

To: New Jersey Law Revision Commission
From: Samuel M. Silver, Deputy Director
Re: Joint Motions to Vacate Parole Ineligibility (N.J.S. 2C:35-12) as discussed in *State v. Arroyo-Nunez*, 470 N.J. Super. 351 (App. Div. 2022).
Date: March 06, 2023

MEMORANDUM

Project Summary

The New Jersey Comprehensive Drug Reform Act of 1987 (“CDRA” or the “Act”) contains several statutes that require a sentencing court to impose a minimum term during which a convicted defendant is be ineligible for parole.¹ If, however, a defendant’s negotiated plea provides for a lesser sentence or, after a trial the State and a defendant enter into a post-conviction agreement that calls for a lesser sentence or period of parole ineligibility, the court may honor such agreements.²

In *State v. Arroyo-Nunez*, the Appellate Division considered whether N.J.S. 2C:35-12 (“Section 12”) permits a trial court to vacate the mandatory period of parole ineligibility of a defendant sentenced to state prison pursuant to a guilty plea to a CDRA offense.³ The Court also considered whether a Directive issued by the New Jersey Attorney General⁴ that permits joint motions⁵ to vacate a mandatory period of parole ineligibility for non-violent drug offenses invalidated the statute and violated the Separation of Powers doctrine.⁶

The Court noted that Section 12, in its current form, could be read to preclude post-conviction agreements for defendants who elected to plead guilty rather than proceed to trial.⁷ After the Court examined the legislative history of the Section, the Attorney General’s Directive, and the Court Rule,⁸ it concluded that motions “filed pursuant to the Directive and under the aegis of the [Rule 3:21-10(b)(3)],” were permissible.⁹ Prospectively, however, such applications would require the judge to “make individualized determinations of whether good cause exists for the requested relief.”¹⁰

¹ N.J. STAT. ANN. §§ 2C:35-1 to – 36A-1 (West 2023). *See also* N.J. STAT. ANN. §§ 2C:35-3 to – 35-8 (CDRA statutes with parole ineligibility provisions).

² N.J. STAT. ANN. § 2C:35-12 (West 2023).

³ *State v. Arroyo-Nunez*, 470 N.J. Super. 351 (App. Div. 2022).

⁴ Directive Revising Statewide Guidelines Concerning the Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12 (Apr. 19, 2021) [hereinafter Att’y Gen. Directive No. 2021-4]

⁵ N.J. CT. RULE 3:21-10(b)(3).

⁶ *See* N.J. CONST. art. III, para. 1 (“The powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others except as expressly provided in this Constitution.”)

⁷ *Arroyo-Nunez*, 470 N.J. Super. at 371.

⁸ *Id.* at 360-364, 376-382.

⁹ *Id.* at 381.

¹⁰ *Id.*

Statute Considered

N.J.S. 2C:35-12, provides in relevant part:

Whenever an offense defined in this chapter specifies a mandatory sentence of imprisonment which includes a minimum term during which the defendant shall be ineligible for parole, a mandatory extended term which includes a period of parole ineligibility, or an anti-drug profiteering penalty pursuant to section 2 of P.L. 1997, c. 187 (N.J.S.2C:35A-1 et seq.), the court upon conviction shall impose the mandatory sentence or anti-drug profiteering penalty unless the defendant has pleaded guilty pursuant to a negotiated agreement or, in cases resulting in trial, the defendant and the prosecution have entered into a post-conviction agreement, which provides for a lesser sentence, period of parole ineligibility or anti-drug profiteering penalty....

Background

• *A Brief History*

The Comprehensive Drug Reform Act of 1987¹¹ was enacted “to eradicate the drug problem by imposing severe punishment[s]” upon convicted defendants.¹² By enacting N.J.S. 2C:35-12, the Legislature sought “to provide an incentive for defendants. . . to cooperate with law enforcement agencies in the war against drugs... [and] to unburden the system by encouraging plea bargaining.”¹³

The CDRA, including Section 12, was the subject of several constitutional challenges shortly after its enactment. In *State v. Lagares*, the New Jersey Supreme Court determined that the State’s unilateral authority to seek a mandatory extended term with mandatory parole ineligibility pursuant to N.J.S. 2C:43-6(f) was unconstitutional as written.¹⁴ In response, the Attorney General promulgated guidelines designed “to promote uniformity and avoid arbitrary or abusive exercises of discretionary power.”¹⁵ In *State v. Vasquez*, the New Jersey Supreme Court “upheld the constitutionality of [N.J.S. 2C:35-12] by maintaining “[j]udicial oversight... to protect [defendants] against arbitrary and capricious prosecutorial decisions.”¹⁶ In *State v. Brimage*, the

¹¹ N.J. STAT. ANN. §§ 2C:35-1 to – 36A-1 (West 2023).

¹² N.J. STAT. ANN. §§ 2C:35-1.1(b) and (c).

¹³ See N.J. STAT. ANN. § 2C:35-12 and *State v. Brimage*, 153 N.J. 1, 9 (1998). See also Dep’t of Law & Pub. Safety, Div. of Crim. Justice, *A Law Enforcement Response to Certain Criticisms of the Comprehensive Drug Reform Act*, at 31 (Sept. 17, 1990) (providing that the CDRA was designed to ease the burdens on the criminal justice system because it “encourage[d] prosecutors to offer defendants an attractive option [avoiding an otherwise prescribed period of parole ineligibility] in exchange for either cooperation or . . . agreeing to plead guilty....”).

¹⁴ *State v. Lagares*, 127 N.J. 20 (1992).

¹⁵ *Arroyo-Nunez*, 470 N.J. Super. at 363 (citing Directive Implementing Guidelines for Determining Whether to Apply For an Extended Term Pursuant to N.J.S.A. 2C:43-6(f) (Apr. 20, 1992)).

¹⁶ *Id.* (quoting *State v. Vasquez*, 129 N.J. 189, 196 (1992)).

New Jersey Supreme Court held that “plea guidelines for N.J.S.[] 2C:35-12 must be consistent throughout the State” to be constitutional.¹⁷

In the six years following the *Brimage* decision, the Attorney General issued two sets of guidelines, each in response to concerns that the guidelines themselves “directly contributed to the disproportionate impact of school zone law on low level offenders, many of whom were minority residents of New Jersey’s inner cities.”¹⁸ These were not, however, the last guidelines issued by the Attorney General in an attempt to remedy past inequities resulting from the imposition of mandatory minimum sentences.

On April 19, 2021, the Attorney General issued a directive that, in part, instructed prosecutors statewide “to end the imposition of mandatory parole ineligibility for [non-violent drug] crimes.”¹⁹ Pursuant to the directive, the waiver of mandatory minimum sentences would occur in four contexts: “during plea negotiations, after conviction at trial, following violations of probation, and in connection with a joint application to modify sentences of inmates currently incarcerated.”²⁰ The Directive also instructed the State to use “existing statutory authority” to waive mandatory sentences;²¹ or the Court Rules to correct the injustices of those mandatory minimum drug sentences already imposed by sentencing courts.²²

- *Joint Applications to Modify Sentences*

On April 03, 2019, Diego Arroyo-Nunez (“Defendant”) entered into a plea agreement after he was charged with first-degree distribution of five or more ounces of cocaine in violation of N.J.S. 2C:35-5(b)(1).²³ In return for his plea, the State agreed to “dismiss all other pending charges and recommend a sentence not to exceed an eleven-year term of imprisonment with twenty-four months of parole ineligibility.”²⁴ The sentencing judge imposed the sentence in accordance with the plea agreement.²⁵ The Defendant did not file an appeal or a petition for post-conviction relief.²⁶

On June 28, 2021, the State and the Defendant filed a joint motion to modify the Defendant’s sentence by vacating the period of parole ineligibility.²⁷ The motion was made

¹⁷ *Id.* at 364 (quoting *State v. Brimage*, 153 N.J. 1, 23 (1998)).

¹⁸ *Id.* See AG Guidelines for Negotiating Cases under N.J.S.A. 2C:35-12 (May 20, 1998) and Revised Attorney General Guidelines for Negotiating cases under N.J.S. 2C:35-12 (Jul. 15, 2004).

¹⁹ *Id.* at 360. See also Att’y Gen. Directive No. 2021-4 at *1 and N.J. Crim. Sent. and Disposition Comm’n, *Annual Rep.* (Nov. 2019) (Comm’n Rep.).

²⁰ Att’y Gen. Directive No. 2021-4 at *1.

²¹ *Id.* at *5 (providing authorization for prosecutors to see the waiver of mandatory periods of parole ineligibility pursuant to N.J.S. 2C:35-12, provided such waivers are consistent with the *Vasquez* and *Brimage* decisions). See cases cited *supra* note 15, 16.

²² *Id.* See also N.J. CT. R. 3:21-10(b)(3) (authorizing a joint application of the defendant and prosecuting attorney to change a sentence for good cause to be filed at any time).

²³ *Arroyo-Nunez*, 470 N.J. Super. at 355.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

pursuant to New Jersey Court Rule 3:21-10(b)(3)²⁸ and the Attorney General’s “Directive Revising Statewide Guidelines Concerning the Waiver of Mandatory Minimum Sentences in Non-Violent Drug Cases Pursuant to N.J.S.A. 2C:35-12,” (“Directive”).²⁹ Shortly before the joint motion was scheduled to be heard, the defendant was released on parole.³⁰

The joint motion, along with approximately 600 jointly filed applications involving other defendants, was assigned to a designated judge.³¹ That judge considered the effect and the constitutionality of the Attorney General’s Directive and reasoned that the Directive effectively invalidated N.J.S. 2C:35-12 and “inval[ue]d the province of the Legislature contrary to the separation of powers doctrine.”³² In the absence of legislative action to modify the statute, the judge found it “simply unreasonable” and “absurd” to allow “the Directive to thwart ‘the strong legislative intent to address the pervasive drug crisis pending in society at the time the statute was enacted.’”³³ The judge observed that inequities might result from denying the retroactive modification of non-violent offender sentences sought by the defendant and similarly situated inmates even though future defendants would benefit from Section 12 waivers, but denied the joint motion.³⁴

A joint appeal followed.³⁵

Analysis

The plain language of N.J.S. 2C:35-12 provides a sentencing court with two options once a defendant has been convicted of a crime under Chapter 35 of the Code of Criminal Justice. First, the statute mandates that the court impose the mandatory sentence.³⁶ A court may impose a lesser sentence or period of parole ineligibility if a defendant’s negotiated plea agreement provides for such treatment or if, after a trial, a defendant and the State enter into a post-conviction agreement for a lesser sentence or period of parole ineligibility.³⁷

In its current form, Section 12 is subject to more than one interpretation. The portion of the statute that permits a defendant and the State to enter into a post-conviction negotiated agreement after a trial “could be read to preclude post-conviction agreements for offenders who chose to plead guilty rather than proceed to trial.”³⁸ The State, in *Arroyo-Nunez*, maintained that “limiting

²⁸ *Id.* See N.J. Ct. Rule 3:21-10(b)(3) (permitting a court to enter an order “at any time... changing a sentence for good cause shown upon the joint application of the defendant and the prosecuting attorney.”).

²⁹ *Id.* See Att’y Gen. Directive No. 2021-4 *5 (authorizing joint applications to modify sentences already imposed on those defendant’s convicted of non-violent drug offenses under Chapter 35 of the New Jersey Criminal Code).

³⁰ *Id.* at 356.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 365.

³⁴ *Id.* at 367.

³⁵ *Id.*

³⁶ N.J. STAT. ANN. § 2C:35-12.

³⁷ *Id.*

³⁸ *Arroyo-Nunez*, 470 N.J. Super. at 370.

post-conviction agreement to only those defendants who went to trial would be patently inequitable and unfair.”³⁹

The Appellate Division noted that Section 12 also does not contain a mechanism that allows a trial court to change an existing sentence.⁴⁰ As enacted, the trial court’s authority to deviate from the mandatory minimums is limited to the defendant’s sentencing hearing.⁴¹ The statute provides that “upon conviction” the court is required to impose the mandatory sentence unless the plea agreement or the post-trial, post-conviction agreement provide otherwise.⁴² Once the defendant has begun to serve the sentence, N.J.S. 2C:35-12 does not authorize a trial court to modify a sentence to enforce a post-conviction agreement regardless of whether that plea was the result of a plea agreement or a trial.⁴³

The Appellate Division opined that any questions concerning the timing of plea agreements or the propriety of post-conviction agreements for defendants who did not proceed to trial is answered by the statute’s legislative history of N.J.S. 2C:35-12.⁴⁴ The *Arroyo-Nunez* Court noted that the *Commentary* to N.J.S. 2C:35-12 provides that “[a] post-conviction agreement... may be consummated at any time after a guilty verdict including the imposition of sentence. Where the prosecutor consents and joins in the application... the defendant would be entitled to be resentenced by the court to any term which could originally have been imposed pursuant to a negotiated plea agreement.”⁴⁵

The CDRA was enacted to revise the State’s “seriously flawed” drug statutes and sentencing practices and “to provide courts with far more precise, consistent, and predictable sentencing guidelines.”⁴⁶ Upon signing the CDRA into law, Governor Kean identified the twin aims of the Act as “crack[ing] down on those who deal in this despicable business” and “provid[ing] help for those who have been hooked and become dependent on narcotics.”⁴⁷ The Court also examined the legislative amendments to Section 14⁴⁸ and noted that these amendments “demonstrate[] an intent to reduce incarceration rates for certain Chapter 35 offenders....”⁴⁹

The *Arroyo-Nunez* Court determined that the motion judge’s conclusion that post-conviction agreements were limited to instances in which a defendant cooperated with law enforcement “misconstrued the authority of the State to enter into post-conviction agreements with defendants under the CDRA to modify mandatory parole ineligibility periods.”⁵⁰ The Appellate

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* See also N.J. STAT. ANN. § 2C:35-12.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 372. (quoting *Sponsor’s Statement to A. 3270* at 52, 55 (Feb. 5, 1987)).

⁴⁷ *Id.* (quoting *Governor’s Signing Statement to A. 3270* at *2 (Apr. 23, 1987)).

⁴⁸ N.J. STAT. ANN. § 2C:35-14 (West 2023) (entitled “Rehabilitation program for drug and alcohol dependent persons subject to a presumption of incarceration or a mandatory minimum period of parole ineligibility; special probation; mandatory commitment to residential treatment facilities; sentencing considerations; expungement”).

⁴⁹ *Id.* at 375.

⁵⁰ *Id.*

Division reversed and vacated the order that denied the joint motion.⁵¹ The Court opined that in deciding future joint motions filed pursuant to the Directive and under the aegis of Rule 3:21-10(b)(3), the trial court judge must make individualized determinations of whether good cause exists for the requested relief.⁵²

Pending Bills

There are no bills pending that seek to amend the language of N.J.S. 2C:35-12.

Conclusion

Staff seeks authorization to conduct additional research and outreach regarding N.J.S. 2C:35-12 to determine whether the statute would benefit from modification.

⁵¹ *Id.* The *Arroyo-Nunez* Court also examined what constitutes “good cause” for modifying a sentence upon the joint application of the State filed pursuant to as set forth in required by R. 3:21-10(b)(3). *Id.* at 375-81. Such a discussion exceeds the purpose of the instant memorandum – the statutory ambiguity of N.J.S. 2C:35-12 – and has been omitted.

⁵² *Id.* at 381.