



NEW JERSEY LAW REVISION COMMISSION

Revised Draft Final Report Regarding the Comprehensive Drug Reform Act - Joint Motions to Vacate Parole Ineligibility (N.J.S. 2C:35-12)

September 11, 2023

The work of the New Jersey Law Revision Commission is only a recommendation until enacted.

Please consult the New Jersey statutes to determine the law of the State.

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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 to 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, a 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 General,⁴ and a New Jersey Court Rule 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 *Arroyo-Nunez* Court noted that Section 12, in its current form, could be read to preclude post-conviction agreements for defendants who elect to plead guilty rather than proceed to trial.⁷ After the Court examined the legislative history of Section 12, 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

Consistent with the *Arroyo-Nunez* Court’s determination, and the legislative history of the CDRA, the Commission recommends the modification of N.J.S. 2C:35-12 to clarify that a defendant may enter into a post-conviction agreement with the State to vacate a mandatory period of parole ineligibility for a non-violent drug offense even if the defendant’s original conviction was the result of a guilty plea.

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 360-64, 376-82.

⁹ *Id.* at 381.

¹⁰ *Id.*

Statute Considered

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

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. The negotiated plea or post-conviction agreement may provide for a specified term of imprisonment within the range of ordinary or extended sentences authorized by law, a specified period of parole ineligibility, a specified fine, a specified anti-drug profiteering penalty, or other disposition. In that event, the court at sentencing shall not impose a lesser term of imprisonment, lesser period of parole ineligibility, lesser fine or lesser anti-drug profiteering penalty than that expressly provided for under the terms of the plea or post-conviction agreement.

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

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).

promulgated guidelines designed “to promote uniformity and avoid arbitrary or abusive exercises of discretionary power.”¹⁵

The New Jersey Supreme Court, in *State v. Vasquez*, “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 New Jersey Supreme Court held that “plea guidelines for N.J.S.A. 2C:35-12 must be consistent throughout the State” to be constitutional.¹⁷ The *Brimage* Court noted that pursuant to Section 12, prosecutors were permitted “through a negotiated plea agreement... [to] waive the minimum mandatory sentence specified for any offense under the CDRA.”¹⁸ Further, the Court determined that Section 12 “requires the sentencing court to enforce all agreements reached by the prosecutor and the defendant... and prohibits the court from imposing a lesser term of imprisonment than that specified in the agreement.”¹⁹

The Attorney General issued two sets of guidelines in the six years following the *Brimage* decision. Each was a 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.”²⁰ These were not the only 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.”²¹ 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.”²² The Directive also instructed the State to use “existing statutory authority” to waive mandatory sentences,²³ or the Court Rules to correct the injustices of those mandatory minimum drug sentences already imposed by sentencing courts.²⁴

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)).

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

¹⁸ *State v. Courtney*, 243 N.J. 77 (2020) (quoting *State v. Brimage*, 153 N.J. at 3).

¹⁹ *Id.* (quoting *State v. Brimage*, 153 N.J. at 9).

²⁰ *Arroyo-Nunez*, 470 N.J. Super. at 364. 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).

²¹ *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.).

²² Att’y Gen. Directive No. 2021-4 at *1.

²³ *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.

²⁴ *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).

• *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).²⁵ 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.”²⁶ The sentencing judge imposed the sentence in accordance with the plea agreement.²⁷ The Defendant did not file an appeal or a petition for post-conviction relief.²⁸

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.²⁹ The motion was made pursuant to New Jersey Court Rule 3:21-10(b)(3)³⁰ 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”).³¹ Shortly before the joint motion was scheduled to be heard, the Defendant was released on parole.³²

The joint motion, along with approximately 600 jointly filed applications involving other defendants, was assigned to a designated judge.³³ 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.”³⁴ 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.’”³⁵ 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.³⁶

A joint appeal followed.³⁷

²⁵ *Arroyo-Nunez*, 470 N.J. Super. at 355.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *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.”).

³¹ *Id.* See Att’y Gen. Directive No. 2021-4 at *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).

³² *Id.* at 356.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 365.

³⁶ *Id.* at 367.

³⁷ *Id.*

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.³⁸ It then indicates, however, that 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.³⁹

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.”⁴⁰ The State, in *Arroyo-Nunez*, maintained that “limiting post-conviction agreement to only those defendants who went to trial would be patently inequitable and unfair.”⁴¹

The Appellate Division noted that Section 12 also does not contain a mechanism that allows a trial court to change an existing sentence.⁴² As enacted, the trial court's authority to deviate from the mandatory minimums is limited to the defendant's sentencing hearing.⁴³ 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.⁴⁴ 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.⁴⁵

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 are answered by the legislative history of N.J.S. 2C:35-12.⁴⁶ 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.”⁴⁷

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

³⁸ N.J. STAT. ANN. § 2C:35-12.

³⁹ *Id.*

⁴⁰ *Arroyo-Nunez*, 470 N.J. Super. at 370.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* See also N.J. STAT. ANN. § 2C:35-12.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

sentencing guidelines.”⁴⁸ 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.”⁴⁹ The Court also examined the legislative amendments to Section 14⁵⁰ and noted that these amendments “demonstrate[] an intent to reduce incarceration rates for certain Chapter 35 offenders....”⁵¹

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.”⁵² The Appellate Division reversed and vacated the order that denied the joint motion.⁵³ The Court opined that in deciding future joint motions filed pursuant to the Directive and Rule 3:21-10(b)(3), the trial court judge must make individualized determinations of whether good cause exists for the requested relief.⁵⁴

Outreach

In connection with this project, the Commission sought comments from knowledgeable individuals and organizations including: the Office of the Attorney General of New Jersey; the American Civil Liberties Union – New Jersey; the Association of Criminal Defense Lawyers; the County Prosecutor’s Association of New Jersey; the Assistant Prosecutor’s Association of New Jersey; the New Jersey Administrative Office of the Courts; Legal Services of New Jersey; the New Jersey Office of the Public Defender; the New Jersey Association of Criminal Defense Lawyers; the leadership of the Criminal Law Section of the New Jersey State Bar Association; several criminal defense attorneys; the New Jersey Institute for Social Justice; the Seton Hall University School of Law – Center for Social Justice; Rutgers Law School – Criminal and Youth Justice Clinic; and several private practitioners.

The Office of the Attorney General thanked the Commission for the “opportunity to review and comment on the Tentative Report....”⁵⁵ Deputy Director Demitro suggested that the Commission’s recommendations are not necessary for three reasons. First, “[t]he revisions [are]... a restatement of the Appellate Division opinion [in *State v. Arroyo-Nunez*].”⁵⁶ Next, “[s]ince the

⁴⁸ *Id.* at 372. (quoting *Sponsor’s Statement to A. 3270* at 52, 55 (Feb. 5, 1987)).

⁴⁹ *Id.* (quoting *Governor’s Signing Statement to A. 3270* at *2 (Apr. 23, 1987)).

⁵⁰ 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”).

⁵¹ *Arroyo-Nunez*, 470 N.J. Super. at 375.

⁵² *Id.*

⁵³ *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.

⁵⁴ *Id.* at 381.

⁵⁵ See letter from Claudia Joy Demitro, Assistant Att’y Gen., Dep. Dir. Div. of Crim. Just., *1 to Samuel M. Silver, Dep. Dir., N.J. Law Revision Comm’n (June 08, 2023) (on file with the NJLRC).

⁵⁶ *Id.*

decision, courts have had no problem implementing the decision or the Directive.”⁵⁷ Further, “because the directive now *mostly* nullifies the proposed subsection (b) of N.J.S. [] 2C:35-12... statutory revisions to that subsection are unnecessary.”⁵⁸ Finally, the possibility exists that “additional judicial decisions about this Directive... could further change the law, and would impact these proposed revisions to the statute.”⁵⁹

Deputy Director Demitro further advised the Commission that both the Division of Criminal Justice and the Attorney General’s Office would “strongly support the statutory removal of mandatory-minimum sentences for certain non-violent drug offenders....”⁶⁰

Pending Bills

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

Conclusion

The Commission recommends the modification of N.J.S. 2C:35-12 to clarify that a defendant may enter into a post-conviction agreement with the State to vacate a mandatory period of parole ineligibility for a non-violent drug offense even if the defendant’s original conviction was the result of a guilty plea.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at *2. It should be noted that the Deputy Director did not indicate the name of any case that is currently pending in either the Appellate Division or the New Jersey Supreme Court.

⁶⁰ *Id.* (acknowledging that similar legislation, S. 3456, 219th Leg. (N.J. 2021), was conditionally vetoed by Governor Murphy on April 19, 2021).

Appendix – Option One

The relevant text of **N.J.S. 2C:35-12, Waiver of Mandatory Minimum and Extended Terms**, including proposed modifications follow (additions proposed before July 20, 2023, are shown with underline; deletions proposed before July 20, 2023, are shown with ~~strikethrough~~; and modifications proposed after the Commission’s July 20, 2023, meeting are shown in *italics* with either underscoring or ~~strikethrough~~):

(a) ~~Subject to the provisions of~~ In the absence of an agreement described in⁶¹ subsection (b), the court upon conviction shall impose the mandatory sentence or anti-drug profiteering penalty ~~Whenever an offense defined in this chapter specifies:~~

(1) a mandatory sentence of imprisonment which includes a minimum term during which the defendant shall be ineligible for parole,

(2) a mandatory extended term which includes a period of parole ineligibility, or

(3) 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.~~

(b) (1) The defendant and the prosecution may enter into a ~~The~~ negotiated plea or post-conviction agreement may that provides ~~may that~~ for:

(A) a specified⁶² term of imprisonment within the range of ordinary or extended sentences authorized by law;⁶³

(B) a specified period of parole ineligibility;⁶⁴

(C) a specified fine;⁶⁵

⁶¹ N.J. LAW REVISION COMM’N, ‘Joint Motions to Vacate Parole Ineligibility,’ Minutes of NJLRC Meeting, *- (July 20, 2023) [hereinafter “July Minutes”] (comments of Comm’r Hartnett clarifying the introductory language of this subsection).

⁶² Compare N.J. STAT. ANN § 2C:35-12 (requiring the use of *specified terms* in a plea agreement) with N.J. STAT. ANN § 2C:43-5 (providing that “[a]ny person who, at the time of sentencing, is less than 26 years of age and who has been convicted of a crime may be sentenced to an *indeterminate term* at the Youth Correctional Institution Complex....”) (emphasis added).

⁶³ See e.g., *State v. Garcia*, 236 N.J. Super. 573, 576 (Law Div. 1989) (finding that finding that the language “term of imprisonment within the range of ordinary or extended sentences *authorized by law*” is “not to be considered as mere surplusage.”). See *Matter of Sussex County Mun. Utilities Authority*, 198 N.J. Super. 214 (App. Div. 1985), quoting *Hackensack Bd. of Ed. v. Hackensack*, 63 N.J. Super. 560, 569 (App.Div.1960); accord *Gabin v. Skyline Cabana Club*, 54 N.J. 550 (1969).

⁶⁴ *State v. Garcia*, 236 N.J. Super. at 576 (finding that “[i]t is clearly within the sentencing guidelines of the [A]ct to include, reduce or eliminate the period of parole ineligibility, as well as to assess a fine or not.”).

⁶⁵ *Id.* See *supra* note 64 and accompanying text.

(D) a specified anti-drug profiteering penalty;⁶⁶ or

(E) any other disposition.⁶⁷

(2) When a joint motion is filed pursuant to a Directive of the Attorney General and [Rule 3:21-10(b)(3)]⁶⁸ [the New Jersey Rules of Court] the ~~trial~~ court judge⁶⁹ shall make an individualized determination⁷⁰ of whether good cause exists for the requested relief.⁷¹

(c) ~~In that event,~~ When the defendant and the prosecution have entered into an agreement pursuant to subsection (b), the court at sentencing shall not impose a lesser term of imprisonment, lesser period of parole ineligibility, lesser fine or lesser anti-drug profiteering penalty than that expressly provided for under the terms of the plea or post-conviction agreement.⁷²

Credits: L.1987, c. 106, § 1, eff. June 22, 1987, operative July 9, 1987. Amended by L.1997, c. 187, § 1, eff. Aug. 4, 1997.

⁶⁶ N.J. STAT. ANN § 2C:35-12. See L.1997, c. 187, § 1, eff. Aug. 4, 1997 (amending the statute to include a reference to the newly enacted anti-drug profiteering penalty at N.J. STAT. ANN. §§ 2C:35A-1 – 2C:35a-8).

⁶⁷ *State v. Garcia*, 236 N.J. Super. at 576 (noting that in 1989 the phrase ‘other disposition’ was a matter of first impression and listing “[o]ther dispositions that are. . . within the guidelines. . . [such as] restitution, and dropping of an offense one degree for sentencing purposes if the court makes the requisite findings.”). See N.J.S. 2C:44-1(f)(2); *State v. Merritt*, 230 N.J. Super. 211 (Law Div. 1988); *State v. Hammer*, 346 N.J. Super. 359 (App. Div. 2001) (providing that a prosecutor may, by way of a plea or post-conviction agreement, waive the mandatory minimum sentence specified for any offense under the Comprehensive Drug Reform Act); *State v. Bridges*, 131 N.J. 402, 406 (1993) (finding that the defendant’s sentence of probation conditioned on 364 days in the county jail is an ‘other disposition’ and noting that section 12 unambiguously means “all sentencing options other than a term of imprisonment within the range of ordinary and extended sentences authorized by law, a period of parole ineligibility, or a fine.”); and *State v. Thomas*, 392 N.J. Super. 169 (App. Div. 2007) (providing that a negotiated plea that recommends a sentence, governs the sentencing).

⁶⁸ New Jersey Court Rule 3:21-10(b)(3) (providing that “[a] motion may be filed and an order may be entered at any time... (3) changing a sentence for good cause shown upon the joint application of the defendant and prosecuting attorney....”).

⁶⁹ E-mail from Comm’r Long, N.J. Law Revision Comm’n to Laura C. Tharney, Exe. Dir., N.J. Law Rev. Comm’n (July 18, 2023, 11:32 AM EST) (recommending the modification of the phrase “trial court judge” to “court” to conform the reference to the rest of the statute) (on file with the NJLRC).

⁷⁰ See *Equal Opportunity for Individuals with Disabilities*, 42 U.S.C. § 12102(4)(E)(i) (requiring that “[t]he determination of whether an impairment substantially limits a major life activity shall be made without the ameliorative effects of mitigating measures....”). See also *City of Newark v. J.S.*, 279 N.J. Super. 178 (Law Div. 1993) (quoting *Arline v. School Bd. of Nassau Cnty*, 772 F.2d 759, 765 (11th Cir. 1985) (“The court is obligated to scrutinize the evidence before determining whether the [government’s] justifications reflect a well- informed judgment grounded in careful and open-minded weighing of the risks and the alternatives, or whether they are simply conclusory statements that are being used to justify reflexive reactions grounded in ignorance or capitulation to public prejudice.”). But see sources cited *infra* note 86 and accompanying text.

⁷¹ *Arroyo-Nunez*, 470 N.J. Super. at 376, 381 (noting that this is an issue of first impression and mandating that the court make individualized determinations of whether good cause exists).

⁷² *State v. Bridges*, 131 N.J. 402, 410 (1993) (determining that a sentence below the prison term provided in the plea agreement “undermines the clear legislative purpose expressed in section 12 [because] Prosecutors would... be reluctant to enter into a... plea agreement knowing that... the defendant could receive only a fraction of the bargained-for time of incarceration.”); *State v. Courtney*, 243 N.J. 77, 87 (2020).

Comments

In its current form, N.J.S. 2C:35-12 is a three sentence block paragraph that is 193 words long. The sentences contain one-hundred and ten, forty-two, and forty-one words respectively. The proposed modifications divide the statute language into subsections to improve accessibility.

- *Subsection (a)*

As enacted, the first sentence of the statute requires a court to impose mandatory sentences and penalties as set forth in Comprehensive Drug Reform Act of 1987 (“CDRA” or the “Act”) and sets forth the circumstances under which such penalties need not be imposed. To make the sentence easier to read and understand, the first sentence of the statute has been divided into two subsections, (a) and (b). As modified, subsection (a) sets forth the sentences and penalties a court must impose when a defendant is convicted. A proposed internal cross-reference to the statutory exceptions in subsection (b), introduces the newly formatted subsection (a).

- *Subsection (b)(1)*

A defendant may avoid the imposition of a mandatory sentence, period of parole ineligibility, or anti-drug profiteering penalty in one of two ways. First, the defendant may enter into a negotiated plea agreement that provides for a reduction in any of the mandatory penalties. Second, a defendant may enter into a post-conviction agreement to reduce or eliminate the mandatory penalties set forth in the CDRA.

The proposed modifications, consistent with the Appellate Division’s decision in *State v. Arroyo-Nunez*,⁷³ eliminate from the statute the ambiguous language that permits the statute to be read in a manner that could prohibit individuals who plead guilty from entering into post-conviction agreements with the State. The suggested language provides that the defendant and the prosecution may enter into a negotiated plea or post-conviction agreement and incorporates the existing statutory language that sets forth the five subjects that may be addressed in such agreements.⁷⁴

- *Subsection (b)(2)*

The language in the newly created subsection (b)(2) incorporates the *Arroyo-Nunez* Court’s requirement that when a trial court considers a joint motion filed pursuant to a Directive of the Attorney General and the New Jersey Rules of Court that the judge make individualized determinations of whether good cause exists for the requested relief.⁷⁵ Staff seeks the Commission’s direction regarding the direct reference to Rule 3:21-10(b)(3) or the New Jersey Rules of Court generally.

- *Subsection (c)*

A negotiated plea or post-conviction agreement may address five subjects. Such agreements may specify the following: (1) a term of imprisonment within the range of ordinary or extended sentences authorized by law; (2) a period of parole ineligibility; (3) a fine; (4) an anti-drug profiteering penalty. In addition, these agreements may provide for any other disposition. The language of this subsection is unaltered, with the exception of the internal cross-reference to subsection (b).

⁷³ 470 N.J. Super. 351 (App. Div. 2022).

⁷⁴ See n. 66 and accompanying text regarding the term “other dispositions” in the context of the imposition of “lesser sentences.”

⁷⁵ *Arroyo-Nunez*, 470 N.J. Super. at 381.

Appendix – Option Two

The proposed revisions shown in this Appendix eliminate subsection (b)(2) that is proposed for inclusion in the Appendix above and make the necessary formatting adjustments.

The relevant text of **N.J.S. 2C:35-12, Waiver of Mandatory Minimum and Extended Terms**, including proposed modifications follow (additions proposed before July 20, 2023, are shown with underline; deletions proposed before July 20, 2023, are shown with ~~striketrough~~; and modifications proposed after the Commission’s July 20, 2023, meeting are shown in *italics* with either underscoring or ~~striketrough~~):

(a) ~~Subject to the provisions of~~ *In the absence of an agreement described in*⁷⁶ subsection (b), the court upon conviction shall impose the mandatory sentence or anti-drug profiteering penalty ~~Whenever~~ an offense defined in this chapter specifies:

(1) a mandatory sentence of imprisonment which includes a minimum term during which the defendant shall be ineligible for parole,

(2) a mandatory extended term which includes a period of parole ineligibility, or

(3) 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.~~

(b) ~~(A)~~⁷⁷ The defendant and the prosecution may enter into a ~~The~~ negotiated plea or post-conviction agreement ~~may~~ that provides for:

~~(A)~~ *(1)* a specified⁷⁸ term of imprisonment within the range of ordinary or extended sentences authorized by law;⁷⁹

⁷⁶ N.J. LAW REVISION COMM’N, ‘Joint Motions to Vacate Parole Ineligibility,’ Minutes of NJLRC Meeting, *- (July 20, 2023) [hereinafter “July Minutes”] (comments of Comm’r Hartnett clarifying the introductory language of this subsection).

⁷⁷ Id. (comments of Comm’r Hartnett recommending the elimination of subsection (b)(2), infra, necessitating the renumbering of this section).

⁷⁸ Compare N.J. STAT. ANN § 2C:35-12 (requiring the use of *specified terms* in a plea agreement) with N.J. STAT. ANN § 2C:43-5 (providing that “[a]ny person who, at the time of sentencing, is less than 26 years of age and who has been convicted of a crime may be sentenced to an *indeterminate term* at the Youth Correctional Institution Complex....”) (emphasis added).

⁷⁹ See e.g., State v. Garcia, 236 N.J. Super. 573, 576 (Law Div. 1989) (finding that finding that the language “term of imprisonment within the range of ordinary or extended sentences *authorized by law*” is “not to be considered as mere surplusage.”). See Matter of Sussex County Mun. Utilities Authority, 198 N.J. Super. 214 (App. Div. 1985), quoting Hackensack Bd. of Ed. v. Hackensack, 63 N.J. Super. 560, 569 (App.Div.1960); accord Gabin v. Skyline Cabana Club, 54 N.J. 550 (1969).

~~(B)~~ (2) a specified period of parole ineligibility;⁸⁰

~~(C)~~ (3) a specified fine;⁸¹

~~(D)~~ (4) a specified anti-drug profiteering penalty;⁸² or

~~(E)~~ (5) any other disposition.⁸³

~~(2) When a joint motion is filed pursuant to a Directive of the Attorney General and [Rule 3:21-10(b)(3)]⁸⁴ [the New Jersey Rules of Court], the trial court judge shall make an individualized determination of whether good cause exists for the requested relief.^{85, 86}~~

(c) ~~In that event,~~ When the defendant and the prosecution have entered into an agreement pursuant to subsection (b), the court at sentencing shall not impose a lesser term of imprisonment, lesser period of parole ineligibility, lesser fine or lesser anti-drug profiteering penalty than that expressly provided for under the terms of the plea or post-conviction agreement.⁸⁷

⁸⁰ *State v. Garcia*, 236 N.J. Super. at 576 (finding that “[i]t is clearly within the sentencing guidelines of the [A]ct to include, reduce or eliminate the period of parole ineligibility, as well as to assess a fine or not.”).

⁸¹ *Id.* See *supra* note 80 and accompanying text.

⁸² N.J. STAT. ANN. § 2C:35-12. See L.1997, c. 187, § 1, eff. Aug. 4, 1997 (amending the statute to include a reference to the newly enacted anti-drug profiteering penalty at N.J. STAT. ANN. §§ 2C:35A-1 – 2C:35a-8.).

⁸³ *State v. Garcia*, 236 N.J. Super. at 576 (noting that in 1989 the phrase ‘other disposition’ was a matter of first impression and listing “[o]ther dispositions that are. . . within the guidelines. . . [such as] restitution, and dropping of an offense one degree for sentencing purposes if the court makes the requisite findings.”). See N.J.S. 2C:44-1(f)(2); *State v. Merritt*, 230 N.J. Super. 211 (Law Div. 1988); *State v. Hammer*, 346 N.J. Super. 359 (App. Div. 2001) (providing that a prosecutor may, by way of a plea or post-conviction agreement, waive the mandatory minimum sentence specified for any offense under the Comprehensive Drug Reform Act); *State v. Bridges*, 131 N.J. 402, 406 (1993) (finding that the defendant’s sentence of probation conditioned on 364 days in the county jail is an ‘other disposition’ and noting that section 12 unambiguously means “all sentencing options other than a term of imprisonment within the range of ordinary and extended sentences authorized by law, a period of parole ineligibility, or a fine.”); and *State v. Thomas*, 392 N.J. Super. 169 (App. Div. 2007) (providing that a negotiated plea that recommends a sentence, governs the sentencing).

⁸⁴ New Jersey Court Rule 3:21-10(b)(3) (providing that “[a] motion may be filed and an order may be entered at any time... (3) changing a sentence for good cause shown upon the joint application of the defendant and prosecuting attorney....”).

⁸⁵ *Arroyo-Nunez*, 470 N.J. Super. at 376, 381 (noting that this is an issue of first impression and mandating that the court make individualized determinations of whether good cause exists).

⁸⁶ *July Minutes, supra note 76 at *- (comments of Comm’r Hartnett recommending the elimination of this subsection and reasoning that because a joint motion brought pursuant to R. 3:21-10(b)(3) will only be granted upon a demonstration of “good cause” there is no need for a statutory reference to this requirement). See Arroyo-Nunez, 470 N.J. Super. at 381 (reasoning that “regardless of the particular context, any determination of good cause demands the court’s considered judgment, not some rubber stamp.”); Id. (quoting *State v. Tuminello*, 70 N.J. 187, 194 (1976) (“At least some of the underlying policy considerations which favor the furnishing of reasons on sentences are equally applicable to a change of sentence: to provide an appellate court with the means by which to review a decision on sentencing; and to contribute to uniformity of sentencing.”). But see sources cited *supra* note 70 and accompanying *text*.*

⁸⁷ *State v. Bridges*, 131 N.J. 402, 410 (1993) (determining that a sentence below the prison term provided in the plea agreement “undermines the clear legislative purpose expressed in section 12 [because] Prosecutors would... be reluctant to enter into a... plea agreement knowing that... the defendant could receive only a fraction of the bargained-for time of incarceration.”); *State v. Courtney*, 243 N.J. 77, 87 (2020).

Credits: L.1987, c. 106, § 1, eff. June 22, 1987, operative July 9, 1987. Amended by L.1997, c. 187, § 1, eff. Aug. 4, 1997.