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MEMORANDUM

Policy Regarding the Prosecution of Low-Level Possession of Marihuana Cases

I. Policy Statement

The Kings County District Attorney's Office is committed to protecting the public's safety and to enhancing the welfare of community members through the fair and intelligent enforcement of our criminal laws. Accordingly, this Office is instituting a new policy with regards to the prosecution of low-level possession of marihuana cases (see, infra, Section II, The Policy). The new policy will identify those offenders whose history and conduct most clearly implicate public safety concerns and will appropriately target the resources of the criminal justice system at those individuals.

The policy covers the handling of cases, both in the Early Case Assessment Bureau (ECAB) and beyond, wherein an individual has been arrested on a top count charge of Criminal Possession of Marihuana in the Fifth Degree, a class B misdemeanor, or Unlawful Possession of Marihuana, a violation. Pursuant to this policy, this Office will use its prosecutorial discretion to decline the prosecution of, and dismiss up front, certain low-level marihuana cases based on criteria concerning the particular individual and the circumstances of the case. Individuals in these cases are accused of possessing marihuana in public and having it in open view or burning (P.L. § 221.10[1]), or of possessing more than 25 grams of marihuana, regardless of whether the possession is in public and the marihuana is in open view or burning (P.L. § 221.10[2]), or of simply knowingly and unlawfully possessing marihuana (P.L. § 221.05). These cases may come

into ECAB either as "on-line" arrests or, much more frequently, as Desk Appearance Tickets ("DATs").

The goal of this new policy is to ensure that: (1) the limited resources of this Office are allocated in a manner that most enhances public safety; and (2) individuals, and especially young people of color, do not become unfairly burdened and stigmatized by involvement in the criminal justice system for engaging in non-violent conduct that poses no threat of harm to persons or property. The policy does not undermine the authority of the police to enforce the law. This Office respects the officers of the New York City Police Department who, with dedication and good faith, discharge their weighty responsibility of keeping the community safe. We recognize that the possession of marihuana is illegal in this State, and that the police, when acting in a constitutional manner, have authority to arrest offenders who break the law. This Office and the NYPD have a shared mission of public safety, and we have collaborated, and will continue to collaborate on many initiatives, that advance that goal. But a District Attorney has the additional duty "to seek justice, and not merely convict" and the important function of trying "to reform and improve the administration of justice" (American Bar Association, *Criminal Justice Standards on the Prosecution Function*, Standard 3-1.2), and it is bearing those obligations in mind, that I am instituting the new policy.

If the conduct in which the individual has engaged is the mere possession of a small amount of marihuana in public, it would not, under most circumstances, warrant saddling that individual with a new criminal conviction and all of its attendant collateral consequences related to employment, education, and housing. Moreover, given the vast number of community members who, regardless of race, have engaged at some point in their lives in this non-violent conduct with impunity, the imposition of a conviction for such conduct may perpetuate the public's perception that the criminal justice system as a whole and law enforcement in particular is neither colorblind, nor class-blind.

In 2013, this Office processed well over 8,500 cases wherein the top charge in the criminal complaint was a count of class B misdemeanor marihuana possession (P.L. § 221.10). More than two-thirds of those cases ended up being dismissed, most often because the defendant was offered an adjournment in contemplation of dismissal at his or her criminal court arraignment. The processing of these cases exacts a cost on the criminal justice system and takes a toll on the individual. Given that these cases are ultimately (and predictably) dismissed, the burdens that they pose on the system and the individual are difficult to justify.

When a person has neither a criminal record nor a pending case nor an open warrant, it makes no sense in most instances for the criminal justice system, including a District Attorney's Office, to devote its scarce resources to lengthy case processing. In those instances, we are pouring money and effort into an endeavor that produces no public safety benefit for the community.

This Office recognizes, however, that there are circumstances when the public possession of even small amounts of marihuana may threaten the health and welfare of community members. That threat is most acute when an individual is smoking marihuana around other people in a public space, especially in a location frequented by families, or when the possessor of the marihuana is himself or herself still a youth. We, as an Office, fully support the efforts of parents, educators, health professionals, and the police both to protect children from marihuana and to dissuade them from lighting up a substance that is unhealthy and illegal. The smoking of marihuana around children, especially if done by older teenagers, may normalize or glamorize the conduct in a way that lures younger children to themselves engage in marihuana use. The threat of harm posed by these offenders, even if they have no criminal record, outweighs the criminal justice system's need to husband its limited resources. Similarly, because young offenders (16- and 17-year-olds), who have only recently taken up marihuana, may be successfully redirected onto a healthier path through a diversion program, it behooves the criminal justice system to

facilitate that redirection if possible, and the NYPD, this Office, and the courts in Brooklyn are all working together to make that happen.

In light of the precepts set out above, when a case is brought by the police to this Office's ECAB, either via an on-line arrest or a DAT, and ECAB personnel have concluded that the individual charged has either no criminal record or only a very minimal criminal record, there will be a presumption that the District Attorney's Office will decline to prosecute the case in the interest of justice when the case involves mere possession. The Office will work with the New York Police Department and community groups to ensure that if there are any facts or circumstances surrounding a particular case or defendant that would justifiably rebut the presumption in favor of dismissal, such information comes to the attention of ECAB personnel, so that a careful, individualized determination can be made about whether to pursue the prosecution of the case. If an individual, who has no criminal record or only a very minimal record, is being charged with burning the marihuana in a public place, the Office will carefully scrutinize the circumstances under which the smoking occurred, and may still decide to decline to prosecute the case in the interest of justice.

When the Office has decided to decline to prosecute the case in the interest of justice, the police will be directed to free the individual if he or she is being held pursuant to an on-line arrest. For DATs, a new protocol (see, infra, Section III, The DAT Protocol) will be instituted that will ensure that the person does not have to return to court if it is not necessary. Sixteen- and 17-year-old offenders who are given DATs by the police will be directed to return to an adolescent court part, specifically designed to divert youth into a helpful program and to provide them with immediate and complete dismissals upon program completion. Pursuant to a decline to prosecute by ECAB personnel, in either an on–line arrest or DAT case, the police will be directed to destroy the defendant's fingerprints in accordance with the provisions of C.P.L § 160.50.

In those cases in which the defendant does have a criminal record, the presumption will be that, if the case does not involve the burning of marihuana in a public place and in the absence of certain other aggravating factors, such as a history of selling drugs to children or dangerous driving while under the influence of drugs or marihuana, the case will be resolved with an adjournment in contemplation of dismissal or a non-criminal disposition.

The goal of our criminal laws is, ultimately, to promote the safety of community members in their persons and property, and as the chief law enforcement officer in Brooklyn, I am dedicated to achieving that goal with justice and fairness. A District Attorney's discretion in whether and how to prosecute a case can be a significant tool, when wielded wisely, to achieving that end. Currently, in the majority of cases in which the defendant has been charged with a class B misdemeanor for criminal possession of marihuana or a violation for unlawful possession of marihuana as the top count, obtaining a conviction against the defendant does not advance public safety with fairness and justice, and, indeed, might well sabotage that goal. Accordingly, as per the policy guidelines which follow, this Office will no longer seek such a disposition.

II. The Policy

The Kings County District Attorney's Office, in deciding how to prosecute a case in which the person has been arrested on a top count charge of P.L. § 221.10 or P.L. § 221.05, will assess the circumstances of each case in light of the guidelines below.

►If at ECAB, we see (1) that the defendant has no prior arrests or criminal convictions, or has only a very minimal criminal record, and (2) that the defendant has provided the police with a verifiable name and address, there will be a presumption that we will decline to prosecute ("DP") the case, unless such defendant has been charged with burning marihuana in a public place. If such a defendant (i.e., no or minimal record) is being charged with burning marihuana in a public place, then we may still DP the case, except if that public place is: (1) a park, playground, zoo, house of worship, or other family-oriented location; (2) on or near school grounds or a school bus as defined in Article 220 of the Penal Law; or (3) a public means of transportation, including subway cars and stations, and buses. If the presumption is applicable, an ECAB supervisor will consider the following factors to determine if the presumption has been rebutted: the circumstances of the case, the nature of any other arrest charges, and the defendant's criminal history, if any. In the event, that ECAB DP's the case, the reason for the DP on the DP paperwork will be noted as follows: "Although there is sufficient evidence to sustain the charge of P.L. § 221.10 [or P.L. § 221.05], the People decline to prosecute **in the interest of justice** pursuant to the class B misdemeanor marihuana possession policy guidelines of the Kings County District Attorney's Office."

►If at ECAB, we see that the defendant and the circumstances of the case do not meet the criteria for a "DP" in the interest of justice as set out above, we will draw up a criminal complaint.

► At arraignments, assuming no non-marihuana misdemeanor crimes have been charged, it will be in the discretion of the ADA to resolve the case either with an adjournment in contemplation of dismissal (meaning an "Adjournment in contemplation of dismissal in cases involving marihuana" [P.L. § 170.56] ["MACD"] or an "Adjournment in contemplation of dismissal" [P.L. § 170.55] ["ACD"]) or a plea offer to the P.L. § 221.05 violation, "Unlawful possession of marihuana."

If the defendant has a criminal record and either the charge involves burning in a public place or one or more of the following aggravating factors is present, there will be a presumption that the offer will be a violation, or, depending on the defendant's criminal history and the circumstances of the case, a class B misdemeanor.

AGGRAVATING FACTORS:

A. The defendant's record contains any conviction for Criminal Sale of Marihuana (P.L. § 221.35 - 221.55), Criminal Sale of a Controlled Substance in or near School Grounds (P.L. § 220.44), or Criminal Sale of a Controlled Substance to a Child (P.L. § 220.48); or

B. The defendant has one or more criminal convictions supporting the inference that the defendant may act in a violent or dangerous manner (e.g., DV offenses; VTL intoxication) when under the influence of marihuana; or

C. The defendant has an open warrant; or

D. DNA needs to be collected; or

E The defendant must register as a sex offender; or

F. The case involves a search warrant.

III. The DAT Protocol

In May 2013, the NYPD announced a new policy with respect to the issuance of DATs in marihuana cases: Under NYPD rules, the issuance of DATs became mandatory, with very few disqualifying factors, for all individuals charged with class B misdemeanor marihuana possession.[1] This policy was apparently meant to benefit defendants by sparing them the experience attendant to on-line arrest case processing (such as time spent in holding cells awaiting arraignment) and also to benefit the criminal justice system by saving some costs attendant to an on-line arrest case processing.

From July 1, 2013 – June 30, 2014, there have been approximately 8,150 cases in which the top count on the Kings County misdemeanor complaint was a P.L. § 221.10 charge. Of those, 5,189 cases (about 64%) came into the system as DATs. Of those 5,189 cases, well over one-half (N=3,156; about 61%) were dismissed, most often with a Marihuana Adjournment in Contemplation of Dismissal ("MACD"; see C.P.L. § 170.56) (N=2,450 cases).

On the one hand, the issuing of a DAT, instead of processing an individual through an on-line arrest, may save the criminal justice system some money and almost certainly is less traumatic and disruptive for the individual, and, therefore, this Office supports the NYPD's policy of issuing DATs in the large majority of misdemeanor marihuana cases (as opposed to proceeding with an on-line arrest), and especially when the offenders are 16- and 17-year-old youths.

On the other hand, the huge number of DATs undoubtedly burdens the criminal justice system. Approximately 120-150 cases are heard in a DAT arraignment part of Criminal Court in Brooklyn, and three parts are calendared during the week. Because of the volume of cases, "return"/arraignment dates are now often as much as 90-120 days after the date of arrest.

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[1] The disqualifying factors include the inability to ascertain the defendant's name or address; that the defendant is an out-of-state resident; and that the defendant owes DNA.

According to a recently issued report, a wait of longer than 45 days after arrest greatly increases the chance that the defendant will not appear at the arraignment.[2] If the defendant fails to appear, a warrant will be issued for his or her arrest -- a waste of resources, if in the end, this Office simply intends to dismiss the case.

The protocol described below targets: (1) those individuals given a DAT with a top count charge of either a class B misdemeanor for criminal possession of marihuana or a violation for unlawful possession, whom the Office, under the new policy, would decline to prosecute, and for whom, under the old policy, a MACD would have eventually been issued; and (2) 16- and 17-year-olds given a DAT with a top count charge of either a class B misdemeanor for criminal possession of marihuana or a violation for unlawful possession, who are now going to be directed into the new DAT-Y Part of Criminal Court. First, the protocol has the potential to remove hundreds of cases from the arraignment docket, thereby allowing the District Attorney's Office, defense counsel, and the court system to focus their time and attention to other cases. Second, the protocol also may save the defendant time and money. Third, by continuing to direct at-risk youth into the DAT-Y Part and giving them an incentive to participate in a worthwhile therapeutic program, the protocol has the potential of reducing recidivism and promoting the general health and welfare of these young community members.

The police officer will proceed as the officer does now -- i.e., creating the DAT package, obtaining the "return"/arraignment date from the NYPD DAT Unit officer, and providing the defendant with the DAT slip with that return date.

The DAT package (the outside of which, police personnel will have marked, as they do now, with "CPM" for a criminal possession of marihuana case) will make its way to KCDA's Early Case Assessment Bureau (ECAB), as per the usual course. The misdemeanor marihuana possession DAT packages will then be quickly sorted in ECAB by a paralegal specifically

[2] See Mary T. Phillips, Ph.D., New York City Criminal Justice Agency, The Past, Present, and Possible Future of Desk Appearance Tickets in New York City, 71 (March 2014).

assigned to the task, and these DATs will receive a priority review. If the DAT relates to a 16- or 17-year-old, ECAB staff will ensure that the complaint is drawn up in time to meet the expedited return date in the DAT-Y Part. For a case involving a defendant older than 18, if ECAB staff conclude that the case should be DP'd in the interest of justice in accordance with the KCDA Policy guidelines, staff will draw up the appropriate DP paperwork and transmit it to the police. In addition, ECAB staff, using a new computer application, will prepare and mail a letter to the defendant advising him/her of the DP and that he/she does not have to appear in court with regards to the arrest.

This protocol will spare ECAB staff from writing up a criminal complaint only to have that instrument dismissed pursuant to an MACD, and it will also mean that the court's DAT dockets will not be clogged up with such cases. Additionally, it will spare the charged individual from taking an unnecessary trip to the courthouse, only to be told that the case is to be dismissed, and it will ensure that an open arrest does not remain on an individual's criminal history for months at a time -- a situation that can have serious and disproportionate repercussions for a person's employment, education, and housing prospects.