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**DIRECTIVE NO. 2010 - 2**

To: Stephen J. Taylor, Director  
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All County Prosecutors

FROM: Paula T. Dow  
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DATE: March 12, 2010

SUBJECT: **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**

The following Supplemental Directive consists of two parts. Part I explains the major features, legislative intent, and practical effects of recently-enacted legislation that revises the mandatory minimum sentencing provisions of New Jersey's drug-free school zone law. This portion of the Supplemental Directive also discusses why it is appropriate, for both legal and policy reasons, to update the Attorney General's Brimage Guidelines, which channel prosecutors' plea negotiation discretion in school zone cases. Part II of this Supplemental Directive sets forth the specific new rules that all prosecutors must henceforth follow in prosecuting school zone cases, amending and supplementing the Revised Brimage Guidelines (2004) so as to account for the recent changes to the statutory sentencing scheme.



## **PART I. GENERAL OVERVIEW OF LEGAL AND POLICY ISSUES**

### **A. Recent Amendments to the Drug-Free School Zone Law Restore Judicial Sentencing Discretion in Certain Cases**

New Jersey's drug-free school zone law, N.J.S.A. 2C:35-7, was recently amended by L. 2009, c. 192. The new law, which took effect immediately upon its adoption on January 12, 2010, gives judges discretion to waive or reduce the mandatory term of imprisonment and parole ineligibility in school zone cases where the crime was not committed while actually on school grounds or a school bus, where firearms or violence were not involved, and where the offender has not previously been convicted of drug distribution or possession with intent to distribute. Until now, the mandatory minimum sentence prescribed in the school zone law could only be waived or reduced by the prosecutor pursuant to N.J.S.A. 2C:35-12, and judges have had no authority to impose a lesser sentence than the one calculated by the prosecutor under the Attorney General's Brimage Guidelines. Under the new law, judges now have independent authority to waive or reduce the mandatory minimum sentence, and may do so without the prosecutor's concurrence.

The revisions to N.J.S.A. 2C:35-7 were intended to address concerns about the broad geographic sweep of the school zone offense. In some jurisdictions, and especially in densely populated urban areas, many if not most homes, businesses, parking lots, sidewalks, and roadways are situated within 1,000 feet of at least one school. As a result, the school zone law's mandatory minimum sentencing provisions can apply even though the offense conduct did not directly endanger schools or school-aged children. This, in turn, can dilute the general deterrent effect of the school zone law, undermining its ability in urban precincts to discourage drug dealers from conducting their illicit activities near schools or in the presence of children.

The new legislation is designed to mitigate the geographic and associated demographic effects of the school zone law by giving trial courts the discretion to reduce the stipulated term of parole ineligibility, or even to impose a noncustodial probationary sentence, in cases where, for example, the judge finds that the school at the center of the protected zone was not in session and children were not exposed to the defendant's drug distribution activities. A court exercising its newly expanded sentencing discretion is thus expected to tailor individual sentences to reflect each defendant's actual culpability as measured in terms of the specific harm that the school zone law is intended to redress, namely, exposing children to the violence and public disorder associated with the illicit drug trade.

B. The New Law Takes Certain School Zone Cases Out of the Realm of State v. Brimage

In State v. Brimage, 153 N.J. 1 (1998), the New Jersey Supreme Court addressed the constitutionality of N.J.S.A. 2C:35-12, which the Court characterized as an “atypical” sentencing statute because it shifts sentencing power from the judiciary to the prosecutor. 153 N.J. at 10. The Court held that to satisfy the constitutional requirements of the separation of powers doctrine, prosecutors must be guided by specific, universal standards in their waiver of mandatory minimum sentences under the Comprehensive Drug Reform Act. Id. at 23. The Court ultimately found that the then-existing Attorney General plea negotiation guidelines did not adequately channel prosecutorial discretion, thereby leading to arbitrary and unreviewable differences between different localities. Ibid. The Court therefore directed the Attorney General to issue new guidelines -- now known as the “Brimage Guidelines” -- to ensure consistency throughout the State and to achieve what the Court described as the “dominant if not paramount sentencing goal of statewide uniformity.” Id. at 21, 24-25.

In school zone cases where discretion to waive or reduce the mandatory minimum sentence now rests with judges, and not just with prosecutors, the separation of powers concerns that lie at the heart of the Supreme Court’s rationale in State v. Brimage no longer exist, since in school zone cases where defendants are eligible to be sentenced under N.J.S.A. 2C:35-7b, the prosecutor’s plea offer can no longer dictate the sentence to be imposed. N.J.S.A. 2C:35-7b(1) expressly provides in this regard that a court has the authority to waive or reduce the mandatory minimum sentence “notwithstanding the provisions of N.J.S.A. 2C:35-12.” Thus, in any case where N.J.S.A. 2C:35-7b applies, the atypical sentencing scheme established in N.J.S.A. 2C:35-12 is displaced, and the allocation of sentencing authority between the prosecutor and the court reverts to the regular sentencing scheme established under the New Jersey Code of Criminal Justice. In State v. Warren, 115 N.J. 433 (1989), the New Jersey Supreme Court explained that under the general sentencing provisions of the Code, the parties can only recommend the sentence to be imposed, and “are not empowered to negotiate a sentence that can have any binding effect.” 115 N.J. at 442.

All of this means that henceforth, in school zone cases where the defendant is eligible to be sentenced under N.J.S.A. 2C:35-7b, judges rather than prosecutors will ultimately determine whether to impose a State Prison term, a county jail term, or noncustodial probation, and judges will also determine the length of any custodial sentence, and whether to impose a period during which the defendant will be ineligible for parole. Because prosecutors in these school zone cases will no longer be able to tender a plea offer that has a binding effect on the sentencing court, any differences in sentencing practices between different localities -- the principal concern expressed by the Court in State v. Brimage -- will not only be reviewable by courts, but will have resulted

from the exercise of judicial rather than prosecutorial sentencing discretion. It is therefore not necessary as a matter of constitutional imperative, or as a matter of sound policy, for the Attorney General in these cases to impose rigid restrictions on a prosecutor's discretion in formulating an appropriate plea offer. Accordingly, in any school zone case where the prosecutor has no factual basis to contest a defendant's eligibility to be sentenced under N.J.S.A. 2C:35-7b, the prosecutor will no longer be required to calculate and tender a Brimage plea offer. See Part II, Section 1a, infra.

C. In Certain Circumstances, School Zone Defendants Are Not Eligible for Judicial Waiver or Reduction of a Mandatory Sentence

N.J.S.A. 2C:35-7b(2) specifies circumstances when the court in a school zone case would have no authority on its own to waive or reduce the mandatory minimum sentence. Specifically, a defendant is ineligible for a judicial waiver or reduction of the mandatory minimum sentence if the offense took place while *on* school property or a school bus, or if the defendant in the course of committing the offense used or threatened violence,<sup>1</sup> or was in possession of a firearm.

While it is for a court, ultimately, to decide whether any of these disqualifying circumstances exist, they are not discretionary factors to be considered as part of the totality of the circumstances in deciding an appropriate sentence. Compare N.J.S.A. 2C:35-7b(1) (setting forth relevant circumstances that the court must consider in exercising discretion, and which factors are discussed in Part I, Section D, infra). Rather, if the court finds that any of the disqualifying circumstances specified in N.J.S.A. 2C:35-7b(2) apply, the court would have no discretion to waive or reduce the mandatory minimum sentence. In those instances, the term of imprisonment and parole ineligibility stipulated by the school zone law can only be waived or reduced by the prosecutor pursuant to N.J.S.A. 2C:35-12, and the prosecutor must therefore calculate and tender a plea offer determined in accordance with the Brimage Guidelines. See Part II, Section 2a, infra.

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<sup>1</sup> An earlier version of the legislation that eventually became L. 2009, c.192 had provided that a defendant would also be ineligible to be sentenced in the court's discretion under N.J.S.A. 2C:35-7b if in the course of committing the school zone offense he or she also committed the offense of eluding in violation of N.J.S.A. 2C:29-2b. That automatic disqualification feature was deleted by Committee amendment. However, a prosecutor may still argue, where the case-specific facts so warrant, that the motor vehicle eluding offense, or any other offense committed against a law enforcement officer that posed a risk of injury to the officer or any other person, constitutes the use of violence or threatened violence within the meaning of N.J.S.A. 2C:35-7b(2)(b). See State v. Crawley, 187 N.J. 440, 460, n.7 (2006) ("Any flight from police detention is fraught with the potential for violence because flight will incite a pursuit, which in turn will endanger the suspect, the police, and innocent bystanders."). Furthermore, a prosecutor may tender a plea offer that requires the defendant to plead guilty to a second-degree violation of N.J.S.A. 2C:29-2b in lieu of or in addition to the school zone charge, which would automatically trigger the presumption of imprisonment set forth in N.J.S.A. 2C:44-1d. See Part I, Section F and Part II, Section 1(d), infra.

D. Sentencing Courts Must Consider Specified Circumstances in Exercising Discretion to Waive or Reduce a School Zone Mandatory Minimum Term

When a school zone defendant is eligible to be sentenced in the court's discretion pursuant to N.J.S.A. 2C:35-7b, the court must consider certain specified circumstances in deciding whether to waive or reduce the mandatory term of imprisonment and parole ineligibility. The specified circumstances set forth in N.J.S.A. 2C:35-7b (1) are:

- a. the extent of the defendant's criminal record and the seriousness of any prior offenses for which the defendant has been convicted;
- b. the specific location of the present offense in relation to school property and the reasonable likelihood of exposing children to drug-related activities at that location;
- c. whether school was in session at the time of the offense; and
- d. whether children were actually present or in the immediate vicinity when the offense took place.

As is true with respect to the general sentencing provisions of the Code of Criminal Justice concerning the aggravating and mitigating factors set forth in N.J.S.A. 2C:44-1a and b, the new law does not assign any burden of proof in establishing these specified circumstances. Cf., N.J.S.A. 2C:1-13d ("When the application of the code depends upon the finding of a fact that is not an element of an offense... the burden of proving the fact is on the prosecution or defendant, depending on whose interest or contention will be furthered if the finding should be made..."). Prosecutors should therefore expect that sentencing courts will find and balance the factors specified in N.J.S.A. 2C:35-7b(1) in the same manner and using the same procedures by which courts presently find, apply, and weigh the general aggravating and mitigating circumstances set forth in N.J.S.A. 2C:44-1a and b.

E. The New Law Does Not Affect Other Mandatory Minimum Sentences Under the Comprehensive Drug Reform Act or Any Other Statute

A court's authority to waive or reduce a mandatory minimum term pursuant to N.J.S.A. 2C:35-7b applies only to the sentence imposed on a conviction for the drug-free school zone offense. N.J.S.A. 2C:35-7b does not authorize a court to waive or reduce a mandatory minimum sentence required to be imposed on conviction for any other offense defined in the Comprehensive Drug Reform Act (e.g., a violation of N.J.S.A. 2C:35-5 involving a first-degree

quantity of heroin or cocaine). The new law also expressly provides that a court is not authorized to waive or reduce the mandatory minimum sentence even in a school zone case if the defendant has previously been convicted of drug distribution or possession with intent to distribute, in which event the defendant is subject to a separate and distinct mandatory three-year minimum term of parole ineligibility pursuant to N.J.S.A. 2C:43-6f (mandatory extended term for repeat drug dealers).<sup>2</sup>

In any school zone case where the judicial waiver/reduction authority under N.J.S.A. 2C:35-7b is inapplicable or unavailable (*i.e.*, a case involving a repeat drug dealer, or an offense committed while actually on school property or a school bus, or that involved violence, threatened violence, or firearms), the separation of powers concerns expressed by the Court in State v. Brimage continue to exist, since the mandatory minimum sentence can only be waived or reduced by the prosecutor pursuant to N.J.S.A. 2C:35-12. Accordingly, the current Brimage Guidelines must be followed and a "Brimage plea offer" must be calculated and tendered in any school zone case where the prosecutor asserts that the defendant is not eligible to be sentenced in the court's discretion pursuant to N.J.S.A. 2C:35-7b. See Part II, Section 2, infra.

F. The New Law Does Not Provide a Means to Overcome the Presumption of Imprisonment Set Forth in N.J.S.A. 2C:44-1d

It is important to note, even at the risk of stating the obvious, that the Legislature by adoption of N.J.S.A. 2C:35-7b did not intend for courts or prosecutors to treat the fact that the defendant's unlawful conduct occurred within a school zone as a *mitigating* circumstance. Indeed, it would be absurd to interpret and implement the new law so that a drug dealer operating in a school zone would receive a lesser sentence than would be imposed had the same act of drug distribution/possession with intent to distribute occurred outside a school zone. It is therefore important for prosecutors and courts to consider the nature and seriousness of the underlying drug distribution/possession with intent to distribute conduct, independent of its occurrence within a school zone, when determining an appropriate plea offer and sentence.

One of the practical effects of the new law is that a school zone violation under N.J.S.A. 2C:35-7 may no longer be the most serious charge -- measured in terms of the likelihood of incarceration and length of sentence -- that applies to the offense conduct. So too, a school zone charge may no longer be more serious than other pending drug or non-drug charges that involve other criminal events or transactions. Until now, the Brimage Guidelines have required a defendant to plead guilty to a so-called "Brimage-eligible offense," such as the third-degree

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<sup>2</sup> The last paragraph of N.J.S.A. 2C:35-7b2 specifically provides in pertinent part that "[n]othing in this subsection shall be construed to establish... a basis for not imposing a term of imprisonment or term of parole ineligibility authorized or required to be imposed pursuant to subsection f. of N.J.S. 2C:43-6 or upon conviction for a crime other than the offense set forth in this subsection."

school zone charge, while allowing the prosecutor discretion to dismiss second-degree drug and non-drug charges that do not carry a minimum sentence under the Comprehensive Drug Reform Act (referred to as “non-Brimage-eligible offenses”). Henceforth, however, when a school zone defendant is eligible to be sentenced in the court’s discretion pursuant to N.J.S.A. 2C:35-7b, it may be more appropriate for the prosecutor to tender a plea offer that requires the defendant to plead guilty to a non-school zone charge, especially when the non-school zone charge is graded as a second-degree or higher crime, since a second-degree offense invokes the presumption of imprisonment set forth in N.J.S.A. 2C:44-1d.

The new statute expressly provides in this regard that “[n]othing in this subsection shall be construed to establish a basis for overcoming a presumption of imprisonment authorized or required by subsection d. of N.J.S. 2C:44-1....” The Legislature thus expressly recognized that the presumption of imprisonment can apply to school zone offense conduct notwithstanding that the school zone offense itself is graded as a third-degree crime, which ordinarily would not trigger the presumption.<sup>3</sup> The presumption of imprisonment may attach in a school zone case when, for example, the offense conduct involves a second-degree quantity of controlled dangerous substance under N.J.S.A. 2C:35-5, and/or where the offense conduct also violates the second-degree crime defined in N.J.S.A. 2C:35-7.1 (drug-free public park or public housing zone).

Consistent with the general principle that a plea offer should accurately reflect the seriousness of the offense conduct, prosecutors, of course, have discretion to require a defendant to plead guilty to the most serious provable offense charged. Furthermore, prosecutors must be able to exercise their discretion in a manner that prevents a defendant from benefitting from having committed an offense in a school zone. Accordingly, prosecutors may choose to fashion a plea agreement that provides, for example, for the dismissal of the third-degree school zone charge in exchange for the defendant pleading guilty to a non-school zone drug or non-drug offense that subjects the defendant to the statutory presumption of imprisonment, which presumption would otherwise not apply if the defendant were to plead only to the third-degree school zone offense under the revised law. See Part II, Section 1(d), infra (authorizing a “package deal” in which the school zone charge is dismissed and defendant pleads guilty to one or more non-school zone offenses). In this way, prosecutors can, through the exercise of their inherent charging discretion, effectively ensure imposition of a State Prison sentence absent a judicial finding of exceptional circumstances that would justify overcoming the strict presumption of imprisonment established in N.J.S.A. 2C:44-1d. See State v. Jabbour, 118 N.J. 1

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<sup>3</sup> N.J.S.A. 2C:44-1d was amended by L. 2007, c. 341 (effective January 13, 2008) to extend the presumption of imprisonment to third-degree convictions where the court finds that the aggravating circumstance set forth in N.J.S.A. 2C:44-1a(5) (substantial likelihood that the defendant is involved in organized criminal activity) applies. See Part II, Section 1(e), infra, incorporating standards from the Revised Brimage Guidelines on when prosecutors may seek to invoke the presumption of imprisonment in a third-degree school zone case based on the defendant’s involvement in organized criminal activity.

(1990).

G. The New Law Requires Statewide Uniformity in the Exercise of Prosecutorial Discretion to Appeal a Waiver or Reduction of a Mandatory Minimum Sentence

The new law expressly authorizes the prosecutor to appeal the sentence in any school zone case where the court exercises its authority under N.J.S.A. 2C:35-7b and elects not to impose a term of parole ineligibility, or places the defendant on probation. The law further directs the Attorney General to develop guidelines "to ensure the uniform exercise of discretion in making determinations regarding whether to appeal a decision to waive or reduce the minimum term of parole ineligibility or place the defendant on probation." Pursuant to the statutory uniformity requirement, Part II, Section 3 of this Supplemental Directive establishes the substantive standard that prosecutors must apply in deciding whether to initiate any such appeal, namely, an abuse of the sentencing court's discretion. To further ensure statewide uniformity, Section 3 also specifies who within the prosecuting agency must review and approve the decision to appeal a sentence where the court has exercised its discretion under N.J.S.A. 2C:35-7b to waive or reduce the mandatory minimum sentence.

H. The New Law Authorizes Certain State Prison Inmates to be Re-Sentenced Under N.J.S.A. 2C:35-7b

Section 2 of L. 2009, c. 192 authorizes certain inmates to move to have their school zone sentence reviewed and to be re-sentenced pursuant to N.J.S.A. 2C:35-7b. This re-sentencing option is only available to inmates who, on the effective date of the law, are "serving a mandatory minimum sentence as provided by section 1 of P.L. 1987, c. 101 (C.2C:35-7)...." Because the phrase "mandatory minimum sentence" refers to a statutorily-prescribed term of parole ineligibility, this Section of the new law would not authorize a court to review or modify a sentence that did not include a court-ordered period of parole disqualification. The new statute also makes clear that the re-sentencing option is not available if the defendant has already been released on parole.

As to any defendant who on the effective date of the act was still serving a mandatory minimum sentence on his or her school zone conviction, the new statute authorizes the reviewing court to re-sentence the defendant "if the court finds that the sentence under review does not serve the interests of justice." In making this determination, the court "shall consider all relevant circumstances, including whether the defendant pleaded guilty pursuant to a negotiated agreement, and whether the prosecution had agreed to dismiss one or more charges which, upon conviction, would have subjected the defendant to the presumption of imprisonment... ." This feature is designed to ensure that the reviewing court takes into account the State's reasonable expectations with respect to the negotiated disposition of multiple charges, and is consistent with

the common-sense principle, discussed in Section F, supra, that a drug dealer who had operated in a school zone should not as a result of the new law end up serving a less time in prison than would have been served had the offense conduct occurred outside a drug-free school zone.

The new law expressly provides that the re-sentencing determination by the court shall not be subject to appeal. Accordingly, a prosecutor cannot appeal the re-sentencing court's discretionary application of the "interests of justice" standard. This provision should not, however, be construed to preclude a prosecutor from appealing if the court had no authority under Section 2 of L. 2009, c. 192 to entertain the re-sentencing application (*i.e.*, where the defendant does not meet the eligibility requirements for having his or her sentence reviewed under Section 2 of the new law), since in that event, every provision of Section 2 of the new law, including the limitation on appeals, would be inapplicable.

By the same token, the new statute should not be construed to preclude the prosecutor from appealing the modification of an inmate's sentence done pursuant to N.J.S.A. 2C:35-7b in any case where the defendant would have been ineligible to be sentenced in the court's discretion under N.J.S.A. 2C:35-7b(2) by virtue of having committed the drug distribution or possession with intent to distribute offense while on school property or a school bus, or by having used or threatened violence or by possessing a firearm in the course of committing the school zone offense, or by having previously been convicted of a drug distribution/possession with intent offense. Any modification of a mandatory minimum sentence done in disregard of the disqualification criteria set forth in N.J.S.A. 2C:35-7b(2) would constitute an illegal sentence that should be subject to correction at any time by an appellate court.

## PART II. SPECIFIC MODIFICATIONS TO THE BRIMAGE GUIDELINES

### 1. School Zone Cases Where Defendants Upon Conviction Are Eligible Pursuant to N.J.S.A. 2C:35-7b For Judicial Waiver of a Mandatory Minimum Sentence

#### a. Discretion to tender a non-Brimage plea offer

The prosecutor need not tender a plea offer determined in accordance with the Brimage Guidelines to a defendant whose only Brimage-eligible charge(s) are for a violation of N.J.S.A. 2C:35-7 if the prosecutor is satisfied that the defendant upon conviction of the school zone charge(s) would be eligible to be sentenced in the court's discretion pursuant to N.J.S.A. 2C:35-7b (*i.e.*, the prosecutor has no factual basis to believe that the school zone offense occurred while *on* school property or a school bus, that the offense involved violence, the threat to use violence, or the possession of a firearm, or that the defendant is subject to the mandatory extended term for repeat drug dealers under N.J.S.A. 2C:43-6f).

#### b. Notice to court and defense counsel of defendant's apparent eligibility to be sentenced in the court's discretion

In the event that the prosecutor exercises the discretion afforded by paragraph a. of this Section and elects not to tender a plea offer calculated in accordance with the Brimage Guidelines, the prosecutor shall advise the court and defense counsel that, based on currently available information, the defendant appears to be eligible upon conviction of the school zone offense(s) to be sentenced in the court's discretion pursuant to N.J.S.A. 2C:35-7b, and that the prosecutor does not intend to contest the defendant's eligibility to be sentenced in the discretion of the court. Such notice shall serve as the explanation for why the prosecutor has not tendered a Brimage plea offer as would otherwise be required in school zone cases by the Brimage Guidelines. If the prosecutor subsequently determines that the defendant is actually ineligible to be sentenced in the discretion of the court pursuant to N.J.S.A. 2C:35-7b, see Part II, Section 2a, infra, the prosecutor shall immediately advise the court and defense counsel of the basis for that new determination, shall immediately withdraw any outstanding plea offer that does not comport with the requirements of the Brimage Guidelines, and shall prepare and tender a Brimage plea offer.

#### c. Prosecutor's right of allocution at sentencing

Nothing in this Supplemental Directive shall be construed to limit the authority of the

prosecutor to argue for a specific sentence, or to argue with respect to the applicability and weight that should be given to the circumstances specified in N.J.S.A. 2C:35-7b(1)(a through d), with the understanding that when the defendant is eligible to be sentenced pursuant to N.J.S.A. 2C:35-7b, the decision to waive or reduce the mandatory minimum sentence under that section rests within the discretion of the court and not the prosecutor, and that any specific sentence urged by the prosecutor or contemplated by a negotiated plea agreement represents a non-binding recommendation.

d. Authority to dismiss school zone charges as part of a “package deal” involving non-school zone charges

When a defendant charged with a school zone offense would be eligible to be sentenced under N.J.S.A. 2C:35-7b, the prosecutor may in the exercise of discretion dismiss the school zone charge(s) in consideration for the defendant’s agreement to plead guilty to one or more non-school zone offenses. Cf., Revised Brimage Guidelines, Sections 1.1 and 3.11 (heretofore permitting dismissal of a school zone charge only when the defendant pleads guilty to another Brimage-eligible offense, and which provisions are hereby superseded and amended by this Supplemental Directive).<sup>4</sup> Nothing herein shall be construed to require the prosecutor to dismiss the school zone charge(s) as part of a package deal.

e. Standard for invoking the “organized criminal activity” aggravating factor to trigger the presumption of imprisonment in a school zone case

A prosecutor in a school zone case shall not ask the court to find the aggravating factor set forth in N.J.S.A. 2C:44-1a(5) (substantial likelihood that the defendant is involved in organized criminal activity) for the purpose of triggering the presumption of imprisonment pursuant to

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<sup>4</sup> In certain circumstances, the Revised Brimage Guidelines and/or other Attorney General charging and plea negotiation Directives provide that the prosecutor must tender a plea offer that requires the defendant to plead guilty to multiple charges, and those provisions of the Brimage Guidelines or other Directives are not amended or superceded by this Supplemental Directive. See, e.g., Revised Brimage Guidelines, Section 11.4 (any plea offer tendered to a school zone defendant who possessed a firearm must require the defendant to plead guilty to both the firearms and school zone charges so as to ensure that the court imposes consecutive sentences on those two convictions as required by law.) It should be noted that the firearms offense defined in N.J.S.A. 2C:39-4.1 is now designated as a “Graves Act” crime by L. 2007, c. 341 (effective January 13, 2008). Accordingly, any such firearms offense is subject to the Attorney General Directive to Ensure Uniform Enforcement of the “Graves Act” (corrected version issued on November 25, 2008), which generally prohibits the downgrading or dismissal of a firearms charge. Note also that any person who commits a violation of N.J.S.A. 2C:39-4.1 (possession of a firearm while committing a drug distribution/possession with intent to distribute offense) is automatically ineligible to be sentenced in the court’s discretion pursuant to N.J.S.A. 2C:35-7b. See Part II, Section 2, infra.

N.J.S.A. 2C:44-1d (as amended by L. 2007, c. 341, sec. 7) unless the prosecutor would be authorized to award aggravating factor points for Brimage Aggravating Factor #4b if the prosecutor were to prepare a Brimage plea offer.<sup>5</sup>

**2. School Zone Cases Where Defendants Upon Conviction Are Not Eligible for Judicial Waiver or Reduction of the Mandatory Sentence**

**a. Requirement to contest eligibility and to tender a Brimage plea offer**

In any school zone case where the prosecutor determines that the defendant is ineligible to be sentenced in the court's discretion pursuant to N.J.S.A. 2C:35-7b (*i.e.*, where the school zone offense was committed while *on* school property or a school bus, or involved violence, threatened violence, or the possession of a firearm, or where the defendant is subject to an extended term as a repeat drug dealer under N.J.S.A. 2C:43-6f), the prosecutor shall prepare and tender a Brimage plea offer, and shall take all appropriate actions to contest the defendant's eligibility to be sentenced pursuant to N.J.S.A. 2C:35-7b. Notice to the court and defense attorney that the defendant is not eligible to be sentenced in the court's discretion pursuant to N.J.S.A. 2C:35-7b shall be provided by tendering the completed Brimage worksheet, which will indicate whether the defendant is subject to an extended term under N.J.S.A. 2C:43-6f (Criminal History Category IV or V), or that the offense occurred on school property (Special Application and Enhancement Feature G), that a firearm was possessed (Special Application and Enhancement Feature D<sup>6</sup>),

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<sup>5</sup> The Revised Brimage Guidelines explain that notwithstanding case law that broadly construes N.J.S.A. 2C:44-1a(5), a prosecutor should not apply the Brimage Guidelines counterpart to the statutory organized criminal activity aggravating factor -- Brimage Aggravating Factor #4b -- automatically or routinely based merely upon the fact that the controlled dangerous substances involved were likely to have been originally produced in a foreign county, that other persons were necessarily involved in the distribution scheme, or that the defendant acted for profit. Revised Brimage Guidelines at 76. For essentially the same policy reasons explained in the Brimage Guidelines, prosecutors should only ask the sentencing court to apply the statutory organized criminal activity aggravating factor where the prosecutor is aware of facts and reasonable inferences that can be drawn therefrom that provide a good faith basis to believe that the school zone defendant is directly and knowingly involved in organized criminal activities. Ibid.

<sup>6</sup> See note 4, *supra*, explaining that because possessing a firearm in the course of committing the school zone offense in violation of N.J.S.A. 2C:39-4.1 is now a Graves Act crime, the interplay of the Revised Brimage Guidelines and the Attorney General Directive to Ensure Uniform Enforcement of the "Graves Act" will generally require the defendant to plead guilty to both the school zone and firearms offenses. The Legislature's decision to expand the list of Graves Act offenses to include N.J.S.A. 2C:39-4.1 and the Attorney General's ensuing promulgation of the Graves Act Directive had the practical effect of eliminating the option formerly available under Section 7.1.1 of the Revised Brimage Guidelines to treat the possession of the weapon as a Special Offense Characteristic. In any case where the defendant commits a Brimage-eligible offense and also violates N.J.S.A. 2C:39-4.1, the prosecutor is now required to invoke Special Application and Enhancement Feature D unless the prosecutor would be authorized under the Graves Act Directive to dismiss the firearms charge.

and/or that violence was used or threatened (Special Application and Enhancement Features C1 and C2 or Aggravating Factor #3a).

b. Requirement to appeal if court waives/reduces the mandatory minimum sentence

If the court rejects the prosecutor's argument that the defendant is ineligible to be sentenced in the court's discretion under N.J.S.A. 2C:35-7b (e.g., the court rejects the prosecutor's contention that the present offense conduct occurred while on school property or a school bus, or involved violence, threatened violence, or possession of a firearm, or that the defendant is subject to an extended term under N.J.S.A. 2C:43-6f), the prosecutor shall notify the Director of the Division of Criminal Justice, and shall appeal the sentence unless the sentence imposed by the court is equal to or greater than the sentence authorized by the plea offer tendered by the prosecutor pursuant to paragraph a. of this Section, or unless the Director approves the prosecutor's recommendation to the Director that an appeal is not warranted.

**3. Standard and Approval Procedures for Appealing a Discretionary Sentence**

When the court exercises its discretion to waive or reduce the three-year mandatory minimum term of parole ineligibility, or to impose a noncustodial or probationary sentence, the prosecutor shall not appeal the sentence unless the County Prosecutor or First Assistant Prosecutor, or Director or Deputy Director of the Division of Criminal Justice in a case prosecuted by the Division, personally determines that the sentence imposed constitutes an abuse of the court's discretion (*i.e., e.g.,* the court failed to consider and make findings on all of the statutorily-specified relevant circumstances, or otherwise was clearly mistaken in evaluating those or other relevant factors). Any such determination shall be documented in the case file and shall be subject to review by the Attorney General or designee upon request.

Nothing in this Section shall be construed to impose substantive or procedural limits on the authority of the prosecutor to appeal the sentence on the grounds that the defendant was not eligible to be sentenced pursuant to N.J.S.A. 2C:35-7b, see Part II, Section 2b, infra (generally *requiring* an appeal in those circumstances), or to appeal a probationary sentence, including a county jail sentence, in any case where the defendant is subject to the presumption of imprisonment pursuant to N.J.S.A. 2C:44-1d. See N.J.S.A. 2C:44-1f (2) (authorizing a prosecutor to appeal a noncustodial or probationary sentence when a defendant is convicted of a crime of the first or second degree).

**4. Applications for Re-Sentencing**

Except as otherwise expressly provided in this Section, a prosecutor has discretion to consent to, or to oppose, a defendant's application to be re-sentenced under N.J.S.A. 2C:35-7b in

accordance with the provisions of Section 2 of L. 2009, c. 192.

The prosecutor shall oppose an inmate's application to be re-sentenced to a noncustodial sentence, or to time served, if the defendant had pleaded guilty to a school zone offense pursuant to a negotiated agreement where the prosecutor had agreed to dismiss another charge that upon conviction would have subjected the defendant to the presumption of imprisonment under N.J.S.A. 2C:44-1d, and where, as a result of re-sentencing, the defendant is likely to serve less time in State Prison than would have been served had the defendant pleaded guilty to the offense that was subject to the presumption of imprisonment.

The prosecutor shall also oppose any application for re-sentencing by a defendant who is not eligible to be re-sentenced pursuant to the conditions established in Section 2 of L. 2009, c. 192 (e.g., where the defendant was not sentenced to a "mandatory minimum sentence" (i.e., a term of parole ineligibility), or has already been released from State Prison on parole), or if the defendant is not eligible to be sentenced in the court's discretion by reason of any disqualifying circumstance set forth in N.J.S.A. 2C:35-7b(2) (i.e., where the school zone offense was committed while on school property or a school bus, the defendant in the course of committing the offense used or threatened violence or possessed a firearm, or where the defendant is subject to an extended term under N.J.S.A. 2C:43-6f based upon a prior conviction for distribution or possession with intent to distribute a controlled dangerous substance).

## **5. Questions**

Any questions concerning the meaning or implementation of this Supplemental Directive shall be directed to the Director of the Division of Criminal Justice or designee.

## **6. Request to the Attorney General for Exemption**

A County Prosecutor or the Director of the Division of Criminal Justice in cases prosecuted by the Division may request the Attorney General, or her designee, in writing for permission to deviate from any requirements or provisions of this Supplemental Directive based upon compelling and extraordinary circumstances not foreseen by this Supplemental Directive.

## **7. Supersedure and Revision of Brimage Guidelines**

Any provision of the Brimage Guidelines inconsistent with this Supplemental Directive is hereby superseded to the extent of such inconsistency, and shall be deemed to have been amended

to comport with the provisions of this Supplemental Directive.

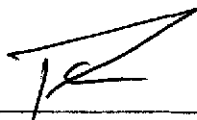
**8. Effective Date**

This Supplemental Directive shall take effect immediately and shall remain in full force and effect unless and until repealed, amended, or superseded by order of the Attorney General. In any case where the prosecutor has already tendered a Brimage plea offer but would no longer be required to do so pursuant to Part II, Section 1(a) of this Supplemental Directive, the prosecutor may, in the exercise of discretion, and with the approval of the court, "turn back the clock" in accordance with the provisions of Section 4.10 of the Brimage Guidelines, and may withdraw the Brimage plea offer and tender in its place a non-Brimage offer.



Paula T. Dow  
Attorney General

Attest:



Phillip H. Kwon  
First Assistant Attorney General

Dated: March 12, 2010