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TO: Assignment Judges
Trial Court Administrators **DIRECTIVE #13-21**

FROM: Glenn A. Grant, J.A.D. 

SUBJ.: Criminal Justice Reform – (1) Summary of Amendments to Pretrial Services Program Pursuant to L. 2021, c. 19 (Marijuana Decriminalization Law); (2) Effects of the Amendments on Pretrial Release; (3) Effects of the Amendments on the Public Safety Assessment

DATE: June 30, 2021

L. 2021, c. 19, the Marijuana Decriminalization Law, was enacted on February 22, 2021 and among other changes, amended certain marijuana offenses, procedures related to Pretrial Services, and the criteria for making a pretrial release or detention decision. This Directive specifically addresses the statutory amendments to the Criminal Justice Reform Act (CJRA) and their effect on the Pretrial Services Program (PSP) and the Public Safety Assessment (PSA). The statutory amendments outlined below are effective July 1, 2021.

I. Pretrial Release Orders may not prohibit the defendant from certain marijuana-related activities, specifically, in violation of N.J.S.A. 2C:35-5(b)(12) and N.J.S.A. 2C:35-10(a)(3).

N.J.S.A. 2A:162-17, entitled “Consideration for pretrial release,” provides for ordering conditions of pretrial release, including nonmonetary conditions. N.J.S.A. 2A:162-17(b)(2)(h) was amended to include the word unlawful before the “use of a narcotic drug,” rather than any use of a narcotic drug. In addition, the amendment to N.J.S.A. 2A:162-17(b)(2)(l) further provides that conditions of release may not include any prohibition or restriction concerning manufacturing, distributing, or dispensing, or possessing or having under control with intent to manufacture, distribute, or dispense, marijuana or hashish in violation of N.J.S.A. 2C:35-5(b)(12), or possession of marijuana or hashish in violation of N.J.S.A. 2C:35-10(a)(3).¹

As a result, the automated Pretrial Release Orders issued on or after July 1, 2021, will be amended to include the appropriate language consistent with the statute, and shall read:

¹ This legislation specifically references New Jersey statutes, and did not provide for treating out of state charges akin to New Jersey charges. As a result, out of state charges are not impacted by the legislation and like other out of state charges, continue to be treated as legitimate charges, convictions and adjudications.

[The defendant] shall refrain from excessive use of alcohol, or any unlawful use of narcotic drugs, or other controlled substance without a prescription by a licensed medical practitioner.

Similarly, in instances where drug testing is ordered in addition to the condition above, Pretrial Services will not record, mark noncompliance, or issue a violation of monitoring for positive results indicating marijuana/hashish use to be consistent with the new legislation. Correspondingly, Pretrial Services staff will no longer ask defendants if they used marijuana or hashish.

II. Certain marijuana related offenses, specifically N.J.S.A. 2C:35-5(b)(12) and N.J.S.A. 2C:35-10(a)(3), are prohibited from consideration in making a pretrial detention decision.

N.J.S.A. 2A:162-20, entitled “Information considered in determination of pretrial detention,” was amended to provide that the court may not consider as part of making a pretrial detention decision whether the defendant engaged in manufacturing, distributing, or dispensing, or possessing or having under control with intent to manufacture, distribute, or dispense, marijuana or hashish in violation of N.J.S.A. 2C:35-5(b)(12), or possession of marijuana or hashish in violation of N.J.S.A. 2C:35-10(a)(3).

III. The court may not revoke release, and a prosecutor may not seek a revocation of release, for a defendant’s alleged violation of N.J.S.A. 2C:35-5(b)(12) or N.J.S.A. 2C:35-10(a)(3). As a result, Pretrial Services will no longer issue a Violation of Monitoring (VOM) for any alleged violation of N.J.S.A. 2C:35-5(b)(12) and N.J.S.A. 2C:35-10(a)(3).

N.J.S.A. 2A:162-24, entitled, “Violation of condition of release, motion by prosecutor,” was amended to provide that a court shall not revoke an eligible defendant’s release and order that the eligible defendant be detained pending trial based on manufacturing, distributing, or dispensing, or possessing or having under control with intent to manufacture, distribute, or dispense, marijuana or hashish in violation of N.J.S.2C:35-5(b)(12), or possession of marijuana or hashish in violation of N.J.S.A. 2C:35-10(a)(3). N.J.S.A. 2A:162-24(b).

Therefore, Pretrial Services will not file a Violation of Monitoring (VOM) for alleged violations of N.J.S.A. 2C:35-5(b)(12) and N.J.S.A. 2C:35-10(a)(3).

IV. Certain marijuana charges shall not be considered by the Public Safety Assessment as risk factors relevant to the risk of failure to appear in court when required and the danger to the community while on pretrial release.

Under the Criminal Justice Reform Act (CJRA) “[t]he Administrative Director of the Courts shall establish and maintain a Statewide Pretrial Services Program which shall provide pretrial services to effectuate the purposes of [this] section[.]” N.J.S.A. 2A:162-25(a). This includes the creation and use of a risk assessment instrument “approved by the Administrative Director of the Courts.” N.J.S.A. 2A:162-25(c).

L. 2021, c. 19 made changes to N.J.S.A. 2A:162-25. These changes restrict the PSA from considering certain marijuana charges in determining a defendant’s risk of failing to appear and new criminal activity. Specifically, N.J.S.A. 2A:162-25, as amended, now instructs that the PSA “shall not consider a charge, including any charge of delinquency, conviction, or adjudication of delinquency...as risk factors relevant to the risk of failure to appear in court when required and the danger to the community while on pretrial release.” N.J.S.A. 2A:162-25(b) (effective July 1, 2021). Therefore, the charges identified below must be removed from certain sections of the PSA.

These changes can be organized into three categories of charges that need to be removed from the PSA: (1) enumerated charges that must always be removed; (2) enumerated charges that must be removed when charged with specific marijuana charges; and (3) charges that must be removed after a factual determination concludes the charges involved marijuana.

Technology will be leveraged where possible to automatically exclude certain convictions pursuant to this legislation. Nevertheless, some manual intervention may be necessary to ensure all convictions are removed. Parties that identify charges appearing on the PSA that should be removed pursuant to the Marijuana Decriminalization law shall bring those to the attention of Pretrial Services. Manual removal of any charges from the PSA is in the discretion of Pretrial Services in consultation with vicinage management.

1. Enumerated marijuana charges that must always be removed from the PSA

These charges are identified in the new statute and are marijuana-specific. Therefore, there is no factual determination necessary prior to their removal. These charges are:

- i. manufacturing, distributing, dispensing, possessing, or having under control with intent to manufacture, distribute, or dispense more than one ounce of marijuana or more than five grams of hashish in violation of N.J.S.A. 2C:35-5(b)(11), or less than one ounce of marijuana or less than five grams of hashish in violation of N.J.S.A. 2C:35-5(b)(12),
- ii. possession of more than 50 grams of marijuana or five grams of hashish in violation of N.J.S.A. 2C:35-10(a)(3), or less than 50 grams of marijuana or five grams or less of hashish in violation of N.J.S.A. 2C:35-10(a)(4).

These charges shall no longer appear on the PSA other than when a defendant's current charge is still a crime or offense pursuant to the amended statute. These exclusions apply to the entire statute, including those subparagraphs enacted pursuant to this legislation. Therefore, the new subparagraphs (N.J.S.A. 2C:35-5(b)(11)(a), N.J.S.A. 2C:35-5(b)(11)(b), N.J.S.A. 2C:35-5(b)(12)(a), N.J.S.A. 2C:35-5(b)(12)(b)) will be excluded in all sections and calculations of the PSA.

2. Enumerated charges that must be removed when charged with specific marijuana charges.

The legislation separately identified charges that must be removed from the PSA only if they are charged in conjunction with N.J.S.A. 2C:35-5(b)(11) or N.J.S.A. 2C:35-5(b)(12). These include distributing, dispensing, or possessing with intent to distribute or dispense, on or within 1,000 feet of any school property, or on or within 500 feet of the real property comprising a public housing facility, public park, or public building in violation of N.J.S.A. 2C:35-7(a) or N.J.S.A. 2C:35-7.1(a).

It is important to note that N.J.S.A. 2C:35-7(a) and N.J.S.A. 2C:35-7.1(a) can be charged with non-marijuana charges and therefore may still appropriately appear on the PSA. Therefore, these charges must be removed only when charged in conjunction with N.J.S.A. 2C:35-5(b)(11) or N.J.S.A. 2C:35-5(b)(12).

3. Charges that must be removed after a factual determination concludes the charges involved marijuana.

The legislation identified certain charges that must not appear on the PSA if the underlying offense involved only marijuana. These charges include being under the influence of marijuana or hashish in violation N.J.S.A. 2C:35-10(b), failing to make lawful disposition of marijuana or

hashish in violation of N.J.S.A. 2C:35-10(c), or a violation involving marijuana or hashish above and possessing with intent to use drug paraphernalia violation of N.J.S.A. 2C:36-2.

The legislation requires a determination to be made as to the nature of the offense charged. Each of these statutes may be appropriately considered by the PSA when charged in conjunction with a non-marijuana charge. Therefore, if a defendant's PSA includes charges of 2C:35-10(b), (c), or 2C:36-2, a factual review will be necessary to determine if they are directly related to marijuana. If Pretrial Services staff determine the charges are marijuana related, they must manually remove the charges from the PSA. In all other instances, these charges may be considered in the risk determination.

Please ensure this Directive is provided to the appropriate staff and advise the relevant stakeholders in your vicinage on these procedures. Any questions or comments may be directed to Justin M. Patterson Moles, Statewide Pretrial Services Manager, by email at justin.moles@njcourts.gov, or by phone at (609) 815-2900 Ext 55315.

Attachments:

Chart 1: Marijuana Legislation: Impact on Pretrial Services Procedure

Chart 2: Marijuana Legislation: Impact on Public Safety Assessment—Charges to be excluded from PSA

cc: Chief Justice Stuart Rabner
Criminal Presiding Judges
Municipal Presiding Judges
Steven D. Bonville, Chief of Staff
AOC Directors and Assistant Directors
Clerks of Court
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Criminal Division Managers and Assistant Division Managers
Municipal Division Managers and Assistant Division Managers
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Julie Higgs, Chief, Municipal Court Services
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Stephanie Ullman, Assistant Chief, Pretrial Services
Raschelle Demshock, Assistant Chief, Criminal Practice

Chart 1: Marijuana Legislation: Impact on Pretrial Services Procedure

Statute Amended	Legal Impact	Pretrial/System Impact
<p>N.J.S.A. 2A:162-17 (Consideration for pretrial release)</p>	<p>Court may not order a condition to refrain from certain marijuana-related activities in violation of N.J.S.A. 2C:35-5(b)(12) or N.J.S.A. 2C:35-10(a)(3).</p>	<ul style="list-style-type: none"> • Automated Release Orders will update condition language to reflect statutory changes (modify prohibition of “any use” of narcotic drugs to “any <u>unlawful</u> use” of narcotic drugs). • Pretrial will not check for marijuana or hashish use as part of monitoring • Pretrial will not file a Violation of Monitoring for suspected marijuana or hashish use • Pretrial will not mark a defendant non-compliant for positive marijuana or hashish drug test results
<p>N.J.S.A. 2A:162-20 (Information considered in determination of pretrial detention)</p>	<p>Court may not consider violations of N.J.S.A. 2C:35-5(b)(12) or N.J.S.A. 2C:35-10(a)(3) as the basis of granting a detention motion.</p>	<ul style="list-style-type: none"> • If detention is denied and defendant is ordered released, same as above
<p>N.J.S.A. 2A:162-24 (Violation of condition of release, motion by prosecutor)</p>	<p>Court may not consider violations of N.J.S.A. 2C:35-5(b)(12) or N.J.S.A. 2C:35-10(a)(3) as the basis of granting a revocation motion.</p>	<ul style="list-style-type: none"> • Pretrial will not recommend revocation for suspected marijuana or hashish use • Pretrial will not check for marijuana or hashish use as part of monitoring • Pretrial will not file a Violation of Monitoring for suspected marijuana or hashish use • Pretrial will not mark a defendant non-compliant for positive marijuana or hashish drug test results

Chart 2: Marijuana Legislation: Impact on Public Safety Assessment—Charges to be excluded from PSA

<p>Marijuana specific charges automatically excluded</p>	<p>School Zone / Public Park charges automatically excluded if charged in conjunction with 2C:35-5(b)(11) or 2C:35-5(b)(12)</p>	<p>Generic drug use charges automatically/ manually excluded if charge is found to be marijuana-related (automatically excluded if charged in conjunction with 2C:35-5(b)(11) or 2C:35-5(b)(12), otherwise, fact-sensitive analysis is required)</p>
<p>2C:35-5(b)(11) (Manufacture/distribute/possession with intent to distribute – marijuana less than or equal too 1oz but less than 5lb or hashish less than or equal too 5g but less than 1lb)</p>	<p>2C:35-7(a) (Distribute on or within 1000 feet of school property/bus)</p>	<p>2C:36-2 (Use or possession with intent to use drug paraphernalia)</p>
<p>2C:35-5(b)(12) (Manufacture/distribute/possession with intent to distribute - marijuana less than 1oz or hashish less than 5g)</p>	<p>2C:35-7.1(a) (Possession or distribution within 500 feet certain public property)</p>	<p>2C:35-10(b) (Under influence without prescription)</p>
<p>2C:35-10(a)(3) (Possession of more than 50g of marijuana or 5g hashish)</p>		<p>2C:35-10(c) (Fails to give controlled dangerous substance to police)</p>
<p>2C:35-10(a)(4) (Possession of less than 50g marijuana or 5g hashish)</p>		