed to require a defendant to waive the right to contest or appeal the state's position that the defendant upon a revocation of parole can be returned to prison notwithstanding that the original term of imprisonment imposed by the court has expired.

C. Negotiated Dismissal or Downgrading of Post-Indictment Charges.

A county prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall not agree as part of a negotiated disposition to dismiss or to downgrade to a third or fourth-degree crime a count or counts of an indictment that would be subject to enhanced punishment pursuant to the No Early Release Act unless:

1. The prosecutor represents on the record that there is insufficient evidence to warrant a first or second-degree conviction, or that the possibility of acquittal is so great that dismissal or downgrading to a third or fourth-degree crime is warranted in the interests of justice; or

2. The prosecutor represents on the record that there is insufficient evidence to establish by a preponderance of the evidence the grounds for imposition of enhanced punishment pursuant to the No Early Release Act; or,

3. A plea is being entered by the defendant to an offense that is subject to the provisions of the No Early Release Act; or,

4. The prosecutor represents on the record that the disposition is necessary to protect the interests of a victim and that the victim has been consulted; or,

5. The prosecutor represents on the record, either in camera or in open court, that the plea agreement is essential to assure defendant's cooperation with the prosecution, provided that the defendant's promise to provide cooperation is put in writing and spells out 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.

D. Conspiracy and Accomplice Liability.

The inchoate offense of conspiracy, as defined in N.J.S.A. 2C:5-2, does not appear to fall within the definition of a "violent crime" within the meaning of the No Early Release Act, notwithstanding that the object of the conspiracy is to commit a violent crime. The essence of a conspiracy offense is the illegal agreement, not the completed act. State v. LaFera, 35 N.J. 75, 86 (1961); State v. Salentre, 275 N.J. Super. 410, 423 (App. Div. 1994), certif. denied 138 N.J. 269 (1994). See also State v. Soltys, 270 N.J. Super. 182, 189 (App. Div. 1994) (a conspiratorial agreement to cause or attempt to cause serious bodily injury constitutes neither a "bodily injury" nor a "threat" thereof), and State v. Connell, 208 N.J. Super. 688 (App. Div. 1986) (conspiracy is not a Graves' Act offense).

Notwithstanding the foregoing, a person who is an accomplice to a completed violent crime is subject to imposition of enhanced punishment pursuant to the No Early Release Act, even though the accomplice did not personally use or threaten the immediate use of a weapon or cause serious bodily injury. See N.J.S.A. 2C:2-6 (explaining when a person is liable for the conduct of another). The No Early Release Act should be interpreted in the same manner as the Graves' Act, which has been

construed to permit convictions and enhanced sentencing on the grounds of accomplice liability. See State v. White, 98 N.J. 122, 131 (1984); State v. Camacho, ___ N.J. ___ (Mar. 25, 1998) (slip op. at 18).

Accordingly, a county prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall not permit a defendant to plead guilty to a conspiracy charge in exchange for the prosecutor's agreement to dismiss a count charging a defendant as an accomplice to a completed substantive offense that would constitute a violent crime under the No Early Release Act, where the prosecutor can establish by a preponderance of the evidence at the sentencing hearing that the accomplice knew or had reason to know before the crime was committed that his partner would use or threaten the immediate use of a firearm, cause serious bodily injury, or otherwise engage in conduct that would make the offense a violent crime within the meaning of the No Early Release Act, or where the prosecutor can establish by a preponderance of the evidence that the defendant had the purpose to promote or facilitate the substantive violent crime. In any case where the defendant had such prior knowledge or shared such purpose, the prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall only dispose of the case in accordance with the requirements of the No Early Release Act and §§ A or C of this Directive.

E. Multiple Counts Involving Multiple Victims.

Nothing in this Directive shall be construed to limit the authority of a county prosecutor or the Director of the Division of Criminal Justice to dismiss, downgrade, or to refrain from charging an offense involving one or more victims where the defendant has agreed to plead guilty to an offense involving another victim or victims where the defendant as a result of such guilty plea will be subject to the provisions of the No Early Release Act.

F. Specific Sentence Recommendations.

Nothing in this Directive shall be construed to limit the authority of a county prosecutor or the Director of the Division of Criminal Justice to agree as part of a negotiated disposition to a maximum custodial sentence to be imposed by the court within the range of sentences authorized by law, provided, however, that a prosecutor shall have no authority to waive or reduce the minimum term of parole ineligibility (i.e.,

85% of the custodial sentence ultimately imposed by the court) required by the No Early Release Act.

G. Sentencing Downgrades.

N.J.S.A. 2C:44-1f(2) authorizes a court in limited circumstances to sentence a person convicted of a first or second-degree crime to a custodial term appropriate to an offense one degree lower if the court is clearly convinced that the mitigating factors substantially outweigh the aggravating factors. A court may exercise this option only where the “interest of justice” so requires. In State v. Megargel, 143 N.J. 484 (1996), the New Jersey Supreme Court recently held:

Furthermore, in those cases in which the Legislature has acted to provide an enhanced penalty for conviction of a particular offense, the downgrade of that offense requires more compelling reasons than the downgrade of an offense for which the Legislature has not attached an enhanced penalty. By its description of the sentence, the Legislature has indicated that an enhanced sentence was contemplated for this crime.
[143 N.J. at 502.]

Furthermore, it is clear under present law that when a person convicted of a second-degree crime is sentenced pursuant to N.J.S.A. 2C:44-1f(2) to a term appropriate to a third-degree crime, the presumption of imprisonment that applies to persons convicted of second-degree crimes remains intact. See State v. O'Connor, 105 N.J. 399 (1987). Applying this principle in the context of the No Early Release Act, a defendant convicted of a first or second-degree violent crime who is sentenced pursuant to N.J.S.A. 2C:44-1f(2) must remain subject to the requirement that he or she serve 85% of the sentence imposed by the court before becoming eligible for parole.

In the event that a defendant subject to the No Early Release Act is sentenced pursuant to N.J.S.A. 2C:44-1f(2), the assistant prosecutor or deputy or assistant attorney general shall take steps to ensure that the defendant is ordered by the court to serve not less than 85% of the total sentence imposed before becoming eligible for parole. If for any reason the court does not impose the 85% term of parole ineligibility, the prosecutor shall appeal the sentence.

Nothing in this section shall be construed to preclude a prosecutor from agreeing as part of a negotiated disposition that the defendant be sentenced pursuant to N.J.S.A. 2C:44-1f(2) where the circumstances of the case so warrant.

H. Overcoming the Presumption of Imprisonment and Application for an Exception to the Graves' Act.

The No Early Release Act does not mandate that defendants be sentenced to terms of imprisonment. Rather, it requires that when a court does impose a term of imprisonment pursuant to other provisions of the New Jersey Code of Criminal Justice, a defendant who was convicted of a violent crime must remain ineligible for release on parole until he or she has served at least 85% of the custodial sentence imposed by the court.

The No Early Release Act applies only to persons convicted of first and second-degree crimes for which there is a statutory "presumption of imprisonment" set forth at N.J.S.A. 2C:44-1d. This presumption of imprisonment can be overcome, but only where there are truly exceptional circumstances and where a court explicitly finds on the record not only that imprisonment would be a serious injustice, but also that such injustice overrides the need to deter others. See State v. Jabbour, 118 N.J. 1 (1990). It is expected that prosecutors would not agree to a negotiated disposition that provides that a person subject to the No Early Release Act would be sentenced to a noncustodial term except in truly extraordinary cases. So too, it is expected that prosecutors would rarely if ever agree to refrain from exercising the right to appeal a court's decision to impose a probationary sentence or county jail term in a case where the presumption of imprisonment applies, especially where the defendant is subject to enhanced punishment pursuant to the No Early Release Act.

Where the Graves' Act applies, that is, where a firearm was used or possessed during the course of committing certain offenses (see N.J.S.A. 2C:43-6c), the prosecutor shall not agree to a noncustodial sentence except pursuant to the provisions of N.J.S.A. 2C:43-6.2.

I. Procedures For Establishing the Grounds for Enhanced Sentence.

It is not necessary for a prosecutor to file an application for enhanced punishment to trigger the 85% minimum term of parole ineligibility under the No Early Release Act. Compare State v. Latimore, 197 N.J. Super. 197 (App. Div. 1984), certif. denied 101

N.J. 328 (1984) (application by prosecutor is not required for imposition of a mandatory extended term pursuant to N.J.S.A. 2C:44-3d). The statute nonetheless requires that notice be provided to the defendant. See also State v. Martin, 110 N.J. 10 (1988).

In cases that will be disposed pursuant to a guilty plea, the prosecutor shall provide the defendant and the court with written notice at or before the plea hearing of the state's intention to establish at the time of sentence that the defendant must be sentenced pursuant to the No Early Release Act to serve not less than 85% of the custodial sentence imposed before becoming eligible for parole.

In cases resulting in a trial verdict, the prosecutor shall immediately following the return of the guilty verdict, or as soon as practicable thereafter, provide written notice to the defendant and the court that the state intends to establish at the time of sentence that the defendant must be sentenced pursuant to the No Early Release Act to serve not less than 85% of the custodial sentence imposed before becoming eligible for parole.

The written notice provided to the defendant and the court pursuant to this section shall set forth the ground(s) for imposing enhanced punishment pursuant to the No Early Release Act. The failure to provide written notice shall not be deemed to be a waiver of the Act, and except as may otherwise be expressly provided in this Directive, the county prosecutor or Director of the Division of Criminal Justice shall have no authority to waive imposition of enhanced sentence required by the No Early Release Act.

In many cases, the material elements of the crime for which the defendant was convicted will automatically establish that he or she is subject to enhanced punishment pursuant to the No Early Release Act. But cf. State v. Palmer, 211 N.J. Super. 349 (App. Div. 1986), where the court commented on the "scant" record before it, and noted that in deciding whether to apply the Graves' Act, the trial court cannot rely solely on the jury's verdict where it is at least theoretically possible that the verdict was not based upon a finding that the defendant had used a firearm.

In cases where the material elements of the underlying offense do not automatically establish the grounds for imposing enhanced punishment pursuant to the No Early Release Act, it shall be the responsibility of the county prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, to establish the grounds for enhanced punishment. Because the finding is to be made at sentencing by a judge rather than at trial by a jury, it is assumed that the prosecutor bears the

burden of proof by a preponderance of the evidence. Furthermore, although the No Early Release Act does not expressly require a court to take judicial notice of facts that were adduced at trial or a plea hearing, cf. N.J.S.A. 2C:43-6, Evid. R. 201b(4) generally provides for judicial notice with respect to “records of the court in which the action is pending.”

A prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall seek imposition of enhanced punishment pursuant to the No Early Release Act if evidence presented at trial or that can be presented at the sentencing hearing, including but not limited to statements by victims or witnesses, demonstrates by a preponderance of the evidence that the defendant used or threatened the immediate use of a weapon, notwithstanding that the weapon was not recovered by police.

J. Relationship to Extended Terms.

The No Early Release Act provides unambiguously that in any case where the statute applies, the court “shall fix a minimum term of 85% *of the sentence* during which the defendant shall not be eligible for parole.” (emphasis added) Thus, the 85% period of parole ineligibility would be determined based upon the total custodial sentence, whether an ordinary term or an extended term, imposed on the conviction for the first or second-degree violent crime. It would clearly contravene the Legislature’s intention in adopting the No Early Release Act to permit a violent offender subject to an extended term to serve only a fraction of the sentence imposed by the court before becoming eligible for release on parole.

Accordingly, a county prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall seek imposition of enhanced punishment pursuant to the No Early Release Act in addition to and not in lieu of any other extended term or enhanced sentencing provision of Title 2C that may be applicable. In the event that a defendant is sentenced to an extended term or other form of enhanced punishment pursuant to any provision of the New Jersey Code of Criminal Justice and is also subject to the No Early Release Act, the prosecutor shall take steps to ensure that the defendant serves not less than 85% of the extended term or enhanced punishment imposed by the court before becoming eligible for parole. Nothing in this Directive shall be construed to require a prosecutor to apply for an extended term of imprisonment.

K. Juveniles Waived to Adult Court.

Juveniles who are waived to adult court pursuant to N.J.S.A. 2A:4A-26 are subject to the provisions of the No Early Release Act and these cases shall be handled in accordance with the provisions of this Directive.

L. Effect of Life Sentence.

Where a defendant subject to the No Early Release Act is sentenced to a life term, other than one that provides for life imprisonment without possibility of parole, see e.g., N.J.S.A. 2C:11-3b(2) and 2C:43-7.1, the prosecutor in the course of plea negotiations and litigation shall proceed as if the defendant were to be sentenced to a custodial term of 75 years and must thus remain ineligible for parole for a term of 63.75 years (85% of 75 years).

M. Required Appeals and Notification of Adverse Rulings to Division of Criminal Justice.

If a court for any reason does not impose an 85% minimum term of parole ineligibility upon a defendant who is subject to the No Early Release Act in accordance with the provisions of this Directive, the county prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the state, shall appeal the court's decision and, where necessary, shall seek to stay the imposition of sentence in order to permit the appeal. In addition, the county prosecutor shall immediately notify the Division of Criminal Justice of any such adverse ruling.

N. Uniform Interpretation.

Any questions concerning the implementation or applicability of the No Early Release Act or concerning this Directive shall be addressed by a county prosecutor to the Director of the Division of Criminal Justice or his designee.

O. Effective Date.

This Directive shall take effect immediately and shall remain in force until such time as it may be amended or superseded by the Attorney General and shall apply to all

first and second-degree crimes that constitute “violent crimes” as defined in the No Early Release Act that were committed on or after the effective date of the Act, June 9, 1997.

Dated: April 24, 1998

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