

# Stetson Journal of Advocacy and the Law

The first online law review designed to be read online



11 Stetson J. Advoc. & L. 99 (2024)

## Two Proposals For Reforming New Jersey's *Brimage* System of Plea Bargaining

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## I. Introduction

99. According to the Supreme Court of the United States, plea bargaining “is not some adjunct to the criminal justice system; it is the criminal justice system.”<sup>2</sup> Unfortunately, while plea bargaining does define the criminal system, scholars and courts identify many problems with the practice, including:

1. The potential vindictiveness of some prosecutorial charging decisions;<sup>3</sup>

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2 *Mo. v. Frye*, 566 U.S. 134, 144 (2012) (quoting Scott and Stuntz, *Plea Bargaining as Contract*, 101 *Yale L.J.* 1909, 1912 (1992)).

3 See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); William J. Stuntz, *Bordenkircher v. Hayes: Plea Bargaining and the Decline of the Rule of Law*, *Harvard L. Rev.* (2006).

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2. potential involuntariness of some pleas;<sup>4</sup>
3. the ideal role for prosecutors in the system;<sup>5</sup>
4. proper application of ineffective assistance of counsel standards to plea bargaining;<sup>6</sup>
5. consequences about which defense attorneys must advise their clients;<sup>7</sup> and
6. uniformity among and within jurisdictions.<sup>8</sup>

100. In the 1990s and early 2000s, New Jersey zeroed in on two of these concerns: uniformity across the state and balance of powers among its branches of government.<sup>9</sup> These concerns lead New Jersey to develop plea bargaining guidelines, now known as *Brimage* Guidelines, which govern when prosecutors may waive mandatory minimum sentences under New Jersey's Comprehensive Drug Reform Act ("CDRA").<sup>10</sup> Within the state itself, *Brimage's* interpretation of separation of powers has gained precedential value – the New Jersey judiciary has applied the three-part system instituted by *Brimage* and its predecessor cases to other statutes.<sup>11</sup> In the roughly 27 years since the adoption of the initial guidelines, the *Brimage* system has become entrenched in New Jersey law, and it has become a so-called model of "prosecutorial self-regulation."<sup>12</sup>

101. However, two fairness issues arise in the application of *Brimage*. First, New Jersey case law places a de-facto burden on defendants to object to their *Brimage* calculations to obtain review, which means meaningful review of *Brimage* calculations occurs only in some circumstances. This system places too heavy a burden on defendants and their attorneys to understand the guidelines and possess the necessary information to lodge objections. Second, the complicated nature of *Brimage* calculations creates the potential

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4 *Boykin v. Ala.*, 395 U.S. 238 (1969).

5 Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, U. Chi. L. Rev. (1968).

6 *Strickland v. Wash.*, 466 U.S. 688 (1984); *Hill v. Lockhart*, 474 U.S. 52 (1985).

7 *Padilla v. Ky.*, 559 U.S. 356 (2010).

8 *State v. Brimage*, 153 N.J. 1 (1998).

9 Ronald F. Wright, *Symposium: Sentencing: What's at Stake for the States? Panel One: Prosecutorial Discretion and its Challenges: Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 Colum. L. Rev. 1010, 1030–31 (2005); *Revised Att'y Gen. Guidelines for Negotiating Cases Under N.J.S.A., Brimage Guidelines 2* (2004).

10 Ronald F. Wright, *Symposium: Sentencing: What's at Stake for the States? Panel One: Prosecutorial Discretion and its Challenges: Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 Colum. L. Rev. 1010, 1030–31 (2005); *Revised Att'y Gen. Guidelines for Negotiating Cases Under N.J.S.A., Brimage Guidelines 2* (2004).

11 *State v. A.T.C.*, 239 N.J. 450 at 34–38 (N.J. 2019); *State v. Benjamin*, 228 N.J. 358, 371–73 (N.J. 2017).

12 Michael Cassidy, *(Ad)Ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 Loy. U. Chi. L.J. 981, 985–1023 (2014).

for *Strickland* deficiency to occur, potentially leading to unfair outcomes for defendants and implicating defendants' state and federal rights to effective assistance of counsel. Accordingly, New Jersey should implement some defendant-centric solutions. First, the New Jersey Supreme Court should eliminate defendants' burden to object to *Brimage* plea calculations to obtain review, and the court should interpret the state separation of powers constitutional doctrine to require review of *Brimage* calculations to occur during or in conjunction with already-routine plea colloquies. Second, the New Jersey Bar or the New Jersey Attorney General should create guidelines providing clear expectations for defense attorneys' obligations during *Brimage* plea negotiations.<sup>13</sup>

102. Part II of this paper covers a brief history of relevant New Jersey case law preceding *Brimage*. It specifically addresses the separation of powers provision of the New Jersey Constitution.<sup>14</sup> It further addresses the *Lagares*, *Vasquez*, and *Brimage* cases, which institutionalized the *Brimage* system as it operates today. Part III(a) analyzes defendants' de facto burden to object to *Brimage* calculations to obtain review, arguing that this uneven system of review is unfair to defendants, and the New Jersey Supreme Court should require review to occur during or in conjunction with every plea colloquy. Part III(b) analyzes how the complicated *Brimage* calculation process creates the potential for *Strickland* deficiency to occur, implicating fairness to defendants and their state and federal rights to effective assistance of counsel. Furthermore, it argues that the New Jersey Bar or the New Jersey Attorney General should implement advisory guidelines outlining defense attorneys' obligations for negotiating pleas in *Brimage* cases. Finally, part IV concludes.

## II. Relevant New Jersey Case Law Preceding *Brimage*

103. The New Jersey Supreme Court created the *Brimage* system with two goals in mind — separation of powers and uniformity. Its concern with separation of powers arose because New Jersey law granted judges little power over sentencing compared to prosecutors' power, particularly under the Comprehensive Drug Reform Act.<sup>15</sup> In a series of decisions, the New Jersey Supreme Court considered the validity of two different provisions of New Jersey drug law under the separation of powers provision of the New

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13 Michael Cassidy, *(Ad)Ministering Justice: A Prosecutor's Ethical Duty to Support Sentencing Reform*, 45 Loy. U. Chi. L.J. 981, 985–1023 (2014).

14 See N.J. Const., Art. III, Para. 1

15 Ronald F. Wright, *Symposium: Sentencing: What's at Stake for the States? Panel One: Prosecutorial Discretion and its Challenges: Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 Colum. L. Rev. 1010, 1030–31 (2005).

Jersey Constitution.<sup>16</sup> That provision states, “[t]he 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.”<sup>17</sup> This provision, along with New Jersey’s concerns about uniformity, prompted three decisions by the New Jersey Supreme Court: *State v. Lagares*, *State v. Vasquez*, and *State v. Brimage*.<sup>18</sup>

104. In *Lagares* and *Vasquez*, the New Jersey Supreme Court held that as written, two different provisions of New Jersey drug law would violate the separation of powers provision.<sup>19</sup> In 1992, in *State v. Lagares*, the court considered the validity of New Jersey’s repeat offender drug law.<sup>20</sup>

In order to save the statute from constitutional infirmity, the court construed the statute to require articulation of written guidelines by the prosecutor’s office, a statement of reasons on the record at the time of a plea for the waiver or dismissal of the mandatory drug term and an ‘arbitrary and capricious’ standard of review by the trial judge.<sup>21</sup>

105. Then, in *State v. Vasquez*, the New Jersey Supreme Court considered whether the mandatory minimum provision of the CDRA, § 2C: 35-12, violated separation of powers.<sup>22</sup> The mandatory minimum provision provides a “mandatory minimum term of imprisonment and parole ineligibility” for ‘certain violations of the [CDRA].’ “Under N.J.S.A. 2C:35-12, a prosecutor may, through a negotiated plea agreement or post-conviction agreement with the defendant, waive or reduce the mandatory minimum sentence. In that event, the court may not impose a lesser sentence than that agreed to by the prosecutor.”<sup>23</sup> In *Vasquez*, like in *Lagares*, the court held that as written, the provi-

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16 *State v. Lagares*, 127 N.J. 20 (N.J. 1992) (holding that New Jersey’s repeat offender drug law violates the state’s separation of powers constitutional provision); *State v. Vasquez*, 129 N.J. 189 at 195–196 (N.J. 1992); *State v. Brimage*, 153 N.J. 1 (1998); N.J. CONST., Art. III, Para. 1

17 N.J. CONST., Art. III, Para. 1

18 Ronald F. Wright, *Symposium: Sentencing: What’s at Stake for the States? Panel One: Prosecutorial Discretion and its Challenges: Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 *Colum. L. Rev.* 1010, 1030–31 (2005); *State v. Vasquez*, 129 N.J. 189, 195–96 (N.J. 1992); *State v. Brimage*, 153 N.J. 1 at 3–27 (1998).

19 *State v. Lagares*, 127 N.J. 20 at 23–37 (N.J. 1992); *State v. Vasquez*, 129 N.J. 189 at 191–210 (N.J. 1992).

20 *State v. Vasquez*, 129 N.J. 189 at 195-196 (N.J. 1992); R. Michael Cassidy, *(Ad)Ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 5 *Loy. U. Chi. L. J.* 981, 207–13 (2014).

21 Michael Cassidy, *(Ad)Ministering Justice: A Prosecutor’s Ethical Duty to Support Sentencing Reform*, 5 *Loy. U. Chi. L. J.* 981, 207–13 (2014); *State v. Lagares*, 127 N.J. 20 at 23–37 (N.J. 1992).

22 *State v. Vasquez*, 129 N.J. 189 at 191–210 (N.J. 1992).

23 *Revised Att’y Gen. Guidelines for Negotiating Cases Under N.J.S.A., Brimage Guidelines 2* (2004); See N.J. STAT. ANN. § 2C: 35-12.

sion would violate separation of powers.<sup>24</sup> Instead of striking down the provision, however, the court extended the three-part system that it created in *Lagares*, holding that prosecutors had to follow Attorney-General issued guidelines governing when mandatory minimum sentences could be waived, provide written explanations (on the record) for their waiver decisions, and submit to judicial review of their decisions.

106. In 1998, the court solidified this system as it exists today. In *Brimage*, the court maintained the three-part structure created after *Vasquez* but held that allowing each county to adopt its own standardized plea offers and policies permits intercounty disparity, thus violating the dominant goal of uniformity in sentencing and threatening the balance between prosecutorial and judicial discretion that is required under *State v. Vasquez*.<sup>25</sup>

107. Furthermore, the court held that the Guidelines had to be consistent across the state, and it “directed the Attorney General to promulgate new plea offer guidelines that all counties must follow.”<sup>26</sup> The Attorney General issued those guidelines in 1998 and issued amended guidelines in 2004. The 2004 guidelines, known as the *Brimage* Guidelines, currently govern plea bargains for “*Brimage*-eligible offenses,” which are “offenses arising under Chapter 35 of Title 2C that carry a mandatory minimum term of imprisonment and parole ineligibility that are subject to waiver and reduction pursuant to the provisions of N.J.S.A. 2C:35-12.”<sup>27</sup> Such offenses include “[d]istribution on or within 1,000 feet of school property” and “[m]aintaining or operating a controlled dangerous substance production facility,” along with others. According to the Guidelines and the New Jersey Supreme Court, prosecutors must record their reasons for waiver or non-waiver, and they must subject their decisions to judicial review.<sup>28</sup>

### III. Creating a Better *Brimage*: Reforms That Will Make *Brimage* Fairer for Defendants and Address Constitutional Concerns

108. This unique three-part structure of the *Brimage* system undoubtedly creates predictability, but it also creates two fairness issues for defendants. First, New Jersey precedent places a de-facto burden on defendants to object in order to obtain judicial review,

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24 *State v. Vasquez*, 129 N.J. 189 at 195–196 (N.J. 1992).

25 Revised Att’y Gen. Guidelines for Negotiating Cases Under N.J.S.A., *Brimage Guidelines 2* (2004); *State v. Brimage*, 153 N.J. 1 (N.J. 1998).

26 *State v. Lagares*, 127 N.J. 20 at 23–37 (N.J. 1992); *State v. Vasquez*, 129 N.J. 189 at 195–196 (N.J. 1992).

27 Revised Att’y Gen. Guidelines for Negotiating Cases Under N.J.S.A., *Brimage Guidelines 2* (2004).

28 *State v. Vasquez*, 129 N.J. 189 at 195–196 (N.J. 1992).

which places an unfair burden on the defense to understand the *Brimage* system and have sufficient information to lodge objections. Second, because of the various steps involved in *Brimage* calculations, the *Brimage* system creates the potential for *Strickland* deficiency to occur, implicating both fairness to defendants and their rights to effective assistance of counsel.

### ***a. Defendants' De Facto Burden to Object to Obtain Review of Brimage Calculations***

109. The Guidelines require prosecutors in *Brimage* cases to engage in a series of technical decisions to determine whether the statutory mandatory terms are waivable. Again, the Guidelines apply to all crimes under the CDRA that have a waivable “mandatory term of imprisonment and parole ineligibility.” Prosecutors have the duty to charge defendants with the “most serious provable *Brimage*-eligible offense[s], and . . . prosecutor[s] [cannot] dismiss, downgrade, or dispose of such charge[s]” unless the Guidelines allow for it. In any given case, the first decision a prosecutor must make is “whether the defendant is eligible for one of the two ‘standardized waivers’” – the “standardized ‘flat’ offer or a standardized ‘open’ plea offer.” If the defendant is not eligible for either of those waivers, then the prosecutor has to use a “non- standardized” calculation process using “Tables of Authorized Plea Offers.”<sup>29</sup>

110. During that non-standardized process, the prosecutor locates the correct charge and then “must consider certain ‘Special Offense Characteristics,’ such as whether the offense involved weapons or whether the offense involved an especially large amount of drugs.”<sup>30</sup> That consideration is the “vertical axis” on the table, and along the “horizontal axis” is the “extent of the defendant’s criminal history.” That calculation gives the prosecutor the maximum, minimum, and presumptive offer for the defendant’s particular case. The prosecutor has to use the presumptive offer unless calculation of aggravating or mitigating factors indicates that an upward or downward movement in sentence is warranted. Then, the prosecutor has to apply enhancements if any from the statute apply, and the prosecutor can give the defendant a downward departure (for cooperation) if allowed by the statute in the particular case at issue. In each plea negotiation for a *Brimage*-eligible offense, the prosecutor must engage in this multi-step process.

111. Defendants are entitled to judicial review of their *Brimage* offers,<sup>31</sup> and case law from the New Jersey Superior Court Appellate Division is instructive in that regard. In its precedent instituting the *Brimage* system, the New Jersey Supreme Court did not

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29 Revised Att’y Gen. Guidelines for Negotiating Cases Under N.J.S.A., [Brimage Guidelines 2](#) (2004).

30 Revised Att’y Gen. Guidelines for Negotiating Cases Under N.J.S.A., [Brimage Guidelines 2](#) (2004).

31 *State v. Vasquez*, 129 N.J. 189, 195–96 (N.J. 1992).



flesh out the process defendants should undertake to obtain review of *Brimage* calculations. The Attorney General of New Jersey did not flesh out the process in the Guidelines either. The Attorney General says only that “the standard of judicial review of a prosecutor’s decision under N.J.S.A. 2C:35-12 requires a defendant to show by clear and convincing evidence that the prosecutor’s decision was arbitrary or capricious to be entitled to relief.”<sup>32</sup> However, the New Jersey Superior Court Appellate Division has provided some clarity on how this judicial review should occur, clarifying the process in *State v. Coulter* in 1999. The Appellate Division decided *Coulter* after the issuance of the original Guidelines but before the New Jersey Supreme Court amended the Guidelines in response to *State v. Brimage*.<sup>33</sup>

112. In *Coulter*, the defendant claimed on appeal that the prosecutor miscalculated his plea offer under the *Brimage* Guidelines. The defendant specifically argued that the prosecutor incorrectly considered an aggravating factor and incorrectly failed to consider a mitigating factor. The Superior Court held that the defendant should have raised the objection at the trial court level and applied a plain error standard, deciding that the defendant was not entitled to relief. The court further explained in dicta that:

[W]here a defendant objects to a prosecutor’s assignment of certain aggravating factors to the plea offer, or the prosecutor’s failure to credit a defendant with a mitigating factor, we envision a proceeding akin to the non-plenary type hearing conducted in the trial courts where the prosecutor has objected to the defendant’s entry into a Pretrial Intervention Program. In such event, the prosecutor is expected to show that the decision being challenged was made on a “good faith basis” and “based upon the information available to the prosecutor and reasonable inferences that can be drawn from such information.”<sup>34</sup>

113. The court, once again in dicta, explained that the *Brimage* Guidelines themselves “warn prosecutors” of the possibility of review, and the court reiterated the Guidelines’ requirement that the defendant has the burden of proof.<sup>35</sup>

114. Cases citing *Coulter* operate under the assumption that if a defendant challenges a *Brimage* offer, then a hearing is held, and the defendant gets the chance to prove arbitrariness and capriciousness.<sup>36</sup> However, as also seen in *Coulter*, if the defendant does not object at the trial court level, then review may not necessarily occur at all.<sup>37</sup>

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32 Revised Att’y Gen. Guidelines for Negotiating Cases Under N.J.S.A., [Brimage Guidelines 2](#) (2004).

33 *State v. Coulter*, [742 A.2d 579](#) (N.J. Super. App. Div. 1999).

34 *State v. Coulter*, [742 A.2d 579](#) (N.J. Super. App. Div. 1999).

35 *State v. Coulter*, [742 A.2d 579](#) (N.J. Super. App. Div. 1999).

36 *State v. Craft*, [225 N.J. 339](#) (N.J. 2016); *State v. Tutis*, [186 N.J. 241](#) (N.J. 2006).

37 *State v. Coulter*, [742 A.2d 579](#) (N.J. Super. App. Div. 1999).

Assuming that all trial courts in New Jersey are currently following the Appellate Division's precedent on applying *Brimage*, trial court review, therefore, hinges on whether the defendant makes an objection. While nothing in the Guidelines or in the *Lagares / Vasquez* line of cases prevents a court from reviewing a *Brimage* calculation *sua sponte*, the *Coulter* case illustrates that a court certainly does not have to do so; sometimes (if not all of the time), review will occur only upon objection by the defense.

115. Conditioning review on objections by defendants places on them and/or their counsel an unfair burden to understand the *Brimage* system. Whether an individual defendant raises an objection likely hinges on the defense's knowledge of two things. First, it depends on whether the defense attorney knows about the opportunity and the need to raise an objection. Such knowledge depends on the defense's familiarity with New Jersey case law like *Coulter*. Second, review also hinges on the defense's knowledge of legitimate grounds. At each point in the previously discussed series of *Brimage* calculation steps there could potentially be room for an objection if the defense has legitimate grounds for objecting. For example, a prosecutor may fail to give one of the waivers when the defendant is entitled to one. If the defense attorney lacks deep familiarity with the facts of the defendant's case, the attorney may not know he or she should make an objection at that point. Evidence suggests that defendants are disadvantaged in the plea bargaining process in ways that may indeed hinder them from lodging proper objections to *Brimage* calculations. Defendants are often represented by public defenders who need to plead cases in order to reduce their workload. These defense attorneys often do not have the resources or the discovery access that prosecutors have, which can create informational disadvantages in plea bargaining.<sup>38</sup>

116. To address the fairness concerns present in this system, the New Jersey Supreme Court should hold that defendants have no obligation to object in order to obtain review and instead conduct *Brimage* hearings in all cases. Requiring non-plenary hearings in all *Brimage* cases would create discussions among prosecutors, defense attorneys, and judges in each case about the correct *Brimage* plea offers. These discussions would give prosecutors more of an incentive to make correct calculations. It would also encourage all defense attorneys involved in *Brimage* cases to conduct good faith investigations into whether prosecutors' *Brimage* offers are correctly calculated.<sup>39</sup>

117. Requiring non-plenary hearings in all *Brimage* cases will not unreasonably reduce prosecutors' discretion under the *Brimage* system. First, as the judicial review component of *Brimage* currently operates, even when defendants object to their *Brimage* calculations, the *Brimage* system accords a lot of deference to prosecutors. *Coulter* clarifies

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38 Rishi Batra, *Judicial Participation in Plea Bargaining: A Proposal for Plea Reform*, [Casetext](#) (Sept. 2, 2015).

39 See *State v. Vasquez*, 129 N.J. 189, 195–96 (N.J. 1992); *State v. Lagares*, 127 N.J. 20 at 23–37 (N.J. 1992).

that “*Brimage* was not intended to eliminate prosecutorial discretion,” but to check that discretion and to provide for uniformity.<sup>40</sup>

It is expected that courts in reviewing whether a plea offer is arbitrary and capricious, reflecting a gross and patent abuse of prosecutorial discretion, will generally defer to prosecutors as to whether there is 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, or to support a prosecutor’s use of a Special Offense Characteristic, an Aggravating or Mitigating Factor, a Special Application and Enhancement Feature, or a Downward Departure for Trial Proof Issues or for Substantial Cooperation.<sup>41</sup>

118. The Superior Court Appellate Division has defined arbitrariness and capriciousness as “willful and unreasoning action, without consideration and in disregard of circumstances.”<sup>42</sup> For example, in *Coulter*, the Appellate Division found no plain error in the *Brimage* plea negotiation that occurred at the trial court, finding that the prosecutor’s inclusion of an aggravating factor and exclusion of a mitigating factor, based on the particular circumstances of the case, were not unreasonable.<sup>43</sup> In practice, the arbitrariness and capriciousness standard leaves prosecutors a lot of discretion to make decisions within the bounds of the Guidelines, and requiring judicial review of all *Brimage* pleas will not unreasonably this discretion.

119. Additionally, if requiring hearings in all *Brimage* cases leads to reductions in efficiency, they will likely be minor and are worth it to better facilitate separation of powers and fair and accurate plea bargains for defendants. New Jersey sources indicate that non-plenary hearings, as should occur in *Brimage* pleas, are essentially non-trial type hearings. In all guilty pleas, whether *Brimage* pleas or not, according to the New Jersey rules of procedure, judges must speak with defendants before accepting their pleas.

The court shall not ... accept a guilty plea without first addressing the defendant personally and determining by inquiry of the defendant ... that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea and that there is a factual basis for the plea.<sup>44</sup>

120. In *Brimage* pleas, the non-plenary hearings for arbitrariness and capriciousness could occur during or in conjunction with these plea colloquies. Accordingly, court dockets would not have to change, and attorneys would not face the burden of having to show up to court for additional proceedings. Adding the review to plea colloquies would

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40 *State v. Coulter*, 742 A.2d 579 (N.J. Super. App. Div. 1999).

41 Revised Att’y Gen. Guidelines for Negotiating Cases Under N.J.S.A., [Brimage Guidelines 2](#)(2004).

42 *State v. Feinstein*, No. A-3516-14T4, at 12–13 (N.J. Super. App. Div. 2016).

43 *State v. Coulter*, 742 A.2d 579 (N.J. Super. App. Div. 1999).

44 N.J. COURT RULES R. 7:6-2(A)(1).

admittedly add some time to each individual colloquy, but the added time would likely not exceed a period of a few minutes per plea. Additionally, ensuring the correctness of defendants' *Brimage* calculations seems worth a reduction in efficiency, particularly when that reduction in efficiency at the trial court level could lead to a reduction in appeals, and thus an increase in efficiency, at the appellate level.

121. The New Jersey Supreme Court could require *Brimage* hearings in every case under the state separation of powers doctrine.<sup>45</sup> Nothing in *Lagares*, *Vasquez*, or *Brimage* explicitly precludes review from occurring in every case or indicates that a hearing should occur only upon objection by the defendant. In fact, the court's dicta in *Lagares* and *Vasquez* arguably supports a broader interpretation of separation of powers. In *Lagares*, the court emphasized that sentencing falls within the realm of trial court judges. In *Vasquez*, the New Jersey Supreme Court explains that its separation of powers concerns center around providing "[j]udicial oversight . . . to protect against arbitrary and capricious prosecutorial decisions." The court further stated that the Guidelines "prevent the legislative goal of uniformity in sentencing from being undermined by unreviewable prosecutorial discretion."<sup>46</sup> Conditioning review on defense objections ignores the traditional role of judges in sentencing and prevents judges from checking prosecutors' power in those cases where the defense does not object. The New Jersey Supreme Court could easily find that such a situation violates the separation of powers provision of its constitution.<sup>47</sup> Such an interpretation logically flows from the *Lagares* and *Vasquez* line of cases interpreting the doctrine. While the Attorney General created the Guidelines, the New Jersey Supreme Court is the obvious entity to make this change.

### ***b. The Brimage System Creates the Potential for Strickland Deficiency to Occur***

122. Under the Federal Constitution, defendants have a Sixth Amendment right to effective assistance of counsel, and that right applies during plea negotiations.<sup>48</sup> To prevail in a federal ineffective assistance of counsel claim, the defendant must prove two prongs: (1) deficiency, and (2) prejudice, as defined in *Strickland v. Washington*.<sup>49</sup> Under the *Strickland* standard, deficiency means that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

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45 See N.J. Const., Art. III, Para. 1.

46 *State v. Vasquez*, 129 N.J. 189 at 195-196 (N.J. 1992); *State v. Lagares*, 127 N.J. 20 at 23-37 (N.J. 1992); *State v. Brimage*, 153 N.J. 1 (N.J. 1998).

47 N.J. Const., Art. III, Para. 1.

48 *Strickland v. WA*, 466 U.S. at 687-88 (1984); *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

49 *Strickland v. WA*, 466 U.S. at 687-88 (1984).

Amendment.”<sup>50</sup> In order to prove deficiency, a “defendant must show that counsel’s representation fell below an objective standard of reasonableness.”<sup>51</sup> Under *Strickland*, prejudice means that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.”<sup>52</sup> In order to prove prejudice, a defendant must show a reasonable probability that the case would have ended differently.<sup>53</sup> New Jersey case law features many examples of defendants raising allegations of state ineffective assistance in the context of their *Brimage* pleas.<sup>54</sup>

123. A New Jersey defendant has a state right to effective assistance of counsel during the plea negotiation process.<sup>55</sup> New Jersey adopted the *Strickland* standard to govern the “state constitutional guarantee of effective assistance of counsel,”<sup>56</sup> which means that the deficiency and the prejudice standards from *Strickland* apply to that analysis.<sup>57</sup> In the context of plea bargains, New Jersey modified the *Strickland* standard slightly.<sup>58</sup> “To set aside a guilty plea based on ineffective assistance of counsel, a defendant must show that (i) counsel’s assistance was not ‘within the range of competence demanded of attorneys in criminal cases,’ . . . and (ii) ‘that there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pled guilty and would have insisted on going to trial.’”<sup>59</sup> This is how defendants should assert ineffective assistance of counsel claims in the context of *Brimage* pleas.

124. Each decision or calculation that goes into a prosecutor’s *Brimage* plea offer can potentially be a place where *Strickland* “deficiency” can occur.<sup>60</sup> As discussed earlier, the first step a prosecutor must take in calculating a *Brimage* plea is to determine the defendant’s potential eligibility for the “standardized “flat” offer or a standardized “open” plea offer.”<sup>61</sup> If the prosecutor does not offer the standardized flat offer or the standardized open offer, the defendant is eligible for one of them, and the defense attorney fails

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50 *State v. Dabney*, No. A-2747-16T3, at 9 (N.J. Super. App. Div. 2018) (quoting *Strickland v. WA*, 466 U.S. at 687–88 (1984)).

51 *Strickland v. WA*, 466 U.S. at 687–88 (1984).

52 *Strickland v. WA*, 466 U.S. at 687–88 (1984).

53 *Strickland v. WA*, 466 U.S. at 687–88 (1984).

54 *State v. Hitchens*, 294 N.W.2d 686 (N.J. Super. App. Div. 1980); *State v. Ellerman*, No. A-3632-14T3 (N.J. Super. App. Div. 2017).

55 *State v. DiFrisco*, 137 N.J. 434, 456–57 (N.J. 1994) (citing *State v. Fritz*, 105 N.J. 42, 58 (N.J. 1987)).

56 *State v. Marolda*, 927 A.2d 154 (N.J. Super. App. Div. 2007); See *State v. Hitchens*, 294 N.W.2d 686 (N.J. Super. App. Div. 1980).

57 *State v. Marolda*, 927 A.2d 154 (N.J. Super. App. Div. 2007).

58 *State v. Hitchens*, 294 N.W.2d 686 (N.J. Super. App. Div. 1980).

59 *State v. DiFrisco*, 137 N.J. at 457 (N.J. 1994) (quoting *Tollett v. Henderson*, 411 U.S. 258, 266 (1973) and *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

60 *Strickland v. WA*, 466 U.S. at 687 (1984).

61 *Revised Att’y Gen. Guidelines for Negotiating Cases Under N.J.S.A., Brimage Guidelines 2* (2004).

to object, that failure could potentially be deficiency. If denying the standardized offers is the correct decision, the next step for the prosecutor is to find out the minimum, maximum, and presumptive plea offer for the defendant based on characteristics of the offense and aggravating/mitigating factors. The characteristics that the prosecutor must consider include “whether the offense involved weapons or whether the offense involved an especially large amount of drugs.”<sup>62</sup> Here, again, the prosecution could incorrectly calculate the defendant’s potential eligibility for the maximum, minimum, or presumptive plea offer by incorrectly accounting for the aggravating and mitigating factors.<sup>63</sup> If so, the defense attorney should object; if the defense attorney does not, that could be *Strickland* deficiency.

125. Finally, the prosecutor has to apply any necessary enhancements or downward departures, and downward departures can also be the basis for ineffective assistance of counsel in two ways. First, deficiency could occur if the prosecutor should apply a downward departure, does not do so, and the defense attorney does not object. Second, deficiency could occur if the prosecutor does not follow *Brimage*’s specific requirements for downward departures. For example, in *State v. Hitchens*, the defendant was charged with a *Brimage*-eligible offense and claimed a violation of his federal and state rights to effective assistance of counsel. The court held that his counsel was deficient in not correctly advising him about the downward departure he was getting in his plea.<sup>64</sup> The court also held that there was prejudice because “there is a reasonable probability that the defendant would not have plead guilty and would have sought to go to trial, had the plea agreement not incorporated his understanding” of his cooperation obligations.

126. As discussed, *Strickland* deficiency can clearly occur at many points throughout a *Brimage* negotiation, and the Appellate Division has found deficiency or suggested that deficiency might exist in some cases. However, *Brimage*-related ineffective assistance of counsel claims can easily fail on the prejudice prong and afford no relief to defendants despite the existence of deficiency or potential deficiency.<sup>65</sup> Consequently, some defendants experience *Strickland* deficiency in the middle of these very complicated *Brimage* negotiations but experience no relief because of their inability to prove prejudice.

127. While changing the ineffective assistance of counsel standards may serve as the ideal solution to this problem, two simpler, more feasible solutions exist. First, as discussed earlier, the New Jersey Supreme Court could change defendants’ obligation to object in order to obtain review. Removing this obligation would help prevent deficiency by eliminating the possibility that defense attorneys do not lodge objections when they

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62 Revised Att’y Gen. Guidelines for Negotiating Cases Under N.J.S.A., [Brimage Guidelines 2](#) (2004).

63 *State v. Coulter*, [742 A.2d 579](#) (N.J. Super. App. Div. 1999)

64 *State v. Hitchens*, [294 N.W.2d 686](#) (N.J. Super. App. Div. 1980).

65 See e.g., *State v. Geiger*, [No. A-5247-13T3](#) (N.J. Super. App. Div. 2016); *State v. Marolda*, [927 A.2d 154](#) (N.J. Super. App. Div. 2007).



should. Second, the New Jersey Bar or the New Jersey Attorney General could create guidelines for defense counsel's obligations during the *Brimage* negotiation process. Such guidelines do not currently exist and could provide useful standards for defense attorney performance by outlining what *Strickland* deficiency looks like in the *Brimage* context. For example, the Guidelines could provide a good faith investigation requirement that would impose on defense attorneys a duty to investigate potential mitigating factors. The New Jersey Bar could easily create aspirational guidelines for defense attorneys under their authority over New Jersey lawyers. Alternatively, the New Jersey Attorney General could create the defense attorney guidelines and add them to the *Brimage* Guidelines as aspirational, rather than binding guidelines. Such a system would solidify defense attorneys' obligations, hopefully reducing deficiency and ineffective assistance of counsel claims by clarifying defense attorneys' responsibilities of investigation and objection.

## IV. Conclusion

128. New Jersey has become a pioneer in requiring prosecutors to regulate themselves during the plea bargaining process due largely to its interpretation of its own separation of powers doctrine. New Jersey's goals of separation of powers and uniformity motivated this regulation. Unfortunately, the application of *Brimage* raises two fairness issues. First, New Jersey case law creates a de-facto obligation for defendants to object in order to obtain judicial review of their *Brimage* pleas, which imposes on defendants an unfair burden to understand the *Brimage* plea negotiation system. While New Jersey's constitutional separation of powers doctrine as currently construed by the New Jersey Supreme Court does not require a hearing in every case, the doctrine arguably should require that. Second, the complicated nature of *Brimage* calculations creates the potential for *Strickland* deficiency to occur, implicating defendants' rights to effective assistance of counsel.<sup>66</sup> To ensure a fairer system for defendants, the New Jersey Supreme Court should require a non-plenary hearings to review *Brimage* calculations in all *Brimage* cases (which could potentially occur during or in conjunction with plea colloquies), and the New Jersey Bar or the Attorney General should issue guidelines for defense attorneys, laying out their obligations under the system. If these changes are made, defendants will benefit from a fairer system, and any potential states considering adopting *Brimage* plea systems in the future can learn from New Jersey's changes.

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66 Ronald F. Wright, *Symposium: Sentencing: What's at Stake for the States? Panel One: Prosecutorial Discretion and its Challenges: Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 *Colum. L. Rev.* 1010, 1030–31 (2005); Revised Att'y Gen. Guidelines for Negotiating Cases Under N.J.S.A., *Brimage Guidelines 2* (2004).