

## What NJ Attys Are Saying About AG's Sentencing Directive

By **Nick Muscavage**

Law360 (April 23, 2021, 3:16 PM EDT) -- The New Jersey Attorney General recently issued a directive instructing prosecutors across the state to waive mandatory minimum sentences for certain nonviolent drug offenses, advancing a key part of the governor's criminal justice reform plan that has been "delayed and denied" for nearly two years, according to the governor.

State Attorney General Gurbir S. Grewal announced the directive on Monday that instructs prosecutors to waive mandatory parole disqualifiers — also known as mandatory minimum prison terms — for nonviolent drug offenses.

Directive 2021-4 will affect both current and past cases, according to Grewal.

For future cases, the initiative directs prosecutors to waive the mandatory minimum parole ineligibility terms associated with certain nonviolent drug offenses under New Jersey law. It also allows inmates who are currently in prison because of a mandatory minimum term for a nonviolent drug offense to request the waiver, requiring prosecutors to file a joint application to rescind the mandatory period of parole ineligibility so the modified sentence will be as if no mandatory minimum had been imposed.

According to Grewal, the directive "essentially takes the imposition of mandatory minimum terms 'off the table' for all current and future nonviolent drug defendants," and also advances a 2019 recommendation from Gov. Phil Murphy's Criminal Sentencing and Disposition Commission, which called for the elimination of all mandatory minimum terms for nonviolent drug crimes.

"It's been nearly two years since I first joined with all 21 of our state's county prosecutors to call for an end to mandatory minimum sentences for nonviolent drug crimes. It's been more than a year since the governor's bipartisan commission made the same recommendation," Grewal said in a statement. "And yet New Jerseyans still remain behind bars for unnecessarily long drug sentences. This outdated policy is hurting our residents, and it's disproportionately affecting our young men of color. We can wait no longer. It's time to act."

Murphy's sentencing commission also led to legislation that would have implemented its sentencing recommendations, but the bill has remained stalled in committee in both houses of the Legislature.

Grewal's directive requires prosecutors to waive the mandatory period of parole ineligibility for the following charges: leader of narcotics trafficking network; maintaining or operating a facility producing a controlled dangerous substance, or CDS; manufacturing, distributing, or dispensing CDS; employing a juvenile in a drug distribution scheme; distributing, dispensing, or possessing with intent to distribute CDS within 1,000 feet of a school; distribution of CDS to persons under age 18.

However, it still allows prosecutors to seek periods of additional parole ineligibility in nonviolent drug cases "when warranted to protect public safety based on the specific facts of the case," according to Grewal.

To learn more about the attorney general's latest criminal justice reform effort, Law360 Pulse spoke to attorneys and experts to hear what they think of the initiative and how it will play out in the Garden State.



Jennifer Sellitti

## Director of training and communications for the New Jersey Office of the Public Defender

"We are pleased that the attorney general stepped in to provide the relief for nonviolent drug offenders that the sentencing commission unanimously agreed was critical to ending racial disparities in our prisons. It is no secret that drug sentences disproportionately impact Black and brown people in the state of New Jersey — so much so that New Jersey has the highest racial disparity in the nation when it comes to prison sentences. This measure goes a long way in eliminating those disparities."

Murphy's sentencing commission noted that Black residents count for 14% of New Jersey's population, but account for 61% of its inmate population, and many are serving sentences for nonviolent drug offenses, Grewal's directive noted.

Sellitti said the key to ending mass incarceration is recognizing who needs to be in prison in the first place.

"Overincarcerating people leads to all sorts of barriers like hiring discrimination, lost job and career opportunities, homelessness and weakening of familial ties. We hope this is a small step in ensuring that prison cells are reserved for only those who truly need to be behind bars and marks a return to a more holistic approach to punishment."

Sellitti also said the attorney general's directive is "far more complicated than legislation and will result in it taking much longer to modify sentences."

"Had the legislation passed, all of the judgments of convictions would have been changed administratively by the New Jersey Department of Corrections. Because our law has not changed and still requires mandatory minimums for certain charges, each person serving a mandatory minimum will have to be brought to court, vacate their original guilty plea, have their sentence modified and then reenter their plea. This will be quite a time-consuming process, especially during the midst of a

pandemic."

"The other issue is that the guidelines give prosecutors discretion to ask for discretionary minimums. It also only applies to a small category of offenses — far less than the legislation. This means that the discretion remains with the prosecutor and does not return to judges. Giving power back to judges was the whole purpose of the legislation."

Regardless, the attorney general's directive is still a step in the right direction, she said.

"Real change comes when we move away from a system based on punishment and return to a system based on rehabilitation."



Sarah Fajardo

### Policy director for the American Civil Liberties Union of New Jersey

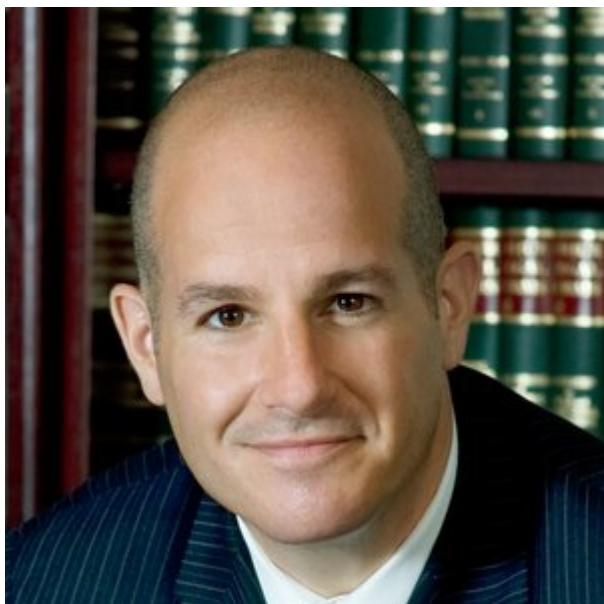
"The attorney general's directive moves New Jersey's sentencing away from the use of policies that have exploded mass incarceration rates, and driven New Jersey's racial disparity rates in prison to the highest levels seen in the nation. By directing prosecutors to stop seeking minimum sentences for specific charges, discretion in sentencing is restored to the courts, and helps prevent prosecutorial pressure behind the scenes to accept hefty sentences. This will benefit thousands of people — more than 1,000 people will become immediately eligible for resentencing under this directive."

Fajardo said research has shown that onerous, lengthy sentences do not support rehabilitation and, when people exit the prison system, they are in no better position than when they went in.

"Additionally, mandatory minimum sentences for nonviolent drug offenses have been a core tool in the U.S.'s unsuccessful war on drugs. As New Jersey moves away from criminalization of cannabis and has regraded psilocybin possession, other components of our criminal legal system also need to adjust. Reforms in sentencing are a critical component of reducing New Jersey's reliance on the criminal legal system and the expansion of mass incarceration."

"A majority of New Jerseyans voted to legalize cannabis on the November 2020 ballot, and national

polling shows overwhelming support for moving away from criminalizing people for engaging with cannabis. Simultaneously there is a growing movement towards a public health-focused, harm-reduction approach to drug use. By shifting away from use of onerous, harmful sentencing practices for this category of offenses, New Jersey takes a first step towards aligning our sentencing policies with other policy progress that the Garden State has made. ACLU-NJ supports the elimination of all mandatory minimum sentences and hopes that this change and additional changes will be codified in statute."



Joshua Bauchner

Partner at Ansell Grimm & Aaron PC and chair of the firm's cannabis law practice group

"It is a welcome and long overdue change. For far too long, minorities have been prosecuted, if not persecuted, for low level, victimless cannabis offenses at a hugely disproportionate rate."

He believes that cannabis criminalization led to a racist criminal justice system, and Grewal's directive comes at a time when the nation is grappling with biased policing practices.

"The country is finally confronting systemic racism, as the recent verdict in Minneapolis confirms. This is one more step forward toward addressing this problem, although much more needs to be done. In addition to the taint of being labeled a felon, incarcerating people among violent offenders creates grave physical and mental risks. Often, upon release, they are challenged in being able to rejoin society as a result of this harm and stigma. A purportedly 'rehabilitative' system fails entirely when it never actually permits people to rejoin society free from the consequences of their incarceration."

Grewal's directive, he said, will begin the process of a much-needed correction of the criminal justice system in New Jersey.

"The impact will be a significant reduction in the prison population and, more importantly perhaps, the removal of the blight of 'felon status' for these nonviolent offenders, which forever impacts on their ability to secure housing, employment, and even vote in certain jurisdictions."

--Editing by John Campbell.