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TO: Director, Division of Criminal Justice
All County Prosecutors
All County Municipal Prosecutor Liaisons
All Municipal Prosecutors

FROM: Gurbir S. Grewal, Attorney General

DATE: August 29, 2018

SUBJECT: Guidance Regarding Municipal Prosecutors' Discretion in Prosecuting Marijuana and Other Criminal Offenses

This Memorandum of Guidance (hereinafter "Memorandum") addresses the scope and appropriate use of prosecutorial discretion by municipal prosecutors handling complaints in municipal court. The Memorandum focuses in particular on how municipal prosecutors may permissibly exercise their discretion in cases involving marijuana-related offenses.

The first part of this Memorandum addresses whether a municipal prosecutor may adopt a policy or practice of "marijuana decriminalization," under which the prosecutor and/or his subordinates categorically will not pursue convictions for statutory offenses related to marijuana. The adoption of such a policy or practice would be an abuse of discretion and is therefore prohibited.

The second part of this Memorandum discusses permissible exercises of prosecutorial discretion by municipal prosecutors at different points in the course of a prosecution. Municipal prosecutors necessarily exercise prosecutorial discretion in discharging the duties of their office. Marijuana-related cases are not unique in this regard. In exercising their discretion, however, prosecutors must be mindful of the need to consider the particular facts and applicable law in each individual case; to justify their decisions to the courts; to make a record that permits review for arbitrariness or discrimination; and to adhere to applicable rules of professional conduct.

The Legislature is considering changes to how marijuana is treated under state law—including changes that may significantly reduce the number of low-level marijuana cases prosecuted in municipal court. Although legislation may soon make this Memorandum



unnecessary or require its amendment, nothing in this Memorandum is intended to reflect upon the Legislature's ongoing deliberations.

Pursuant to the authority granted to me under the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 to -117, which provides for the general supervision of criminal justice by the Attorney General as chief law enforcement officer of the State to secure the benefits of uniform and efficient enforcement of the criminal law and the administration of criminal justice throughout the State, I, Gurbir S. Grewal, hereby provide the following guidance to all prosecutors operating under the authority of the laws of the State of New Jersey as to the prosecution of marijuana offenses in municipal court.

I. A Municipal Prosecutor May Not Adopt a Categorical Policy or Practice of Refusing to Seek Convictions for Statutory Offenses Related to Marijuana.

Prosecutors necessarily exercise some discretion in carrying out the duties of the office. A prosecutor's discretion is not unlimited, however, and when a municipal prosecutor exceeds the scope of his or her discretion, the County Prosecutor or the Attorney General may intervene. See N.J.S.A. 2B:12-27; see also N.J.S.A. 2A:158-5; N.J.S.A. 2B:25-7.

It would exceed the scope of a municipal prosecutor's discretion to adopt a policy or practice of refusing to seek convictions for statutory offenses related to marijuana, notwithstanding the particular facts and applicable law in the individual case before the prosecutor. By categorically suspending enforcement of a State law, a municipal prosecutor impermissibly assumes a role that properly belongs to the Legislature. As explained below, a categorical policy or practice of amending marijuana-related statutory offenses to ordinance violations – or dismissing the charges outright – is impermissible, as is any substantially similar policy or practice.

Categorical enforcement policies and practices adopted at the county or municipal level may impair one of the objectives of New Jersey's criminal justice system: to promote the reasonably uniform administration of state laws. See, e.g., N.J.S.A. 2B:25-1. Our system aims to treat similarly situated offenders similarly, without regard to where in the State their conduct allegedly occurred. The discretion of county and municipal prosecutors to adopt categorical enforcement policies and practices may be limited in service of that goal.¹

Categorical enforcement policies and practices adopted at the county or municipal level also raise questions of preemption. A local governmental unit may not "decriminalize" or

¹ See, e.g., State v. Brimage, 153 N.J. 1 (1998) (prohibiting county-specific standardized plea offers and policies due to the resulting arbitrary and unreviewable differences between different localities); State v. Baynes, 148 N.J. 434 (1997) (holding that a prosecutor's rejection of a defendant's admission into a Pretrial Intervention (PTI) Program "was a patent and gross abuse of discretion" because the prosecutor had "abandon[ed] his discretion in favor of a per se rule . . . unsupported by the legislative purpose behind both the PTI Statute and the Comprehensive Drug Reform Act, by the Guidelines, and by the caselaw."); Attorney General's Directive to Ensure Uniform Enforcement of the "Graves Act" (Oct. 23, 2008; corrected Nov. 25, 2008).

otherwise license conduct which violates the State’s criminal code. See N.J.S.A. 2C:1-5(d). Any policy or practice of a municipal prosecutor’s office—or any local governmental ordinance, law, or regulation—is preempted if it conflicts with this principle.²

The line between permissible and impermissible exercises of discretion is not always a clear one. For that reason, among others, municipal prosecutors should confer with the Municipal Prosecutor Supervisor/Liaison in the County Prosecutor’s Office before adopting a policy or practice that approaches the line.

Judicial decisions shed light on the difference between prosecutorial discretion and abdication. For example, in State v. Winne, 12 N.J. 152 (1953), the Supreme Court sustained the indictment of the Bergen County Prosecutor for criminal nonfeasance in office due to his alleged failure to enforce state laws against gambling. A county prosecutor, the Court concluded, does not “have it within his power to cripple or nullify the enforcement of the criminal law in his county or to choose at his pleasure the portion of the criminal law he would enforce.” Id. at 170-71. A “prosecutor winking at and tolerating the violation of the laws” is not properly exercising whatever discretion he possesses. Id.

“The duty of a prosecuting officer necessarily requires that in each case he examine the available evidence, the law and the facts, and the applicability of each to the other, and that he intelligently weigh the chances of successful termination of the prosecution” State v. Ward, 303 N.J. Super. 47, 57 (App. Div. 1997) (citing Winne, 12 N.J. at 172). When a prosecutor does not weigh the facts and the applicable law in the case before him, but instead rests his decision-making on categorical policies or practices not grounded in the law, he has not yet begun to exercise his prosecutorial discretion. See Winne, 12 N.J. at 173; see also Baynes, 148 N.J. at 451.

For these reasons, a municipal prosecutor may not adopt a “decriminalization” policy or practice of refusing to seek convictions for statutory offenses related to marijuana, without regard to the particular facts and applicable law in the individual case before him. This policy applies, but is not limited to, charges of possession of marijuana or hashish, N.J.S.A. 2C:35-10(a)(4), being under the influence of a controlled dangerous substance or its analog, N.J.S.A. 2C:35-10(b), use or possession with intent to use drug paraphernalia, etc., N.J.S.A. 2C:36-2, and loitering to obtain or distribute a controlled dangerous substance, N.J.S.A. 2C:33-2.1.

II. Municipal Prosecutors Must Exercise Prosecutorial Discretion on a Case-by-Case Basis, Considering the Particular Facts and Applicable Law in Each Case.

Municipal prosecutors should exercise their prosecutorial discretion in marijuana-related cases as they would in any other case—based on the particular facts and applicable law, and consistent with their ethical obligations to the State, the defendant, and the courts. The applicable

² See Attorney General Guideline: Prosecution of DWI & Refusal Violations 14 (Jan. 24, 2005) (citing State v. Paserchia, 356 N.J. Super. 461 (App. Div. 2003)) (“[A] plea to a violation of an ordinance, when the underlying charge or charges are governed by State statutes is not permitted.”); see also Memorandum to All County Prosecutors re: Training Powerpoint Presentation for Municipal Prosecutors (Apr. 5, 2011); Memorandum to All Municipal Court Prosecutors re: Plea Agreements in Municipal Courts (Nov. 18, 1998).

law in marijuana-related cases may include the Supreme Court’s Guidelines to Part VII of the Rules, which include restrictions on plea agreements involving certain drug-related offenses. Although the law places significant limits on municipal prosecutors’ discretion, the law also grants municipal prosecutors the latitude necessary to see that individual justice is done in individual cases.

Please consider this additional guidance as to how municipal prosecutors might appropriately exercise their discretion at different points in the prosecution of marijuana-related offenses.

A. Case Selection and Initiation

Municipal prosecutors do not have the discretion to decide which cases will be initiated or which offenses will be charged within their jurisdiction. See N.J.S.A. 2B:25-5. The municipal court accepts for filing “every complaint made by any person,” R. 7:2-1(b), and the complaining witness—who may be a private citizen, a law enforcement officer, or another official—determines which offenses to charge in the complaint. R. 7:2-1(a). Unlike a county prosecutor, whose exercise of discretion in deciding which charges to pursue is an important part of their prosecutorial duties, the initial charging decision is not the municipal prosecutor’s to make. Accordingly, a municipal prosecutor has no latitude to use any discretionary authority at this stage of the proceedings to dispense or otherwise deal with statutory offenses related to marijuana.

B. Plea Agreements, Amendments, and Dismissals

After a complaint is filed, the municipal prosecutor is “responsible for handling all phases of the prosecution of an offense.” N.J.S.A. 2B:25-5(a). As explained in the Commentary on the Guidelines to Part VII of the Rules, the municipal prosecutor is not duty bound to pursue a conviction on every offense charged in every complaint:

It is recognized that it is not the municipal prosecutor’s function merely to seek convictions in all cases. The prosecutor is not an ordinary advocate. Rather, the prosecutor has an obligation to defendants, the State and the public to see that justice is done and truth is revealed in each individual case. The goal should be individual justice in individual cases.

In discharging the diverse responsibilities of that office, a prosecutor must have some latitude to exercise the prosecutorial discretion demanded of that position. . . .

[Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey, Pressler & Verniero, Current N.J. Court Rules, Appendix to Part VII cmt. (2018) [Part VII Guidelines].]

Municipal prosecutors therefore have discretion in appropriate cases to recommend that the court accept a plea to a lesser or other offense, N.J.S.A. 2B:25-11, to move to amend an original charge, N.J.S.A. 2B:25-5(c); N.J.S.A. 2B:25-12, and to request dismissal of a charge,

N.J.S.A. 2B:25-5(c). In exercising their discretion, municipal prosecutors must adhere: to constitutional, statutory, and ethical restrictions; to rules, guidance, and decisional law adopted by the Judiciary; and to supervisory instructions of the County Prosecutor and the Attorney General.

a. Plea agreements

From 1974 to 1990, all plea bargaining in municipal courts was prohibited, pursuant to a Supreme Court directive. See State v. Hessen, 145 N.J. 441, 446-49 (1996). That prohibition has been relaxed, but the Court's Part VII Rules and Guidelines still impose significant limits on municipal prosecutors' discretion to enter into plea agreements, and prohibit the use of plea agreements to resolve certain marijuana and other offenses. See id. at 451-54.

Plea agreements in municipal court are now governed by Rule 7:6-2; the Court's Guidelines to Part VII and accompanying Commentary; case law; and guidance from the Office of the Attorney General. When a plea agreement is reached, its terms and the factual basis that supports the charge(s) must be fully placed on the record by the prosecutor, so that the court may review the plea agreement under the "interests of justice" standard. See R. 7:6-2(d).

The prohibition on resolving certain marijuana and other offenses through plea agreements appears in the Guidelines located in the Appendix to Part VII of the Court Rules. Guideline 4 currently states:

No plea agreements whatsoever will be allowed in drunken driving or certain drug offenses.

A. Driving while under the influence of liquor or drugs (N.J.S.A. 39:4-50) and

B. Possession of marijuana or hashish (N.J.S.A. 2C:35-10a(4)), being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10b), and use, possession or intent to use or possess drug paraphernalia, etc. (N.J.S.A. 2C:36-2).

....

Nothing contained in these limitations shall prohibit the judge from considering a plea agreement as to the collateral charges arising out of the same factual transaction connected with any of the above enumerated offenses in Sections A and B of this Guideline.

The judge may, for certain other offenses subject to minimum mandatory penalties, refuse to accept a plea agreement unless the prosecuting attorney represents that the possibility of conviction is so remote that the interests of justice requires the acceptance of a plea to a lesser offense.

[Part VII Guideline 4.³]

If a defendant is charged with more than one violation under Chapter 35 or 36 of the Code of Criminal Justice arising from the same factual transaction and the defendant pleads guilty to one charge or seeks a conditional discharge under N.J.S.A. 2C:36A-1, all remaining Chapter 35 or 36 charges arising from the same factual transaction may be dismissed by the judge on the recommendation of the prosecutor. See Part VII Guideline 4. Prosecutors should exercise their discretion on a case-by-case basis in evaluating whether to recommend dismissal in this context, and dismissal often will be appropriate.

b. Amendments and dismissals

The Guidelines' prohibitions on certain drug- and alcohol-related plea agreements do not "affect in any way the prosecutor's discretion in any case to move unilaterally for an amendment to the original charge or a dismissal of the charges pending against a defendant." Part VII Guideline 3; see also Part VII Guidelines Comment ("Plea agreements are to be distinguished from the discretion of a prosecutor to charge or unilaterally move to dismiss, amend or otherwise dispose of a matter."). Municipal court complaints charging marijuana-related offenses are subject to the usual rule that a municipal prosecutor may move to amend or dismiss all or part of the complaint "for good cause." See N.J.S.A. 2B:25-5(c); R. 7:8-5 (dismissal); see also N.J.S.A. 2B:25-12 (amendment); R. 7:14-2 (amendment).

A municipal prosecutor's well-founded determination that the State lacks sufficient evidence to proceed ordinarily will constitute "good cause" to amend or dismiss a charge. The Commentary to the Part VII Guidelines states that "a prosecutor should not prosecute when the evidence does not support the State's charges." Therefore, insufficient evidence "usually" will be the "cause" for a motion to dismiss a pending charge, and that "the prosecutor should have the ability to amend the charges to conform to the proofs." Dismissal and amendment on these grounds are the examples of appropriate uses of prosecutorial discretion recognized in the Commentary to the Part VII Guidelines and in guidance from the Division of Criminal Justice.⁴

³ The prohibition of plea agreements for certain marijuana and other drug offenses encompasses any agreement between the prosecutor and the defense "as to the offense or offenses to which a defendant will plead guilty on the condition that any or all of the following occur: (a) the prosecutor will recommend to the court that another offense or offenses be dismissed; (b) the prosecutor will recommend to the court that it accept a plea to a lesser or other offense (whether included or not) than that originally charged; (c) the prosecutor will recommend a sentence(s), not to exceed the maximum permitted, to the court or remain silent at sentencing." Part VII Guideline 2. A plea agreement includes "all of those traditional practices, utilized by prosecutors and defense counsel, including 'merger', 'dismissal', 'downgrade' or 'amendment.'" Part VII Guidelines Comment.

⁴ See, e.g., Attorney General Directive Prohibiting Municipal Court Plea Offers to "No Point" Violations for Graduated Drivers Licensees (Sept. 17, 2008) ("Nothing in this Directive should be construed to limit the authority of the prosecutor to dismiss any charge(s) where the prosecutor represents to the court on the record, either in camera, or in open court, that there is

While insufficiency of the evidence “usually” will be the basis for an amendment or dismissal, other reasons might justify amendment or dismissal of a complaint. The relevant statutes and Court Rules do not specifically address what other circumstances might constitute “good cause.” To the extent permitted by law, however, a municipal prosecutor should consider the impact of adverse collateral consequences of a conviction based on the specific circumstances or factors presented by the defendant or elicited by the court. Such circumstances or factors may include, but are not limited to:

- a. The age of the defendant, and the nature and extent of the defendant’s prior criminal record;
- b. The nature and circumstances of the offense and the arrest;
- c. Adverse employment or military enlistment consequences (including hindering or precluding future employment, access to professional/occupational licensing, or ability to enlist in the armed services);
- d. Adverse immigration consequences;
- e. Adverse educational consequences (including potential removal from school or student housing and hindering or precluding access to student financial assistance);
- f. Adverse housing and other government benefit consequences (including hindering or precluding future access to public housing and monetary benefits from the government);
- g. Adverse familial consequences (including parenting/family status changes and financial or other burdens for family members); and
- h. Other factors identified in the National Prosecution Standards published by the National District Attorneys Association.⁵

In considering whether to move to amend or dismiss a complaint, a municipal prosecutor should be guided by the Court’s admonition that “the prosecutor has an obligation to defendants, the State and the public to see that justice is done and truth is revealed in each individual case.” See Commentary to Part VII Guidelines. “The goal should be to achieve individual justice in individual cases.” Ibid.

insufficient evidence to warrant a conviction, or that the possibility of acquittal is so great that dismissal of the charge(s) is warranted in the interests of justice.”).

⁵ See National District Attorneys Association, National Prosecution Standards (3d ed.), <https://ndaa.org/wp-content/uploads/NDAA-NPS-3rd-Ed.-w-Revised-Commentary.pdf>.

The reasons for any amendment or dismissal must be acceptable to the municipal court. If a municipal prosecutor moves to amend or dismiss a complaint, the prosecutor must personally represent on the record the reasons in support of the motion. See Part VII Guideline 3. The prosecutor should anticipate that the court will question the basis for the motion to prevent an improper amendment or dismissal. See, e.g., Memorandum from Philip S. Carchman, J.A.D., to Municipal Court Judges re: Sample Questions for Use in Drunk Driving Cases (Dec. 2, 2004). At all times, the prosecutor should remain mindful of his ethical obligations to the State and the court. See, e.g., In re Norton, 128 N.J. 520, 533-40 (1992); In re Whitmore, 117 N.J. 472, 475-80 (1990).

C. Sentencing

Municipal court judges exercise considerable discretion at sentencing. For statutory offenses, the court's discretion is subject to any statutory maximum or minimum penalties and based on the criteria prescribed by N.J.S.A. 2C:44-1 to -3 and N.J.S.A. 2C:51-2. See R. 7:9-1(b). A municipal prosecutor seeking to mitigate the consequences of a marijuana conviction may make favorable sentencing recommendations or not object to the defendant's requests. The prosecutor also may support the defendant's application for a "compelling circumstances" exception to the driver's license suspension penalty under N.J.S.A. 2C:35-16 and/or the defendant's application for relief from the Drug Enforcement and Demand Reduction penalty under N.J.S.A. 2C:35-15.

D. Diversion Programs and Community Court

A number of programs offer eligible defendants in municipal court cases diversionary treatment as an alternative to traditional prosecution. These include conditional discharge and conditional dismissal programs. In addition, the Cities of Newark and Jersey City operate innovative Community Solutions (or community court) programs focused on remedying some of the underlying causes of low-level crime. Municipal prosecutors may be called upon to recommend whether eligible defendants should be accepted into these programs. Nothing in this Memorandum should deter any municipal prosecutor from freely recommending that any eligible defendant be accepted into any of these diversion programs.

Recent decisions from the Appellate Division have addressed whether marijuana-related offenses pending against the same defendant in different municipal courts may be consolidated with the defendant's consent, pursuant to Rule 7:8-4, in order to maintain the defendant's eligibility for a diversion program. See State v. Whooley, No. A-3395-15T2, 2017 N.J. Super. Unpub. LEXIS 2016 (App. Div. Aug. 8, 2017); State v. Sokolovski, No. A-4734-15T2, 2017 N.J. Super. Unpub. LEXIS 2537 (App. Div. Sept. 17, 2017). The Appellate Division concluded that consolidation was permissible in these cases even though the marijuana-related offenses pending in each municipal court did not "ar[ise] out of the same facts and circumstances." R. 7:8-4. Based on the Appellate Division's decisions, municipal and county prosecutors should consider consenting to consolidation in similar cases to allow defendants to qualify for diversion.

III. Effective Date

On July 24, 2018, I asked all municipal prosecutors to seek an adjournment until September 4, 2018, or later, of any matter involving a marijuana-related offense pending in municipal court, while the Office of the Attorney General developed guidance for prosecutors. That request will expire on September 4, 2018.

This Memorandum of Guidance shall take effect immediately upon issuance.



Gurbir S. Grewal
Attorney General

ATTEST:



Veronica Allende
Director, Division of Criminal Justice

Dated: August 29, 2018