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TO: Director, Division of Criminal Justice
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FROM: Gurbir S. Grewal, Attorney General

DATE: June 17, 2020

SUBJECT: **Guidance Regarding Municipal Prosecutors' Discretion in Prosecuting COVID-19 Related Offenses¹**

The world is currently facing a coronavirus (COVID-19) pandemic. As of today's date, more people in the United States have tested positive for, and have died from, COVID-19 than in any other country in the world. Moreover, as of today's date, New Jersey has the second largest number of people in the United States who have tested positive for, and who have unfortunately died from, COVID-19.

In an effort to protect the health, safety, and welfare of New Jersey residents and reduce the spread of COVID-19, Governor Philip D. Murphy issued a number of Executive Orders (collectively, the Orders) establishing statewide social distancing strategies to combat the rate of community spread of COVID-19. These emergent measures included, but were not limited to, closing enumerated facilities and businesses to the public, limiting the number of people who can gather in any one location, and limiting the reasons for which a person can travel outside their residence.

The vast majority of New Jerseyans have abided by the Governor's Orders and helped New Jersey slow the spread of COVID-19 over the last several months. Some have not. Accordingly, at the outset of the pandemic in New Jersey, to ensure accurate interpretation and

¹ On August 29, 2018, I issued a Memorandum of Guidance ("Memorandum #1") addressing the scope and appropriate use of prosecutorial discretion by municipal prosecutors handling complaints in municipal courts. Memorandum #1 also focused on how municipal prosecutors may permissibly exercise their discretion in cases involving marijuana-related offenses. This Memorandum incorporates, by reference, the guidance issued in Memorandum #1.



uniform enforcement of the Orders, I required that designated assistant prosecutors within each County Prosecutor's Office ("COVID-19 Prosecutor") review and pre-approve every COVID-19 related charge in their county. This pre-approval process not only ensured that similarly situated defendants across the state were being treated in a similar manner, but also helped ensure compliance with the Governor's Orders. As these charged cases now proceed through our municipal courts, it is equally important that each case be prosecuted in a uniform and consistent fashion to ensure they are all resolved in a fair and just manner.

Therefore, 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 COVID-19 related cases in municipal court.

I. Categorical Approaches to Resolving COVID-19 Cases Prohibited

Municipal prosecutors—like all prosecutors—must exercise their prosecutorial discretion in COVID-19 related cases as they would in any other matter: on a case-by-case basis. When exercising their discretion, they must adhere to statutory, constitutional, and ethical restrictions, as well as rules, guidance and case law from the Judiciary. In addition, they must follow the supervisory instructions of the County Prosecutor and the Attorney General (including this Memorandum). This means that municipal prosecutors cannot refuse to prosecute cases simply because they are COVID-19 related, or related to the enforcement of the Governor's Orders. That would be an inappropriate exercise of prosecutorial discretion.

Also impermissible is a categorical policy or practice of amending COVID-19 related charges to local ordinance violations or dismissing the charges outright. Unlike most complaints filed in municipal court, COVID-19 related charges are only pursued after a review of available facts by the COVID-19 Prosecutor and with the COVID-19 Prosecutor's authorization to proceed with the charge. Indeed, without approval by the COVID-19 Prosecutor, COVID-19 related charges should not be filed. Categorical policies and practices adopted at the municipal level refusing to enforce these charges will undoubtedly lead to disparate administration of these laws.

II. Guidelines for the Appropriate Exercise of Municipal Prosecutor Discretion in COVID-19 Cases

Notwithstanding the above prohibitions, municipal prosecutors may appropriately exercise their discretion at different points in the prosecution of COVID-19 related offenses as set forth below.

A. Plea Agreements, Amendments, and Dismissals

Municipal prosecutors retain the discretion to move unilaterally for an amendment of the original charge to an offense that is not a local ordinance, or a dismissal of the charges pending against a defendant if the prosecutor determines and personally represents on the record the

reasons in support of the motion. See Appendix to Part VII of the Rules Governing the Courts of the State of New Jersey, Guidelines for Operation of Plea Agreements in the Municipal Courts of New Jersey, Guideline 3. The reasons for any amendment or dismissal must be acceptable to the municipal court.

For example, a municipal prosecutor's determination that the State lacks sufficient evidence to proceed in a given case will ordinarily constitute "good cause" to amend or dismiss a charge. But any such determination must be made on a case-by-case basis and clearly set forth on the record.

While insufficiency of the evidence "usually" will be the basis for an amendment or dismissal, as noted in Memorandum #1, other reasons may also justify amendment or dismissal of a complaint. To the extent permitted by law, a municipal prosecutor may also 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. Other circumstances or factors that prosecutors should consider when resolving a particular case include, but are not limited to:

1. The age of the defendant, and the nature and extent of the defendant's prior criminal record;
2. The nature and circumstances of the offense and the arrest, including, but not limited to, the following:
 - a) the offense required a significant law enforcement or first responder response or use of resources;
 - b) the defendant's conduct jeopardized the health, welfare, or safety of another person;
 - c) the defendant refused to obey the lawful orders of any person who is performing any function authorized under the law;
 - d) the defendant's actions jeopardized the health, safety, or welfare of a minor, or of an individual they supervise or otherwise have control over; and
 - e) the defendant committed the offense against a first responder, including, but not limited to, a police or other law enforcement officer, correctional employee, emergency medical technician, medical professional, firefighter, or any staff, security guard, or other employee at any police, fire, or medical building or facility;
3. Whether the defendant was previously warned or received prior charges for this or similar conduct;
4. Other factors identified in the National Prosecution Standards published by the National District Attorneys Association.²

² These factors can be found at: <https://ndaa.org/wp-content/uploads/NDAAP-NPS-3rd-Ed.-w-Revised->

B. Considerations in Light of Executive Order 152

Last week, Governor Murphy announced that, going forward, all outdoor political activity and outdoor worship services would be permitted, without any limitation on the number of individuals permitted to gather for such activities. As articulated in Executive Order No. 152 the Governor's decision was based both on the lower risks of COVID-19 transmission outdoors and on the societal importance of these activities. To ensure that all outdoor political activities and outdoor worship services receive uniform treatment, I am directing prosecutors to move to dismiss any Executive Order violations previously filed for such conduct, despite the initial probable cause determination or appropriateness of the violation at the time it was issued. Based on data maintained by the Division of Criminal Justice, there were five individuals who received summonses for organizing outdoor political protests and religious services in violation of Orders prior to the issuance of Executive Order No. 152; no individual protestors or worshipers have been cited to date.

C. Sentencing

COVID-19 related charges heard in municipal court will generally be either Disorderly Persons (DP) or Petty Disorderly Persons (PDP) offenses. Although municipal court judges have considerable discretion at sentencing, their discretion is subject to the minimum or maximum penalties set forth in the statutes. One area where municipal prosecutors can exercise their discretion when seeking to mitigate the consequences of a COVID-19 related conviction is at sentencing. The municipal prosecutor may choose to make a favorable sentencing recommendation or not object to the defendant's sentencing request. Any recommendation, however, must be within the statutory sentencing guidelines.

D. Conditional Dismissals, Diversion Programs and Community Court

Depending on the facts and circumstances of a particular case, the municipal prosecutor may consider recommending, or not opposing a defendant's request for, a conditional dismissal as an alternative to an outright dismissal if the defendant is otherwise eligible and where such a resolution would be in the interests of justice. Again, these determinations must be made on a case-by-case basis, and the factors the municipal prosecutor should consider when deciding whether to recommend a conditional dismissal are as follows:

1. The nature and circumstances of the offense;
2. The facts surrounding the commission of the offense;
3. The motivation, age, character, and attitude of the defendant;
4. The desire of the complainant or victim to forego prosecution;
5. The needs and interests of the victim and the community;

6. The extent to which the defendant's offense constitutes part of a continuing pattern of anti-social behavior;
7. Whether the offense is of an assaultive or violent nature, whether in the act itself or in the possible injurious consequences of such behavior;
8. Whether the defendant's participation will adversely affect the prosecution of codefendants;
9. Whether diversion of the defendant from prosecution is consistent with the public interest; and
10. Any other factors the prosecutor might deem relevant.

See N.J.S.A. 2C:43-13.1.

In addition to conditional dismissal programs, some cities such as Newark and Jersey City operate innovative Community Solutions (or community court) programs as an alternative to traditional prosecution. Municipal prosecutors in jurisdictions offering these programs may be asked 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.

If a defendant applies to the court for entry into the conditional dismissal program, or a community court program like the ones offered in Newark and Jersey City, and the municipal prosecutor does not think the defendant should be admitted into this program, the municipal prosecutor *must* put their objection on the record. The order approving the defendant's participation in the conditional dismissal program is a final order. However, upon request of the municipal prosecutor, this order must be stayed for a period of 10 days to permit the prosecutor time to appeal this order to the Superior Court. See N.J.S.A. 2C:43-13.2. When the municipal prosecutor objects to an order approving the defendant's entry into the conditional dismissal program, or a community court program like the ones offered in Newark and Jersey City, the municipal prosecutor shall immediately notify the county's COVID-19 Prosecutor and/or Municipal Prosecutor Liaison so that the county prosecutor's office can take appropriate action regarding the municipal appeal.

III. Additional Consultation with COVID-19 Prosecutors

To the extent the municipal prosecutor does not know whether a contemplated exercise of discretion is permissible or impermissible, the municipal prosecutor should seek clarity from the COVID-19 Prosecutor and/or the Municipal Prosecutor Liaison in the County Prosecutor's Office. Each County Prosecutor's Office shall designate the contact within their office for COVID-19 related case questions.

IV. Effective Date

This Memorandum of Guidance shall take effect immediately upon issuance.



Gurbir S. Grewal
Attorney General

ATTEST:



Veronica Allende
Director, Division of Criminal Justice
Dated: June 17, 2020