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MEMORANDUM

TO: Director, Division of Criminal Justice
County Prosecutors

FROM: Stuart Rabner *SR*
Attorney General

DATE: May 31, 2007

SUBJECT: *Guidelines Concerning Prosecutions of Public Officials*

1. INTRODUCTION AND OVERVIEW

On March 15, 2007, Governor Jon Corzine signed P.L. 2007, c. 49, which significantly enhances the punishment of government officials who are convicted of abusing their office and violating the public trust. The new law, which applies to offenses that occur on or after April 14, provides that when a public officer or employee is convicted of one of the listed crimes and the offense involves or touches upon his or her office, the defendant must be sentenced by the court to a minimum term of imprisonment and parole ineligibility, subject to two limited exceptions. N.J.S.A. 2C:43-6.5(a). Defendants who are sentenced to a minimum term of imprisonment are not eligible for early release through the Intensive Supervision Program (ISP). N.J.S.A. 2C:43-6.5(d)(2). The new law also creates a presumption that a public official charged with a listed offense is ineligible for diversion through the Pretrial Intervention Program (PTI), and a prosecutor may not recommend the defendant's admission into PTI without the prior approval of the Attorney General. N.J.S.A. 2C:43-6.5(d)(1).



N.J.S.A. 2C:43-6.5(e) requires the Attorney General to develop guidelines to ensure the uniform exercise of discretion in making determinations regarding the waiver or reduction of a mandatory minimum term of imprisonment and regarding a defendant's participation in a pretrial intervention program. The following Guidelines are issued pursuant to that statutory requirement, and also pursuant to the Criminal Justice Act of 1970, N.J.S.A. 2C:52-17B-97 et seq., which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State, in order to secure the benefits of a uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State. N.J.S.A. 2C:52-17B-98.

2. SCOPE AND APPLICATION

These Guidelines apply to the investigation and prosecution of all persons who serve or who have served as a public officer or employee under the government of this State or any political subdivision of this State [hereinafter referred to as "public officials"] who are convicted of the following listed crimes where the crime involves or touches upon the person's office or employment. An offense is deemed to involve or touch upon the person's office if the crime was related directly to the person's performance in, or circumstances flowing from, the specific public office or employment held by the person.

The predicate offenses are as follows:

Criminal coercion under paragraph 4, subsection a. of N.J.S.A. 2C:13-5;

Theft by deception, N.J.S.A. 2C:20-4, if the amount involved exceeds \$10,000;

Theft by extortion under subsection d. of N.J.S.A. 2C:20-5;

Theft by failure to make required disposition of property received, N.J.S.A. 2C:20-9, if the amount involved exceeds \$10,000;

Commercial bribery, N.J.S.A. 2C:21-10;

Money laundering, N.J.S.A. 2C:21-25;

False contract payment claims, N.J.S.A. 2C:21-34;

Bribery in official matters, N.J.S.A. 2C:27-2;

Threats and improper influence in official and political matters, N.J.S.A. 27-3;

Unlawful official business transaction where interest is involved, N.J.S.A. 2C:27-9;

Acceptance or receipt of unlawful benefit by public servant for official behavior, N.J.S.A. 2C:27-10;

Offer of unlawful benefit to public servant for official behavior, N.J.S.A. 2C:27-11;

Perjury, N.J.S.A. 2C:28-1;

Tampering with witnesses, N.J.S.A. 2C:28-5;

Tampering with public records or information, N.J.S.A. 2C:28-7;

Compounding, N.J.S.A. 2C:29-4;

Official misconduct, N.J.S.A. 2C:30-2;

Speculating or wagering on official action or information, N.J.S.A. 2C:30-3, and

Pattern of official misconduct, N.J.S.A. 2C:30-7.

These Guidelines apply to matters prosecuted by a County Prosecutor or by the Division of Criminal Justice, and the term prosecutor refers to the County Prosecutor or Division of Criminal Justice as appropriate.

3. CHARGING AND DISPOSITION OF COVERED OFFENSES

a. Charging Decisions

When there is a lawful basis for charging a public official with an offense listed in Section 2 and there is reason to believe that the offense involved or touched upon the official's office, position or employment, the County Prosecutor, or the Division of Criminal Justice in a matter investigated by the Division, should file or approve charges and pursue the imposition of enhanced punishment authorized by P.L. 2007, c. 49.

b. Prosecutorial Approval of Police Complaints

A criminal complaint charging a public official with an offense listed in Section 2 should not be filed by any law enforcement officer or agency without the prior approval of the County Prosecutor or his designee or the Director of the Division of Criminal Justice or his designee. Each County Prosecutor shall designate one or more assistant prosecutors to review and approve complaints and to serve as liaisons to the Division of Criminal Justice on matters relating to these Guidelines.

c. Deconfliction with Division of Criminal Justice

A County Prosecutor shall notify the Director of the Division of Criminal Justice or designee before filing or approving any charge that, upon conviction, would subject a public official to the enhanced punishment authorized by P.L. 2007, c. 49.

d. Plea Offers

Any plea offer should accurately reflect the impact and harm caused by the defendant's conduct, and should effectuate the Legislature's clearly expressed intention to promote general deterrence, that is, to discourage *other* public officials from abusing their office and violating the public trust. Subject to an assessment of the available trial proofs and the defendant's willingness to cooperate with law enforcement authorities, the plea offer should require the defendant to plead guilty to the most serious, readily provable offense that is subject to enhanced punishment.

4. COOPERATION AGREEMENTS

a. Statutory Authority for a Court to Waive or Reduce a Minimum Term

N.J.S.A. 2C:43-6.5(c)(1) provides that a sentencing court may waive or reduce the mandatory term of imprisonment on motion by the prosecutor stating that the defendant has provided substantial assistance in a criminal investigation or prosecution of another person. The law provides that the appropriate waiver or reduction will be determined by the court for reasons stated that may include, but are not limited to, the following factors:

(i) the court's evaluation of the significance and usefulness of the defendant's assistance, giving substantial weight to the prosecutor's evaluation of the assistance rendered;

- (ii) the truthfulness, completeness and reliability of any information or testimony provided by the defendant;
- (iii) the nature and extent of the defendant's assistance;
- (iv) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (v) the timeliness of the defendant's assistance.

The statute expressly provides that in making its determination, the court must give substantial weight to the prosecutor's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain. These statutory features are derived from Section 5K 1.1 of the Federal Sentencing Guidelines, and are also substantially similar to the factors described in Section 13 of the revised Brimage Guidelines.

b. Prosecutor's Assessment of Value of Cooperation

A minimum term of imprisonment and parole ineligibility can be waived under this provision only if the defendant's efforts are of *substantial* value to the State. The nature, extent and significance of cooperation and assistance can involve a broad spectrum of conduct that must be evaluated by the prosecutor or on a case-by-case basis. Latitude must therefore be afforded to a prosecutor in deciding whether to move for a waiver, and in deciding the specific reduction of a mandatory minimum sentence to recommend to the court.

In addition to considering the specific factors listed in the statute, the prosecutor in determining the significance, value and usefulness of the defendant's assistance should give due consideration to the rank of other government officials who are being investigated and/or prosecuted based on the defendant's assistance, the seriousness of the crime(s) committed by any other person that will be prosecuted based upon the defendant's assistance, and the actual results of the defendant's assistance, and not just the extent of the defendant's efforts. See State v. Gerns, 145 N.J. 216, 227, 229 (1996) (good faith efforts alone do not satisfy a defendant's cooperation agreement; defendant's performance must provide some tangible benefit to the prosecutor).

A cooperation agreement pursuant to these Guidelines must include the requirement that the defendant fully cooperate in disclosing all criminal activities known to the defendant that were or are being committed by any other persons,

and by turning over or assisting in obtaining any records that corroborate criminal activities.

c. Approval Authority

All cooperation agreements pursuant to N.J.S.A. 2C:43-6.5(c)(1) must be approved personally and in writing by the County Prosecutor, or by the Director of the Division of Criminal Justice in cases prosecuted by the Division.

d. Specificity of Cooperation Agreement

In State v. Gerns, 145 N.J. 216 (1996), a case involving the waiver of a mandatory parole ineligibility term under the Comprehensive Drug Reform Act, the New Jersey Supreme Court concluded that the cooperation agreement in that case should have spelled out more clearly what the defendant was expected to do. Although the defendant had executed a “confidential informer contract of cooperation,” the term “cooperation” was not defined in that document or anywhere else in the record. To address the New Jersey Supreme Court’s concerns, a cooperation agreement that is offered in exchange for the prosecutor’s agreement to file a motion to waive or reduce a mandatory term of imprisonment and parole ineligibility under N.J.S.A. 2C:43-6.5 (c)(1) that is offered in exchange for defendant’s promise to provide future or ongoing cooperation must set forth the reasonable expectations and obligations of both the defendant and the State in sufficient detail so that those expectations and agreed-upon responsibilities are clearly understood and can be enforced by a court, if necessary.

The Court in Gerns also held that the plea agreement in that case should have indicated more precisely the sentence the prosecutor would recommend to the court if defendant’s cooperation was determined by the prosecutor to be of substantial value to the State. The Court in Gerns recognized that prosecutors need to retain flexibility in sentencing recommendations based on the substantiality and quality of the defendant’s cooperation. The need to preserve prosecutorial discretion, however, must be weighed against a defendant’s need to know at the time of his or her plea the outer limits of a prosecutor’s conditional waiver decision. Accordingly, in these circumstances, the plea agreement should specify the range of parole ineligibility terms (minimum and maximum) contemplated by the plea agreement based upon the extent and quality of the defendant’s cooperation.

e. Documentation and Confidentiality

To ensure uniformity and to permit the sentencing court to exercise its responsibilities under N.J.S.A. 2C:43-6.5 (c)(1), the prosecutor must state the reasons that justify the waiver or reduction of the minimum sentence. The prosecutor should provide these reasons to the court *in camera* or in writing under seal when necessary for the safety of the defendant or others and to avoid inappropriate disclosure of an ongoing or potential investigation. Except as otherwise required by law or Court Rule, the nature and terms of a defendant's past work and anticipated future cooperation with law enforcement authority shall not be disclosed to the public or any person who might further disclose that information if such disclosure would jeopardize the safety of the defendant or others, or undermine an ongoing or pending investigation. In any of those circumstances, written documentation concerning the cooperation agreement shall be deemed confidential.

The prosecutor shall prepare a written memorialization of the terms of the cooperation agreement, which shall be kept on file. The requirement that the cooperation agreement be in writing and be kept on file will help to ensure that the State complies with any discovery obligations that may arise from the use of the cooperating defendant as a witness in the prosecution of another defendant. See *e.g.*, State v. Taylor, 49 N.J. 440 (1967) (the State has the duty to disclose a promise or agreement to recommend a specific sentence or leniency for the accomplice who is testifying for the State); State v. Satkin, 127 N.J. Super. 306 (App. Div. 1974) (State at the time of trial must reveal the existence of a promise or recommendation of leniency made to a material witness; a promise of leniency is not prosecutor's workproduct protected from disclosure under R. 3:13-3c).

5. WAIVER OR REDUCTION OF MANDATORY MINIMUM TERM FOR EXTRAORDINARY CIRCUMSTANCES

N.J.S.A. 2C:43-6.5 (c)(2) provides a second means by which a court might refrain from imposing the full term of imprisonment and parole ineligibility otherwise prescribed for a public official convicted of a predicate offense. Specifically, the new law provides that where the sentencing court finds by clear and convincing evidence that extraordinary circumstances exist such that imposition of a mandatory minimum term would be a serious injustice which overrides the need to deter such conduct by others, the court may waive or reduce the mandatory minimum term after stating with specificity its reasons for doing so.

a. Application of Legal Standard

The standard for waiver or reduction of a minimum term under this provision is extremely strict, and may be even more restrictive than the standard set forth in N.J.S.A. 2C:44-1d, which is used to overcome the presumption of imprisonment, since the new law expressly requires a finding of “extraordinary circumstances” and uses a “clear and convincing” level of proof. Cf., State v. Jabbour, 118 N.J. 1 (1990) (construing N.J.S.A. 2C:44-1d to explain that the presumption of imprisonment can only be overcome under exceptional circumstances).

The sentencing goal of general deterrence – the need to discourage other public officials from abusing their office – is paramount. Moreover, these offenses, by their nature, tend to involve conduct that is planned and willful, and that is motivated by economic greed or lust for power.

It is also reasonable to expect that courts would be especially reluctant to waive or reduce the parole ineligibility term where the defendant has been convicted of a second-degree or higher crime, which would invoke the presumption of imprisonment under N.J.S.A. 2C:44-1d even if the offense did not involve an abuse of the public trust.

The relevant caselaw interpreting N.J.S.A. 2C:44-1d makes clear that the “serious injustice” standard is not satisfied by a court’s finding that the mitigating factors substantially outweigh the aggravating factors. See State v. O’Connor, 105 N.J. 399 (1987). Nor is the presumption overcome by the fact that the defendant has good prospects for rehabilitation. See State v. Soricelli 156 N.J. 525 (1999).

In State v. Evers, 175 N.J. 355 (2003), the Court found that the defendant’s status as “family man,” “breadwinner,” and “esteemed member of the community” were not so extraordinary as to alter the conclusion that his imprisonment would not constitute a serious injustice overriding the need for deterrence.

Furthermore, the serious injustice standard is not satisfied by the fact that the defendant is a first offender and has led a crime-free life. State v. Soricelli, supra. It should be noted in this regard that as a general proposition, public officials subject to N.J.S.A. 2C:43-6.5(a) would tend to be first offenders. Given New Jersey’s laws governing forfeiture of public office, a person who has been previously convicted of a crime in many cases would not have the opportunity to hold a public office that might be abused.

b. Role of the Prosecutor

The decision to waive or reduce a mandatory minimum term based on extraordinary circumstances under N.J.S.A. 2C:43-6.5 (c)(2) is to be made by the sentencing court. Unlike the exception for substantial cooperation set forth in N.J.S.A. 2C:43-6.5(c)(1), a waiver based on extraordinary circumstances does not require a motion by the prosecutor.

A prosecutor will be expected to object to a waiver or reduction of a minimum term under this provision unless the County Prosecutor, after consulting with the Director of the Division of Criminal Justice or designee, or the Director in cases prosecuted by the Division, determines that an objection is not warranted based on truly extraordinary circumstances. Where a County Prosecutor proposes not to object to the waiver or reduction of a minimum term on these grounds, the prosecutor shall prepare and provide to the Director of the Division of Criminal Justice a written statement of reasons explaining the basis for that recommendation.

c. Adverse Rulings

In the event that a court waives or reduces a mandatory minimum term of imprisonment over the prosecutor's objection, the prosecutor shall immediately notify the Director of the Division of Criminal Justice or designee, and shall seek to stay the imposition of the sentence in order to permit the appeal.

6. ADMISSION TO PRETRIAL INTERVENTION

N.J.S.A. 2C:43-6.5d(1) provides that a prosecutor must seek the prior approval of the Attorney General before recommending or consenting to the referral to a pretrial intervention program of a person who serves or has served as a public officer or employee and who is charged with one of the listed crimes where that crime involved or touched upon the person's office. The new statute further amends N.J.S.A. 2C:43-12b to create a presumption against admission of the public officer or employee in these circumstances, and also amends N.J.S.A. 2C:43-12a(3) to make clear that the listed crimes in these circumstances should not be considered to be "victimless" offenses for purposes of the PTI Guidelines.

a. Consideration of All Relevant Circumstances

In implementing the new law, prosecutors should not categorically deny a defendant's PTI application, but rather should consider all relevant factors set

forth in N.J.S.A. 2C:43-12 to determine whether there is a basis to overcome the statutory presumption against admission.

b. Procedures for Obtaining Attorney General Approval

If a County Prosecutor, or the Director of the Division of Criminal Justice in cases prosecuted by the Division, determines that admission into PTI is appropriate, the County Prosecutor or Director shall provide to the Attorney General 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 statute and waiver factors, but should be fact-specific and not vague. See State v. Nwobu, 139 N.J. 236 (1995). A County Prosecutor shall transmit the request for the Attorney General's approval through the Director of the Division of Criminal Justice or designee, and the Director of the Division of Criminal Justice shall make recommendations to the Attorney General on whether to approve the County Prosecutor's request to consent to the defendant's admission to PTI.

c. When Notification and Approval is Not Required

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 or seek approval from the Attorney General, and a County Prosecutor need not notify the Director of the Division of Criminal Justice of the decision to object to PTI.

d. Adverse Rulings

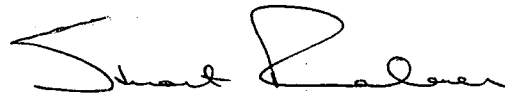
If any court finds that a prosecutor has abused discretion in refusing to consent to a defendant's admission to pretrial intervention, or if the court otherwise admits the defendant to PTI over the prosecutor's objection, the prosecutor shall immediately notify the Director of the Division of Criminal Justice or designee in writing of such ruling, and shall appeal the ruling.

7. QUESTIONS

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

8. EFFECTIVE DATE

These Guidelines shall take effect immediately, and shall apply to all cases involving criminal conduct occurring on or after the effective date of P.L. 2007, c. 49 (April 14, 2007), and shall remain in full force and effect unless and until repealed, amended, or superceded by order of the Attorney General.



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/mp

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