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To: Assistant Municipal Prosecutors

From: Chief Prosecutor Jacob V. Hudnut 

cc: Mayor Steven M. Fulop
Corporation Counsel Peter J. Baker

Date: July 19, 2018

RE: NEW MARIJUANA DECRIMINALIZATION POLICY

Each year in the State of New Jersey there are more than 25,000 arrests for marijuana possession. It is estimated that prosecution following these arrests has cost our state well more than \$1 billion each decade in policing, court operations, probation, and jailing. Much of these costs fall on municipalities, like Jersey City, for which resources are scarce to begin with. Marijuana possession is non-violent in nature, and focusing law enforcement resources on violent offenses does far more to promote safe communities.

The collateral consequences of marijuana possession prosecution are considerable. They include driver's license suspensions, criminal records, loss of student financial aid, bans from public housing, adverse effects on employment opportunities, and loss of immigration status. What's even more alarming is that New Jerseyans of color are three times more likely to be arrested for marijuana and suffer these consequences than white New Jerseyans, despite similar cross-racial usage rates. This disparity should give us pause.

Additionally, last year Governor Phil Murphy successfully campaigned for the governorship on a platform that included marijuana legalization based largely upon the above-stated facts. Recent public opinion polling shows that as many as 60% of New Jerseyans support marijuana legalization. It is estimated that taxing and regulating marijuana could generate more than \$300 million per year in revenue for our state. Related legislation is pending in Trenton with support from top lawmakers.

We – in a city as large, diverse, and progressive as Jersey City – are poised to take action. We owe it to the public we serve to address this injustice in our state. Accordingly, effective immediately this office will no longer criminally prosecute marijuana possession before the municipal courts of Jersey City. We will not contribute to the racially disparate and costly prosecution of a non-violent disorderly person offense (hereafter “misdemeanor crime”) that is on the verge of

legalization amid widespread public support for same. In taking this position, we exercise prosecutorial discretion and recognize our duty to the public as outlined below.

Prosecutors are vested with broad discretionary powers. State v. Laws, 51 N.J. 494, 510-11, cert. denied 393 U.S. 971 (1968). Prosecutors may prosecute under any of the alternative actions available within the factual situation of an arrest, State v. States, 44 N.J. 285, 291-92 (1965), and need not pursue the maximum charge sustainable under the facts, In re Buehrer, 50 N.J. 501, 521 (1967).

In fact, the Supreme Court's Comment to the Guidelines governing plea negotiation in municipal courts provides express support for the spirit of this policy by highlighting a prosecutor's larger duty to the public, stating that:

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

(Pressler, Current N.J. Court Rules, Guideline 4 to R. 7:6-2) (emphasis added). This policy is differentiated from the type of arbitrary or abusive action limited by the Guidelines governing plea negotiation in municipal courts. See, e.g., In re Norton, 128 N.J. 520 (1992) (disciplining parties in a drunk driving action for not disclosing that charges were dropped without good cause amidst an improper conflict between judge and defendant).

Please note that this policy should have *no* effect on collateral or companion charges or cases involving controlled dangerous substances other than marijuana.

In light of this new policy, kindly proceed in the following course:

Amend

Under the authority granted by N.J.S.A. 2B:25-12, all marijuana-related offenses before the Jersey City municipal courts shall be amended by this office to Jersey City, New Jersey Municipal Code (hereafter "Local Ordinance") offenses. These are non-criminal dispositions. Local Ordinances § 242-6 (Peace and good order – public areas), § 242-7 (Peace and good order – motor vehicles), and §245-1 (Peddling, soliciting and canvassing) are suggested. Copies are attached hereto.

For purposes of this policy, marijuana-related offenses shall include: possession of marijuana or hashish (N.J.S.A. 2C:2C:35-10a(4)); being under the influence of a controlled dangerous substance or its analog (N.J.S.A. 2C:35-10b); 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).

This new policy also encompasses the non-criminal motor vehicle regulation of possession of controlled dangerous substance in a motor vehicle (N.J.S.A. 39:4-49.1). This office has a longstanding history of dismissing this charge in large part because of the unduly onerous mandatory two-year license suspension required upon conviction. This practice should not change. This new policy does not, however, impact our enforcement of the non-criminal motor vehicle regulation of operating a motor vehicle while intoxicated (N.J.S.A. 39:4-50) against drivers suspected to be under the influence of marijuana. In fact, this office will be advocating for increased resources and opportunities for police training in detecting drug-induced intoxication so that our office can successfully meet our burden in these important prosecutions.

The recommended sentence sought by this office upon a conviction of a Local Ordinance shall be a fine no greater than \$50 or five hours of community service in lieu of a fine. See Local Ordinance § 1-25 (attached hereto). However, this office should not object if the court will accept a recommendation of court costs only if you believe that the offense was aberrational for the defendant.

Dismiss

However, we should be mindful that an adjudication of guilty by either plea or trial to a local ordinance bars an individual from the automatic expungement of the underlying arrest normally available under N.J.S.A. 2C:52-6. This runs contrary to the underlying aims of this new policy. Therefore, dismissal of the amended charge may be appropriate. Circumstances calling for a dismissal could include: aberrational indicia, a lack of prior criminal contact by the defendant, surrounding circumstances unlikely to re-occur, the absence of any public nuisance or disturbance in the underlying arrest, etc. This evaluation will not be unlike a weighing of the criteria for withholding or imposing sentence of imprisonment found in N.J.S.A. 2C:44-1.

Please be prepared to make a record in court upon dismissal, addressing both the case's individual facts warranting dismissal and the larger aims of this new policy.

Divert

This office also recognizes that while contributing to the racially disparate and costly prosecution of a non-violent misdemeanor crime that is on the verge of legalization amid widespread public support for same is unjust, so is turning our back on addiction and chronic unemployment.

Therefore, individuals with marijuana possession charges and signs of addiction as evidenced by significant prior criminal contact for possessory charges should be diverted to Jersey City Community Solutions (hereafter "community court") in the normal course following the amendment of their charge to a local ordinance. Currently, successful completion of community service and particularized and identified social services results in dismissal of underlying charges before the community court. However, this diversion to community court **does not** contemplate the defendant who presents as a one-time or even occasional marijuana user with little to no prior criminal contact.

Additionally, we must recognize that there will be instances in which felony cases are downgraded and remanded by the County Prosecutor to this office. Marijuana cases with indicia of distribution or possession with intent to distribute warrant higher scrutiny than those cases originally charged

by the arresting officer as a simple possessory offense. (However, be mindful of the difference between distribution charges based on an exchange of monetary currency as opposed to sharing among acquaintances.) An affirmative conclusion after that scrutiny may call for a higher monetary or community service sentencing recommendation than addressed earlier in this memorandum. More likely, those cases should be diverted to community court in the normal course following the amendment of their charge to a local ordinance so that social services including job training and placement may be made available to those individuals who appear to be illegally distributing marijuana in exchange for monetary currency.