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ALL COUNTY PROSECUTORS

Re: Prosecution of Drug Cases Following State v. Brimage

Overview

On February 19, 1998, the New Jersey Supreme Court announced its decision in State v. Brimage, unanimously ruling that the Attorney General Guidelines for prosecuting cases under N.J.S.A. 2C:35-12 do not promote uniformity in sentencing — one of the Penal Code's fundamental goals — because each county prosecutor's office was afforded the discretion to adopt its own plea policies and standardized plea offers. The Court thus invalidated the individual county plea policies and instructed me to issue new plea offer guidelines within ninety days to ensure uniformity among the counties in enforcing the Comprehensive Drug Reform Act.

The Court made its ruling prospective except for cases on direct appeal. It is now necessary to address two categories of defendants whose cases are affected by the Court's decision: first, those who have already pleaded guilty pursuant to negotiated agreements under N.J.S.A. 2C:35-12 and whose cases were still on direct appeal as of February 19, 1998, and second, those defendants who are still awaiting disposition of pending drug charges that carry a minimum term of imprisonment under the Comprehensive Drug Reform Act.

Renegotiating Cases on Direct Appeal

The Court in Brimage held that defendants whose cases are on direct appeal have the option of vacating their guilty plea and proceeding to trial, or else vacating their plea and renegotiating with the prosecutor. In the event that a defendant chooses to pursue

the latter option, the Court held that, "his plea shall be determined under the Attorney General's Guidelines as they stood at the time of his sentencing." (slip op. at 33).

As noted above, the Attorney General Guidelines had allowed county prosecutors limited discretion to promulgate "standardized" plea offers that could reduce the term of imprisonment otherwise required by the Legislature. Where a county prosecutor for any reason did not promulgate a standardized plea offer, the starting point for the application of the authorized upward and downward departure factors would be the statutorily-prescribed term of imprisonment and parole ineligibility (e.g., three years without parole in the case of a violation of N.J.S.A. 2C:35-7). See State v. Gerns, 146 N.J. 216, 222-24 (1996) (counties that have not adopted their own guidelines are required to follow the Attorney General Guidelines).

The Supreme Court in Brimage expressly recognized in this regard that under the Attorney General Guidelines, the "specified mandatory terms of imprisonment and minimum term of parole ineligibility should be treated as 'norms' ..." (slip op. at 15). In fact, the Attorney General's 1992 Plea Directive characterized the statutorily-prescribed term of imprisonment and term of parole ineligibility as the "presumptive sentence," noting that "the decision to enter into a plea agreement ... shall reflect the legislative policies enunciated in N.J.S.A. 2C:35-1.1 and the legislative determination that the appropriate sentence in the normal case is, for the offenses so designated in the statute, the specified mandatory term of imprisonment and minimum term of parole ineligibility." Attorney General Guidelines, § II.1 (1992). See also State v. Gerns, supra, 145 N.J. at 223.

Because the county prosecutors' authority to promulgate their own standardized plea offers has been nullified by the Supreme Court, the starting point for renegotiating plea offers for those defendants who choose to vacate their guilty pleas shall be the statutorily-prescribed term of imprisonment and parole ineligibility. Prosecutors may tender plea offers below the statutorily-prescribed sentence only where this would be appropriate after considering the two authorized downward departure factors described in § II.5 of the 1992 Directive, that is, (1) that the defendant has agreed to provide cooperation with the state, or (2) a lesser sentence is deemed appropriate after an assessment of the proofs available. It should be noted that while a county prosecutor cannot require the court to impose a greater term of imprisonment than that minimally prescribed by the Legislature, prosecutors during the course of renegotiating a defendant's plea offer should still consider the applicability of the authorized upward departure factors, see § II. 5b of the 1992 Directive, as a way of neutralizing or counterbalancing any downward departure factor that might apply.

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Pending Cases

Pursuant to the Court's instructions, I will within ninety days of the Court's ruling issue a new set of plea offer guidelines that all counties must follow and that will ensure statewide uniformity in prosecuting cases under the Comprehensive Drug Reform Act. In the interim, and so as to permit pending cases to be processed in an orderly and efficient fashion, the following interim plea policy is hereby established:

The "standardized" or "presumptive" plea offer for a defendant charged with a violation of N.J.S.A. 2C:35-7 shall be a state prison term with one (1) year of parole ineligibility if the plea is taken before indictment, or eighteen (18) months of parole ineligibility if the plea is taken after indictment, except that where the offense involves less than one ounce of marijuana, the presumptive plea offer shall be 364 days in county jail as a condition of probation if the plea is accepted before indictment, or a three-year state prison term without a period of parole ineligibility if the plea is accepted after indictment.

These standardized or presumptive plea offers shall become the starting point for the application of the authorized upward and downward departure factors described in previous Attorney General guidelines. In all other cases involving charges subject to mandatory minimum terms of imprisonment under the Comprehensive Drug Reform Act, the presumptive plea offer shall be the term of imprisonment and parole ineligibility prescribed by the Legislature.

All provisions of the previously-issued Attorney General guidelines, other than the provision authorizing prosecutors to establish their own standardized plea offers, shall remain in full force and effect.

This interim plea policy shall remain in effect until further notice, and shall apply to all pending cases without regard to the date when the offense occurred.

Sincerely yours,



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