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**SUPPLEMENTAL DIRECTIVE
REVISING THE ATTORNEY GENERAL GUIDELINES
FOR NEGOTIATING CASES UNDER N.J.S.A. 2C:35-12
("BRIMAGE" GUIDELINES)**

The Attorney General Guidelines for Negotiating Cases Under N.J.S.A. 2C:35-12 ("Brimage" Guidelines) issued on May 20, 1998 are revised as follows:

I. ESTABLISHMENT OF NEW TRIGGERING EVENT FOR ESCALATING TO A FINAL POST-INDICTMENT PLEA OFFER.

Under the current "Brimage" Guidelines, the initial post-indictment plea offer expires either 20 days after it has been offered or immediately upon the convening of a hearing under R. 3:5-7(d) and 3:9-1(e). The provision that requires an automatic escalation in the event that a pretrial suppression hearing is convened is premised on a recognition that the prosecutorial and judicial resources expended in litigating a pretrial motion to suppress evidence are often comparable to the resources that would be expended at a trial on the merits of the drug charge, since the pretrial hearing and any ensuing trial will often involve the same witnesses describing the same events and transactions.

Experience under the "Brimage" Guidelines confirms that a significant proportion of prosecutorial resources are expended *before* the pretrial hearing date (i.e., e.g, reviewing reports and interviewing police witnesses, researching legal issues, and preparing formal briefs in response to a defendant's pretrial motion). Accordingly, the "Brimage" Guidelines are hereby amended to permit a prosecutor to tender a "final post-indictment offer"[1] on the date when the State's brief is filed or required to be filed pursuant to R. 3:5-7(b) or a scheduling order fixed by the

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[1] It should be noted that this escalation event could occur before the return of an indictment were a court to direct a prosecutor to file a brief responding to a defendant's motion to suppress prior to indictment. See Application Note #14, establishing an automatic escalation to a final post-indictment offer when a court convenes a pre-indictment suppression hearing.

court, rather than upon the convening of a hearing under R. 3:5-7(d) and 3:9-1(e). To ensure that the defendant has a reasonable opportunity to accept the offer before it graduates to a final post-indictment offer, the plea offer worksheet should expressly advise the defendant if the offer will expire upon the filing of the State's brief in response to any such motion to suppress and, where feasible, the worksheet provided to the court and the defendant should indicate the specific date when the plea offer will expire and be replaced by a final post-indictment offer.

II. EXPRESS AUTHORIZATION TO ESTABLISH A "PLEA CUT-OFF RULE."

At least one prosecutor's office has established a general plea cut-off policy for all cases (not just those involving drug offenses). This prosecutor-controlled cut-off is invoked before the formal, court-controlled cut-off rule is imposed pursuant to R. 3:9-3(g). The "Brimage" Guidelines are hereby amended to authorize prosecutors to adopt a plea cut-off policy provided, however, that the prosecutor must afford a defendant a reasonable opportunity to accept a "final post-indictment offer" calculated pursuant to the "Brimage" Guidelines before that final offer expires and is withdrawn. Nothing in this section shall be construed to authorize a prosecutor to refrain from tendering a pre-indictment, initial post-indictment, or final post-indictment offer as may be required by the "Brimage" Guidelines.

III. ESTABLISHMENT OF NEW COMPLEX/PROTRACTED LITIGATION DOWNWARD ADJUSTMENT.

A. Background.

The "Brimage" Guidelines impose strict limitations upon a prosecutor's authority to reduce a plea offer based upon anticipated trial proof problems. Whereas prior Attorney General guidelines had authorized a true "departure" based upon an assessment of trial proof sufficiency (meaning that a prosecutor had unlimited discretion to reduce or waive altogether the term of parole ineligibility on this ground), the "Brimage" Guidelines only permit the prosecutor to reduce the recommended sentence by a discrete amount. Specifically, a prosecutor is authorized only to adjust the plea offer to the bottom of the range in the applicable cell in the Table of Authorized Dispositions or, in some cases, to tender an offer three months below the bottom of the range. Furthermore, under the "Brimage" Guidelines and Attorney General Directive 1998-1, prosecutors are generally precluded from dismissing a school-zone count in return for the defendant's agreement to plead guilty to a non-school zone drug distribution-type offense, that is, one that is not subject to a waivable mandatory term of imprisonment and parole ineligibility under N.J.S.A. 2C:35-12.

A number of prosecutors and judges have commented that the trial proof adjustment feature in Part VIII of the "Brimage" Guidelines provides insufficient flexibility for prosecutors to account for unusual or exceptional litigation problems. This has resulted in complex and protracted pretrial litigation that might have been avoided. Providing prosecutors with more flexibility in calculating "Brimage" plea offers in these kinds of unusual or exceptional cases involving complex or protracted litigation issues would enhance the overall scheme that is designed to avoid the unnecessary expenditure of prosecutorial and judicial resources. These revisions, however, must include appropriate procedural and substantive safeguards to channel the exercise of prosecutorial discretion and to maintain overall uniformity in accordance with the Supreme Court's directive in State v. Brimage, 153 N.J. 1 (1998).

B. ***Criteria for Invoking the New Complex/Protracted Litigation Downward Adjustment***

A new downward adjustment factor is hereby established that may be used in lieu of the existing trial proof adjustment feature. (The trial proof adjustment feature described in Part VIII of the "Brimage" Guidelines remains available, but may not be invoked in any case where the prosecutor elects to take advantage of the new complex/protracted litigation adjustment feature.) The new downward adjustment — which is reserved for unusual or exceptional cases involving a significant expenditure of prosecutorial or judicial resources — may be invoked only where the prosecutor determines in the exercise of reasoned discretion that one or more of the following circumstances exist:

1. The case involves extensive, complex, and unusual pretrial motions practice (e.g., it is expected that more witnesses would be called and more hearing dates convened to decide pretrial motions than would occur at the trial on the merits itself), reflecting an anticipated expenditure of prosecutorial and judicial resources that is disproportionate to the nature and seriousness of the offense and the term of imprisonment likely or required to be imposed following a conviction at trial.

2. The case will require extensive and unusual discovery or extensive pretrial preparation reflecting an anticipated expenditure of prosecutorial resources that is disproportionate to the nature and seriousness of the offense and the term of imprisonment likely or required to be imposed following a conviction at trial.

3. Extraordinary and significant expenses are likely to be incurred by the prosecution, such as protracted efforts to locate witnesses, extradite out-of-state witnesses, or to retain expert witnesses, reflecting an anticipated expenditure of resources that is disproportionate to the nature and seriousness of the offense and the term of imprisonment likely or required to be imposed following a conviction at trial.

4. The case contemplates a protracted trial and the expenditure of trial resources that is disproportionate to the nature and seriousness of the offense and the term of imprisonment likely or required to be imposed following a conviction at trial.

5. The case follows a hung jury, mistrial, or remand after a conviction has been reversed by the Appellate Division or Supreme Court, and there is a real possibility that the State would be unsuccessful in pursuing the prosecution.

It is intended and expected that the new downward adjustment will be reserved for unusual or exceptional circumstances involving a significant expenditure of prosecutorial or judicial resources and *will not be used routinely*, since the amount of discretion to reduce the plea offer that is afforded by the new adjustment feature (see § C, infra) might reintroduce disparity into the plea negotiation and sentencing systems in contravention of the "Brimage" Guidelines and the Supreme Court's clear mandate in State v. Brimage. Compare State v. Lagares, 127 N.J. 20, 32 (1992) (constitutionality of N.J.S.A. 2C:43-6f depends on the Attorney General issuing guidelines that reflect the legislative intent to make extended sentencing of repeat drug offenders "the norm rather than the exception"). The Division of Criminal Justice shall collect information and report periodically to the Attorney General on how often the new adjustment feature is being used and its effect on statewide uniformity. (See also discussion of "procedural safeguards," § F, infra.)

The decision whether to tender a reduced offer using the complex/protracted litigation downward adjustment is necessarily vested in the reasoned discretion of the prosecutor. Accordingly, a prosecutor is not required to employ this downward adjustment in any case where the prosecutor believes in good faith that the defendant would ultimately be convicted at trial, notwithstanding that prosecution of the case will involve a significant expenditure of resources.

C. ***Effect of Adjustment on Plea Offer Calculation and Maximum Extent of Reduction.***

The complex/protracted litigation downward adjustment may be made only after the prosecutor has otherwise determined an appropriate plea offer calculated in accordance with the "Brimage" Guidelines, taking into account all applicable offense characteristics, aggravating and mitigating circumstances, and special application and enhancement features. (As noted above, a prosecutor invoking the new downward adjustment may not also invoke the trial proof adjustment feature described in Part VIII of the "Brimage" Guidelines.) In this way, the court and the defendant will be advised of the extent of the downward adjustment and will be advised of the plea offer that would have been tendered in accordance with the "Brimage" Guidelines if this downward adjustment had not been made.

Where the prosecutor in the exercise of discretion elects to make a complex/protracted litigation adjustment, the prosecutor is authorized to reduce the plea offer otherwise calculated pursuant to the "Brimage" Guidelines to the following extent:

TYPE OF CASE AND DEFENDANT	*MAXIMUM AUTHORIZED ADJUSTMENT*
Fourth-degree crime involving Criminal History Category I, II, or III	up to nine (9) months reduction
Fourth-degree crime involving Criminal History Category IV or V	up to twelve (12) months reduction
Third-degree crime involving Criminal History Category I, II, or III	up to twelve (12) months reduction
Third-degree crime involving Criminal History Category IV or V	up to eighteen (18) months reduction
Second-degree crime involving Criminal History Category I, II, or III	up to eighteen (18) months reduction
Second-degree crime involving Criminal History Category IV or V	up to twenty-four (24) months reduction
First-degree crime involving Criminal History Category I, II, or III	up to twenty-four (24) months reduction
First-degree crime involving Criminal History Category IV or V	up to thirty-six (36) months reduction
Leader of Narcotics Trafficking Network (Table 6) involving Criminal History Category I, II, or III	up to four (4) years reduction
Leader of Narcotics Trafficking Network (Table 6) involving Criminal History Category IV or V	up to eight (8) years reduction

The extent of the reduction within the limits established in the foregoing table is vested in the reasoned discretion of the prosecutor considering the nature of the complex/protracted litigation issues, the resources that would be expended in pursuing the litigation, the likelihood of prevailing in the litigation, and the seriousness of the offense. Thus, for example, in a case involving a third-degree school-zone offense committed by a Criminal History Category II defendant, the prosecutor would be authorized by this Supplemental Directive to tender a plea offer (expressed in terms of months of parole ineligibility) between one (1) and twelve (12) months less than the offer that would have been tendered in accordance with the "Brimage" Guidelines but for the complex/protracted litigation downward adjustment.

Prosecutors in determining the extent of the downward adjustment within the limits established in the foregoing table may also take into account the factors and circumstances expressly referred to in the trial proof adjustment feature in Part VIII of the "Brimage" Guidelines, although as noted above, that feature could not be used in combination with the new downward adjustment for complex/protracted litigation issues. Note further that prosecutors are not authorized to invoke the new complex/protracted adjustment feature based upon the kinds of common or recurring trial proof problems, however substantial, that are described in Part VIII of the "Brimage" Guidelines. While such circumstances may be considered by prosecutors in determining the extent of an authorized downward adjustment, the unusual or exceptional circumstances necessary to trigger any complex/protracted litigation adjustment must satisfy one or more of the criteria enumerated in § B. In other words, common trial proof problems (e.g., the possibility of losing a routine suppression motion or credibility problems for a key prosection witness due to criminal charges or involvement) may be taken into account in determining the amount of the reduction within the prescribed limits, but would not be sufficient to justify invoking the new complex/protracted litigation adjustment feature. Absent the unusual or exceptional circumstances necessary to trigger the new adjustment, such common problems must continue to be addressed in the context of the trial proof issue adjustment feature in Part VIII of the "Brimage" Guidelines.

Nothing in this Supplemental Directive time shall be construed in any way to limit the authority of the county prosecutor at any time to make a downward departure for substantial cooperation in accordance with the provisions of Part X of the "Brimage" Guidelines.

Because the Court in State v. Brimage made clear that prosecutors must provide the reasons for choosing to waive or not to waive a mandatory minimum period of parole ineligibility under N.J.S.A. 2C:35-12, a prosecutor must note on

the revised worksheet[2] whether this downward adjustment feature is being used and must also indicate the extent to which the adjustment has resulted in a reduction in the term of parole ineligibility that would otherwise apply. However, the prosecutor is not required to describe on the worksheet the specific factual or legal issues that gave rise to the complex/protracted litigation downward adjustment. It is thought that prosecutors might be chilled from making appropriate use of this feature if they were required to highlight potential weaknesses in the prosecution and to make this information available to the defense, since to do so in the course of ongoing plea negotiations might suggest possible theories for cross-examining prosecution witnesses, filing defense motions, or otherwise suggest a defense strategy, or might even lead a guilty defendant to overestimate his chances for an acquittal or dismissal and opt for a trial or pretrial litigation that might properly have been avoided by a guilty plea. (Note, however, that the prosecutor must explain the exact reasons for invoking the adjustment to the Division of Criminal Justice on a confidential basis. See procedural safeguards, § F(2), infra.) As with the trial proof adjustment feature in Part VIII of the "Brimage" Guidelines, nothing in this Supplemental Directive shall be construed in any way to affect a prosecutor's obligation to comply with the rules of discovery, including a prosecutor's legal and ethical duty to disclose exculpatory information.

Note that the prosecutor must continue to require the defendant to plead guilty to the school-zone charge (or other charge subject to a waivable, mandatory minimum term of imprisonment and parole ineligibility pursuant to N.J.S.A. 2C:35-12), and nothing in this Supplemental Directive or in the "Brimage" Guidelines should be construed to authorize a prosecutor to dismiss any such charge in favor of a plea to N.J.S.A. 2C:35-5, unless the prosecutor represents to the court on the record that the State cannot prove the 1,000-foot location element (or, where applicable, that the State cannot prove that the controlled substances involved exceed the weight threshold necessary to make the distribution-type offense subject to a mandatory term of imprisonment and parole ineligibility). Accordingly, the extent of any reduction of a mandatory term of imprisonment shall continue to be limited even where the prosecutor elects to invoke the new complex/protracted litigation adjustment.

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[2]The Division of Criminal Justice will distribute a revised worksheet that provides space to indicate when a prosecutor has invoked the new complex/protracted litigation downward adjustment. In addition, the Division of Criminal Justice will provide to the county prosecutors software to facilitate the preparation of "Brimage" worksheets.

D. ***Timing of Downward Adjustment and Authority to Reissue the Functional Equivalent of a Pre-Indictment Offer.***

It is generally assumed that the complex/protracted litigation downward adjustment would be made at the time that the pre-indictment plea offer is tendered, although prosecutors are authorized to make this adjustment in calculating an initial post-indictment or even final post-indictment offer provided that the complex or protracted litigation issues have not already been decided and the unusual or extraordinary expenditure of prosecutorial and/or judicial resources has not already been incurred.

Notwithstanding the regular graduated plea or "escalation" provisions of the "Brimage" Guidelines, where the complex or protracted litigation issues first arise or are otherwise made known to the prosecutor only after a pre-indictment or initial post-indictment offer has already been tendered and rejected or otherwise expired (e.g., where a defendant raises a new claim or issue requiring extensive and complex pretrial litigation after an indictment has been returned), the prosecutor is authorized in the exercise of reasoned discretion to tender a new downward adjustment plea based upon a *pre*-indictment offer calculated in accordance with the "Brimage" Guidelines, notwithstanding that the defendant has already been indicted or has already rejected a final post-indictment offer. Given such a material change of circumstances (i.e., the newly-discovered prospect of complex or protracted litigation), the prosecutor is hereby authorized to disregard any previous offers and recalculate a downward adjusted offer as if it were the first plea offer tendered to the defendant.

This feature is consistent with the goal of affording prosecutors greater flexibility to conserve prosecutorial and judicial resources by avoiding the necessity to engage in further protracted or complex litigation. This option is reserved for cases where the prosecutor was unaware of the prospect of complex or protracted litigation at the time that the initial plea offer was tendered.

Where the prosecutor elects in the exercise of discretion to "set the clock back" by issuing a downward adjusted pre-indictment offer after the defendant has been indicted, the prosecutor must fully describe the circumstances justifying the invocation of this feature in the required notification to the Division of Criminal Justice described in § F(2). Nothing in this section shall be construed to require a prosecutor to invoke this feature and to tender the functional equivalent of a new pre-indictment offer, and the prosecutor shall have the discretion to apply a complex/protracted litigation downward adjustment to an initial post-indictment or final post-indictment offer calculated in accordance with the "Brimage" Guidelines. (Recall also that the prosecutor in any event retains the discretion to fix the extent

of the new downward adjustment at any point within the range established in the table in § C (i.e., e.g., a reduction of between one (1) to twelve (12) months of parole ineligibility in a case involving a third-degree crime committed by a Criminal History Category I, II, or III defendant).)

E. ***Automatic Plea Cut-Off Feature.***

When a prosecutor in the exercise of discretion elects to invoke the new complex/protracted litigation downward adjustment, the defendant shall be required to accept the offer or proceed to trial. Notwithstanding any other provision of the "Brimage" Guidelines, a prosecutor invoking the new complex/protracted litigation downward adjustment feature is not authorized to tender any further plea offer other than one calculated as a result of a material change in circumstances warranting a new calculation (compare the standard for waiving the formal plea cut-off rule in R. 3:9-3(g)) or a substantial cooperation offer, which may be tendered at any time in accordance with Part X of the "Brimage" Guidelines and Attorney General Directive 1998-1. Notwithstanding the ordinary escalation system established in the "Brimage" Guidelines, a prosecutor invoking the new complex/protracted litigation adjustment is generally precluded from tendering an ordinary initial post-indictment or final post-indictment plea offer following a defendant's rejection of a plea offer that was subject to a complex/protracted litigation downward adjustment. This "all or nothing" system is designed to provide the greatest possible incentive for a defendant to accept the plea and thereby allow the prosecution to avoid the unusual and significant resource expenditures that justified invocation of the downward adjustment in the first place.

A prosecutor invoking the new adjustment will be required to fix a specific date or event at which the adjusted plea offer will expire and at which point the new plea cut-off feature will automatically be invoked. This expiration date or event shall be clearly stated on the plea negotiation worksheet along with a notice explaining the effect of the automatic plea cut-off so as to put the defendant on clear notice that, absent a material change of circumstances or substantial cooperation, no further plea offer reducing the statutorily-prescribed minimum term of parole ineligibility will be tendered.

Any plea offer that accounts for the complex/protracted litigation adjustment must include an express waiver by the defendant of any pretrial motions or appeals. See R. 3:9-3(d).

F. ***Procedural Safeguards.***

In order to ensure that the new complex/protracted downward adjustment feature is reserved for unusual or extraordinary cases and does not result in a reintroduction of disparity, the following procedural safeguards are implemented:

1. Any plea offer that takes into account a complex/protracted litigation downward adjustment must be approved by a supervisor designated by the county prosecutor (as is the case with substantial cooperation agreements under Part X of the current "Brimage" Guidelines).

2. Although approval from the Division of Criminal Justice is not required to invoke the new downward adjustment, the prosecutor's office shall within five (5) working days of tendering a downward adjusted plea offer provide to the Division of Criminal Justice a statement of reasons explaining why the complex/protracted litigation downward adjustment feature was invoked and, where applicable, explaining the reasons for tendering a downward adjusted offer based upon a pre-indictment calculation although the defendant was already indicted. This statement of reasons shall be provided on a form developed by the Division of Criminal Justice that shall be marked "confidential work product," and this information shall not be made available to the court or to the defense counsel for the reasons noted in § C, supra. The prosecutor shall attach to the new form a copy of the plea negotiation worksheet (including all schedules) that was provided to the court and defense attorney in accordance with the "Brimage" Guidelines.

3. In order to measure the effects of the new adjustment feature, the prosecutor shall report to the Division of Criminal Justice whether a downward adjusted plea offer was accepted or rejected by the defendant. The prosecutor must also advise the Division of Criminal Justice when the prosecutor following the rejection of a downward adjusted plea waives the automatic plea cut-off feature and tenders a new plea offer as a result of a material change of circumstances or a substantial cooperation agreement. The Division of Criminal Justice will provide standardized forms to facilitate such notifications.

4. The authority to make a complex/protracted litigation downward adjustment is established for a one (1) year interim or "pilot" basis, during which time the Division of Criminal Justice shall monitor the effects of the new policy.

IV. EFFECTIVE DATE, SUNSET PROVISION, AND NOTICE OF ADVERSE COURT DECISIONS.

The above-described revisions to the "Brimage" Guidelines shall take effect on September 6, 1999 and shall apply to all cases pending on that date insofar as their application does not introduce confusion or delay.

The authority to tender a plea offer that takes into account the complex/protracted litigation downward adjustment described in § III shall expire on September 6, 2000, unless the Attorney General shall direct otherwise. The Attorney General expressly reserves the right to terminate the complex/protracted litigation adjustment pilot program prior to September 6, 2000 and thereby rescind a prosecutor's authority to make a complex/protracted litigation downward adjustment, in which event Part III of this Supplemental Directive will be repealed in its entirety, and plea offers in all pending cases will be calculated in accordance with the provisions of the original "Brimage" Guidelines.

If a court rules that any provision or feature of the above-described revisions is unconstitutional or otherwise void, invalid, or unenforceable, the prosecuting agency shall immediately notify the Division of Criminal Justice.

JOHN J. FARMER, JR.
ATTORNEY GENERAL

Dated:

ATTEST:

PAUL H. ZOUBEK
FIRST ASSISTANT ATTORNEY GENERAL