APPLICATION NOTES
TO
ATTORNEY GENERAL DIRECTIVE 1998-1
AND
ATTORNEY GENERAL GUIDELINES
FOR NEGOTIATING CASES
UNDER N.J.S.A. 2C:35-12

Revised May 15, 2000

The following Application Notes are designed to address questions that have been raised under Attorney General Directive 1998-1 and the Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12. These interpretations, clarifications, and technical corrections are designed to ensure the uniform interpretation and implementation of the Attorney General Directive and the Guidelines.

Application Note	Description	Page	Cross-Reference to Guidelines
#1	Correction Regarding Number of Adjustment Points That Would Require a Prosecutor to Tender a Plea Offer Other Than the Presumptive Offer or at the Top or Bottom of the Applicable Range	1	Part VII § C, pp. 42-43
#2	Calculation of Criminal History Points for Prior Convictions/Adjudications Imposed on Different Dates	2	Part V p. 30
#3	Clarification Regarding Timing of Graduated Plea Offers and Plea Cut-Off Policies	3	Part II § E, pp. 11-13
#4	Notification of Criminal History Category Discrepancies	6	Part II § J, p. 17
#5	Tendering Anticipatory Plea Offers Contingent on Future Events	8	Part II § E, p. 13
#6	Conditional Pleas Involving Multiple Defendants	9	Part II § M, p. 19
#7	Dismissal of School Zone Cases as Part of a “Package” Deal	11	Part II § M, p. 19
#8 (Revised)	Reasons for Denying Pretrial Intervention Applications	12	Directive 1998-1 § 9, pp. 6-8
#9	Designation of Quality of Life Special Enforcement Zones	14	Part VII, § A(1), p. 35
#10	Determination of Drug-Free Park, Public Housing, and Public Building Zones	15	Part VII, § A(1), p. 34
#11	No Supervisory Approval Required to Effect a Downward Adjustment for Trial Proof Issues	17	Part VIII p. 47
#12	Prohibition on “Double Counting” the Weapons Involvement Special Offense Characteristic When a Defendant Also Pleads Guilty to a Violation of N.J.S.A. 2C:39-4.1	18	Part IV § A(1), p.24
#13	Extended Term Eligibility Applies Without Regard to the "Remoteness" of the Prior Drug Distribution-Type Conviction.	20	Part V p. 29
#14	Automatic Escalation to “Final Post-Indictment Offer” When a Court Convenes a Pre-Indictment Suppression Hearing.	22	Part II § E, pp. 9-12

Application Note	Description	Page	Cross-Reference to Guidelines
#15	Maximum Authorized Complex/Protracted Litigation Issue Reduction in School Zone Cases Involving Second-Degree Amounts and Less Than One Ounce of Marijuana/Authority to Reduce Offer to a County Jail or Non-Custodial Sentence.	25	September 2, 1999 Supplemental Directive, § III C, pp. 5-6
#16	Clarification Regarding Aggravating Factor #4b (Organized Crime) and Its Relationship to Mitigating Factor #2a (Minor or Minimal Participant)	27	Guidelines Part VI § A, p. 32, 37 § B, p. 33, 39-40
#17	Clarification Regarding Effect of "Possession With Intent" Prior Convictions on a Defendant's Criminal History Category	30	Part V, p. 28
#18	Clarification Regarding Timing of Escalating Plea Offers in Counties That Do Not Have a Pre-Indictment Program	32	Guidelines Part II, § E, pp. 12-13
#19	Designation of Retail Establishments and Adjacent Areas as Quality of Life Special Enforcement Zones to Respond to the Proliferation of "Ecstasy" and Other "Club" Drugs	35	Guidelines, Part VII, § A(1), p. 35
#20	Prohibition on "Double Counting" of Aggravating Factor #1b (Offense Occurring in a 500 Foot Drug-Free Public Park/Housing Zone) When a Defendant Also Pleads Guilty to a Violation of N.J.S.A. 2C:35-7.1	37	Guidelines, Part VII, § A(1) p. 35
#21	Extended Term Eligibility for Repeat Drug Offenders Charged With a Present Violation of N.J.S.A. 2C:35-7.1(500 Foot Drug-Free Public Park/Housing Zone)	39	Attorney General Executive Directive 1998-1, § 4, pp. 3-4 and Guidelines, Part II, § I, p. 16

APPLICATION NOTE #1[1]

Correction Regarding Number of Adjustment Points That Would Require a Prosecutor to Tender a Plea Offer Other Than the Presumptive Offer or at the Top or Bottom of the Applicable Range

[See Guidelines, Part VII, § C, pp. 42-43.]

The Guidelines currently state on p. 43 that an assistant prosecutor must tender the maximum (or minimum) term within the applicable range if "the absolute value of the grand point total is greater than 7 (e.g., -8, -9, +8, +9, etc.) ..." The Guidelines should read "If the absolute value of the grand point total is *7 or more* (e.g., -7, -8, +7, +8, etc.) ..." Please note that the rule is correctly stated on p. 22 of the Guidelines and is also correctly summarized on the worksheet.

A similar error appears on p. 43 with respect to the number of points that would require a prosecutor to tender an offer other than the presumptive offer fixed at or around the midpoint of the range. Specifically, the Guidelines currently state on p. 43 that the prosecutor must tender an offer greater than the presumptive offer "where the combined point total is greater than +3" and must tender an offer less than the presumptive offer "[i]f the combined negative point total is greater than -3 (e.g., -4, -5, -6, etc,)." The Guidelines should read, "where the combined negative point total is *3 or more*" and "[i]f the combined negative point total is greater than *-2* (e.g., -3, -4, -5, -6)." Once again, the rule is correctly stated on p. 22 of the Guidelines and on the worksheet.

Finally, the same basic error appears on p. 42, which currently states that a prosecutor must tender the appropriate presumptive offer, "[i]f the combined point total is between -3 and +3 (e.g., -2, +2 etc.)." The correct statement of the rule, which appears on p. 22 and on the worksheet, is that the presumptive plea offer must be tendered if the grand point total "ranges from -2 to +2."

It should be noted that when the grand point total is between +2 and -2, the prosecutor is required under the Guidelines to use the presumptive plea offer unless there is a basis to make a downward departure for substantial cooperation, a downward adjustment based on trial proof issues, or unless a special application and enhancement feature applies that requires a higher term. When the grand point total ranges from +3 to +6 (or -3 to -6), the prosecutor must tender an offer above (or below) the presumptive offer. The prosecutor in these circumstances may tender an offer at the top (or bottom) of the applicable range, or may tender an offer above (or below) the presumptive offer in one-month increments. For example, if the applicable range is 9-12-18 months and the grand total of adjustment points if +3, the prosecutor would be authorized to tender a plea offer ranging from thirteen (13) months up to eighteen (18) months of parole ineligibility.

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1 Issued June 8, 1998.

APPLICATION NOTE #2[2]

Calculation of Criminal History Points for Prior Convictions/Adjudications Imposed on Different Dates

[See Guidelines, Part V, p. 30.]

The Guidelines provide on p. 30 that when calculating criminal history points, prior convictions/adjudications that were imposed on different dates are to be treated as separate convictions/adjudications "unless the subsequently-imposed sentence was ordered to be served concurrently with the previously-imposed sentence." The above-quoted provision is subject to the rule discussed later on that same page that provides that concurrent sentences should be treated as a single conviction *unless the underlying offenses were separated by an arrest (i.e., the defendant was arrested for the first offense prior to committing the second offense).* Obviously, it makes no sense to say that convictions entered on the same day can, in certain circumstances, be treated as separate offenses notwithstanding that the sentences were ordered to be served concurrently, but to require that convictions imposed on different days must automatically be treated as a single offense if the sentences were ordered to be served concurrently without regard to whether the actual offense conduct was separated by an arrest.

The rule, simply stated, is that when convictions/adjudications are separated by an intervening arrest (i.e., the defendant was arrested for the earlier offense prior to committing the subsequent offense), the convictions should be treated as separate convictions, without regard to the date when sentences were imposed and notwithstanding that the subsequently-imposed sentence was ordered to be served concurrently with the previously-imposed sentence. See Federal Sentencing Guidelines Manual, Application Note 3 to § 4A1.2 at p. 292 (1998 Ed.).

Finally, where convictions/adjudications were imposed on different dates and the "rap" sheet does not indicate whether the subsequently-imposed sentence was ordered to be served concurrently or consecutively, the prosecutor should treat the convictions/adjudications as separate offenses for the purposes of calculating the criminal history points. If it is later determined that the sentences were actually order to be served concurrently, and that the offenses were not separated by an arrest, the prosecutor must recalculate the criminal history points where this would redound to the defendant's benefit and result in placing the defendant in a lower criminal history category.

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2 Issued June 8, 1998.

APPLICATION NOTE #3.[3]

Clarification Regarding Timing of Graduated Plea Offers and Plea Cut-Off Policies

[See Guidelines, Part II, § E, pp. 11-13.]

The Guidelines provide in Part II, § J, that "all plea offers must include a date or event at which the offer will expire and will automatically be withdrawn. The expiration can be based upon the passage of time ... an event ... or can be based on a material change in circumstances .... ." (Guidelines at p. 16.) The first plea offer provided to a defendant in the graduated plea system is called a "pre-indictment offer," although the Guidelines make clear that this first offer may actually come after the defendant has been indicted. (This circumstance is referred to in the Guidelines as the "functional equivalent" of a pre-indictment offer.) The goal is to ensure statewide uniformity by making certain that all non-fugitive defendants are afforded a reasonable opportunity to plead to this first offer, recognizing that not all counties have a formal pre-indictment case disposition program.

A question has arisen whether a prosecutor is required under the Guidelines to hold the pre-indictment offer open until the defendant is actually indicted. The answer to this question is that the prosecutor may provide that a pre-indictment offer expires at a specified date or event *before* indictment, provided that all non-fugitive defendants are afforded a reasonable opportunity to receive and act upon this first plea offer.

Where a county has established a pre-indictment case disposition program, prosecutors and courts have a strong interest in encouraging defendants to participate and take advantage of the program, and to abide by the rules, procedures, and time limits established as part of the program. In cases where the defendant rejects a pre-indictment program offer, the case is then often referred to a grand jury unit in the prosecutor's office, which prepares the case for presentation to a grand jury. There may be some delay between the date of the pre-indictment program court event and the return of the indictment, sometimes because the prosecutor's office is waiting to receive the results of a laboratory analysis of the drugs involved.

The graduated plea system established in the Guidelines was by no means designed to provide an incentive for defendants to postpone their decision to accept the first plea offer until just before the matter is to be presented to a grand jury. Once a defendant rejects the pre-indictment offer (whether expressly, or impliedly by failing to accept the offer at the pre-indictment program calendar call and by failing to request an adjournment of the pre-indictment program court event), there is no reason to delay moving to the next step in the three-tiered graduated plea system. To the contrary, in order to promote the efficient management and operation of these pre-indictment case disposition programs, defendants should be encouraged to make their decision to accept or reject the initial plea offer as soon as possible.

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3 Issued June 8, 1998.

The second plea offer in the three-step graduated system, referred to in the Guidelines as the "initial post-indictment offer," automatically becomes operative upon the expiration or rejection by the defendant of the so-called "pre-indictment" offer. (In effect, the second offer could be made before indictment and might in those circumstances be characterized as the "functional equivalent" of an initial post-indictment offer.) This second offer would ordinarily expire after twenty (20) days and, following its expiration, the third offer in the graduated system would automatically become operative. Where, however, the initial plea offer expired before indictment, the 20-day time period for accepting the second-step plea offer should be tolled until the defendant is indicted, and this window should be tied to a post-indictment court event (e.g., the arraignment), so that the defendant has a meaningful opportunity to accept or reject this second offer. Accordingly, the third or "final" offer in the graduated system should not become operative before indictment.

This interpretation is necessary because there may not be a scheduled court event between the pre-indictment program calendar call and the return of the indictment at which the defendant could accept or reject the second-step plea offer. In addition, pretrial hearings pursuant to R. 3:9-1(d) are held only after indictment, and the 20-day window is designed to provide a reasonable opportunity for the defendant to accept or reject this offer before motions are filed or pretrial hearings are convened. It is also important to provide an indicted defendant some tangible incentive to plead guilty before filing and litigating any such pretrial motions.

A question has arisen whether prosecutors may withdraw the second plea offer if the court were to schedule a hearing under R. 3:9-1(d) within the 20-day window. The purpose of the graduated system is to conserve judicial and prosecutorial resources, not to encourage a race to the courthouse to convene evidentiary hearings within the 20-day deadline. In fact, the Guidelines expressly provide that "the initial post-indictment plea offer must include a condition that the defendant waive the right to file or further litigate any pretrial motions." (Part II, § E, p. 11.) Accordingly, the Guidelines should be interpreted to require the initial post-indictment plea offer to expire automatically if *either* 20 days has elapsed, *or* an evidentiary hearing is convened to decide pretrial motions. (Recall that plea offers can expire after either the passage of a period of time or at a designated event.) If a hearing is convened, the second-step plea offer must automatically be withdrawn and must be replaced with the so-called "final" plea offer, representing the third and final step in the three-tiered graduated plea system.

Note that the term "final" should not be construed to mean that the offer is fixed and immutable. Prosecutors are free to modify the "final" offer to account for changed circumstances. For example, the final post-indictment offer may be reduced in accordance with the Guidelines where new circumstances make it appropriate to make a downward adjustment for trial proof issues (e.g., a prosecution witness becomes uncooperative or unavailable). So too, the final offer may be withdrawn and replaced with a higher offer where new circumstances suggest, for example, that the defendant

belongs in a higher criminal history category, that a previously unaccounted-for aggravating factor or special application and enhancement feature applies, or where the strength of the State's case and the likelihood of conviction has improved, requiring a reconsideration of a previously accounted-for trial proof downward adjustment (e.g., where a co-defendant pleads guilty and agrees to cooperate, or a guilty verdict is obtained in a related case involving the same witnesses, or a pretrial motion to dismiss the case or suppress evidence is denied, etc.).

APPLICATION NOTE #4.[4]

Notification of Criminal History Category Discrepancies

[See Guidelines, Part II, § J, p. 17.]

As noted throughout the Guidelines, prosecutors are permitted and expected to calculate and tender plea offers based upon the information that has traditionally been available to them. The system is not designed to impede the orderly processing of cases by requiring prosecutors to track down information that is not readily available in the case file. Note, however, that the Guidelines presuppose that a prosecutor would never tender a plea offer without first reviewing the defendant's criminal record and determining, for example, whether the defendant is subject to a mandatory extended term of imprisonment as a repeat offender under N.J.S.A. 2C:43-6f. Accordingly, under these Guidelines (as well as under the predecessor Attorney General guidelines), a prosecutor is expected to have access to and carefully review the defendant's "rap" sheet before tendering any plea offer. The new Guidelines recognize, however, that these "rap" sheets may turn out to be incomplete and may not, for example, include information concerning juvenile adjudications entered in other counties.

For this reason, the Guidelines include a provision in Part II, § J that accounts for situations where a plea offer is accepted by the defendant and the court at a plea hearing, but a subsequently-prepared presentence report reveals that the defendant's criminal record is more serious than previously thought. In that event, the Guidelines authorize the prosecutor to keep the plea offer on the table, even though the defendant actually falls under a higher criminal history category than accounted for in the plea offer. When this occurs, the prosecutor must alert the court to the discrepancy. It is also necessary in these circumstances to provide notification to the Division of Criminal Justice so that the Attorney General can monitor the implementation and reliability of the system.

To facilitate the notification process, prosecutors should use the attached form to advise the Division of Criminal Justice when a plea offer that is later discovered to be based on inaccurate or incomplete criminal history information is nonetheless accepted by the court. Completed criminal history discrepancy forms should be sent to the Division on the 15th of each month.

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4 Issued June 8, 1998.

NOTIFICATION OF DISCREPANCY BETWEEN CRIMINAL HISTORY CATEGORY USED TO DETERMINE PLEA OFFER AND DEFENDANT'S ACTUAL CRIMINAL HISTORY (See Part II, Section J of Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-7)

County______________________________________

Defendant Name______________________________ SBI Number____________________

Use this form to notify the Director of the Division of Criminal Justice that the plea offer that was accepted by the defendant and the court was based on incomplete and/or inaccurate Criminal History information.

Criminal History Category Used to Determine Plea Offer: ☐

Corrected Criminal History Category: ☐

As a result of additional criminal history information learned after the plea was taken pursuant to 3:9-3 (e.g., information detailed in the presentence investigation report), the...

Prosecutor moved to withdraw the plea offer. ☐

Prosecutor elected not to withdraw original plea offer, but the court vacated the plea. ☐

The court accepted the original plea offer and defendant was sentenced thereunder. ☐

Comments (optional):____

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Send to: New Jersey Division of Criminal Justice
Research and Evaluation Section
Hughes Justice Complex
P.O. Box 085
Trenton, New Jersey 08625-0085

APPLICATION NOTE #5.[5]

Tendering Anticipatory Plea Offers Contingent on Future Events

[See Guidelines, Part II, § E, p. 13.]

In order to conserve resources and avoid filing unnecessary forms with the court and the Division of Criminal Justice, a prosecutor may indicate on the worksheet that when the current plea offer expires, it will automatically be replaced with another specific plea offer pursuant to the graduated plea system established in the Guidelines. For example, the pre-indictment plea offer may indicate that the offer is "twelve (12) months of parole ineligibility and expires upon return of an indictment, at which point the plea offer will be eighteen (18) months of parole ineligibility."

This practice would obviate the need for the prosecutor to prepare and file a second plea worksheet. Similarly, a prosecutor may choose on a single initial worksheet to announce in advance all three steps of the graduated plea system, alerting the defendant specifically as to when each offer will expire and what the next plea offer will be. This approach, besides conserving resources, may also help to convince guilty defendants that it is in their best interests to plead guilty before the plea offer is automatically increased pursuant to the Guidelines.

It should be noted, of course, that if new information becomes available that would lead the prosecutor to tender a different offer than the one originally expected to be tendered, then a second or subsequent worksheet, accounting for the changed circumstances, must be prepared and provided to the defendant, the court, and the Division of Criminal Justice.

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5 Issued June 8, 1998.

APPLICATION NOTE #6.[6]

Conditional Pleas Involving Multiple Defendants

[See Guidelines, Part II, § M, p. 19.]

A question has arisen concerning a prosecutor's authority under the new Guidelines to tender a "joint" or "packaged" plea offer to multiple defendants who are alleged to be involved in a common drug-distribution scheme where the offer tendered to each defendant requires that the others accept the arrangement and plead guilty. In other words, may a prosecutor under the Guidelines continue the well-accepted practice of tendering a "conditional" plea offer to a defendant under circumstances where that offer does not become operative unless one or more other co-defendants also agree to plead guilty?

The new Guidelines were not intended to change the pre-existing practice for handling multiple defendants and are, in fact, designed to promote the interests of judicial economy and finality, providing incentives for all guilty defendants to plead guilty, as well as to achieve the Legislature's goal of disrupting entire drug trafficking enterprises. See Attorney General Directive 1998-1, § 14 (provisions of the Directive not inconsistent with those of prior directives and guidelines shall be construed as a continuation of such prior directives and guidelines). Nothing in the Guidelines should therefore be construed to require a prosecutor to tender a plea offer to any defendant where to do so would undermine or jeopardize the successful prosecution of one or more other defendants. Accordingly, and notwithstanding any other provision of the Guidelines, a prosecutor may refrain from tendering an offer in these circumstances, or may tender a plea offer that is subject to the condition that the case involving co-defendants is also disposed of. This interpretation is consistent with Part II, § M, which explains the "scope" of the Guidelines and which expressly provides that a prosecutor need not tender a plea offer if that would preclude or compromise the prosecution of other charges against a defendant.

In order to comply with the rule re-affirmed in State v. Brimage, 153 N.J. 1 (1998) that prosecutors must state on the record their reasons for choosing to waive or not to waive a statutorily-prescribed mandatory minimum term of parole ineligibility, a prosecutor in these circumstances involving multiple defendants must explain to the court the reasons for not tendering a plea offer, or for tendering an offer that is subject to the condition that other defendant(s) also plead guilty. To ensure fairness, moreover, where any such conditional plea offer is tendered before indictment and the defendant indicates a willingness to accept the offer but is precluded from effectuating the plea agreement because of a co-defendant's refusal to plead guilty, the plea offer shall be deemed to be "frozen" for the purposes of determining the "timing" of the plea, and if the case against the remaining co-defendant(s) is disposed of, the defendant who indicated a willingness to accept the initial plea offer shall be permitted to plead guilty to the pre-indictment offer, notwithstanding that the defendant has since been indicted and would otherwise be required to plead guilty to a post-indictment offer calculated under the Guidelines. This interpretation is consistent with the rule established in Part

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6 Issued June 8, 1998.

II, § E, pp. 12-13 of the Guidelines, which provides that where a prosecutor for any reason does not tender a plea offer prior to the return of an indictment, the prosecutor will be required pursuant to the Guidelines to tender the applicable "pre-indictment" plea offer, notwithstanding that the defendant has already been indicted.

It should also be noted, of course, that a prosecutor retains the authority pursuant to Part X of the Guidelines at any time to make a downward departure for substantial cooperation based, for example, on a defendant's assistance in prosecuting co-defendants.

APPLICATION NOTE #7.[7]
Dismissal of School Zone Cases as Part of a Package Deal
[See Guidelines, Part II, § M, p. 19.]

Nothing in Attorney General Directive 1998-1 or the "Brimage" Guidelines should be construed to limit the authority of a prosecutor to dismiss one or more counts under N.J.S.A. 2C:35-7 (Drug-Free School Zone) as part of a negotiated disposition where the defendant will plead guilty in accordance with the Guidelines to another 2C:35-7 charge. This rule is consistent with the provisions of the Attorney General's No Early Release Act Directive, the Supreme Court's April 27, 1981 Plea Bargaining Memorandum for Graves' Act cases, and prior Attorney General drug prosecution guidelines. It should also be noted that under current law, when a defendant is subject to prosecution for multiple drug-free school zone counts involving completely separate transactions, the decision to impose consecutive or concurrent terms of imprisonment and parole ineligibility is generally vested in the discretion of the court pursuant to N.J.S.A. 2C:44-5a, and a prosecutor arguably has no authority under N.J.S.A. 2C:35-12 to require the court to impose consecutive sentences.

Note that a prosecutor is ***not*** required by this Application Note to "package" multiple drug counts involving separate and distinct transactions. The Guidelines clearly provide in Part III, p. 21, that 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 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." Thus, a prosecutor retains the discretion, subject to the rules governing the joinder of offenses (see R. 3:15-1), to refuse to dismiss provable charges as part of a plea agreement. Because the prosecutor cannot compel the court to impose consecutive as opposed to concurrent sentences, the prosecutor's exercise of discretion in refusing to "package" separate pending charges cannot result in formalized intercounty disparity within the meaning of State v. Brimage, 153 N.J. 1 (1998).

7 Issued June 8, 1998.

REVISED APPLICATION NOTE #8.[8]
Reasons for Denying Pretrial Intervention Applications
[See Directive, 1998-1, § 9, pp. 6-8.]

Attorney General Directive 1998-1, § 9, as revised May 1999, implements the rule recently established by the Supreme Court in State v. Caliguiri, 158 N.J. 28 (1999), which precludes prosecutors from "categorically" denying a PTI application on the grounds that the defendant is charged with a violation of N.J.S.A. 2C:35-7 and thus faces a mandatory minimum sentence. The Attorney General Directive provides, however, that where a defendant would be subject to a special offense characteristic, aggravating adjustment factor, or special application and enhancement feature under the "Brimage" Guidelines, the prosecutor must cite these case-specific circumstances as further bolstering the presumption against PTI admission established by the court in Caliguiri. In doing so, prosecutors should frame their legal/factual arguments in terms of the PTI criteria set forth in N.J.S.A. 2C:43-12e and in R. 3:28.

For example, if the charged school zone offense involved the possession of firearms or the use or threatened use of other weapons (a special offense characteristic under the "Brimage" Guidelines), those facts and circumstances would be relevant in bolstering the presumption against PTI admission under a number of statutory PTI criteria, including but not limited to: the nature of the offense (criterion #1); the facts of the case (criterion #2); the needs and interests of society (criterion #7); the extent to which the defendant may present a substantial danger to others (criterion #7); the possible injurious consequences of the defendant's behavior (criterion #10); whether the crime is of such a nature that the value of supervisory treatment would be outweighed by the public need for prosecution (criterion #14); and that the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling the defendant into a supervisory treatment program (criteria #17).

Such aggravating circumstances would also be relevant in applying the underlying legal standard established by the Court in Caliguiri, namely, whether the defendant has established compelling reasons that overcome the presumption against admission into PTI.

It should be noted that the PTI Guidelines promulgated by the Supreme Court permit a school zone defendant to apply for PTI even though he was a parolee or probationer at the time of the offense, provided that the chief probation officer or district parole supervisor is consulted. (See PTI Guideline 3(f) following R. 3:28.)

The "Brimage" Guidelines establish a special enhancement and application feature where the present offense was committed while the defendant was under parole or probation supervision. Accordingly, and so as to reconcile the requirements of the Attorney General Guidelines with the Rules of Court governing PTI applications, the prosecutor in these circumstances should argue, for example, that the fact that the

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8 Issued June 8, 1998.

present offense was committed while the defendant was under supervision indicates that there is a low probability that the causes of the defendant's criminal behavior can be controlled by proper treatment (statutory criterion #5), that the defendant would not be conducive to change through his participation in supervisory treatment (criterion #6), that the defendant's crime constitutes part of a continuing pattern of antisocial behavior (criterion #8), and that the defendant's record of criminal violations (criterion #9) militates against overcoming the presumption that his PTI application should be rejected.

APPLICATION NOTE #9[9]

Designation of Quality of Life Special Enforcement Zones

[See Guidelines, Part II, § A(1), p. 35.]

Aggravating Factor #1c applies where the drug distribution-type offense occurred in a "Quality of Life" Special Enforcement Zone, provided that the county prosecutor has "designated the specific area constituting the Special Enforcement Zone based upon the criteria established in the Attorney General's Model Quality of Life Program. Attorney General Directive 1996-03, which was issued on October 30, 1996, required prosecutors in consultation with local law enforcement officials to identify any and all locations within the county jurisdiction where controlled dangerous substances are routinely sold out in the open.

To accomplish the designation process for purposes of the "Brimage" Guidelines, prosecutors must provide the Director of the Division of Criminal Justice with a letter that specifically describes the boundaries and locations of all special enforcement zones. A map depicting these zones should be appended. The prosecutor's letter should describe the nature of the drug-distribution problem within each zone and should document that the designation by the county prosecutor was made in consultation with the local police department. The letter should also explain the steps that were taken to solicit the views and opinions of representatives of the communities and neighborhoods where these zones are located. Finally, the letter should also document the steps that have been taken by the county prosecutor to publicize the establishment and location of each special enforcement area. See Part II, § N ("Public Outreach") of the Attorney General's Model Quality of Life Program.

The Model Quality of Life Program developed by the Attorney General and endorsed by the Governor is designed to focus law enforcement and prosecutorial resources and attention on specific neighborhoods and locations, sometimes referred to as "hot spots," where drug distribution is open and notorious. Accordingly, prosecutors are not authorized pursuant to the "Brimage" Guidelines to designate an entire county or municipal jurisdiction.

Prosecutors may designate new special enforcement zones, or make revisions to the boundaries of previously-designated zones, as circumstances warrant, provided that notice is given to the Director of the Division of Criminal Justice pursuant to the "Brimage" Guidelines and this Application Note.

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9 Issued June 8, 1998.

APPLICATION NOTE #10[10]

Determination of Drug-Free Park, Public Housing, and Public Building Zones

[See Guidelines, Part VII, § A(1), p. 34.]

Aggravating Factor #1b applies where the drug distribution-type offense occurred in a drug-free park, public housing, or public building zone in violation of N.J.S.A. 2C:35-7.1, which took effect on January 9, 1998. A question has arisen how prosecutors will be expected to account for this aggravating factor where, for whatever reasons, maps depicting the location and boundaries of these specially protected areas have not been developed and approved by local or county ordinances pursuant to the provisions of N.J.S.A. 2C:35-7.1.

The Guidelines recognize the practical need for pre-indictment programs to emphasize the swift disposition of cases. These pre-indictment offers are usually based upon the limited information that is typically available to a county prosecutor at that point, which information appears in the initial police report and a "rap" sheet. The Guidelines are not designed in any way to impede the orderly disposition of cases or to require prosecutors to conduct supplemental investigations to obtain information that is not readily available in the case file. Rather, prosecutors are expressly permitted under the Guidelines to tender plea offers based upon a good faith assessment of the facts and circumstances then known to the prosecutor. The Guidelines also permit a prosecutor to indicate 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 determination of the appropriate plea offer. See Guidelines, Part II, § B, at p. 6. It should also be noted that the Guidelines spell out the procedures to be used by prosecutors for withdrawing and replacing plea offers where new information becomes available that would lead to a different plea offer under the Guidelines than the one previously tendered. See Guidelines, Part II, § J.

Accordingly, prosecutors are not required to delay the pre-indictment disposition of a case by initiating a supplemental investigation to determine whether the offense occurred in a public park, public housing, or public building zone where the jurisdiction in which the offense was committed has not produced an approved map depicting the location and boundaries of any such zones. It is expected that a prosecutor's ability to efficiently determine the applicability of this aggravating factor will be greatly facilitated by the eventual creation of these maps and their approval by local or county ordinance, and prosecutors are therefore strongly encouraged to work with local and county engineers and governing bodies to develop these maps as quickly as possible.

It should also be noted that N.J.S.A. 2C:35-7.1 makes clear that this new second-degree offense can be proved by other means. Accordingly, if a defendant were to reject a pre-indictment plea offer and the case were to be bound over to grand jury, it might be appropriate at that stage in the proceedings for the prosecutor to initiate a

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10 Issued June 8, 1998.

supplemental investigation to determine conclusively whether the offense occurred in such a zone. This approach is consistent with the general theme established in the Guidelines that defendants should be placed on clear notice that authorized plea offers become more stern as the case proceeds through the criminal justice system, both as a result of the formal graduated plea system established in the Guidelines and as a consequence of the additional information that a county prosecutor is likely to obtain during the course of preparing the case for presentation to a grand jury or for trial.

APPLICATION NOTE #11[11]

No Supervisory Approval Required to Effect a Downward Adjustment for Trial Proof Issues

[See Guidelines, Part VIII, p. 47.]

A prosecutor is authorized by Part VIII of the Guidelines to tender a plea offer below the offer otherwise prescribed by assessing the proofs available to sustain a conviction. A question has arisen whether this "downward adjustment" requires the approval of a designated senior assistant prosecutor. Unlike the "downward departure" for substantial cooperation under Part X, which requires the approval of a designated assistant prosecutor or deputy or assistant attorney general who is authorized in writing by the county prosecutor or Director of the Division of Criminal Justice to approve such true "departures," any assistant prosecutor, or deputy attorney general in cases prosecuted by the Division of Criminal Justice, is authorized to make the downward adjustment based upon trial proof issues. By establishing definitive limits on the extent to which this downward adjustment can affect an authorized plea offer, the Guidelines establish an appropriate safeguard to prevent unwarranted disparity, thus obviating the need to restrict the number of assistant prosecutors who are authorized to make these kinds of case-specific evaluations. County prosecutors may, of course, establish their own internal supervisory and approval procedures, but such procedures are not required by the "Brimage" Guidelines.

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11 Issued June 8, 1998.

APPLICATION NOTE #12[12]

Prohibition on "Double Counting" the Weapons Involvement Special Offense Characteristic When a Defendant Also Pleads Guilty to a Violation of N.J.S.A. 2C:39-4.1

[See Guidelines, Part IV, § A(1), p. 24.]

On June 24, 1998, Governor Whitman signed P.L. 1998, c. 26, establishing three new offenses allocated to N.J.S.A. 2C:39-4.1 that are designed to provide enhanced punishment for drug dealers who choose to carry or use weapons. Specifically, the new law makes it a crime for a person while in the course of committing a drug distribution-type offense to: (a) possess a firearm; (b) possess a non-firearm weapon with the purpose to use such weapon unlawfully against the person or property of another; or, © possess a non-firearm weapon under certain circumstances not manifestly appropriate for such lawful uses as the weapon may have. The new offenses are not subject to the exemption set forth in N.J.S.A. 2C:39-6e, which generally permits persons to possess firearms in their own residences or places of business. That exemption applies only to the offenses codified in subsections b, c, and d of N.J.S.A. 2C:39-5. Accordingly, the Legislature by adoption of the new law has made clear that drug dealers have no legal right to possess firearms at any location.

Of special note, the new weapons law provides that notwithstanding the provisions of N.J.S.A. 2C:44-5 or any other law, the sentence imposed upon violation of one of the new weapons offenses shall be ordered to be served consecutively to the sentence imposed on a conviction for violation of certain drug distribution-type offenses in Chapter 35 or a conspiracy or attempt to commit these drug offenses. Under this statutory scheme, neither a court nor a prosecutor has the authority to waive the mandatory consecutive sentencing feature. Compare N.J.S.A. 2C:43-6.2 (spelling out the procedures whereby a prosecutor is authorized to make application to the assignment judge to waive imposition of the mandatory sentence under the Graves' Act).

Many of the factual circumstances covered under the new weapons law are already addressed in the Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12 ("Brimage Guidelines"). The Brimage Guidelines require prosecutors to account for certain aspects of the defendant's "relevant conduct" that bear on culpability. Specifically, the Guidelines define a "special offense characteristic" where the drug distribution-type offense "involves weapons." See Part IV, § A(1) at p. 24. This offense characteristic, in turn, is used to determine the applicable row to be used in the appropriate Table of Authorized Dispositions. The practical effect of applying this special offense characteristic is to add six months of parole ineligibility to the authorized disposition of the drug offense.

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12 Issued on September 15, 1998.

The "Brimage" Guidelines apply only to the negotiated disposition of drug distribution-type charges that are subject to a waivable mandatory minimum term of imprisonment and parole ineligibility pursuant to N.J.S.A. 2C:35-12, and nothing in those Guidelines should be construed to require, or to preclude, a prosecutor from "packaging" any such drug distribution-type charge(s) with non-Chapter 35 charges in a single plea offer. See Guidelines, Part II, § M, at p. 19. (It is often desirable to resolve all pending charges against a defendant in a single "package" disposition so as to conserve limited judicial and prosecutorial resources.)

Notwithstanding the foregoing, and in order to avoid the impermissible "double counting" of the weapons involvement aggravating circumstance, where a defendant pleads guilty to a drug distribution-type charge under the "Brimage" Guidelines (i.e., a count subject to the provisions of N.J.S.A. 2C:35-12) and also pleads guilty to a violation of an offense defined at N.J.S.A. 2C:39-4.1 involving the same transaction or episode as the drug-distribution charge, the prosecutor shall *not* account for the special offense characteristic of weapons involvement in determining the appropriate row to be used in calculating the authorized plea offer for the drug distribution-type charge. Where, in contrast, the prosecutor agrees as part of a package disposition to move to dismiss the N.J.S.A. 2C:39-4.1 weapons charge, then the special offense characteristic of weapons involvement must be accounted for in determining the authorized disposition of the drug distribution-type charge. Nothing herein shall be construed to authorize a prosecutor to dismiss a drug distribution-type charge subject to N.J.S.A. 2C:35-12 in exchange for the defendant's agreement to plead guilty to a violation of N.J.S.A. 2C:39-4.1.

Prosecutors are reminded that if a defendant is convicted of both a drug distribution-type offense and one of the new weapons offenses defined at N.J.S.A. 2C:39-4.1, the court must impose consecutive sentences. As noted above, a prosecutor has no discretion under the statutory scheme to waive the mandatory consecutive feature, and if the court for any reason fails to impose consecutive sentences, the prosecutor must notify the Director of the Division of Criminal Justice and appeal any such illegal sentence.

In order to ensure uniformity in responding to legal issues, if a defendant challenges the constitutionality of N.J.S.A. 2C:39-4.1 or the implementation of the provisions of this Application Note, the prosecuting agency shall immediately notify the Division of Criminal Justice. See § 13 of Attorney General Directive 1998-1.

APPLICATION NOTE #13[13]

Extended Term Eligibility Applies

Without Regard to the "Remoteness" of the Prior Drug Distribution-Type Conviction.

[See Guidelines, Part V, p. 29.]

A question has arisen whether a defendant is subject to an extended term of imprisonment and parole ineligibility pursuant to N.J.S.A. 2C:43-6f if he or she was previously convicted of a drug distribution-type offense where more than ten years has passed since the sentence imposed on the earlier conviction was completely served. Nothing in the "Brimage" Guidelines should be construed to exempt a defendant from extended term eligibility on the grounds that the prior drug distribution-type conviction is remote in time. Accordingly, in determining an authorized disposition under the "Brimage" Guidelines, a defendant who has previously been convicted of a drug distribution-type offense must be classified under Criminal History Category IV or V, regardless of how much time has elapsed since the prior drug distribution-type conviction.

The confusion on this issue is the result of the statement on p. 29 of the Guidelines that provides:

> 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.

This provision of the "Brimage" Guidelines applies only to the calculation of criminal history points, and not to a determination of whether a defendant is eligible for an extended term of imprisonment or parole ineligibility pursuant to N.J.S.A. 2C:43-6f. That statute unambiguously provides in pertinent part that:

> For the purpose of this subsection, a previous conviction exists where the actor has *at any time* been convicted under chapter 35 of this title or Title 24 of the Revised Statutes or under any similar statute of the United States, this State, or any other state for an offense that is substantially equivalent to N.J.S. 2C:35-3, N.J.S. 2C:35-4, N.J.S. 2C:35-5, N.J.S. 2C:35-6, or section 1 of P.L. 1987, c. 101 (C. 2C:35-7).
> [emphasis added]

It is clear from the text of this statute that the Legislature created no exception

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13 Issued on September 29, 1998.

for "remote" prior convictions. The enhanced sentencing scheme for recidivist drug distributors is markedly different from the one established in the "Three Strikes" statute, N.J.S.A. 2C:43-7.1, where the Legislature expressly stated that:

> The provisions of this section shall not apply unless the prior convictions are for crimes committed on separate occasions and unless the crime for which the defendant is being sentenced was committed within either 10 years of the date of the defendant's last release from confinement for commission of any crime or within 10 years of the date of the commission of the most recent of the crimes for which the defendant has a prior conviction.
> [N.J.S.A. 2C:43-7.1c.]

It is thus clear that the Legislature is aware of the issue of remoteness and knows how to exempt remote prior convictions from the ambit of a mandatory enhanced sentencing statute. It must therefore be assumed that the intent in N.J.S.A. 2C:43-6f is to invoke the mandatory extended term on the basis of a prior drug conviction imposed "at any time."

Nor does Attorney General Directive 1998-1 recognize or purport to create an exemption for temporally remote prior drug convictions. That Directive requires the prosecutor to apply for an extended term of imprisonment pursuant to N.J.S.A. 2C:43-6f unless there is a basis for waiving an extended term pursuant to ¶ C of § IV of the Directive. Paragraph C, in turn, sets forth "the only grounds for waiving an extended term of imprisonment pursuant to N.J.S.A. 2C:43-6f." None of the enumerated grounds for waiving an extended term account for the remoteness of the prior drug conviction." Accordingly, under Attorney General Directive 1998-1 and the "Brimage" Guidelines, the date of the prior drug distribution-type conviction is irrelevant to a determination that the defendant is subject to an extended term and must be classified as a Criminal History Category IV or V offender for purposes of determining the appropriate "cell" in the Table of Authorized Disposition.

APPLICATION NOTE #14[14]

Automatic Escalation to "Final Post-Indictment Offer" When a Court Convenes a Pre-Indictment Suppression Hearing.

[See Guidelines, Part II E, pp. 9-12.]

A question has arisen as to the appropriate plea offer that should be tendered under the graduated plea system established in the Attorney General's "Brimage" Guidelines in the event that a court convenes a hearing under R. 3:5-7(d) and 3:9-1(e) to decide a motion to suppress evidence before an indictment has been returned. In such event, the prosecutor must immediately withdraw any outstanding pre-indictment plea offer and must tender in its place a "final" post-indictment offer calculated pursuant to the Guidelines, even though the defendant has not yet been indicted.

The Attorney General's "Brimage" Guidelines, like the Federal Sentencing Guidelines on which they are based, are designed to provide a practical incentive for guilty defendants to plead guilty before significant judicial and prosecution resources are expended. Compare Federal Sentencing Guidelines Manual § 3E 1.1, which awards a benefit to a defendant who "timely notif[ies] 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." As a practical matter, the resources expended in litigating a pretrial motion to suppress evidence are comparable to the resources that would be expended at a trial on the merits of a drug charge, since the pretrial hearing and any ensuing trial will often involve the same witnesses describing the same events and transactions. In fact, it is not uncommon in school-zone drug cases for a Fourth Amendment suppression hearing to be more complex and protracted than the subsequent trial before a jury.

When the "Brimage" Guidelines were adopted, it was generally assumed that hearings to decide pretrial suppression motions would be heard only after an indictment had been returned. This has been the standard practice throughout the state. The Court Rules, however, do not appear definitively to preclude a judge from convening a suppression hearing before indictment. But cf. R. 3:9-1, which establishes a series of "pretrial procedures" that presumably are meant to be followed in order, to wit: a pre-arraignment conference; a plea offer; an arraignment/status conference; pretrial hearings; and, finally, a pretrial conference. The logical sequence of pretrial procedures set forth in this rule would seem to confirm that pretrial hearings such as those to decide a motion to suppress evidence are meant to occur after the arraignment/status conference (which, in turn, occurs after indictment) and immediately before the pretrial conference, at which the trial memorandum is prepared, a trial date is set, and the plea "cut-off" rule is invoked. Notwithstanding the foregoing, it appears that in certain circumstances, pretrial suppression hearings have been conducted prior to indictment, ostensibly on the theory that a prosecution is pending "or threatened" within the meaning of R. 3:5-7(a).

14 Issued on December 7, 1998.

In applying the "Brimage" Guidelines to these unusual circumstances, it is necessary to examine how procedural events trigger an escalation within the graduated plea system. Ordinarily, the return of an indictment serves as the first event leading to an escalation from the pre-indictment offer to the initial post-indictment offer. Thereafter, either the passage of time (i.e., 20 days) or the convening of a pretrial hearing triggers the next escalation to the third step in the three-tiered system, the so-called "final" post-indictment plea offer. It is critical to note, however, that escalation need not occur in the normal sequence where actual court events do not follow standard practice. Thus, a pretrial hearing will be deemed to trigger a final post-indictment offer even if this results in bypassing the initial post-indictment offer. (Note that the triggering event is the convening of a hearing, not merely the filing of a motion to suppress.)

The automatic escalation rule established in this Application Note is a logical extension of the principles and procedures set forth in the "Brimage" Guidelines that are designed to conserve resources by providing practical incentives for defendants to plead guilty before significant prosecution and judicial resources have been expended. It is already well established under the Guidelines that the actual return of an indictment is not dispositive of whether a prosecutor is required to tender a pre-indictment or post-indictment plea offer. Thus, for example, the Guidelines expressly require a prosecutor in certain circumstances to tender what is described as the "functional equivalent" of a pre-indictment offer where a county does not have a pre-indictment case disposition program, notwithstanding that the defendant has already been indicted. See Part II § E at pp. 12-13.

Furthermore, Application Note #3 already makes clear that a prosecutor must withdraw any pending initial post-indictment plea offer and replace it with the functional equivalent of a "final" post-indictment plea offer if a court schedules an evidential hearing within the normal 20-day interval between the initial post-indictment and final post-indictment plea offers. Specifically, Application Note #3 expressly provides that if such a hearing is convened, the second-step plea offer must automatically be withdrawn and be replaced with the so-called "final" plea offer, representing the third and final step in the three-tiered graduated plea system. This interpretation was deemed necessary to discourage "a race to the courthouse to convene evidentiary hearings within the 20-day deadline."

Applying this same principle, where a defendant elects to exercise his or her right to contest the admissibility of evidence and the court convenes a pretrial hearing on the defendant's motion, the defendant will be deemed to have waived any expectation of receiving a pre-indictment or initial post-indictment plea offer. Of course, if the defendant prevails in a pre-indictment motion to suppress, it is likely that any criminal complaint involving the suppressed evidence would be dismissed. If, on the other hand,

the state prevails in the motion to suppress, the prosecutor may only tender a plea offer equivalent to the applicable final post-indictment offer, notwithstanding that the defendant has not yet been indicted.

APPLICATION NOTE #15

Maximum Authorized Complex/Protracted Litigation Issue Reduction in School Zone CasesInvolving Second-Degree Amounts and Less Than One Ounce of Marijuana/ Authority to Reduce Offer to a County Jail or Non-Custodial Sentence

[See September 2, 1999 Supplemental Directive, § III C, pp. 5-6]

A question has arisen as to the maximum allowable downward adjustment for complex/protracted litigation issues under the Attorney General's September 2, 1999 Supplemental Directive, which took effect on September 6, 1999. The Supplemental Directive includes a table on p. 5 that displays the maximum authorized reductions, which are based on the degree of the present offense and the defendant's criminal history category. Specifically, a question has been raised concerning how a prosecutor should handle a case involving a violation of N.J.S.A. 2C:35-7 (Drug-Free School Zone), which is graded as a third-degree crime, where the case involves a second-degree amount of drugs.

The original "Brimage" Guidelines account for second-degree drug amounts (e.g., between one-half to five ounces of heroin, cocaine, or methamphetamine) as a special offense characteristic that must be documented on the plea offer worksheet. This special offense characteristic is then used to determine the applicable row in the Table of Authorized Dispositions (e.g., rows E and F of Table 1).

Where a prosecutor is authorized and elects to make a downward adjustment for complex/protracted litigation issues, the prosecutor in determining the maximum allowable reduction should treat a school zone case as if it were a second-degree crime where the case involves a second-degree amount of drugs, notwithstanding that a violation of N.J.S.A. 2C:35-7 is technically graded as a third-degree crime. Thus, for example, where the second-degree drug amount special offense characteristic applies, a prosecutor may reduce the Brimage plea offer in a school zone case by up to eighteen (18) months in the case of a Criminal History Category I, II, or III defendant, or by up to twenty-four (24) months in the case of a Criminal History Category IV or V defendant.

Applying this same general principle, in school zone cases involving marijuana in an amount less than one (1) ounce (rows A and B in Table 1 of Authorized Dispositions), the case should be treated as a fourth-degree crime for purposes of determining the maximum allowable downward adjustment for complex/protracted litigation issues. Thus, in such cases, the maximum authorized reduction would be nine (9) months in the case of a Criminal History Category I, II, or III defendant, or up to twelve (12) months in the case of a Category IV or V defendant.

Where a school zone offense involving a third-degree amount of drugs occurs within a 500-foot public housing, park, or property zone, thereby invoking Aggravating Factor #1b, the prosecutor should treat the case as a third-degree crime for the purposes of determining the maximum allowable downward adjustment for complex/protracted

litigation issues, notwithstanding that the public housing, park, or property zone offense defined at N.J.S.A. 2C:35-7.1 is graded as a second-degree crime. Unlike the above-described situation involving a second-degree amount of drugs (which constitutes a special offense characteristic that has the effect of automatically adding six months of parole ineligibility to the "Brimage" Guidelines plea offer), the fact that the offense occurred in a public housing, park, or property zone only results in two aggravating factor points that may not directly affect the number of months of parole ineligibility required to be imposed under the "Brimage" Guidelines. Thus, in third-degree school zone cases where Aggravating Factor #1b applies, the maximum authorized reduction would be twelve (12) months in the case of a Criminal History Category I, II, or III defendant or up to eighteen months (18) months in the case of Category IV or V defendant.

Another question has arisen as to a prosecutor's authority under the Supplemental Directive where an authorized reduction for complex/protracted litigation issues is longer than the term of imprisonment and parole ineligibility that would otherwise be required in accordance with the "Brimage" Guidelines. A prosecutor is authorized in those circumstances to recommend a non-custodial sentence, or to recommend a specific term of incarceration in county jail (up to 365 days) as a condition of probation. Note that a county jail or so-called "split sentence" under N.J.S.A. 2C:43-2b(2) would not provide for a minimum term of parole ineligibility. The extent of the complex/protracted litigation issue downward adjustment within the limits established in the Supplemental Directive is vested in the reasoned discretion of the prosecutor, and nothing in the Supplemental Directive or this Application Note should be construed to require a prosecutor in those circumstances to recommend a non-custodial or county jail sentence.

APPLICATION NOTE #16[15]

Clarification Regarding Aggravating Factor #4b (Organized Crime) and Its Relationship to Mitigating Factor #2a (Minor or Minimal Participant)

[See Guidelines, Part VI, § A, p. 32 and 37; § B, pp. 33 and 39-40]

A question has arisen concerning the appropriate use of aggravating Factor #4b, which applies if there is a substantial likelihood that the defendant is involved in organized criminal activity. Relatedly, a question has been raised concerning the interrelationship between that aggravating factor and Mitigating Factor #2b, which applies where the defendant is only a minimal or minor participant in the criminal conduct. The organized crime aggravating factor should not be invoked routinely merely because certain kinds of illicit drugs, such as heroin or cocaine, are necessarily imported into this country by means of sophisticated organized criminal enterprises. Furthermore, as a general proposition, the organized crime aggravating factor should not be invoked in any case where the defendant is entitled to mitigating points as a minor or minimal participant under Mitigating Factor #2a.

The Attorney General's Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12 ("Brimage" Guidelines) did not intend that every profit-minded drug case be treated as if it involved organized criminal activity within the meaning of Aggravating Factor #4b. It is true that this aggravating factor "is derived substantially verbatim from the aggravating circumstances defined in N.J.S.A. 2C:44-1a(5)." Guidelines at 37. It is also true that cases decided under the general sentencing provisions of the New Jersey Code of Criminal Justice suggest that a sentencing court would be authorized to consider the organized crime aggravating circumstance set forth in N.J.S.A. 2C:44-1a(5) in virtually any commercially-motivated drug case, and especially those involving substances such as cocaine and heroin that are produced abroad. In State v. Toro, 227 N.J. Super. 215 (App. Div. 1998), certif. denied 118 N.J. 215 (1989), for example, the court held:

> The trial judge also properly identified the likelihood that defendant was involved in organized criminal activity as an aggravating factor. As noted by the trial judge, most cocaine is grown in Central America and the importation, processing, and distribution of the drug in this country involves an elaborate criminal network. The amount of cocaine found in defendant's possession provides ample support for the trial judge's finding that defendant was a participant in that organized distribution network. [229 N.J. Super. at 227.]

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15 Issued February 4, 2000.

See also, State v. Varona, 242 N.J. Super. 474, 491-492 (App. Div. 1990), certif. denied 122 N.J. 386 (1990); State v. Velez, 229 N.J. Super. 305, 316 (App. Div. 1988), *modified and aff'd,* 119 N.J. 185 (1990) (*per curiam*) ("It was abundantly clear to the trial judge, as it is to us, that [defendant] had to be obtaining the cocaine from other sources and was not manufacturing it himself. This is sufficient to support the judge's reasoning [to consider the organized crime aggravating factor].")

Notwithstanding this decisional law, for purposes of applying the "Brimage" Guidelines, the organized crime aggravating factor should not be used automatically or routinely based merely upon the fact that the controlled dangerous substances involved had been grown, produced, imported, manufactured, or otherwise handled by others, or were originally produced in foreign countries so as to depend upon sophisticated methods of importation and distribution to regional and local markets. Nor should this aggravating factor be invoked merely because others were necessarily involved in the distribution scheme, or because the defendant acted for profit. Rather, it was intended that under the "Brimage" Guidelines, Aggravating Factor #4b would only be used where the prosecutor is aware of facts and the reasonable inferences that can be drawn therefrom that provide a good faith basis to believe that the defendant is a member, associate, or affiliate of a "gang," "set," "crew," or traditional or non-traditional organized crime group or "family."

The degree of participation in organizational activities necessary to trigger the aggravating factor ordinarily would not be established merely by the fact that the defendant is a low-level employee of a criminal enterprise, or served solely as a kind of "independent contractor" (e.g., a drug courier or "mule") of a commercial drug distribution enterprise. Accordingly, before invoking Aggravating Factor #4b, the prosecutor should be aware of facts that reasonably suggest that the defendant was a direct participant or stakeholder in the illicit commercial enterprise. The fact that the defendant was paid a fixed fee for services (e.g., $500 to transport a shipment of drugs from a source state to New Jersey), rather than receiving a percentage of profits or proceeds of illicit drug transactions, would ordinarily suggest that the defendant was merely a "mule" or courier and thus not subject to Aggravating Factor #4b. So too, the Guidelines explain in describing Mitigating Factor #2a that a "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 [mitigating] factor." Guidelines at p. 39. A defendant's lack of knowledge or understanding of the scope and structure of the criminal activity would also militate strongly against a finding that Aggravating Factor #4b applies.

The "Brimage" Guidelines clearly establish that it is a mitigating circumstance that a defendant played only a "minor" or "minimal" role in the criminal scheme. A defendant would be entitled to mitigating points under Mitigating Factor #2a, for example, if his or her involvement in the commercial criminal enterprise was limited to transporting drugs. This mitigating factor would apply even to defendants who repeatedly provide this illicit service for pecuniary gain.[16] (In that event, the factor would be worth two mitigating points.) The Guidelines expressly provide in this regard that, "[d]efendants who serve as couriers, off-loaders, or lookouts on a repetitive or professional basis would fall into this category [i.e., would be classified as "minor" participants]." Guidelines at p. 39.

The same facts used to establish Mitigating Factor #2a (e.g., that the defendant is a professional courier employed by an ongoing or sophisticated enterprise) should not be used to establish Aggravating Factor #4b, since this would have the practical effect of automatically negating the mitigating circumstance. This is not to suggest that a person serving as a courier or off-loader could not be subject to Aggravating Factor #4b by being a member, for example, of a criminal street gang. The prosecutor in deciding whether to award points under any of the aggravating factors grouped under the "organization" subheading should consider the defendant's actual involvement and participation in organization activities, and not just the specific task the defendant was engaged in at the time of his or her arrest. The Guidelines thus require that all "relevant conduct" be considered in determining the defendant's culpability. However, Aggravating Factor #4b should not be applied unless the prosecutor is aware of facts that reasonably suggest that the defendant was more than a low-level employee or was not just serving as the functional equivalent of an "independent contractor" of a commercial distribution scheme.

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16 It should be noted that where a "mule" earns a substantial source of livelihood from providing such illicit services, he or she would be entitled to two mitigating points under Mitigating Factor #2a, but would also be subject to Aggravating Factor #4c. This point is expressly noted in the discussion of Mitigating Factor #2a found on p. 29 of the Guidelines.

APPLICATION NOTE #17[17]

Clarification Regarding Effect of "Possession With Intent" Prior Convictions on a Defendant's Criminal History Category

[See Guidelines, Part V, p. 28]

A question has been raised concerning the effect of a prior possession with intent to distribute conviction in the determination of a defendant's criminal history category, and specifically whether a "possession with intent" prior conviction is meant to be treated the same as a prior conviction for actual distribution of a controlled dangerous substance. Neither the law governing a defendant's eligibility for an extended term as a repeat drug offender, N.J.S.A. 2C:43-6f, nor the Attorney General's Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12 ("Brimage" Guidelines) draw any distinction between a prior conviction for possession of a controlled dangerous substance with intent to distribute and a prior conviction for actual distribution of a controlled substance. This approach is consistent with the definition of the substantive offense found at N.J.S.A. 2C:35-5, which treats the possession of a controlled dangerous substance with intent to distribute the same as the actual distribution of a controlled substance.

The confusion arises from an abbreviated (and incomplete) description of the criminal history calculation rules that appears in Table 2 in Schedule I of the Plea Negotiation Worksheet. The form explains that a defendant falls under Criminal History Category IV (Extended Term) where the defendant has a "[p]revious conviction for distribution or possession with intent to distribute CDS... ." In contrast, the form indicates that a defendant falls under Criminal History Category V (Enhanced Extended Term) where the defendant "has a prior distribution conviction" and ten or more additional criminal history points.

Some assistant prosecutors may have interpreted the truncated phrase "prior distribution conviction" on the worksheet to exclude possession with intent cases. This would have the effect of limiting the universe of Criminal History Category V offenders to those who had previously been convicted of actual distribution. (Note that most distribution-type prosecutions tend to involve possession with intent; comparatively few cases involve situations where the defendant was caught in the act of actual distribution.) That interpretation was not intended and is not consistent with the rules set forth in the "Brimage" Guidelines . The abbreviated explanation of the rules that appears on the worksheet was provided only as a convenience to those who complete these forms and was not meant to amend the text of the actual "Brimage" Guidelines.

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17 Issued February 4, 2000.

Accordingly, the worksheet cannot be cited for the proposition that only defendants who have a prior conviction for actual distribution are eligible to be treated as Criminal History Category V offenders.

The rules governing the determination of a defendant's criminal history category are set forth in Part V of the "Brimage" Guidelines on p. 28. Specifically, the Guidelines expressly provide that a defendant falls under Criminal History Category V (Enhanced Extended Term) if he or she "is eligible for an extended term of imprisonment pursuant to N.J.S.A. 2C:43-6f ***and*** has ten 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 N.J.S.A. 2C:43-6f." (emphasis in original) The text of N.J.S.A. 2C:43-6f, in turn, provides unambiguously that a defendant is subject to the mandatory extended term of imprisonment if he or she "has been previously convicted of manufacturing, distributing, dispensing, ***or possessing with intent to distribute*** a controlled dangerous substance or controlled substance analog... ." (emphasis added). Clearly then, defendants who have been previously convicted of possession with intent to distribute are "eligible for an extended term of imprisonment pursuant to N.J.S.A. 2C:43-6f" within the meaning of the Guidelines and would thus fall under Criminal History Category V if they also have ten or more criminal history points.

It should be noted that the recently-issued "Brimage" software was designed to draw no distinction between prior distribution and possession with intent to distribute convictions for purposes of determining the appropriate criminal history category. Prosecutors who use the software need only select from the "drop-down" box the statutory citation for the prior drug distribution-type conviction (e.g., N.J.S.A. 2C: 35-5, 2C:35-7, etc.). The software will automatically print on Schedule I a textual description of the prior distribution-type offense (e.g., "school zone," "distribution/possession with intent," etc.). Note further that if the defendant was convicted of both actual distribution and possession with intent to distribute based on a single transaction, prosecutors using the "Brimage" software should only record a single drug distribution-type conviction, even if the court for some reason did not merge the two offenses for purposes of sentencing. See also Guidelines, Part V, at p. 30 (explaining that "[p]rior 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").

APPLICATION NOTE #18[18]

Clarification Regarding Timing of Escalating Plea Offers in Counties That Do Not Have a Pre-Indictment Program

[See Guidelines, Part II, § E, pp. 12-13]

A question has arisen concerning the escalation of a pre-indictment plea offer to the initial post-indictment offer in counties that do not have a pre-indictment program. For the following reasons, the "75-day" rule described in the "Brimage" Guidelines on pp. 12-13 should not be construed to establish a hard and fast deadline after which the first plea offer automatically escalates to the next step in the three-tiered system. In counties that do not have a pre-indictment program, or in any case where a non-fugitive defendant did not receive a pre-indictment offer, the defendant must be given a reasonable opportunity to accept or reject a pre-indictment offer or the functional equivalent of a pre-indictment offer before that offer escalates to the next step in the three-tiered system, regardless of how much time has actually elapsed since the defendant's arrest.

One of the central features of the "Brimage" Guidelines is to establish a formal escalating plea system that is designed to encourage guilty defendants to plead guilty at the earliest possible opportunity so as to minimize the expenditure of prosecutorial resources and to promote the rehabilitation of the defendant through the timely acceptance of responsibility. The return of an indictment is one of the events that triggers an escalation in the authorized plea offer. The "Brimage" Guidelines expressly recognize, however, that some counties do not have a formal pre-indictment program, and in these jurisdictions, defendants might have no meaningful opportunity to accept or reject a plea offer before they are actually indicted. The Guidelines recognize that it would be unfair (and violative of the paramount goal of uniformity established by the Supreme Court in State v. Brimage) if defendants in counties without pre-indictment programs were to receive harsher, post-indictment pleas only because there was no practical opportunity for the prosecutor to tender a pre-indictment plea offer or its functional equivalent.

The original "Brimage" Guidelines therefore establish an alternative procedure to be used by counties that do not have a formal pre-indictment program. Specifically, the Guidelines provide that a prosecutor is required 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. The Guidelines

18 Issued March 24, 2000.

further provide that, "[a]ny 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." Guidelines at 13.

This portion of the "Brimage" Guidelines should not be interpreted to require an automatic escalation of the plea offer upon expiration of the 75-day time period where a non-fugitive defendant has not been afforded a meaningful opportunity to make an informed decision to accept or reject the prosecutor's initial plea offer. Accordingly, in counties that do not have a pre-indictment program, a prosecutor is required to tender and to keep open the applicable "pre-indictment" plea offer until such time as the defendant has had a meaningful opportunity to accept or reject the offer. Where such opportunity has been provided, the offer may expire and be replaced with the applicable initial post-indictment offer ***before or after*** the passage of 75 days from the date of the defendant's arrest.

Preferably, the expiration date of the first offer should be tied to a scheduled court event, such as the arraignment/status conference, since this would conserve resources. In any event, for the purposes of complying with the Guidelines, a defendant will not be deemed to have had a meaningful opportunity to consider and to accept or reject the initial plea offer unless (1) the defendant is represented by an attorney or has expressly waived the right to be represented by an attorney with the approval of the court (see R. 3:4-2a); (2) the defendant has had an opportunity to receive discovery material or, in cases before indictment, an opportunity to inspect discoverable materials in accordance with the provisions of R. 3:13-3; (3) the defendant had been advised of the specific court event or date at which the first offer would expire; and (4) the defendant has had an opportunity to advise the prosecutor in writing, or orally at a court event, whether he or she is accepting the offer, or an opportunity to request the prosecutor in writing, or orally at a court event, to extend the deadline within which the defendant must announce his or her decision to accept or reject the offer.

It is expected that these procedures will not introduce unnecessary delay in the processing of cases. Prosecutors are reminded that if the defendant is a fugitive at the time that an indictment is returned, the prosecutor is not required by the "Brimage" Guidelines to tender or make available a pre-indictment plea offer or the functional equivalent of a pre-indictment offer. See Guidelines at p. 13. A fugitive defendant will be deemed to have waived any expectation or right to receive a pre-indictment plea offer or its functional equivalent and, in such cases, the return of an indictment will automatically result in an escalation to the applicable initial post-indictment plea offer.

Finally, prosecutors are further reminded that they are required pursuant to the Guidelines to notify the Attorney General in writing, through the Director of the Division of Criminal Justice, if the county does not have a pre-indictment case disposition program or if the county suspends or abolishes any such program.

APPLICATION NOTE #19[19]

Designation of Retail Establishments and Adjacent Areas as Quality of Life Special Enforcement Zones to Respond to the Proliferation of "Ecstasy" and Other "Club" Drugs

[See Guidelines, Part VII, § A(1), p. 35]

A question has arisen concerning the authority of a county prosecutor to designate quality of life special enforcement zones to respond to the proliferation of "Ecstasy" and other "rave" or "club" drugs. Under the "Brimage" Guidelines, when a drug distribution-type offense that is subject to a waivable mandatory minimum term under N.J.S.A. 2C:35-12 (i.e., e.g., a "drug-free school zone" offense) is committed in a designated special enforcement zone, the defendant is subject to an aggravating factor worth three points under the "community impact" category. These special enforcement zones need not be limited to street corners and open-air markets. Rather, prosecutors are permitted and are strongly encouraged to identify and designate as special enforcement zones any and all clubs, bars, and other establishments and adjacent areas where persons frequently congregate to purchase, sell, and consume "Ecstasy" or other illicit drugs.

The county narcotics task force commanders report that "Ecstasy" is becoming a "drug of choice" in many communities. This especially dangerous substance is typically sold and consumed at clubs, bars, and other locations where purchasers and users congregate and socialize. The "Brimage" Guidelines expressly authorize county prosecutors to designate quality of life special enforcement zones based upon the criteria established in the Attorney General's Model Quality of Life Program. Guidelines at 35. The Guidelines specifically refer to the need, "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. Id.

Nothing in the Guidelines or in the Attorney General's Quality of Life Model Program should be interpreted in any way to limit special enforcement zones to open-air locations, and certainly, the Guidelines should not be interpreted to mean that these zones can only be designated in urban or inner city locations. Rather, all drug nuisances could be designated as special enforcement zones, including buildings and adjacent areas where drug buyers and sellers congregate to engage in unlawful activity. Accordingly, a bar, club, restaurant, or other establishment that caters to persons who routinely congregate to buy, sell, or use "Ecstasy" or other "club" drugs, such as GHB or GBL, are

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19 Issued May 1, 2000.

appropriate locations for designation as special enforcement zones for purposes of the "community impact" aggravating factor set forth in the "Brimage" Guidelines.

Prosecutors are reminded that for Aggravating Factor #1c to apply, the prosecutor must provide to the Division of Criminal Justice a map or description of all special enforcement zones. As noted in the Guidelines, this procedural safeguard will help to ensure that the aggravating factor is not applied in an arbitrary or capricious manner, and is designed to comply with the requirement set forth by the New Jersey Supreme Court in State v. Brimage that any consideration of local (as opposed to statewide) conditions be "explicitly detailed" and "precisely and distinctly enumerated." 153 N.J. 24 (1998).

Prosecutors are further reminded that pursuant to the Attorney General's Model Quality of Life Program, it would be appropriate for prosecutors to initiate and coordinate efforts to enforce all applicable health, safety, and alcohol beverage control violations occurring in a designated special enforcement zone.

APPLICATION NOTE #20[20]

Prohibition on "Double Counting" of Aggravating Factor #1b (Offense Occurring in a 500 Foot Drug-Free Public Park/Housing Zone) When a Defendant Also Pleads Guilty to a Violation of N.J.S.A. 2C:35-7.1

[See Guidelines, Part VII, § A(1), p. 35]

A question has arisen whether a prosecutor is required under the Attorney General's "Brimage" Guidelines to "package" charges involving a violation of N.J.S.A. 2C:35-7 (1,000 foot drug-free school zone) and N.J.S.A. 2C:35-7.1 (500 foot public park, housing, or building zone). These distinct zones often overlap. Under Attorney General Directive 1998-1 and the "Brimage" Guidelines, prosecutors are permitted but are not required to dismiss a count charging a violation of the second-degree crime defined at N.J.S.A. 2C:35-7.1 in exchange for the defendant pleading guilty to a violation of the offense defined at N.J.S.A. 2C:35-7. However, where a defendant is required by the prosecutor to plead guilty to both offenses for conduct involving the same event or transaction, the prosecutor in calculating a plea offer under the Guidelines for the drug-free school zone offense may not count aggravating points under Aggravating Factor #1b.

Typically, plea agreements under N.J.S.A. 2C:35-12 involve not only the prosecutor's agreement to reduce the statutorily-prescribed term of parole ineligibility (e.g., three years in the case of a violation of N.J.S.A. 2C:35-7), but also often include a condition whereby the prosecutor agrees to dismiss one or more other charges pending against the defendant. This is sometimes referred to as "charge bargaining" or "packaging." Application Note #7 makes clear that a prosecutor is not required to "package" multiple counts involving separate and distinct transactions. So too, nothing in the "Brimage" Guidelines should be construed to require a prosecutor at any time to dismiss provable counts.

Under the Guidelines, a prosecutor is not permitted to dismiss a charge carrying a waivable mandatory minimum term of imprisonment in return for a defendant pleading guilty to another charge that does not carry a mandatory minimum term. (See Guidelines, Part II, § M, p. 19.) Thus, for example, where a defendant's conduct involves a violation of both N.J.S.A. 2C:35-7 and 2C:35-7.1, the prosecutor is not permitted to dismiss the drug-free school zone charge, even though that charge is graded only as a crime of the third degree as compared to the 2C:35-7.1 offense, which is graded as a crime of the second degree. It is understandable that a prosecutor might want the defendant's criminal record to reflect a second-degree conviction should it be necessary

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20 Issued May 15, 2000.

in the future to calculate criminal history points if the defendant recidivates. However, as noted above, Attorney General Directive 1998-1 and the "Brimage" Guidelines preclude a prosecutor from dismissing a count that is subject to the provisions of N.J.S.A. 2C:35-12 in favor of a one that does not carry a mandatory minimum term under the Comprehensive Drug Reform Act or some other law, such as the Graves' Act or the No Early Release Act. As noted above, prosecutors may in the exercise of their discretion nonetheless require the defendant to plead guilty to *both* offenses, thereby ensuring that the defendant's criminal record includes a second-degree conviction. (Note that the decision to impose consecutive as opposed to concurrent terms of imprisonment on the two convictions would be vested in the discretion of the court, not the prosecutor. Cf. N.J.S.A. 2C:39-4.1 (establishing a nonwaivable mandatory consecutive sentencing feature for a drug-related weapons offense) .

In order to avoid the impermissible "double counting" of a single aggravating circumstance (i.e., the fact that the offense occurred within 500 feet of a public park, public housing facility, museum, or library), where the prosecutor elects not to make dismissal of an N.J.S.A. 2C:35-7.1 charge part of the bargain so that the defendant is required to plead guilty to both 2C:35-7 and 2C:35-7.1 charges involving the same event/transaction, the prosecutor in calculating the authorized plea offer under the Guidelines for the school zone violation may not count the two points that would otherwise be applied under Aggravating Factor #1b. Note, of course, that if some other aggravating factor in the "community impact" category applies (i.e., e.g., if children were present or if the offense occurred in a designated "Quality of Life" special enforcement zone), then those aggravating factor points must be calculated. Furthermore, if two more counts that the defendant pleads guilty to involve separate events or transaction, then the aforesaid prohibition against "double counting" would not apply, and the prosecutor must award points under Aggravating Factor #1b.

APPLICATION NOTE #21[21]

Extended Term Eligibility of Repeat Drug Offenders Charged With a Present Violation of N.J.S.A. 2C:35-7.1 (500 Foot Drug-Free Public Park/Housing Zone)

[See Attorney General Executive Directive 1998-1, § 4, pp. 3-4 and Guidelines, Part II, § I, p. 16]

A question has arisen whether a prosecutor must apply for an extended term of imprisonment under N.J.S.A. 2C:43-6f and the Attorney General's "Brimage" Guidelines where the defendant has been previously convicted of manufacturing, distribution, or possession with intent to distribute a controlled dangerous substance and where the present offense involves a violation of the 500 foot drug-free public park, housing, and building offense defined at N.J.S.A. 2C:35-7.1. Attorney General Directive 1998-1 makes clear that a prosecutor must seek an extended term under N.J.S.A. 2C:43-6f in all cases where that statute applies unless there is a basis for waiver. In determining whether such waiver is permissible, the Attorney General Directive incorporates the "Brimage" Guidelines (Table 2). (See also Guidelines, Part II, § I.) Technically, the second-degree crime defined at N.J.S.A. 2C:35-7.1 is not one of the predicate crimes expressly listed in N.J.S.A. 2C:43-6f. (The latter statute was adopted years before the public park/housing/building offense was enacted and was not amended to incorporate the new offense). However, the basic drug distribution-type offense defined at N.J.S.A. 2C:35-5 is a lesser-included offense of N.J.S.A. 2C:35-7.1; one cannot violate the public park/housing/building zone offense without also violating the basic offense of manufacturing, distribution, or possessing with intent to distribute a controlled dangerous substance in violation of N.J.S.A. 2C:35-5.

Accordingly, a prosecutor may not circumvent the "Brimage" Guidelines by failing to charge a previously-convicted offender with a violation of N.J.S.A. 2C:35-5 where this would have the effect of precluding a successful application for an extended term of imprisonment and parole ineligibility. Note that if the underlying 2C:35-5 offense is graded as a third-degree crime, the prosecutor in calculating an appropriate plea offer must use Table 2, Rows C or D of the "Brimage" Guidelines. In other words, the determination of the extent of the reduction of the mandatory extended term must be calculated in these circumstances as if the most serious present offense is a third-degree crime, notwithstanding that the defendant is also charged with a second-degree crime under N.J.S.A. 2C:35-7.1, since the latter offense technically is not a predicate for an extended term and because penal statutes should be strictly construed. The prosecutor in these circumstances will invariably be required to formally apply for an extended term

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21 Issued May 15, 2000.

under N.J.S.A. 2C:43-6f so as to permit imposition of the period of parole ineligibility prescribed by the applicable table of authorized plea offers. (See Guidelines, Part II C, explaining how plea offers must be "structured" to ensure that courts impose sentences in accordance with the Table of Authorized Dispositions.) It should be noted, finally, that a prosecutor would be authorized but not required in these circumstances to dismiss the second-degree 2C:35-7.1 as part of a "package" deal. (See Application Note 20.)