

**BRIMAGE GUIDELINES 2 (2004 REVISIONS)**

**APPLICATION NOTE #1**

**Eligibility for “Open” Standardized Waiver Offer When the Aggregate Amount of Drugs Involved Is Not Documented (See Section 6.5.1)**

**(ISSUED: November 18, 2004)**

Questions have been raised concerning the practical implementation of the revised Brimage Guidelines with respect to the third enumerated eligibility criterion for an “open” standardized waiver offer. See Section 6.5.1. This eligibility criterion may be established by two distinct means: first, if the defendant at the time of the present offense was less than 26 years of age, or second, if the current offense involved a small amount of drugs, which is operationally defined as an aggregate amount of controlled substances less than one-quarter of the amount needed to establish a second-degree crime pursuant to N.J.S.A. 2C:35-5 (e.g., 3.54 grams of heroin or cocaine). A defendant is deemed to have satisfied this eligibility criterion if *either* of these distinct conditions exist. Thus, for example, if the defendant at the time of the present offense was less than 26 years of age, the amount of drugs involved would be irrelevant for the purposes of determining the defendant’s eligibility for an “open” plea offer.<sup>1</sup>

Several prosecutors have expressed concern because in some cases, the aggregate weight of the drugs involved may not be documented in the case file at the time of the initial screening process when decisions would ordinarily be made as to whether a defendant is eligible for a standardized “flat” or “open” plea offer. (Note that standardized waiver offers are available only pre-indictment or the functional equivalent of pre-indictment. See Section 6.2.) Accordingly, there may be cases where the prosecutor is fully satisfied that the amount of drugs involved does not exceed the second-degree statutory threshold (which would automatically render the defendant ineligible for a standardized “flat” offer), but it is not certain whether the amount involved exceeds the lower threshold for eligibility for a

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<sup>1</sup> Where the Brimage-eligible offense involves a second-degree amount of drugs, the defendant is automatically ineligible for any standardized waiver offer. See Section 6.4.1(1). The Table set forth in footnote 4 on page 43 of the revised Brimage Guidelines is designed to assist prosecutors by displaying the eligibility amount thresholds for various controlled substances. The Table mistakenly includes a reference to LSD. Because a drug distribution or possession with intent charge involving LSD is graded as either a first or second degree crime, see N.J.S.A. 2C:35-5b(6) and (7), a defendant charged with distribution or possession with intent to distribute LSD is automatically *ineligible* for a standardized waiver offer, regardless of the amount involved.

standardized “open” plea offer pursuant to eligibility criterion #3. Several prosecutors have expressed concern that the disposition of some cases may therefore be delayed and additional expenses incurred if forensic laboratories were required to perform measurements that have heretofore been unnecessary to achieve the just and timely resolution of a case.

The revised Brimage Guidelines are designed to facilitate, not impede or delay the fair and expeditious resolution of criminal cases. It is therefore appropriate to interpret the Guidelines in a manner so that prosecutors can decide whether to extend standardized waiver offers based on the limited information documented in a typical case file. See Section 10, page 67. This can best be achieved with respect to the amount threshold eligibility criterion by clarifying what could be characterized as the “burden of production.”

As a general proposition, Section 6.4.1 provides that a standardized plea offer may only be tendered “where the prosecutor is satisfied that *all* of the required criteria or conditions exist.” (emphasis in original) In essence, the revised Brimage Guidelines generally provide that a defendant is presumptively ineligible for a standardized waiver offer unless information in the case file reasonably suggests that each and every required criterion has been satisfied. Compare “flat” offer criterion #8 (the decision to disqualify a defendant because the current offense was committed while the defendant was knowingly involved in criminal street gang related activity must be approved by a supervisor designated by the county prosecutor or the Director of the Division of Criminal Justice.)

Notwithstanding this general burden of proof under the Brimage Guidelines, a defendant shall presumptively be deemed to satisfy “open” offer eligibility criterion #3 unless the prosecutor has an objectively reasonable basis to believe that the amount of drugs involved exceeds the Guidelines threshold. In the absence of such a factual basis, the prosecutor is hereby authorized to assume that this eligibility criterion has been satisfied.<sup>2</sup> A prosecutor, in other words,

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<sup>2</sup> Nothing in this Application Note should be construed to require a prosecutor to tender an “open” plea offer where the prosecutor has doubts concerning the defendant’s eligibility. A prosecutor always retains the discretion to delay tendering a plea offer while awaiting more specific information or verification of the amount of drugs involved. Note that pursuant to the requirements of Section 4.5, if the prosecutor elects to submit the case to a grand jury and the defendant is indicted while the prosecutor is awaiting more specific information, the defendant shall be entitled to an “open” plea offer as the “functional equivalent” of a pre-indictment offer if the new information demonstrates that the defendant had, in fact, been eligible for a standardized “open” offer at the time the case was submitted to the grand jury.

should not conclude that a defendant is ineligible for a standardized “open” plea offer based on the amount threshold set forth in criterion #3 unless the prosecutor has some objective basis to believe that the amount of drugs involved exceeds the Guidelines threshold.

It should be noted that a prosecutor need not have proof beyond a reasonable doubt in order to determine that a defendant is ineligible based on this or any other criterion. Rather, a prosecutor need only have a “good faith basis to support a determination that a defendant is ineligible for a standardized waiver offer based upon one or more specific eligibility criteria.” Section 3.3 (disputed facts).

The amount of drugs involved for purposes of this eligibility criterion may therefore be established by any objectively reasonable method, including not only direct weight measurements made by police departments or forensic laboratories, but also by means of reasonable extrapolations or estimates made by prosecutors based upon the information contained in the case file. To aid in this process, prosecutors may develop schedules of commonly-sold drugs that show the amount of drugs that are typically packaged in various retail “sales units” that are distributed in the jurisdiction.<sup>3</sup> These schedules can then be used by assistant prosecutors as appropriate to estimate the weight of the drugs involved (based on the number of seized units) and to determine whether the amount involved is below or clearly exceeds the “open” offer threshold, or, in close cases, whether it would be appropriate in the exercise of reasoned prosecutorial discretion to delay tendering a standardized “open” plea offer pending the receipt of more specific information concerning the aggregate amount of drugs involved.

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<sup>3</sup> Any such schedule would describe the amount of specified drugs typically contained in various retail package units that are commonly sold in the region, based upon historical and intelligence information gleaned from law enforcement experience. Such schedules would not alter the uniform statewide amount thresholds established in Section 6.5.1 of the Brimage Guidelines. Rather, such schedules would merely provide a guide so that assistant prosecutors screening a case could reasonably estimate the amount of drugs where the number of seized units or distinctive packages is known, but the aggregate weight is not documented in the case file.

By way of example, in any jurisdiction where street-level heroin is sold in recognizable “decs” that typically contain one-tenth gram, an assistant prosecutor in that jurisdiction may confidently tender an “open” plea offer in a case involving distribution or possession with intent to distribute less than twenty-five such sales units. In contrast, the seizure of 75 such retail packages, for example, would provide a good faith basis to believe that the defendant is ineligible for an “open” offer. The schedules developed by the prosecutor’s office may similarly refer to other typical retail, street-level packaging units for various specific drugs, such as “nickel” and “dime” bags of heroin, cocaine and/or marijuana, individual “crack” vials, “bricks” of heroin, etc.)

In the event that a prosecutor tenders an “open” plea offer and thereafter becomes aware of new information indicating that the defendant is ineligible for such an offer by reason of the amount of drugs involved, the prosecutor in the exercise of reasoned discretion may withdraw the “open” offer and tender a replacement plea offer that accounts for the newly-discovered circumstances. See Section 3.7. In order to promote the interests of finality and the efficient disposition of the case, the prosecutor may also elect in these circumstances to permit the defendant to be sentenced in accordance with the original “open” offer, provided that the prosecutor alerts the court to the newly-learned information so that the court can properly discharge its responsibility in deciding whether to accept, reject or vacate the negotiated disposition. See Sections 3.1 and 3.7.

If the prosecutor initially determines that the defendant is ineligible for a standardized “open” plea offer based on criterion #3 and subsequently learns that the amount of drugs involved did not, in fact, exceed the Guidelines threshold, the prosecutor shall be required to tender a standardized “open” plea offer, regardless of the timing of the plea, see Section 4.5 and footnote 2, supra, provided of course that the defendant would otherwise have been eligible for an “open” offer at the time that the prosecutor determined that the defendant was ineligible based on the amount of drugs involved.

It should be noted, finally, that as a practical matter, in many cases, criterion #3 will not be critical to the prosecutor’s determination of eligibility for an “open” plea offer. As noted above, if the defendant at the time of the present offense was under 26 years of age, it would not matter whether the amount of drugs involved was greater than one-quarter of the amount required to establish a second-degree crime. So too, the question of a defendant’s eligibility under “open” offer criterion #3 would be rendered academic if the defendant is for any other reason ineligible for a standardized “flat” or “open” plea offer.