



# FAIR AND JUST PROSECUTION

Promoting justice through leadership and innovation

## ISSUES AT A GLANCE

### Marijuana Policy Reform

*Fair and Just Prosecution (FJP) brings together recently elected district attorneys<sup>1</sup> as part of a network of like-minded leaders committed to change and innovation. FJP hopes to enable a new generation of prosecutive leaders to learn from best practices, respected experts, and innovative approaches aimed at promoting a justice system grounded in fairness, equity, compassion, and fiscal responsibility. In furtherance of those efforts, FJP's "Issues at a Glance" provide district attorneys with information and insights about a variety of critical and timely topics. These papers give an overview of the issue, key background information, ideas on where and how this issue arises, and specific recommendations to consider. They are intended to be succinct and to provide district attorneys with enough information to evaluate whether they want to pursue further action within their office. For each topic, Fair and Just Prosecution has additional supporting materials, including model policies and guidelines, key academic papers, and other research. If your office wants to learn more about this topic, we encourage you to contact us.*

#### SUMMARY

**This FJP "Issues at a Glance" brief discusses the prosecutor's role in marijuana policy reform. The brief seeks to provide guidance to DAs considering new approaches to this topic.**

Lawmakers and community members are rethinking past "war on drugs" policies that have governed criminal prosecution of drug crimes for the past 50 years. According to the Pew Research Center, 67% of Americans believe drug policy should focus more on treatment than prosecution.<sup>2</sup> Aggressive criminalization of marijuana, even for simple possession, is costly and

<sup>1</sup>The term "district attorney" or "DA" is used generally to refer to any chief local prosecutor, including State's Attorneys, prosecuting attorneys, etc.

<sup>2</sup>Pew Research Center, *America's New Drug Policy Landscape: Two-Thirds Favor Treatment, Not Jail, for Use of Heroin, Cocaine*, April 2014, at 1, available at <http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/>. ("76% of the public ... think that people convicted of possessing small amounts of marijuana should not have to serve time in jail," and majority of public thinks marijuana should be legal).

***"At 107,000 cases over the last 10 years, we have spent in excess of \$250 million collectively prosecuting a crime that has produced no tangible evidence of improved public safety... [T]he collateral damage to our workforce is immeasurable — because what we have done is we have disqualified, unnecessarily, thousands of people from greater job, housing and education opportunities by giving them a criminal record for what is in effect a minor law violation."***

— HARRIS COUNTY (HOUSTON, TX) DISTRICT ATTORNEY KIM OGG

has failed to reduce dependence or drug-related crime.<sup>3</sup> In an effort to address these concerns, state legislatures, city councils, and a growing number of DAs have started implementing and supporting reforms in regard to the handling of marijuana possession and use offenses. These reforms have sought to refocus limited law enforcement resources on more serious crimes and avoid the adverse consequences that result from criminalizing drug use and addiction.

The time is ripe for prosecutors to revisit how their offices handle marijuana possession and use cases. Elected DAs can play a leadership role in improving outcomes in these cases and advancing reforms that address fundamental concerns with drug policy, while also promoting public safety.

## BACKGROUND AND DISCUSSION

### The Effects of Marijuana Prohibition

Many states and localities have determined that the current system of arresting and prosecuting individuals for minor drug offenses has created a criminal justice system that is inefficient and ineffective. Although advocates and criminal justice practitioners criticize the current legal framework for a variety of reasons, several specific issues have driven the push for reforms across the country and caused many DAs to reevaluate how they handle marijuana cases.

First, aggressive enforcement of marijuana simple possession and use offenses takes time away from investigating and prosecuting more serious crimes. A recent report found that in 2015, arrests for marijuana possession outnumbered arrests for all violent crimes combined — with, on average, one marijuana possession arrest every 25 seconds.<sup>4</sup> When she recently announced policy changes aimed at diverting marijuana possession cases, Harris County (Houston, TX) District Attorney Kim Ogg estimated that Houston police officers had spent approximately 40,000 police hours over the past decade “arresting and transporting marijuana offenders rather than patrolling neighborhoods.”<sup>5</sup> Many law enforcement leaders agree that scarce resources should be focused on serious or violent crime, rather than on low-level, nonviolent offenses such as drug possession.<sup>6</sup> Strict marijuana prosecution hinders that goal. It is also important to note that experts believe that there is no credible evidence that marijuana legalization has either contributed to a rise in crime or led to increased substance use.<sup>7</sup>

Second, marijuana criminalization is expensive to enforce. In the year following Philadelphia’s decriminalization ordinance, the city is estimated to have avoided roughly \$9 million in

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<sup>3</sup> See Mike Males & Lizzie Buchen, *Reforming Marijuana Laws: Which Approach Best Reduces the Harms of Criminalization?: A Five State Analysis*, Center on Juvenile and Criminal Justice (Sept. 2014), available at: [http://www.cjcj.org/uploads/cjcj/documents/cjcj\\_marijuana\\_reform\\_comparison.pdf](http://www.cjcj.org/uploads/cjcj/documents/cjcj_marijuana_reform_comparison.pdf).

<sup>4</sup> Human Rights Watch, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, Oct. 12, 2016, available at: <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.

<sup>5</sup> Kim Ogg, *Misdemeanor Marijuana Diversion Program*, Mar. 1, 2017, available at: <https://app.dao.hctx.net/sites/default/files/2017-03/MMDPOverview.pdf>.

<sup>6</sup> Law Enforcement Leaders to Reduce Crime & Incarceration, *Fighting Crime and Strengthening Criminal Justice: An Agenda for the New Administration*, Feb. 13, 2017, available at: [http://lawenforcementleaders.org/wp-content/uploads/2017/02/LEL\\_An\\_Agenda\\_for\\_the\\_New\\_Administration.pdf](http://lawenforcementleaders.org/wp-content/uploads/2017/02/LEL_An_Agenda_for_the_New_Administration.pdf).

<sup>7</sup> See Angela Dills, et al., *Dose of Reality: The Effect of State Marijuana Legalizations*, Cato Institute, Sept. 16, 2016, available at: <https://www.cato.org/publications/policy-analysis/dose-reality-effect-state-marijuana-legalizations#full>.

enforcement and adjudication costs that could potentially be allocated to other law enforcement priorities.<sup>8</sup> In Harris County, DA Ogg determined that residents paid over \$26 million in tax dollars for the arrest and prosecution of misdemeanor marijuana offenses — money that could have been spent targeting serious or violent crime.<sup>9</sup> Even without calculating the costs incurred through the investigation, arrest, and adjudication of marijuana offenses, Right on Crime has determined that incarceration generally can cost between \$16,000 per year per inmate (the average in Texas) to \$50,000 per year per inmate (the average in California), thereby underscoring the expense of incarcerating individuals charged with low-level marijuana offenses.<sup>10</sup> Increasingly, budget-strapped counties are finding the cost of low-level marijuana enforcement too heavy to bear.

Finally, marijuana enforcement disproportionately affects people of color.<sup>11</sup> A 2016 report found that African-American adults were more than four times as likely to be arrested for marijuana possession as white adults.<sup>12</sup> A 2013 report reached a similar conclusion, finding that African-Americans were 3.7 times as likely to be arrested for marijuana possession as whites, even though there was little difference in usage rates between the two groups.<sup>13</sup> As a result of these disparities, minorities disproportionately bear the collateral consequences of arrest and conviction — including lost earnings, stigma, or immigration consequences, among others.

## Trends in State Law

Concerned with the adverse effects of marijuana prohibition and bolstered by public support for reforming marijuana laws,<sup>14</sup> states across the country have adopted new approaches to marijuana

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<sup>8</sup> Hayden Mitman, *At City Hall, Activists Tout Fiscal Benefits of Marijuana Decriminalization*, Philly Voice, October 20, 2016, available at <http://www.phillyvoice.com/city-hall-activists-tout-9m-city-savings-marijuana-decriminalization/>.

<sup>9</sup> Kim Ogg, *Misdemeanor Marijuana Diversion Program*, Mar. 1, 2017, available at: <https://app.dao.hctx.net/sites/default/files/2017-03/MMDPOverview.pdf>.

<sup>10</sup> Right on Crime, *Substance Abuse*, available at: <http://rightoncrime.com/category/priority-issues/substance-abuse/>.

<sup>11</sup> See American Civil Liberties Union, *The War on Marijuana in Black and White*, June 2013, at 21-22, available at <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf> (ACLU, “The War on Marijuana”).

<sup>12</sup> Human Rights Watch, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, Oct. 12, 2016, available at: <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.

<sup>13</sup> ACLU, *The War on Marijuana*, *supra* n. 11 at 17.

<sup>14</sup> A recent national poll found that 61% of people support the legalization of marijuana. See Jennifer De Pinto, *Marijuana Legalization Support at All-Time High*, CBS News, Apr. 20, 2017, available at: <http://www.cbsnews.com/news/support-for-marijuana-legalization-at-all-time-high/>.

***“Until the legislature makes progress on marijuana, we are making these ACDs [adjournment of a case with later dismissal of charges absent any rearrest] as short as practicable in order to reduce these harmful collateral consequences.... No one should be denied a home or a college education for something as trivial as pot possession.”***

— MANHATTAN (NY) DISTRICT ATTORNEY CY VANCE

possession.<sup>15</sup> In 2012, voters in Colorado and Washington passed initiatives legalizing the use and possession of recreational marijuana, becoming the first states in the country to do so. Since then, six other states and the District of Columbia have followed their lead, opting to legalize recreational marijuana.<sup>16</sup>

While much of the media focus is on full legalization, a wide spectrum of marijuana policy reform options exists.<sup>17</sup> Thirteen states — including more conservative states such as Mississippi and Nebraska — have passed laws removing jail time for low-level marijuana possession. And eleven other states, including Montana and Florida, have legalized the use of medical marijuana. All told, 33 states and the District of Columbia have enacted some form of marijuana reform in recent years, with more statewide initiatives underway.

In states where marijuana possession remains criminalized, dozens of localities have begun reforming marijuana enforcement policies. Most recently, the Dallas City Council approved a “cite-and-release” ordinance, whereby anyone caught possessing four ounces or less of marijuana will receive a ticket for possession, rather than an arrest and court summons.<sup>18</sup> Explicitly citing the “valuable prosecutorial resources . . . utilized in prosecuting marijuana offenses,” the St. Louis Board of Aldermen passed an ordinance imposing a \$100-\$500 fine for possession of under 35 grams of marijuana.<sup>19</sup> Under the ordinance, half of all fines collected<sup>20</sup> will fund substance abuse treatment programs.<sup>21</sup> And in Orlando, the City Council recently passed an ordinance removing jail time for the possession of 20 grams or less of marijuana.<sup>22</sup>

## The Prosecutor’s Role in Marijuana Policy Reform

The American Bar Association’s Standards for the Prosecution Function entrust prosecutors with the duty “to seek justice, not merely to convict,” and to “seek to inform and improve the administration of criminal justice.”<sup>23</sup> As those Standards state, “[w]hen inadequacies or injustices in the substantive or procedural law come to the prosecutor’s attention, he or she should stimulate efforts for remedial action.”<sup>24</sup>

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<sup>15</sup> Marijuana Policy Project, *State Policy*, available at: <https://www.mpp.org/states/>.

<sup>16</sup> These states are: Alaska (2015), California (2016), Maine (2016), Massachusetts (2016), Nevada (2016), and Oregon (2014).

<sup>17</sup> For a detailed outline of marijuana policy options, see Kilmer et al: <https://www.rand.org/pubs/perspectives/PE149.html>.

<sup>18</sup> Stephen Young, *Dallas Just Approved a New Policy on Street-Level Pot Busts*, Dallas Observer, Apr. 13, 2017, available at: <http://www.dallasobserver.com/news/dallas-oks-cite-and-release-for-pot-9364895>.

<sup>19</sup> St. Louis Board of Aldermen, *Ordinance 69429: Marijuana Decriminalization*, Apr. 22, 2013, available at: <https://www.stlouis-mo.gov/internal-apps/legislative/upload/Ordinances/BOAPdf/69429x00.pdf>.

<sup>20</sup> *Id.*

<sup>21</sup> The use of any punitive sanction — including a fine as an alternative to arrest, prosecution, or incarceration — necessarily implicates concerns about fairness and equitable or excessive enforcement. A person’s ability to pay a fine should not dictate his or her eligibility to avoid a criminal sanction.

<sup>22</sup> Orlando City Code § 43.95 (Possession of Cannabis or Cannabis Paraphernalia).

<sup>23</sup> American Bar Association, *Standards for the Prosecution Function*, Standard 3-1.2, available at: [http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pfunc\\_blk.html#1.2](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blk.html#1.2).

<sup>24</sup> *Id.*

Bearing these principles in mind, many prosecutors have moved away from strict marijuana enforcement. Some prosecutors, including “former Brooklyn (NY) District Attorney Ken Thompson chose to exercise their prosecutorial discretion and decline prosecution for most low-level marijuana offenses.<sup>25</sup> More recently, Nueces County (Corpus Christi, TX) District Attorney Mark Gonzalez has announced that his office will not prosecute minor marijuana possession offenses, even for individuals arrested multiple times.<sup>26</sup>

Other district attorneys have implemented cite-and-release programs. For instance, as noted above, DA Ogg recently unveiled a Misdemeanor Marijuana Pretrial Diversion Program which allows individuals charged for the first time with possessing four ounces or less of marijuana to avoid arrest and prosecution if they pay a fine and complete a substance abuse program.<sup>27</sup> Police officials in Philadelphia have instituted a policy whereby individuals found in possession of 30 grams or less of marijuana are given a civil citation, provided certain requirements are met.<sup>28</sup> And Milwaukee County (WI) District Attorney John Chisholm has created a pretrial diversion program for individuals caught possessing small amounts of marijuana.<sup>29</sup>

Finally, some district attorneys have used their position as elected law enforcement leaders to speak out in support of city council ordinances or state laws decriminalizing marijuana possession within their jurisdiction. In 2015, Hamilton County (Cincinnati, OH) Prosecuting Attorney Joseph Deters — referred to as “one of [Ohio’s] toughest law-and-order prosecutors” — supported a statewide ballot initiative to legalize marijuana, describing marijuana prohibition as “useless” and “a major waste of resources for law enforcement.”<sup>30</sup> And before Nashville passed its marijuana decriminalization ordinance, District Attorney General of Metropolitan Nashville and Davidson County (TN) Glenn Funk issued a statement expressing his “appreciat[ion]” for the city council’s effort to give local law enforcement the option of issuing a civil citation, rather than arresting the individual on state charges.<sup>31</sup>

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<sup>25</sup> Kenneth P. Thompson, *Brooklyn District Attorney Kenneth P. Thompson Announces New Policy for Prosecuting Low-Level Marijuana Possession Arrests*, July 8, 2014, available at: [http://brooklynda.org/wp-content/uploads/2015/03/MarijuanaPolicy\\_7\\_8\\_2014.pdf](http://brooklynda.org/wp-content/uploads/2015/03/MarijuanaPolicy_7_8_2014.pdf). Mr. Thompson’s successor, Acting District Attorney Eric Gonzalez, has announced that he will continue this policy. See Alan Feuer, *Ken Thompson’s Successor: A ‘Pure District Attorney’ Working Under the Radar*, N.Y. Times, Nov. 28, 2016, available at: <https://www.nytimes.com/2016/11/28/nyregion/brooklyn-district-attorney-eric-gonzalez.html>.

<sup>26</sup> Rudy Trevino, *New D.A. Announces Changes to Marijuana Enforcement*, KIII TV, Jan. 5, 2017, available at: <http://www.kiiitv.com/news/local/new-da-announces-changes-to-marijuana-enforcement/382667253>.

<sup>27</sup> Kim Ogg, *Misdemeanor Marijuana Diversion Program*, Mar. 1, 2017, available at: <https://app.dao.hctx.net/sites/default/files/2017-03/MMDPOverview.pdf>.

<sup>28</sup> Philadelphia Police Dept., *Directive 3.23: Possession of Small Amounts of Marijuana (Possession of 30 Grams or Less)*, City Code Chapter § 10-2100, Nov. 24, 2015, available at: <http://www.phillypolice.com/assets/directives/D3.23-PossessionOfSmallAmountsOfMarijuana.pdf>.

<sup>29</sup> Milwaukee County District Attorney, *Milwaukee County Early Intervention Programs*, Oct. 31, 2014, available at: <http://milwaukee.gov/ImageLibrary/Groups/2014.10.31MilwaukeeCountyEarly.pdf>.

<sup>30</sup> Alan Johnson, *Hamilton County Prosecutor Joe Deters Says He Supports Marijuana Legalization*, Columbus Dispatch, May 12, 2015, available at: <http://www.dispatch.com/content/stories/local/2015/05/12/joe-deters-supports-marijuana-legalization.html>.

<sup>31</sup> Steven Hale, *Metro Police Now Neutral on Marijuana Decriminalization*, Nashville Scene, Sept. 6, 2016, available at: <http://www.nashvillescene.com/news/pith-in-the-wind/article/20832803/metro-police-now-neutral-on-marijuana-decriminalization>.

## RECOMMENDATIONS

District attorneys around the country are already demonstrating their ability to implement drug reforms, especially related to marijuana, that are tailored to the unique circumstances within their jurisdiction. These reforms have occurred regardless of whether the state legislature or local city council has passed a law effectively decriminalizing marijuana possession. Based on our review of these reform efforts, there are **six specific actions** prosecutors could take relatively quickly to bring about change. Some of these reforms can happen entirely at the prosecutor's discretion, while others require more extensive coordination with local authorities and officials.

1. **Revisit the wisdom of prosecuting low-level drug possession offenses.** The recreational use of marijuana is legal in eight states and the District of Columbia, and decriminalized to some degree in thirteen others. Public polling indicates significant support for new approaches to drug consumption, suggesting that decriminalization and legalization will continue in jurisdictions around the country. Several prosecutors have declined to prosecute marijuana offenses, even in jurisdictions where marijuana remains fully criminalized. All of these developments reflect a growing trend against the prosecution of low-level marijuana possession.
2. **Establish cite-and-release programs with local law enforcement.** Working closely with local police departments, DAs can develop a program authorizing police officers to issue civil citations to, rather than arresting, those caught in possession of marijuana. Cite-and-release programs save money, preserve law enforcement resources, and lessen the burden on court dockets. Jurisdictions adopting citations and similar sanctions need to be cautious and deliberate in determining the policies regarding how they are imposed. If **evaluations of indigency and affordability** are not considered in the imposition and amount of any financial penalties, these sanctions can lead to unmet obligations and financial burdens that will only serve to penalize lower-income individuals.
3. **Implement strong pre-charge diversion programs.** Either instead of, or in addition to, a cite-and-release program, prosecutors should implement diversion programs that minimize an individual's exposure to criminal court proceedings. Pre-charge diversion initiatives — including the successful LEAD program — should be encouraged.
4. **Consider supporting state and local laws decriminalizing marijuana possession.** Prosecutors are an important voice in local jurisdictions; their support or opposition can determine the outcome of a criminal justice reform initiative. Prosecutors should consider supporting efforts to decriminalize marijuana possession at the local and state levels.
5. **Collect and share data.** Prosecutors should collect and share key data publicly with advocates and stakeholders. The information gathered from arrest data is critical to maintaining accountability and to publicly promoting the success of reform initiatives.
6. **Spread the word.** Elected DAs should be an integral part of public education and communication efforts in regard to the harms of strict marijuana enforcement and the need for reform.

## RESOURCES

- Kim Ogg, *Misdemeanor Marijuana Diversion Program*, Mar. 1, 2017, available at: <https://app.dao.hctx.net/sites/default/files/2017-03/MMDPOverview.pdf>.
- Philadelphia Police Dept., *Directive 3.23: Possession of Small Amounts of Marijuana (Possession of 30 Grams or Less)*, City Code Chapter § 10-2100, Nov. 24, 2015, available at: <http://www.phillypolice.com/assets/directives/D3.23-PossessionOfSmallAmountsOfMarijuana.pdf>.
- Milwaukee County District Attorney, *Milwaukee County Early Intervention Programs*, Oct. 31, 2014, available at: <http://milwaukee.gov/ImageLibrary/Groups/2014.10.31MilwaukeeCountyEarly.pdf>.
- Human Rights Watch, *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, Oct. 12, 2016, available at: <https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states>.
- American Civil Liberties Union, *The War on Marijuana in Black and White: Billions of Dollars Wasted on Racially Biased Arrests*, June 2013, available at: <https://www.aclu.org/files/assets/1114413-mj-report-rfs-rel1.pdf#11>.

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