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**To: Assignment Judges
Criminal Presiding Judges** **Directive # 09-18**
(Supersedes Directive # 10-80)

From: Glenn A. Grant, J.A.D. *GGG*

**Subj: Guidelines for Downgrades/Dismissals under the Graves Act: Strict
Enforcement of Mandatory Minimum Custodial Terms for Offenses
Involving Firearms**

Date: July 2, 2018

This Directive is being promulgated on the recommendation of the Conference of Criminal Presiding Judges to continue the mandates and guidance set forth in Directive #10-80 "Sentencing Guidelines for Dismissals Under the Graves Act," issued April 27, 1981. The prior directive was issued for primarily two purposes: (1) to ensure that mandatory prison terms pursuant to N.J.S.A. 2C:43-6(c), the Graves Act, were imposed in accordance with the Legislature's intent, and (2) to promulgate guidelines as to when a judge may approve a negotiated plea, which involves dismissal of an offense carrying a mandatory custodial term.

This directive supersedes Directive #10-80 because the referenced offenses and the mandatory custodial terms have since been amended; however, the overall purposes in that directive are still applicable. Specifically, these purposes are: (1) to continue to mandate the strict enforcement of the mandatory parole ineligibility terms under the Graves Act in accordance with the Legislature's intent, and (2) to reaffirm the 1981 guidelines regarding the dismissal of Graves Act offenses.

When the prior directive was issued, the mandatory custodial terms for the Graves Act offenses were fixed at between one-third and one-half of the sentence imposed by the court or three years, whichever is greater, or eighteen months in the case of a fourth degree charge, during which the person was ineligible for parole. The current mandatory minimum terms for a Graves Act offense, effective August 8, 2013, are fixed at one-half of the sentence imposed by the court, or 42 months, whichever is greater, or eighteen months for a fourth degree offense, during which the person is ineligible for parole.

The prior directive predated N.J.S.A. 2C:43-6.2, which was adopted effective April 14, 1989 and which provides that, on motion by the prosecutor to the Assignment Judge, the mandatory custodial term for the designated Graves Act offenses (N.J.S.A. 2C:43-6(c)) can be

reduced to a one-year period of parole ineligibility or to probation.¹ The Supreme Court addressed the procedures for applications for a waiver of the Graves Act mandatory minimum terms and sentencing in State v. Nance, 228 N.J. 378 (2017). The Nance case provided that the application for waiver must be made to the Assignment Judge, or the Criminal Presiding Judge as the Assignment Judge's designee, and that the judge considering the application must consider the presumption of incarceration under N.J.S.A. 2C:44-1(d) when deciding between the probationary term and the term of incarceration with a one-year period of parole ineligibility.

As noted above, the 1981 directive addressed the circumstances under which a trial judge may accept a negotiated plea involving a dismissal of an offense carrying a mandatory custodial term under the Graves Act. Those guidelines, which remain in effect, provide that such dismissal may only be approved by the judge when:

1. The prosecutor represents on the record that there is insufficient evidence to warrant a conviction, or that the possibility of acquittal is so great that dismissal is warranted in the interests of justice; or
2. A plea is being entered by the defendant to an offense (a) requiring a parole ineligibility term under Chapter 31 (now N.J.S.A. 2C:43-6(c)), or (b) not requiring a mandatory parole ineligibility term but where the negotiated plea acknowledges that a parole ineligibility term is to be imposed at least equal in length to that which would have been required for the offense being dismissed; or
3. The prosecutor states on the record, either in camera or in open court, that the plea bargain is essential to ensure defendant's cooperation with the prosecution.

These requirements are also included in the Attorney General's Directive on the Graves Act, addressed to prosecutors, issued by then Attorney General Anne Milgram on November 25, 2008.

As set forth in the 1981 directive, the guidelines must also be observed in dismissing or downgrading an indictment or counts thereof after indictment. Additionally, a judge may deviate from the mandate of this directive, subject to requirements of law, only if, as a result of circumstances clearly not foreseen by the directive, he or she finds compelling reasons to do so and states them on the record.

As noted above, applications for downgrade or waiver of Graves Act mandatory parole ineligibility terms shall be governed by the provisions of N.J.S.A. 2C:43-6.2 and State v. Nance, supra.

¹ The 1981 directive was later updated to require that any deviation must be in accordance with N.J.S.A. 2C:43-6.2, regarding waivers, and N.J.S.A. 2C:43-6.3, which provided for review of existing custodial sentences in effect at the time that the waiver statute was enacted, thus giving those inmates the opportunity to request to be resentenced.

Finally, the guidelines and mandates set forth herein (except for waiver under N.J.S.A. 2C:43-6.2) also apply to N.J.S.A. 2C:43-6(g) (which became effective May 30, 1990), imposing mandatory minimum custodial terms for persons convicted of the designated offenses therein, or who attempted to commit these offenses, and were in possession of a machine gun or assault firearm. Subsection (g) was also addressed in the above-cited Attorney General Directive, which imposed the same mandates for prosecutors as to enforcement of mandatory terms, plea agreements and dismissals.

Any questions or comments regarding this Directive may be directed to Sue Callaghan, Assistant Director for Criminal Practice, by email at Sue.Callaghan@njcourts.gov or by phone at 609-815-2900 ext. 55300.

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