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ANNE MILGRAM
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TO: Deborah Gramiccioni, Director
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All County Prosecutors

FROM: Anne Milgram
Attorney General

DATE: November 25, 2008

SUBJECT: Correction to "Graves Act" Directive Regarding Extended Term Eligibility

Section 3 of the Attorney General Directive to Ensure Uniform Enforcement of the "Graves Act," issued on October 23, 2008, requires prosecutors to apply for an extended term of imprisonment and parole ineligibility in all cases where the defendant is eligible for the extended term by reason of a prior Graves Act conviction. Paragraph 2 of that Section states that a defendant is eligible for an extended term even if the prior crime was not designated as a Graves Act offense before January 13, 2008, the date when P.L. 2007, c. 341 was enacted.

The statement in the second paragraph is incorrect. When the Legislature recently amended N.J.S.A. 2C:43-6c and expanded the list of Graves Act offenses to include a number of possessory gun crimes, including those set forth in N.J.S.A. 2C:39-5, it did not amend N.J.S.A. 2C:44-3d (second offender with a firearm) to expand the list of crimes that serve as predicate offenses that would subject a repeat gun offender to a mandatory extended term. Accordingly, paragraph 2 of Section 3 of the Directive is hereby deleted.


It should be noted, however, that under the new law and the Attorney General Directive, a person who commits a Graves Act offense and who has previously been convicted of any Graves Act offense, including a violation of N.J.S.A. 2C:39-5a, b or c, is not eligible for a waiver or reduction of sentence pursuant to N.J.S.A. 2C:43-6.2. (See Section 6 of the Directive.) That safety valve feature is available only to a defendant "who has not previously been convicted of an offense under that subsection [referring specifically to N.J.S.A. 2C:43-6c]." In other words, the mandatory sentence waiver/reduction provision, unlike the repeat offender extended term provision set forth in N.J.S.A. 2C:44-3d, incorporates the expansion of Graves Act offenses listed in N.J.S.A. 2C:43-6c as amended by P.L. 2007, c. 341.



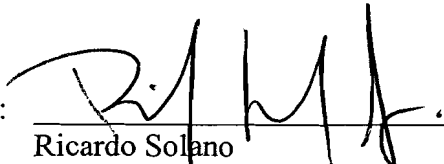
For purposes of implementing N.J.S.A. 2C:43-6.2, a prior conviction for any offense now listed in N.J.S.A. 2C:43-6c shall be deemed to disqualify the defendant from a waiver or reduction of the mandatory sentence for the present offense, even if the prior conviction was not enumerated in N.J.S.A. 2C:43-6c at the time it was committed. This interpretation is founded on the well-settled principle that recidivist enhancement statutes do not violate the *Ex Post Facto Clause* if they were on the books at the time the last offense was committed. Cf., State v. Oliver, 162 N.J. 580, 586-87 (2000), citing Gryger v. Burke, 334 U.S. 728, 732, 68 S.Ct. 1256, 1258, 92 L.Ed. 1683, 1687 (1948) (sentence as habitual criminal is not viewed as new jeopardy or additional penalty for earlier crimes; rather, it is stiffened penalty for latest crime). In the present context, this principle applies with equal if not greater force where the statute at issue does not prescribe an enhanced sentence, but rather disqualifies a repeat offender from the lenity that could otherwise be afforded to certain first offenders.

Accordingly, a repeat Graves Act offender upon conviction must be sentenced to the statutorily-prescribed minimum term of imprisonment and parole ineligibility applicable to the present Graves Act offense for which he or she is convicted, except as may be authorized pursuant to Section 7 of the Directive (substantial cooperation agreements).

For the forgoing reasons, I am appending hereto a corrected version of the Directive that replaces the one that was originally issued on October 23. The corrected version also revises the supervisory approval process in certain sentence reduction cases under N.J.S.A. 2C:43-6.2, and makes a technical revision to confirm that the Directive applies to cases where police on their own authority have filed a complaint lawfully charging a Graves Act crime.



Anne M. Ingram
Attorney General

Attest: 

Ricardo Solano
First Assistant Attorney General



JON S. CORZINE
Governor


State of New Jersey
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ANNE MILGRAM
Attorney General

MEMORANDUM

TO: Deborah Gramiccioni, Director
Division of Criminal Justice

All County Prosecutors

FROM: Anne Milgram 
Attorney General

DATE: October 23, 2008

SUBJECT: Attorney General Directive to Ensure Uniform Enforcement of the "Graves Act" (Corrected Version as of 11/25/08) ¹

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The Directive originally issued on October 23, 2008 was amended by order of the Attorney General on November 25, 2008.



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1. INTRODUCTION AND OVERVIEW

Earlier this year, Governor Corzine signed into law a package of bills that provide police and prosecutors with powerful new tools to address the State's gun and gang problems. The Governor and Legislature by enactment of these laws intended to send a clear message that the unlawful possession of firearms, especially by those who are affiliated with street gangs, will not be tolerated. These new laws recognize that easy accessibility to firearms prompts spontaneous shootings and facilitates the spread of a culture of violence throughout the State. These laws reflect a sound policy judgment that the cycle of violence can be disrupted by the threat of arrest and vigorous prosecution. It now becomes the responsibility of police and prosecutors to make certain that these new gun laws are strictly and uniformly enforced in accordance with the Legislature's intent and the Governor's Strategy for Safe Streets and Neighborhoods.

The new laws expand the scope of the "Graves Act," N.J.S.A. 2C:43-6c, which requires imposition of a minimum term of imprisonment and parole ineligibility upon conviction for certain gun-related crimes. Until recently, the Graves Act applied only when a person was convicted of possessing or using a firearm while in the course of committing certain predicate crimes, or possession of a firearm for an unlawful purpose in violation of N.J.S.A. 2C:39-4a. Effective January 13, 2008, the list of offenses that are subject to the Graves Act was significantly expanded by enactment of P.L. 2007, c. 341, and that list now includes a number of possessory firearms crimes. Specifically, Graves Act mandatory sentencing provisions now also apply if a person is convicted of:

- unlawful possession of a machine gun, handgun, rifle or shotgun in violation of N.J.S.A. 2C:39-5a, b, or c. The offense of unlawful possession of a handgun, other than one in the nature of an air gun or spring gun, has also been upgraded to a second degree crime;
- Possession of a sawed-off shotgun in violation of N.J.S.A. 2C:39-3b;
- possession of a defaced firearm in violation of N.J.S.A. 2C:39-3d;
- possession of a firearm while committing a drug distribution or

possession with intent to distribute offense in violation of N.J.S.A. 2C:39-4.1a;

- possession of certain weapons by persons previously convicted of specified offenses, in violation of a violation of N.J.S.A. 2C:39-7a or b(2);
- the manufacture, transport, or disposition of a machine gun, sawed-off shotgun, or assault firearm in violation of N.J.S.A. 2C:39-9 a, b, or g;
- the defacement of a firearm in violation of N.J.S.A. 2C:39-9e.

Except as provided in N.J.S.A. 2C:43-6.2, a person convicted of any of the foregoing firearms crimes must be sentenced to a term of imprisonment and minimum term of parole ineligibility fixed at, or between, one-third to one-half of a sentence imposed, or three years, whichever is greater, or eighteen months in cases involving crimes of the fourth degree. Furthermore, a person convicted of a Graves Act offense who has previously been convicted of certain firearms offenses must be sentenced to a mandatory extended term of imprisonment pursuant to N.J.S.A. 2C:44-3d. When that repeat gun offender statute applies, the sentence imposed must include a minimum term of parole ineligibility fixed at or between one-third to one-half of the extended term sentence, or *five* years, whichever is greater. In addition, N.J.S.A. 2C:39-5(i) provides that a person convicted of the unlawful possession of a machine gun, handgun or assault firearm must be sentenced to a parole ineligibility term of five years if the sentencing court finds that the organized criminal activity aggravating factor set forth in N.J.S.A. 2C:44-1a (5) applies.

To ensure statewide uniformity in the enforcement of the Graves Act, and to provide reasonable incentives for guilty defendants to accept responsibility by pleading guilty in a timely manner so as to maximize deterrence by ensuring the swift imposition of punishment, this Directive instructs prosecutors to tender an initial standardized plea offer pursuant to N.J.S.A. 2C:43-6.2 that will in typical cases result in the defendant serving a State Prison term of one year without possibility of parole. Subsequent plea offers must require the defendant to serve three years of parole ineligibility unless the prosecutor determines that the applicable mitigating factors substantially outweigh the aggravating circumstances. Prosecutors are authorized to permit a defendant to enter pretrial

intervention only in rare cases involving extraordinary and compelling circumstances. Prosecutors are authorized to permit a probationary sentence upon conviction of a Graves Act crime only where the circumstances of the case fall outside the heartland of the legislative policy to deter unlawful gun possession.

2. CHARGING, DISMISSALS AND CHARGE BARGAINING

a. Required Charging of Graves Act Offenses

When there is a lawful basis for charging a person with a crime that is subject to the Graves Act, the County Prosecutor, or the Division of Criminal Justice in a matter investigated by the Division, shall file or approve the charge(s) if the police have not already filed a complaint, and shall pursue the imposition of the prescribed term of imprisonment and parole ineligibility pursuant to N.J.S.A. 2C:43-6c (recently expanded Graves Act), 2C:43-6g (Graves Act for machine guns or assault firearms possessed for an unlawful purpose or during commission of certain predicate crimes), or 2C:43-7c (repeat Graves Act extended term), except as may otherwise be authorized by this Directive.

b. Cases Involving Assault Firearms

When there is a lawful basis for charging a violation of N.J.S.A. 2C:39-5f (unlawful possession of an assault firearm), but the defendant is not subject to enhanced punishment pursuant to N.J.S.A. 2C:43-6g, the prosecuting agency shall, in addition to the 2C:39-5f charge, file or approve a complaint for violation of N.J.S.A. 2C:39-5 b. or c., as appropriate, depending upon whether the assault firearm was a handgun, or a rifle or shotgun, in order to make certain that the defendant is charged with a crime that is subject to the Graves Act.

c. Dismissals and Downgrades

A prosecuting agency shall not dismiss or downgrade, or agree to dismiss or downgrade, any complaint or count of an indictment or accusation charging an offense that is subject to a minimum term of imprisonment pursuant to N.J.S.A. 2C:43-6c, 2C:43-6g, or 2C:43-7c, other than an offense that involves only the simple possession of a spring gun, air gun, or other weapon of a similar nature the possession of which is a third-degree crime under N.J.S.A. 2C:39-5b, unless:

- i. The prosecutor represents to the court on the record, either *in camera* or in open court, that there is insufficient evidence to warrant a conviction, or that the possibility of acquittal is so great that dismissal is warranted in the interests of justice; or
- ii. The defendant will be sentenced to a term of imprisonment and a term of parole ineligibility at least equal in length to that which would have been required for the Graves Act offense being dismissed, (e.g., the defendant is pleading guilty to an offense that is subject to the No Early Release Act, N.J.S.A. 2C:43-7.2); or
- iii. The prosecutor states on the record, either *in camera* or in open court, that the dismissal or downgrade is essential to assure defendant's cooperation with the prosecution of another. See also Section 6, infra.
- d. Aggregate Data Reporting to Attorney General

On a quarterly basis, each prosecuting agency shall report to the Attorney General on the aggregate number of Graves Act charges that were dismissed or downgraded during the reporting period pursuant to this section for each of the categories listed in subsection c. of this Section (*e.g.*, charges dismissed for lack of proofs, cases where defendants received greater or equivalent parole ineligibility terms, and charges dismissed in exchange for the defendant's substantial cooperation).

3. PURSUING EXTENDED TERM APPLICATIONS

A prosecuting agency shall apply for an extended term of imprisonment in any case where defendant is subject to an extended term pursuant to N.J.S.A. 2C:43-7c and 2C:44-3d (second offender with a firearm), except where the present offense involves simple possession of an air gun, spring gun, or other weapon of a similar nature, the possession of which is a third degree crime under N.J.S.A. 2C:39-5b. (Note that N.J.S.A. 2C:44-3d was not amended by P.L. 2007, c. 341 to expand the list of Graves Act crimes that serve as predicate offenses that subject a repeat gun offender to a mandatory extended term.) Where the defendant is subject to a mandatory extended term pursuant to N.J.S.A. 2C:44-3d, the prosecuting agency shall not agree to a term of parole ineligibility of less than five

years except as may be authorized pursuant to Section 7 of this Directive (substantial cooperation agreements), or where the possibility of acquittal or suppression of critical evidence is so great that a lesser term of parole ineligibility is warranted in the interests of justice.

4. ORGANIZED CRIMINAL ACTIVITY SENTENCING ENHANCEMENT

a. Systems for Identifying Graves Act Defendants for Whom the Organized Criminal Activity Factor Applies

Each prosecuting agency shall establish and continually enhance information sharing systems and procedures to identify defendants who might be subject to the aggravating sentencing factor set forth in N.J.S.A. 2C:44-1a (5), which applies where there is a substantial likelihood that the defendant is involved in organized criminal activity. At a minimum, the prosecuting agency shall consult with its countywide gang and gun task force to determine whether a Graves Act defendant might be subject to this aggravating factor.

b. Presentation of Organized Criminal Activity Information to the Sentencing Court

Where a prosecuting agency has information concerning the defendant's involvement in organized criminal activity (*e.g.*, information that the defendant is a member or associate of some identifiable group engaged in criminal activity that has a common name or identifying sign, symbol, tattoo or other physical marking, style of dress or use of hand signs or other indications of association or common leadership), the prosecuting agency shall seek enhanced punishment pursuant to N.J.S.A. 2C:39-5(i), unless the presentation of such information at the sentencing hearing would compromise an investigation or source of intelligence information, or except as may be provided by Section 6 or 7 of this Directive. Because this particular aggravating factor focuses on the background of the offender, rather than the nature and severity of the offense, a prosecuting agency should seek the enhanced sentence regardless of whether the firearm is linked to organized criminal activity. See State v. Merlino, 208 N.J. Super. 247 (Law Div. 1984) (prosecution may establish at sentencing that there was a substantial likelihood that the defendant was involved in organized criminal activity in a case where the particular crime for which the defendant was convicted was not related to the defendant's organized crime activity).

c. Notice to Defendant of Intention to Seek Enhanced Sentence

In order to ensure that the defendant is advised of the penal consequences of a plea as required by State v. Kovack, 91 N.J. 476 (1982) and State v. Burford, 163 N.J. 16 (2000), when the prosecuting agency tenders a plea offer, it shall inform the defendant if the State intends to present evidence or information at the sentencing hearing concerning defendant's membership in or affiliation with an organization or group that engages in criminal activity, or if the prosecutor otherwise intends to ask the sentencing court to find the organized criminal activity sentencing factor

5. STRICT ENFORCEMENT OF THE PRESUMPTION OF INELIGIBILITY FOR PRE-TRIAL INTERVENTION IN GRAVES ACT CASES

a. Consideration of All Relevant Circumstances

Persons charged with any first or second degree crime, or with an offense that carries a mandatory minimum term of imprisonment, such as the Graves Act, are subject to a presumption of PTI ineligibility, and these defendants must show "compelling reasons" to be admitted to pretrial intervention. See State v. Nwobu, 139 N.J. 236, 252 (1995) (further noting that "[t]o forestall imprisonment a defendant must demonstrate something extraordinary or unusual, something 'idiosyncratic,' in his or her background.>").

In light of the Legislature's recent policy decision to significantly upgrade the seriousness of firearm offenses, it is expected that prosecutors will consent to a defendant's admission to PTI only in rare cases involving extraordinary and compelling circumstances that fall outside the heartland of the legislative policy to deter unauthorized gun possession (e.g., the defendant has no prior involvement with the criminal justice system, he or she lawfully acquired and possessed the firearm in a different state and the defendant's presence in New Jersey was incident to lawful travel). Prosecutors should not, however, categorically deny a defendant's PTI application. Rather, prosecutors should consider all relevant factors set forth in the PTI Guidelines and in N.J.S.A. 2C:43-12 to determine whether there are compelling case-specific reasons to overcome the presumption against admission. See State v. Caliguiri, 158 N.J. 28 (1999).

b. County Prosecutor or Director Approval Required

A prosecuting agency shall not consent to a Graves Act defendant's admission to PTI unless the County Prosecutor, or in cases prosecuted by the Division of Criminal Justice, the Director, personally approves the application in writing, except that the personal approval of the County Prosecutor or Director is not required when the offense involves only the simple possession of a spring gun, air gun, or other weapon of a similar nature, the possession of which is a third degree crime under N.J.S.A. 2C:39-5b.

c. Statement of Reasons to the Attorney General

In any case where the County Prosecutor or Director of the Division of Criminal Justice personally approves a Graves Act defendant's application for PTI pursuant to paragraph b. of this Section, the Prosecutor or Director shall within 30 days of the approval provide to the Attorney General or designee a complete statement of reasons describing all pertinent and available facts relevant to the factors enumerated in the PTI Guidelines. The statement of reasons should not simply repeat the relevant waiver factors and aggravating and mitigating circumstances, but should be fact-specific and not vague. See State v. Nwobu, 139 N.J. 236 (1995). The statement of reasons must also describe the steps taken and sources consulted to determine whether there is any reason to believe that the defendant is involved in organized criminal activity, see Section 4, which aggravating circumstance would effectively preclude the defendant's admission to PTI in all but the most extraordinary and remarkable circumstances. Cf. PTI Guideline Criterion #8 (defendant's crime constitutes part of a continuing pattern of anti-social behavior).

d. Notification to Attorney General Not Required to Object to PTI

In the event that a prosecutor determines after full and careful consideration of all relevant circumstances that it is appropriate to sustain the presumption of ineligibility and object to a defendant's admission to PTI, the prosecutor shall not be required to notify the Attorney General or designee of the decision to object to PTI.

e. Adverse Rulings

If any court finds that a prosecutor has abused discretion in refusing to consent to a defendant's admission to pre-trial intervention, or if the court otherwise admits the defendant to PTI over the prosecutor's objection or without the prosecutor's consent, the prosecutor shall immediately notify the Attorney General, or designee, in writing, and shall appeal the ruling.

6. WAIVER OR REDUCTION OF GRAVES ACT MANDATORY MINIMUM SENTENCE

a. Statutory Authority for Waiver or Reduction

N.J.S.A. 2C:43-6.2 specifies a procedure to allow for the reduction or waiver of an otherwise mandatory minimum term of imprisonment and parole ineligibility imposed under the Graves Act. Specifically, the statute provides that:

On a motion by the prosecutor made to the assignment judge that the imposition of a mandatory minimum term of imprisonment under ... subsection c. of N.J.S. 2C:43-6 for a defendant who has not previously been convicted of an offense under that subsection ... does not serve the interests of justice, the assignment judge shall place the defendant on probation pursuant to paragraph (2) of subsection b. of N.J.S. 2C:43-2 or reduce to one year the mandatory minimum term of imprisonment during which the defendant would be ineligible for parole. The sentencing court may also refer a case of a defendant who has not previously been convicted of an offense under that subsection to the assignment judge, with the approval of the prosecutor, if the sentencing court believes that the interests of justice would not be served by the imposition of a mandatory minimum term.

The procedures and criteria set forth in paragraphs b-e of this Section are intended to ensure statewide uniformity in the exercise of prosecutorial discretion in implementing N.J.S.A. 2C:43-6.2.

Note that where the defendant has previously been convicted of a Graves Act offense, he or she is not eligible for a waiver or reduction pursuant to N.J.S.A. 2C:43-6.2. For purposes of implementing N.J.S.A. 2C:43-6.2, a prior conviction for any offense now listed in N.J.S.A. 2C:43-6c shall be deemed to disqualify the defendant from a waiver or reduction of the mandatory sentence for the present offense, even if the prior conviction was not enumerated in N.J.S.A. 2C:43-6c at the time it was committed. For example, a person who commits a violation of N.J.S.A. 2C:39-5a, b, or c after January 13, 2008 who had previously been convicted of a violation of N.J.S.A. 2C:39-5a, b, or c is ineligible for waiver or reduction of the mandatory sentence under N.J.S.A. 2C:43-6.2, notwithstanding that the prior 2C:39-5 offense was committed before January 13, 2008, at a time when a violation of 2C:39-5 was not deemed to be a Graves Act crime. For these individuals, the minimum legal sentence is three years of parole ineligibility, except as may be authorized pursuant to Section 7 of this Directive (substantial cooperation agreements).

This interpretation of N.J.S.A. 2C:43-6.2 is founded on the well-settled principle that recidivist enhancement statutes do not violate the *Ex Post Facto Clause* if they were on the books at the time the last offense was committed. Cf., State v. Oliver, 162 N.J. 580, 586-87 (2000), citing Gryger v. Burke, 334 U.S. 728, 732, 68 S.Ct. 1256, 1258, 92 L.Ed. 1683, 1687 (1948) (sentence as habitual criminal is not viewed as new jeopardy or additional penalty for earlier crimes; rather, it is stiffened penalty for latest crime). In the present context, this principle applies with equal if not greater force where the statute at issue does not prescribe an enhanced sentence (e.g., an extended term), but rather disqualifies a repeat offender from the lenity that could otherwise be afforded to certain first offenders.

b. Approval by County Prosecutor or First Assistant, or Director or Deputy Director

A prosecuting agency shall not i) file a motion pursuant to N.J.S.A. 2C:43-6.2 to waive or reduce a minimum term of imprisonment and parole ineligibility, ii) agree as part of a negotiated disposition to file such a motion, or iii) approve or agree to approve a sentencing court's referral of the case to the assignment judge for reduction or a waiver of a minimum term, unless the County Prosecutor or First Assistant Prosecutor, or Director of the Division of Criminal Justice or a Deputy Director in any case prosecuted by the Division, has personally approved the waiver or reduction in writing, except that approval in writing by a supervisor designated by the County Prosecutor or Director shall be sufficient where a

standardized sentence reduction plea offer is tendered pursuant to Section 6c(4), or where the case involves only the simple possession of a spring gun, air gun, or other weapon of a similar nature, the possession of which is a third degree crime under N.J.S.A. 2C:39-5b. The County Prosecutor and Director are authorized to designate one or more supervisors to review and approve standardized plea offer sentence reductions under Section 6c(4) and plea offers in cases involving only simple possession of spring guns, air guns or similar weapons.

c. Standards For Exercising Prosecutorial Discretion

1. Relevant Factors

In determining whether to move for or approve the waiver or reduction of the minimum term of parole ineligibility pursuant to N.J.S.A. 2C:43-6.2, the prosecuting agency shall consider all relevant circumstances concerning the offense conduct and the offender, including those aggravating and mitigating circumstances set forth in N.J.S.A. 2C:44-1. The prosecuting agency may also take into account the likelihood of obtaining a conviction at trial.

2. Determination of Involvement in Organized Criminal Activity

A prosecuting agency shall not move for or approve a waiver or reduction pursuant to N.J.S.A. 2C:43-6.2 without taking reasonable steps to determine whether the defendant might be subject to the aggravating sentencing factor set forth in N.J.S.A. 2C:44-1a(5). See also Section 4, supra. The steps taken to make this determination shall be memorialized pursuant to Section 6d. Where the organized criminal activity aggravating factor applies, the prosecuting agency shall not move for or approve a waiver or reduction except as may be authorized pursuant to Section 7, or where there is a significant possibility of an acquittal or suppression of critical evidence.

3. Strict Presumption Against Probationary Term

A prosecuting agency shall not move for or approve a sentence of probation except for extraordinary and compelling reasons that take the case outside the heartland of the legislative policy to deter unauthorized gun possession (e.g., the defendant has no prior involvement with the criminal justice system, the firearm

was unloaded, and the circumstances make clear that the firearm posed no risk to officer or public safety), so that imposition of a state prison term would constitute a serious injustice that overrides the need to deter others from unlawfully possessing a firearm.

4. Initial Standardized Plea Offer Reduction to One-Year Term

The prosecuting agency as part of the State's initial plea offer shall agree to move pursuant to N.J.S.A. 2C:43-6.2 for a reduction to a one-year term of parole ineligibility, unless the prosecuting agency determines that the aggravating factors applicable to the offense conduct and offender outweigh any applicable mitigating circumstances, or unless the prosecuting agency determines that a sentence reduction to a one-year term parole ineligibility would undermine the investigation or prosecution of another. The prosecuting agency shall fix a time or event (e.g., indictment) at which the initial plea offer shall expire.

5. Subsequent Plea Offers

If the defendant does not accept the prosecuting agency's initial plea offer and pleads guilty pursuant to a subsequent plea offer, the prosecuting agency shall not move for or approve a reduction or a waiver pursuant to N.J.S.A. 2C:43-6.2 unless the prosecuting agency determines that the mitigating factors applicable to the offense conduct and the offender substantially outweigh any applicable aggravating factors.

6. Post Conviction Waiver/Reduction

A prosecuting agency shall not move for or agree to a waiver or reduction pursuant to N.J.S.A. 2C: 43-6.2 after a defendant has been convicted at trial except in exchange for the defendant's substantial cooperation in the investigation or prosecution of another. See also, Section 7.

d. Memorialization of Reasons

The prosecuting agency shall document in the case file its analysis of all of the relevant aggravating and mitigating circumstances, whether or not the agency moves for or approves a waiver or reduction pursuant to N.J.S.A. 2C:43-6.2. Furthermore, where the prosecuting agency is seeking or approving a probationary sentence, the memorialization of reasons must explain why the imposition of a

one-year term of imprisonment and parole ineligibility would constitute a serious injustice that overrides the need to deter others from unlawfully possessing firearms. A copy of all case-specific memorializations required by this Section shall also be maintained in a separate cumulative file in order to facilitate such audits as the Attorney General may from time-to-time direct to ensure the proper and uniform implementation of this Directive. The case file and cumulative audit file shall also document the information sources consulted to determine whether the defendant might be subject to the aggravating sentencing factor set forth in N.J.S.A. 2C:44-1a(5) (substantial likelihood that the defendant is involved in organized criminal activity).

e. Data Reporting to Attorney General

On a quarterly basis, each prosecuting agency shall report to the Attorney General the following information, on a form or in a manner as may be prescribed by the Director of the Division of Criminal Justice, in order to permit the Attorney General to monitor the implementation and effects of this Directive:

- the number of pre-indictment and post-indictment pleas where the prosecutor moved for or approved a waiver or reduction of the minimum term;
- the number of trials, and trial results, and
- such other information that the Director of the Division of Criminal Justice determines is relevant to the Attorney General's monitoring and oversight responsibilities.

f. Specification of Approved Reduction

When a prosecuting agency moves for or approves a reduction or waiver of a mandatory minimum term pursuant to N.J.S.A. 2C:43-6.2, the prosecuting agency shall specify to the court whether it is seeking or approving a reduction to a one-year term of parole ineligibility, or is seeking or approving imposition of a probationary term.

g. Unauthorized Sentence Reductions

In the event that a court waives or reduces a mandatory minimum term without the prosecutor's approval, or if the prosecuting agency applies for or approves a reduction to a one-year term of parole ineligibility and the court imposes a probationary term, the prosecuting agency shall immediately notify the Director of the Division of Criminal Justice, shall seek a stay of the sentence, and shall appeal the sentence. (Note that where the offense is graded as a second degree crime, such as unlawful possession of a handgun in violation of N.J.S.A. 2C:39-5b, the defendant is subject to a presumptive State Prison sentence pursuant to N.J.S.A. 2C:44-1(d), separate and apart from the Graves Act. This presumption can only be overcome by a finding that imprisonment would constitute a serious injustice that overrides the need to deter others, and a prosecutor is authorized to appeal a probationary or county jail sentence.)

7. AUTHORITY TO ENTER INTO SUBSTANTIAL COOPERATION AGREEMENTS

Notwithstanding any other provision of this Directive, a prosecutor is authorized to dismiss a charge or to waive or reduce an otherwise mandatory minimum term under the Graves Act in exchange for the defendant's cooperation in assisting the prosecutor or another law enforcement agency in the identification, investigation, apprehension or prosecution of another, provided that the cooperation is of substantial value to the State, as determined by a supervisor designated pursuant to this Section. A defendant's agreement to make a timely acceptance of responsibility by pleading guilty shall not by itself constitute substantial cooperation for the purposes of this Directive.

To ensure uniformity and to permit meaningful review by the Attorney General, the prosecutor's case file must include a detailed description of the nature, extent, significance, value and usefulness of the defendant's assistance, including a description of the: i) usefulness, completeness and reliability of any information or testimony provided by the defendant, ii) the extent to which the defendant's assistance concerns the criminal activity of other specified person(s) who are more culpable than the defendant, and iii) any injuries suffered or any risk of danger or injury to the defendant or his or her family resulting from the substantial cooperation.

Any cooperation agreement which results in the dismissal or downgrading of a Graves Act charge, or that results in a waiver or reduction of the statutorily prescribed minimum term of parole ineligibility, must be approved in writing by a supervisor who is authorized by the County Prosecutor or Director of the Division of Criminal Justice to approve such agreements. The County Prosecutor and Director are authorized to designate one or more persons with sufficient experience and expertise to approve such agreements.

In addition, the defendant's agreement to provide substantial cooperation shall be put in writing and shall spell out the reasonable expectations and obligations of both the defendant and the State in sufficient detail so that these expectations and agreed-upon responsibilities are clearly understood and can be reviewed upon request by the Attorney General, or designee, and enforced by a court if necessary.

On a quarterly basis, each prosecuting agency shall report to the Attorney General on the aggregate number of cases during the reporting period where the mandatory minimum term was waived or reduced in exchange for a defendant's substantial cooperation. The Attorney General may from time to time audit the prosecutor's case files to ensure uniform compliance with this Directive.

8. REQUEST TO 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 designee, in writing for permission to deviate from any of the requirements or provisions of this Directive based upon compelling and extraordinary circumstances not foreseen by this Directive.

9. LITIGATION NOTICE AND SUPPORT

The County Prosecutor shall advise the Director of the Division of Criminal Justice, or designee, of any litigation concerning the interpretation or implementation of the Graves Act, or concerning any provision of this Directive. The Division may assist in the development of legal briefs or otherwise to ensure the uniform enforcement of this Directive.

10. QUESTIONS

All questions concerning the interpretation and implementation of this Directive shall be addressed to the Director of the Division of Criminal Justice or designee.

11. EFFECTIVE DATE

This Directive shall take effect immediately and shall apply to all Graves Act offenses committed on or after January 13, 2008. This Directive shall remain in full force and effect unless and until amended or superceded by order of the Attorney General.

/s/ Anne Milgram

Anne Milgram
Attorney General

Attest: /s/ Ricardo Solano

Ricardo Solano
First Assistant Attorney General