



State of New Jersey

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ATTORNEY GENERAL LAW ENFORCEMENT DIRECTIVE NO. 2021-4

TO: All Law Enforcement Chief Executives

FROM: Gurbir S. Grewal, Attorney General

DATE: April 19, 2021

SUBJECT: Directive Revising Statewide Guidelines Concerning the Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12

In November 2019, the Criminal Sentencing and Disposition Commission (CSDC or the Commission) issued unanimous recommendations calling on the State to eliminate mandatory minimum sentences for six non-violent drug crimes.¹ This Directive instructs prosecutors statewide to use existing statutory authority to waive the imposition of those mandatory minimum sentences, establishing rules ensuring the consistent application of such waivers in four contexts: during plea negotiations, after conviction at trial, following violations of probation, and in connection with a joint application to modify the sentences of inmates currently incarcerated.

Mandatory Parole Ineligibility and Section 12 Waivers in Non-Violent Drug Cases

Generally speaking, State law divides a defendant’s sentence into two parts: imprisonment, then parole. For many crimes, the defendant becomes eligible for parole after serving one-third of the sentence, with a strong presumption in favor of release immediately upon eligibility.² (As a practical matter, many defendants under this “default” rule become

¹ The Commission issued a total of nine recommendations, which can be found in its November 2019 report at https://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/criminal_sentencing_disposition_ar2019.pdf.

² Pursuant to N.J.S.A. 30:4-123.51, adult inmates sentenced to a term of incarceration at a county jail or state prison become eligible for parole after having served one-third of the sentence where no mandatory minimum term has been imposed, less commutation time for good behavior and credits for diligent application to work and other institutional assignments. At the time of parole eligibility, inmates are subject to release via “administrative parole,” see N.J.S.A. 30:4-123.55b, *et seq.*, unless they are statutorily ineligible, in which case they are subject to the



eligible for parole after serving approximately 20 percent of their sentences, after taking into account credits earned while in custody, including commutation and work credits.) For approximately 80 crimes, however, State law requires that the sentencing judge impose a longer period of parole ineligibility that, depending on the offense, must be either a certain percentage of the total sentence—ranging from 33 to 85 percent—or a fixed number of years. Individuals sentenced for these crimes must serve the period of parole ineligibility in custody, and cannot apply any of their commutation or work credits to obtain an earlier release. *See* N.J.S.A. 30:4-123.51(a). As a result, individuals convicted of these mandatory minimum offenses typically spend a greater percentage of their sentences incarcerated than those convicted of crimes subject to the default rule of parole eligibility.³

Six of the State’s mandatory minimum crimes relate to non-violent drug activity:

2C:35-3	Leader of narcotics trafficking network
2C:35-4	Maintaining or operating a facility producing a controlled dangerous substance (CDS)
2C:35-5	Manufacturing, distributing, or dispensing CDS
2C:35-6	Employing a juvenile in a drug distribution scheme
2C:35-7	Distributing, dispensing, or possessing with intent to distribute CDS within 1,000 feet of a school
2C:35-8	Distribution of CDS to persons under age 18

Each of these statutes contain language regarding the imposition of mandatory terms. For example, for first-degree violations of N.J.S.A. 2C:35-5, the court is required to impose a parole disqualifier “at, or between, one-third and one-half of the sentence imposed,” while for first-degree violations of N.J.S.A. 2C:35-3, the court must ensure that the offender “serve 25 years before being eligible for parole.” In addition, individuals convicted of a second or subsequent drug offense are subject to a separate provision of the Criminal Code that mandates an extended term of imprisonment for recidivist drug offenders. N.J.S.A. 2C:43-6(f).

However, these drug crimes differ from the State’s other mandatory minimum offenses in one key respect: the period of mandatory parole ineligibility can be waived pursuant to a “negotiated agreement” between the defendant and the State. Under N.J.S.A. 2C:35-12 (“Section 12”), the parties can enter into an agreement—before or after conviction—that provides for a shorter period of parole ineligibility, among other possible sentence modifications. In addition,

ordinary parole process, N.J.S.A. 30:4-123.53. Both administrative parole and “ordinary” parole include presumptions in favor of release.

³ In addition to extended periods of parole ineligibility mandated for specific crimes, the Criminal Code also authorizes the court at sentencing to impose a discretionary period of parole ineligibility for *any* crime when the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors, as defined in N.J.S.A. 2C:43-6(b). This Directive only addresses the imposition of statutorily required periods of parole eligibility. As always, the court retains the authority to impose discretionary parole eligibility when circumstances warrant.

Section 12 prohibits the sentencing judge from imposing a lesser sentence or shorter parole disqualifier than is provided for under the terms of the agreement.

When Section 12 was passed by the Legislature in 1987, the goal was to encourage plea bargaining and cooperation with law enforcement by providing incentives for pleading guilty.⁴ Because these agreements limit judicial power and can lead to very different sentencing outcomes for what are, on paper, similar offenses, Section 12 has been subject to considerable litigation over the past three decades. In 1992, the State supreme court held that prosecutorial discretion under this section is subject to judicial review for arbitrary and capricious action. *State v. Vasquez*, 129 N.J. 189, 195-96 (1992). Since then, multiple Attorneys General have issued law enforcement directives to prosecutors governing the exercise of Section 12 discretion. These rules, now known as the *Brimage* guidelines, are named for a 1998 case requiring that the Attorney General not simply provide guidance on individual cases but also establish rules to ensure uniformity in the application of Section 12 across the State's 21 counties. *State v. Brimage*, 153 N.J. 1, 23 (1998). The current version of these rules, known as the "Revised *Brimage* Guidelines" or "*Brimage 2*," were drafted in 2004 and updated most recently in 2010.⁵

The Revised *Brimage* Guidelines runs more than 100 pages and focuses on the plea offers that prosecutors may extend to defendants pursuant to Section 12, with detailed instructions on when certain terms and conditions may be included in an offer. The guidelines also include a 5-page worksheet that prosecutors use to calculate the length of the sentence to be offered, incorporating information about the defendant's criminal history as well as aggravating and mitigating factors associated with the offense conduct.⁶ The process is far more structured than what is required to negotiate plea agreements for non-drug crimes because it is designed to accomplish a single constitutional imperative: ensuring that prosecutors exercise Section 12 discretion fairly and uniformly.

Commission's Recommendations Regarding Non-Violent Drug Crimes

In February 2018, Governor Phil Murphy convened the CSDC to review the State's sentencing laws and provide specific recommendations "to ensure a stronger, fairer, and more just state."⁷ In November 2019, the Commission issued its first annual report, which

⁴ See *State v. Brimage*, 153 N.J. 1, 9 (1998) (citing, among other sources, a 1990 report published by the Division of Criminal Justice titled "A Law Enforcement Response to Certain Criticisms of the Comprehensive Drug Reform Act").

⁵ AG Directive 2010-2 ("Supplemental Directive Modifying the *Brimage* Guidelines to Account for Judicial Authority to Waive or Reduce Mandatory Minimum Sentences in School Zone Cases Pursuant to N.J.S.A. 2C:35-7b"), issued March 12, 2010, https://www.nj.gov/oag/dcj/agguide/directives/brimage_all.pdf; AG Directive 2004-2 ("*Brimage* Guidelines 2: Revised Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12"), issued July 15, 2004, <https://www.nj.gov/oag/dcj/agguide/directives/brimagerevision.htm>.

⁶ See, e.g., Revised *Brimage* Guidelines, Appendix 1B ("*Brimage* Plea Negotiation Worksheet"), <https://www.nj.gov/oag/dcj/agguide/directives/appendix1b.pdf>, and Appendix II ("Table of Authorized Plea Offers"), <https://www.nj.gov/oag/dcj/agguide/directives/appendix2.pdf>.

⁷ "Governor Murphy Convenes the Criminal Sentencing and Disposition Commission," February 11, 2018, https://nj.gov/governor/news/news/562018/approved/20180211a_criminal.shtml.

unanimously recommended that the State, among other things, eliminate mandatory minimum sentences for non-violent drug crimes. The Commission—which includes the Attorney General, the Public Defender, the President of the New Jersey County Prosecutors Association, and the Chairman of the State Parole Board, as well as representatives of the Governor and legislative leaders of both parties—recommended that the Legislature amend the State’s sentencing laws to end the imposition of mandatory parole ineligibility for these crimes and create a mechanism to retroactively modify the sentences of individuals currently incarcerated under mandatory minimum terms.⁸

The proposed retroactivity provision as envisioned by the CSDC would involve a two-step process. Upon enactment, the State would have 30 days to identify all incarcerated individuals who qualified for a sentence modification. After 30 days, all qualifying inmates would receive retroactive relief, with the court rescinding the mandatory period of parole ineligibility and modifying the sentence as if the defendant had been instead subject to the “default” rule of 33 percent parole ineligibility, minus prison credits, at the time of conviction.⁹ During this 30-day period, however, the State would have the opportunity to file an objection in particular cases.¹⁰ Where an objection is filed, the court would hold a hearing on whether to grant retroactive relief. If the State established by clear and convincing evidence that rescinding the inmate’s parole disqualifier would pose a substantial risk to public safety, then the court could decline to modify the sentence, or could reduce the parole disqualifier by less than the default. If the State failed to meet its burden, however, then the inmate’s sentence would be automatically modified as if an objection had never been filed.

The Commission’s 2019 report described facts and findings that gave rise to its unanimous recommendations. The Commission found that mandatory minimum laws have not simply fueled the significant increase in the State’s prison population over the last four decades but, also, have contributed to the stark racial disparities found in our prisons. The Commission noted, for example, that Black residents constitute 14 percent of the State’s overall population but 61 percent of its inmate population, many of whom are serving sentences for non-violent drug offenses.¹¹ The Commission argued that by eliminating mandatory minimum sentences for these crimes, New Jersey would take a “significant step” towards addressing the lack of proportionality in the State’s sentencing laws and help undo a system of “mass incarceration”

⁸ 2019 Commission Report, at 1-2.

⁹ Once an inmate reached the new date of parole eligibility, the inmate would proceed through the normal parole process, subject to the requirements of the Parole Board, including notification to any victims of the offense. 2019 Commission Report, at 25. As a practical matter, the retroactive modification process would only benefit inmates convicted of multiple crimes when the most serious crime of conviction was the mandatory minimum drug crime. Inmates also serving a sentence for an offense with a longer period of parole ineligibility, e.g., an offense subject to the No Early Release Act, would be unlikely to see a change in their parole eligibility date.

¹⁰ The Commission also recommended that the Attorney General closely supervise the filing of notices of objection to ensure that they would be issued sparingly and use consistent criteria.

¹¹ *Id.* at 19-20.

that has inflicted serious and long-lasting harms on the State's residents, especially its residents of color.¹²

The practical impact of the Commission's recommendations, if adopted, would be significant. The retroactivity provision would likely result in hundreds of inmates becoming immediately eligible for parole, with hundreds more reaching eligibility in the subsequent months. And the impact of the changes would grow over time, as the elimination of mandatory parole ineligibility for non-violent drug offenses would reduce the number of inmates sentenced to terms with a lengthy parole disqualifier. These reductions would accelerate efforts to reduce the State's overall prison population and result in cost-savings over time.¹³

The Commission's recommendations received widespread support at the time they were announced in November 2019. The Governor and legislative leaders endorsed the proposals, as did the Public Defender, the Attorney General, and all 21 County Prosecutors.

New Statewide Guidance Regarding Section 12 Waivers

The State possesses a significant tool for correcting injustices in the use of mandatory minimum drug sentences: the ability to seek waivers of mandatory periods of parole ineligibility pursuant to Section 12, provided such waivers are sought in a consistent manner under the *Vasquez* and *Brimage* decisions. In addition, pursuant to Court Rule 3:21-10(b)(3), the State, jointly with an incarcerated defendant, may at any time file an application seeking to change a sentence for good cause, including a request to rescind a mandatory term of parole ineligibility pursuant to Section 12.

This Directive therefore establishes statewide rules that require prosecutors to seek the waiver of mandatory parole disqualifiers for non-violent drug crimes during plea negotiations, following a probation violation, and after conviction at trial. Where the defendant makes a request, prosecutors will also be required to file a joint application to modify the sentences of inmates currently incarcerated. Taken together, these rules essentially take the imposition of mandatory parole disqualifiers "off the table" for all current and future non-violent drug defendants, and allow those currently incarcerated pursuant to such terms an opportunity for early release from custody. These mechanisms achieve—to the greatest extent possible under current law—the Commission's recommendation to eliminate the use of mandatory minimum sentences for non-violent drug crimes.

The Directive also establishes protocols to ensure that the modification of inmates' sentences does not create undue public safety risks. Section I.D of this Directive creates a two-track process for sentence modifications: one for when the prosecutor and the defendant agree that the defendant's sentence should revert to the default 33 percent parole disqualifier, *see*

¹² *Id.* at 2, 20-22.

¹³ *See id.* at 33.

Section I.D.2, and another for when the prosecutor believes that the defendant's conduct warrants some additional, discretionary period of parole ineligibility above the default 33 percent, *see* Section I.D.3. It is anticipated that, in the large majority of cases, prosecutors and defendants will agree that the defendant's sentence should be modified as if the defendant had never been subject to a mandatory minimum term in the first place. But in a small number of cases, prosecutors will have a factual basis to seek the discretionary parole disqualifiers that they would have pursued had there been no mandatory minimum term at the time of sentencing.

This Directive makes clear that, in seeking a discretionary parole disqualifier at the time of a sentence modification, the prosecutor must meet the same standard that applies in a typical sentencing hearing: by clearly convincing the court that the aggravating factors associated with the offense substantially outweigh the mitigating factors. *See* N.J.S.A. 2C:43-6(b). To help ensure that prosecutors request discretionary parole disqualifiers rarely and in a consistent manner, the Directive requires prosecutors to consult with the Director of the Division of Criminal Justice before pursuing such parole disqualifiers. The Directive also makes clear that, as part of a sentence modification, the prosecutor may not seek a discretionary period of parole ineligibility any longer than the mandatory term originally imposed by the court at the time of sentencing. These safeguards ensure that no defendant is worse off as a result of a sentencing modification, while also allowing the prosecutor to seek the continued incarceration of individuals who present public safety risks.

Therefore, pursuant to the authority granted to me under the New Jersey Constitution and the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, and consistent with my obligations under *State v. Brimage*, 153 N.J. 1, I hereby direct all law enforcement to comply with the following procedures and protocols.

I. Section 12 Waivers

- A. ***Plea offers.*** Whenever a state, county, or municipal prosecuting attorney extends a plea offer contemplating a conviction for a violation of N.J.S.A. 2C:35-3, 35-4, 35-5, 35-6, 35-7, and/or 35-8, or any violation subject to a mandatory extended term pursuant to 2C:43-6(f) (the "qualifying Chapter 35 offenses"), the offer must include a provision agreeing that, pursuant to N.J.S.A. 2C:35-12 ("Section 12"), the court at sentencing shall impose a period of parole ineligibility for any qualifying Chapter 35 offense equal to one-third of the sentence, less commutation, minimum custody, and work credits earned while in custody, consistent with N.J.S.A. 30:4-123.51(a), as if the individual had not been subject to a mandatory minimum term.
1. The prosecuting attorney and the defendant may agree to any other terms regarding the disposition of the matter that are permitted by law and deemed acceptable by the

parties, provided that the final agreement includes the Section 12 waiver of mandatory parole ineligibility as described above. When the parties are unable to agree on all terms of a plea agreement, they may agree to leave certain matters to the discretion of the court at sentencing, provided that the agreement includes the Section 12 waiver.

2. In formulating a plea offer, the prosecuting attorney shall consult the Revised *Brimage* Guidelines, but shall not be bound by its provisions. As in any case not subject to those Guidelines, prosecuting attorneys shall exercise their judgment to ensure that plea offers reflect the nature and circumstances of the offense, the defendant's criminal history, and any aggravating or mitigating circumstances. Supervisory prosecutors shall ensure that attorneys working under their supervision seek uniformity in the terms of plea offers extended to similarly situated defendants.
 3. The prosecutor is permitted to offer, and the parties may agree to, a provision of a plea agreement whereby the court at sentencing is authorized to decide whether to impose an additional, discretionary period of parole ineligibility, pursuant to N.J.S.A. 2C:43-6(b), if the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors. Any such period of discretionary parole ineligibility would be served in addition to the period equal to one-third of the sentence, less prison credits, described in Section I.A above.
 4. Nothing in this Directive prohibits a prosecuting attorney from seeking a mandatory extended term pursuant to N.J.S.A. 2C:43-6(f), provided that the prosecuting attorney agrees to waive the extended period of mandatory parole ineligibility pursuant to Section 12.
- B. ***Post-trial agreements.*** Whenever a defendant is convicted after trial of a qualifying Chapter 35 offense, the prosecuting attorney shall offer the defendant the opportunity to enter into an agreement prior to sentencing that contains the following terms:
1. Pursuant to Section 12, the court at sentencing shall impose a period of parole ineligibility for any qualifying Chapter 35 offense equal to one-third of the sentence, less commutation, minimum custody, and work credits earned while in custody, consistent with N.J.S.A. 30:4-123.51(a), as if the individual had not been subject to a mandatory minimum term; and
 2. The court at sentencing shall retain discretion to impose any other sentencing terms it deems just and appropriate, including, where appropriate, the imposition of an additional, discretionary period of parole ineligibility, pursuant to N.J.S.A. 2C:43-6(b), if the court is clearly convinced that the aggravating factors substantially outweigh the mitigating factors. Any such period of discretionary parole ineligibility

would be served in addition to the period equal to one-third of the sentence, less prison credits, described in Section I.B.1 above.

- C. ***Violations of probation.*** Whenever a defendant is alleged to have violated probation for a sentence for a qualifying Chapter 35 offense, and the parties have not previously entered into a Section 12 agreement pursuant to Sections I.A or I.B of this Directive, then the prosecuting attorney shall offer the defendant such an agreement in connection with the violation of probation, offering terms consistent with those required by Sections I.A or I.B. of this Directive.
- D. ***Joint applications for sentence modifications.*** Upon request by an incarcerated defendant, a prosecuting attorney shall agree to file a joint motion to change a sentence pursuant to *R. 3:21-10* to rescind a mandatory period of parole ineligibility for a qualifying Chapter 35 offense, subject to the following requirements and procedures:
1. Each state and county prosecuting authority shall establish, in consultation with the Public Defender, a process for receiving requests from incarcerated defendants seeking a sentence modification. The prosecuting authority shall only consider requests from defendants:
 - a. Currently serving a sentence for a qualifying Chapter 35 offense that includes a mandatory period of parole ineligibility; and
 - b. At the time of the request, the defendant remains ineligible for parole solely on account of the parole disqualifier mandated by the qualifying Chapter 35 offense (e.g., the defendant is not serving a concurrent sentence for another crime that imposes a longer period of parole ineligibility).
 2. For each defendant who meets the criteria defined in Section I.D.1 (“qualifying defendants”), the prosecuting authority shall promptly offer the defendant the opportunity to file a joint motion pursuant to *R. 3:21-10* that contains the following terms:
 - a. The parties shall agree, pursuant to Section 12, to seek a modification of the defendant’s sentence only insofar as it reduces the period of parole ineligibility resulting from the qualifying Chapter 35 offense to equal one-third of the original sentence, less commutation, minimum custody, and work credits earned while in custody, consistent with N.J.S.A. 30:4-123.51(a), as if the individual had not been subject to a mandatory minimum term; and
 - b. The parties will jointly oppose any sentence modification other than those agreed to in their joint motion and described in this subsection.

3. The prosecuting authority shall not offer a joint motion pursuant to Section I.D.2 when the prosecuting authority concludes, in consultation with the Director of the Division of Criminal Justice (“DCJ Director”), that the aggravating factors associated with the defendant’s offense of conviction substantially outweigh the mitigating factors. In such cases, the prosecuting authority shall instead promptly offer the defendant the opportunity to file a joint motion pursuant to *R. 3:21-10* that contains the following terms:
 - a. The parties shall agree, pursuant to Section 12, to seek a modification of the defendant’s sentence only insofar as it reduces the period of parole ineligibility resulting from the qualifying Chapter 35 offense to equal one-third of the original sentence, less commutation, minimum custody, and work credits earned while in custody, consistent with N.J.S.A. 30:4-123.51(a), as if the individual had not been subject to a mandatory minimum term;
 - b. The prosecuting authority reserves the right to argue that, as part of the sentence modification, the court should impose an additional, discretionary period of parole ineligibility, consistent with N.J.S.A. 2C:43-6(b), on the grounds that the aggravating factors associated with the defendant’s offense of conviction substantially outweigh the mitigating factors, provided that the prosecuting authority does not seek a period of parole ineligibility any longer than the mandatory one imposed as part of the original sentence; and
 - c. The parties will jointly oppose any sentencing modification other than those agreed to in their joint motion as described in this subsection.
4. By May 19, 2021, the DCJ Director shall publish statewide procedures for prosecuting authorities for:
 - a. Receiving and reviewing requests submitted by incarcerated defendants, pursuant to Section I.D.1, and
 - b. Consulting with the DCJ Director when the prosecuting authority believes that the aggravating factors associated with the defendant’s offense of conviction substantially outweigh the mitigating factors, pursuant to Section I.D.3.
5. When reviewing requests and preparing joint motions, prosecuting authorities shall prioritize requests from qualifying defendants who, if their sentences were modified pursuant to this Directive, would be eligible for parole on July 1, 2021 or earlier.
6. When filing a joint motion for sentence modification pursuant to this Directive, the prosecuting authority shall state that good cause for the modification exists as a result of:

- a. CSDC's unanimous recommendation in favor of retroactive modification of mandatory periods of parole ineligibility imposed for qualifying Chapter 35 offenses, for the reasons described in CSDC's November 2019 report; and
- b. The need to ensure sentencing uniformity for defendants convicted of qualifying Chapter 35 offenses, in light of this Directive's instructions that prosecutors waive mandatory periods of parole ineligibility for all current and future defendants pursuant to Section 12.

II. Other Provisions

- A. ***Non-enforceability by third parties.*** This Directive is issued pursuant to the Attorney General's authority to ensure the uniform and efficient enforcement of the laws and administration of criminal justice throughout the State. This Directive imposes limitations on law enforcement agencies and officials that may be more restrictive than the limitations imposed under the United States and New Jersey Constitutions, and federal and state statutes and regulations. Nothing in this Directive shall be construed in any way to create any substantive right that may be enforced by any third party.
- B. ***Severability.*** The provisions of this Directive shall be severable. If any phrase, clause, sentence or provision of this Directive is declared by a court of competent jurisdiction to be invalid, the validity of the remainder of the Directive shall not be affected.
- C. ***Questions.*** Any questions concerning the interpretation or implementation of this Directive shall be addressed to the DCJ Director, or their designee.
- D. ***Effective date.*** This Directive shall take effect on May 19, 2021, and shall remain in force and effect unless and until it is repealed, amended, or superseded by Order of the Attorney General.



Gurbir S. Grewal
Attorney General

ATTEST:



Andrew Bruck
First Assistant Attorney General

Dated: April 19, 2021

N.J.S.A. 2C:35-12

Waiver of mandatory minimum and extended terms

Whenever an offense defined in this chapter specifies a mandatory sentence of imprisonment which includes a minimum term during which the defendant shall be ineligible for parole, a mandatory extended term which includes a period of parole ineligibility, or an anti-drug profiteering penalty pursuant to section 2 of P.L. 1997, c. 187 (N.J.S.2C:35A-1 et seq.), the court upon conviction shall impose the mandatory sentence or anti-drug profiteering penalty unless the defendant has pleaded guilty pursuant to a negotiated agreement or, in cases resulting in trial, the defendant and the prosecution have entered into a post-conviction agreement, which provides for a lesser sentence, period of parole ineligibility or anti-drug profiteering penalty. The negotiated plea or post-conviction agreement may provide for a specified term of imprisonment within the range of ordinary or extended sentences authorized by law, a specified period of parole ineligibility, a specified fine, a specified anti-drug profiteering penalty, or other disposition. In that event, the court at sentencing shall not impose a lesser term of imprisonment, lesser period of parole ineligibility, lesser fine or lesser anti-drug profiteering penalty than that expressly provided for under the terms of the plea or post-conviction agreement.