

**MAY 1999 REVISIONS
TO
ATTORNEY GENERAL DIRECTIVE 1998-1
PROSECUTING CASES UNDER
THE COMPREHENSIVE DRUG REFORM ACT**

This Directive amends § 9 of Attorney General Directive 1998-1 in accord with § 16 of that Directive. Section 9 is amended to read as follows:

9. Criteria for Admitting Persons Charged With N.J.S.A. 2C:35-7 Into PTI.

In State v. Caliguiri, 158 N.J. 28 (1999), the Supreme Court held that although participation in pretrial intervention is presumptively unavailable to a defendant charged with distribution or possession of a controlled substance with intent to distribute while within 1,000 feet of school property, the prosecutor in that case, acting in accordance with the provisions of a prior Attorney General directive, mistakenly denied defendant entry into the program on a categorical basis, without allowing the defendant an opportunity to rebut the presumption. The Court rejected the Attorney General's argument that defendants who are subject to a mandatory term of imprisonment and parole ineligibility are ineligible for PTI. The Court instead held that the decision regarding participation in PTI is primarily individualistic in nature, and a prosecutor must therefore consider the individual defendant's features that bear on his or her amenability to rehabilitation. The Court further explained that "the Legislature considered [N.J.S.A. 2C:35-7] a serious crime," and adopted the standard applicable to defendants charged with second degree crimes: an offender is eligible for admission into PTI if he demonstrates "compelling reasons." 158 N.J. at __; slip op. at 18-19. The Court referred to State v. Nwobu, 139 N.J. 236, 252-53 (1995), as illustrating what constitutes compelling reasons. The Court cautioned, "However, when a defendant is charged with a third-degree offense and the prosecutor has discretion to waive incarceration, the weight of the evidence to rebut the presumption against PTI need not be as great as if the defendant had been charged with a second-degree offense." 158 N.J. at __; slip op. at 21.

Accordingly, a prosecutor may not categorically deny a defendant's application for PTI, but rather shall consider all of the facts and circumstances deemed to be relevant pursuant to N.J.S.A. 2C:43-12 and the PTI Guidelines reproduced after R. 3:28. The prosecutor shall also consider all applicable facts and circumstances determined to be relevant under the Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12.

Recognizing that lack of uniformity by prosecutors in handling PTI applications in school zone cases would undermine the statewide prosecution policies in the appended Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12,

a prosecutor shall not consent to an application for pretrial intervention for any person charged with a violation of N.J.S.A. 2C:35-7 (Distribution or Possession With Intent to Distribute Within a Drug-Free School Zone) or any second-degree crime under Chapter 35 of Title 2C unless:

a. The prosecutor determines that the proofs available for trial would not sustain a conviction on that charge; or,

b. There are compelling reasons pertaining to the offense or the offender that would overcome the presumption that PTI is unavailable. It is expected that this presumption of non-availability would be especially difficult to overcome if the offense involved weapons within the meaning of Part IV of the Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12, or where the defendant would be subject to any of the Special Application and Enhancement Features or any Aggravating Adjustment Factor described in those Attorney General Guidelines.

In balancing and applying the PTI eligibility criteria set forth in N.J.S.A. 2C:43-12, the prosecutor shall not consider the offense defined in N.J.S.A. 2C:35-7, or any other crime defined in Chapter 35 of Title 2C, to be a "victimless offense" within the meaning of N.J.S.A. 2C:43-12a(3). In addition, given the need to send the strongest possible message in order to deter all forms of illicit drug-distribution activities, especially those occurring on or near school grounds or involving a significant (i.e., second degree) quantity of drugs, the prosecutor in formulating his or her recommendation shall consider statutory eligibility criteria #7 ("the needs and interests of the victim and society"), #14 ("whether or not the crime is of such nature that the value of supervisory treatment would be outweighed by the public need for prosecution"), and #17 ("whether or not the harm done to society by abandoning criminal prosecution would outweigh the benefits to society from channeling an offender into a supervisory treatment program") as militating against the admission to PTI of a person charged with a provable violation of N.J.S.A. 2C:35-7 or any second-degree crime under Chapter 35 of Title 2C.

The Legislature by adoption of N.J.S.A. 2C:35-14 has established a rehabilitation option specifically addressed to the needs of drug-dependent persons who commit an offense under N.J.S.A. 2C:35-7 or an offense under Chapter 35 that is subject to the statutory presumption of imprisonment. Accordingly, and in order to protect public safety, where the defendant is charged with a violation of N.J.S.A. 2C:35-7 or a second-degree crime under Chapter 35 of Title 2C, in addition to considering the foregoing criteria in determining whether to overcome the presumption against admission, a prosecutor shall not consent to the defendant's application for PTI if the defendant is drug dependent within the meaning of N.J.S.A. 2C:35-2 unless, as a condition of pretrial intervention, the defendant will be admitted to a suitable residential treatment facility for inpatient treatment for a period of not less than six (6) months. Given the limited

resources and supervisory capabilities of the PTI program, and the inherent risk of relapse and re-offense, a drug-dependent drug dealer should, in the absence of compelling and extraordinary circumstances, be prosecuted and sentenced pursuant to N.J.S.A. 2C:35-14 and § 12 of this Directive rather than be diverted to PTI.

Where the prosecutor determines to consent to an application for pretrial intervention by a defendant charged with a violation of N.J.S.A. 2C:35-7 or any second-degree crime under Chapter 35 of Title 2C, the prosecutor shall advise the Director of the Division of Criminal Justice in writing of the basis for the decision. The prosecutor must include in the correspondence to the Director a succinct description of the facts that constitute the "compelling reasons" that overcome the presumption against PTI eligibility, and must also account for any applicable special offense characteristic, aggravating factor, or special application and enhancement feature under the Guidelines that militates against overcoming the presumption of unavailability. If a court admits a defendant charged with a violation of N.J.S.A. 2C:35-7 or a second-degree crime under Chapter 35 of Title 2C into PTI over the prosecutor's objection, the prosecutor shall appeal the ruling and shall notify the Director of the Division of Criminal Justice.


This revision to Directive 1998-1 shall take effect immediately and shall remain in effect until such time as it may be revised or repealed by the Attorney General.

GIVEN under my hand and seal this seventeenth day of May, in the year of our Lord, one thousand nine hundred and ninety-nine, and of the Independence of the United States, the two hundred and twenty-second.



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ATTEST:



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