

Commonwealth of Virginia

COUNTY OF FAIRFAX

4110 CHAIN BRIDGE ROAD, ROOM 114
FAIRFAX, VIRGINIA 22030-4047

STEVE DESCANO
COMMONWEALTH'S ATTORNEY

Move to Dismiss Simple Possession of Marijuana Charges Levied Against Adults

The mission of the Fairfax County Commonwealth's Attorney's Office is to create a safe and just Fairfax County. Fulfilling this mission requires the Commonwealth's Attorney to take a holistic view of the community, consider the downstream effects of the Office's actions, and prudently expend the Office's resources. Prosecuting adults for simple possession of marijuana expends an enormous amount of money and time on something that does not significantly affect public safety. The downstream consequences of these prosecutions have a perpetually negative effect on individuals, families, and communities. These negative consequences are disproportionately visited upon communities of color, leading to community discontent and distrust of the justice system. In short, prosecuting adults for simple possession of marijuana is at odds with the Office's mission to create a safe and just Fairfax. As a result, and consistent with the maxim that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate,"¹ the Fairfax County Commonwealth's Attorney directs the Office's prosecutors to move to dismiss simple possession of marijuana charges levied against adults.²

"Simple possession" of marijuana refers to possession of marijuana for personal use. It does not include possession with the intent to distribute, nor does it include conspicuous public use of marijuana.

Prosecutors will make a case-by-case determination regarding whether the facts of a case qualify as "simple possession." Prosecutors will look at the totality of the circumstances in making this determination. The prosecutor will take into consideration all the relevant factors of a case including, but not limited to, the amount of marijuana present, the packaging and division of marijuana, and any accompanying drug or drug-sale paraphernalia.

Reasoning

Prosecuting adults for simple possession of marijuana does not improve community safety. A recent study comparing crime rates of two states that have legalized recreational marijuana with states that continue to completely prohibit marijuana found "no statistically significant long-term effects of recreational marijuana legalization or retail sales on violent or

¹ Virginia Rules of Professional Conduct § 3.8, Comment 1 (2009).

² This policy's definition of "marijuana" is the definition found in § 18.2-247 (D).

property crime rates.”³ This study is one of only many concluding that tolerant marijuana policies do not result in rising crime levels.⁴ In addition to the lack of direct connection between marijuana prohibition and crime, the negative downstream effects of these prosecutions have the potential to create future crime. Furthermore, every resource spent on marijuana-possession cases could be spent on cases that directly and significantly impact community safety.

Prosecuting adults for simple possession of marijuana is an incredibly expensive proposition. Fairfax County Police Officers have made an arrest or issued a summons for possession of marijuana 11,937 times between 2017 and 2019.⁵ Prosecuting each of these cases requires an expenditure of resources by the police, the court, and the Commonwealth’s Attorney’s Office. A Fairfax County Police Officer routinely must appear at two, and often three, court hearings for every marijuana-possession case. The average patrol officer earns an hourly wage of \$34.77 per hour,⁶ but is paid time and a half for appearing in court,⁷ which results in an hourly wage of \$52.15 for court appearances, all of which by county regulation are deemed to last a minimum of two hours for payroll purposes.⁸ If each arrest or citation takes an hour of officer time and the arresting/citing officer must appear in court only twice for each case, Fairfax County Police will have spent over \$2.9 million on possession of marijuana cases in a two-year period. This figure does not account for costs borne by the court or the Commonwealth’s Attorney’s Office. Nor does it account for the cost to have the evidence evaluated at the Virginia Department of Forensic Science’s (“DFS”) laboratory facility, as prescribed by Virginia Code § 19.2-188.1. All told, Virginia is estimated to spend more than \$81 million per year on marijuana enforcement.⁹

In addition to monetary costs associated with marijuana-possession prosecutions, the opportunity costs are staggering. For example, DFS laboratory testing of marijuana has been a major factor in creating a backlog of 12,609 controlled-substances cases awaiting DFS testing.¹⁰ Marijuana accounts for 17% of DFS’s drug testing cases—more than heroin and illicit synthetic

³ Ruibin Lu, et al., *The Cannabis Effect on Crime: Time-Series Analysis of Crime in Colorado and Washington State*, JUSTICE QUARTERLY, 2019, available at

<https://www.tandfonline.com/doi/full/10.1080/07418825.2019.1666903?scroll=top&needAccess=true>.

⁴ See e.g., Angela Dills, et al., *Dose of Reality: The Effect of State Marijuana Legalizations*, Cato Institute (September 16, 2016), available at <https://www.cato.org/publications/policy-analysis/dose-reality-effect-state-marijuana-legalizations>.

⁵ Statistics received from the Office of the Executive Secretary (OES), Supreme Court of Virginia.

⁶ Fairfax County Fiscal Year 2020 Pay Plan O, available at

<https://www.fairfaxcounty.gov/hr/sites/hr/files/assets/documents/hr/compensationplans/fy2020/oplan.pdf>.

⁷ Fairfax County Personnel Regulations, Chapter 4.15, available at

<https://www.fairfaxcounty.gov/hr/sites/hr/files/assets/documents/hr/chap4.pdf>.

⁸ Fairfax County Police Department General Order number 340, available at

<https://www.fairfaxcounty.gov/police/sites/police/files/assets/images/chief/generalorders/nonregularemployment.pdf>.

⁹ Jeffrey Miron, *The Budgetary Effects of Ending Drug Prohibition*, Cato Institute (July 23, 2018), available at

<https://www.cato.org/publications/tax-budget-bulletin/budgetary-effects-ending-drug-prohibition>.

¹⁰ Letter from Linda C. Jackson, Department Director at Virginia Department of Forensic Science, to all agencies served by DFS, dated March 11, 2019, available at <https://www.dfs.virginia.gov/wp-content/uploads/2019/03/Controlled-Substances.pdf>.

opioids, methamphetamine, and prescription opioids.^{11,12} This backlog has resulted in each newly submitted drug case being placed into a months-long queue before it is tested.^{13,14} Relieving DFS of the need to test marijuana for possession cases would allow DFS to increase the speed at which it provides prosecutors the results they need to prosecute crimes related hard drugs. Similarly, public safety would be better served by having officers focused on cases other than marijuana possession, as a recent study showed that removing possession-of-marijuana cases from law enforcement's purview increased case clearance rates.¹⁵ Removing adult simple-possession-of-marijuana cases from prosecutors' dockets allows prosecutors more time to focus on serious crimes that often involve victims. Bringing additional focus to those types of cases can have a positive effect on public safety and, combined with the resultant possibility of

¹¹ VIRGINIA DEPARTMENTS OF FORENSIC SCIENCE & CRIMINAL JUSTICE SERVICES, DRUG CASES SUBMITTED TO THE VIRGINIA DEPARTMENT OF FORENSIC SCIENCE CALENDAR YEAR 2018, available at https://www.dfs.virginia.gov/wp-content/uploads/2019/11/DFS2018DrugSubmissionDataReport_Final.pdf.

¹² DFS has resorted to extreme measures to address this backlog, including implementing three mandatory overtime periods for its examiners between October 2017 and March 2019 and outsourcing controlled-substance cases to a private, out-of-state laboratory. Linda C. Jackson letter of March 11, 2019 *supra* note 10.

¹³ See Virginia Department of Forensic Science site *Average Case Turnaround Times*, available at <https://www.dfs.virginia.gov/about-dfs/current-turnaround-times/>; Linda C. Jackson letter of March 11, 2019 *supra* note 10.

¹⁴ The argument that Virginia's statutory framework allows for prosecution of marijuana possession without laboratory testing is unavailing because unreliable marijuana field tests have essentially nullified that statutory framework. In a possession-of-marijuana trial, Virginia Code Section 19.2-188.1 allows the government to prove that a substance is marijuana through reliance on a DFS-approved field test:

any law-enforcement officer shall be permitted to testify as to the results of any marijuana field test approved as accurate and reliable by the Department of Forensic Science pursuant to regulations adopted in accordance with the Administrative Process Act (§ 2.2-4000 et seq.), regarding whether or not any plant material, the identity of which is at issue, is marijuana . . .

However, as a result of industrial hemp and hemp products becoming legal, the sole DFS-approved field test—the Duquenois-Levine test—has become inadequate for this purpose, because it cannot distinguish illegal marijuana from legal industrial hemp. Letter from Linda C. Jackson, Director at Virginia Department of Forensic Science, to All Agencies Service by the Department of Forensic Science (DFS) Laboratories, dated May 23, 2019, available at <https://www.dfs.virginia.gov/wp-content/uploads/2019/05/DFS-Notice-Regarding-Marijuana-Field-Tests-and-Marijuana-Analysis-and-Reporting.pdf>. DFS has communicated this shortcoming and instructed law enforcement to use a second test—the 4-AP test—in combination with the Duquenois-Levine test to help distinguish between marijuana and industrial hemp. Letter from Linda C. Jackson, Department Director at Virginia Department of Forensic Science, to All Law Enforcement Agencies Served by DFS, dated November 8, 2019, available at <https://www.dfs.virginia.gov/wp-content/uploads/2019/11/DOC-2019-11-12T133005.682.pdf>. However, DFS has not approved the 4-AP test “as accurate and reliable . . . pursuant to regulations adopted in accordance with the Administrative Process Act.” VIRGINIA DEPARTMENT OF FORENSIC SCIENCE, 4-AP FIELD TEST INSTRUCTION SHEET (November 12, 2019), available at <https://www.dfs.virginia.gov/wp-content/uploads/2019/11/Cannabis-Typification-Field-Test-Instructions-V2-1.pdf>; see also *id.*; General Notices section of the Virginia Register of Regulations (no notice published in accordance with 6 VAC § 40-50-60). Therefore, the 4-AP test is not covered by § 19.2-188.1 and therefore, the proposed combination of field tests cannot be relied upon to prove that a substance is marijuana. VIRGINIA DEPARTMENT OF FORENSIC SCIENCE, 4-AP FIELD TEST INSTRUCTION SHEET.

¹⁵ David. A. Makin, et al., *Marijuana Legalization and Crime Clearance Rates: Testing Proponent Assertions in Colorado and Washington State*, POLICE QUARTERLY Vol. 22(1) (2019), available at <https://journals.sagepub.com/doi/pdf/10.1177/1098611118786255>.

providing faster resolution to victims, would help improve public confidence in the justice system.

The downstream consequences of prosecuting adults for simple possession of marijuana represent another type of cost: the unjustified negative effect on the prosecuted individual, their family, and the community. Successful prosecution of these cases results in the individual having a criminal record that can never be expunged. This record can be seen in perpetuity by every employer, renter, and creditor the individual will encounter. Such a criminal record could seriously limit one's options in life. This is particularly true for Fairfax residents in the employment context because they would be at a disadvantage when competing with job applicants from other jurisdictions—most notably Washington, D.C.—which do not criminalize simple possession of marijuana. These types of diminished prospects can create unjustified generational hardship for that individual's family. Potential generational hardship is a particularly acute concern for our non-citizen neighbors, such as Legal Permanent Residents, who could have their families broken up due to marijuana-possession prosecutions. Based on the amount of marijuana they possess, a Legal Permanent Resident can be considered “automatically deportable” and be placed in deportation proceedings due to a possession-of-marijuana conviction.¹⁶ Even if that individual did not possess enough marijuana to be considered “automatically deportable,” they may not be allowed to re-enter the United States if they leave (“inadmissibility”).¹⁷ These types of economic, familial, and social downstream consequences have serious and wide-ranging effects that have the potential to greatly weaken our communities.

Not all communities bear the brunt of these downstream consequence equally—they disproportionately affect people of color. A 2017 review of data from the Virginia State Police found that on a per capita basis, African American are 3.2 times more likely than whites to be arrested for marijuana in Fairfax County.¹⁸ The issue of disparate impacts is not unique to Fairfax, according to a 2017 study on marijuana decriminalization that the Virginia Crime Commission completed for the General Assembly. According to the Crime Commission, the U.S. Census Bureau estimates that as of 2016, approximately 70% of Virginia's population was white and 19.8% was African American,¹⁹ but in Virginia:

- 45.5% of first offense arrests for possession of marijuana were of African Americans; and

¹⁶ KATHY BRADY, ET. AL., PRACTICE ADVISORY IMMIGRATION RISKS OF LEGALIZED MARIJUANA (Jan. 2018) at 3, [available at https://www.ilrc.org/sites/default/files/resources/marijuana_advisory_jan_2018_final.pdf](https://www.ilrc.org/sites/default/files/resources/marijuana_advisory_jan_2018_final.pdf).

¹⁷ *Id.* at 4.

¹⁸ SaraRose Martin, The numbers behind racial disparities in marijuana arrests across Va., Capital News Service (May 15, 2017), [available at https://wtvr.com/2017/05/15/racial-disparities-in-marijuana-arrests-seen-across-virginia/](https://wtvr.com/2017/05/15/racial-disparities-in-marijuana-arrests-seen-across-virginia/); Underlying data available at https://docs.google.com/spreadsheets/d/12Rc8wjCq_9boDDnQcQZYiHR6MABFIhsGcYrL8GtmIH/withedit#gid=868658731.

¹⁹ VIRGINIA CRIME COMMISSION, Decriminalization of Marijuana Study Highlights (January 2018), [available at http://vscc.virginia.gov/Mari%20Highlights_FINAL-5.pdf](http://vscc.virginia.gov/Mari%20Highlights_FINAL-5.pdf). The categories used in the Crime Commission's study are: (1) White; (2) Black/African American; (3) Asian or Native Hawaiian/Pacific Islander; (4) two or more races or other; and (5) American Indian/Alaska Native. VIRGINIA CRIME COMMISSION, Decriminalization of Marijuana Presentation (October 30, 2017), [available at http://vscc.virginia.gov/VSCC_FINAL_Decrim%20Mari%20Present.pdf](http://vscc.virginia.gov/VSCC_FINAL_Decrim%20Mari%20Present.pdf).

- 52.7% of second or subsequent-offense arrests for possession of marijuana were of African Americans.²⁰

In the face of these disparate impacts, the prosecution of marijuana counterproductively breeds reluctance on the part of community members to trust or cooperate with the justice system. Such prosecution also encourages the perception that the justice system is not focusing its attention on legitimately dangerous crimes. Neither outcome is productive for a law-enforcement apparatus that relies on community trust and cooperation to maintain and improve safety.

The current approach to marijuana possession is not working for Fairfax County. Prosecuting adults for marijuana possession wastes resources, hurts our neighbors and our communities, and does not significantly improve community safety. The American Bar Association's Standards for the Prosecution Function entrust prosecutors with the duty to "seek to reform and improve the administration of criminal justice" and direct prosecutors that "[w]hen inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, the prosecutor should stimulate and support efforts for remedial action."²¹ It is clear that there are inadequacies and injustices in how our criminal justice system deals with possession of marijuana and that they make our communities less safe. As such, the Fairfax County Commonwealth's Attorney directs the Office's prosecutors to move to dismiss simple possession of marijuana charges levied against adults.

Prosecution of Marijuana-Driven Criminal Behavior Unchanged

We will continue to prosecute dangerous behavior arising from marijuana use and abuse, including impaired driving and illegal street sales of marijuana, which bring with them a risk of violence inherent in the illegal drug trade.

Addressing these problems does not, however, require the prosecution of marijuana users for possessing marijuana alone or justify the resources or disparate impact inherent in prosecuting them.

Providing Juveniles with Necessary Services

The Fairfax County Commonwealth's Attorney's Office will distinguish adult possession-of-marijuana cases from those involving juveniles. Because of the difference between the juvenile justice system and the traditional criminal justice system, juveniles who encounter law enforcement due to marijuana have a wider array of useful services available to them than do adults. This is partly in recognition that juvenile drug use may indicate other issues that government and community services can help alleviate. The benefits inherent in providing

²⁰ VIRGINIA CRIME COMMISSION, Decriminalization of Marijuana Study Highlights (January 2018), available at http://vscc.virginia.gov/Mari%20Highlights_FINAL-5.pdf.

²¹ AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION (4th ed. 2017), Standard 3-1.2(f).

juveniles with needed services that they would not otherwise be able to access justify the expenditure of resources to connect juveniles with those services.

The juvenile justice system also shields juveniles from the negative lifelong downstream consequences faced by adults. Juvenile misdemeanor arrests such as arrests for possession of marijuana are not subject to public disclosure and are automatically expunged after a set period of time.²²

The Office will not apply this policy directive to juveniles because they stand in a different posture than adults. A juvenile's first contact with the juvenile justice system in a misdemeanor matter is usually handled informally, without the involvement of a judge or this Office, and results in a dismissal. This Office would typically only be involved in a juvenile marijuana misdemeanor if the juvenile had repeated contacts with the juvenile justice system—a scenario indicating that the drug use may be indicative of other issues that services can help alleviate. Distinguishing between adults and juveniles is not an effort to punish juveniles. It is an effort to help them and connect them with needed services. This stance is consistent with the General Assembly's vision of the juvenile justice system as one that has the ability "to deter crime by providing community diversion or community-based services to juveniles who are in need of such services."²³

Other Crimes Committed while Possessing Marijuana

This policy does not change the Office's commitment to keeping our community safe. When individuals commit criminal acts while also possessing marijuana in a manner consistent with this policy's definition of "simple possession of marijuana," the Office will prosecute the non-simple-possession acts in accordance with the Office's normal standards.

A Continued Commitment to the Prosecution of Drug Distribution and Violent Crime

Nothing in this policy changes the Office's commitment to keep our community safe from violent and dangerous behaviors. As always, we will vigorously prosecute violent individuals, gang members, and firearms abusers who maim and kill. We will vigorously prosecute the drug dealers who prey upon the addictions of others in the name of profit.

By building community trust and by focusing our resources, we remain more committed than ever to our core mission of creating a safe and just Fairfax County.

Effect of Policy on Plea Agreements

There are instances where defendants wish to plead guilty to violating § 18.2-250.1 ("Possession of marijuana unlawful") as part of a plea agreement. This policy does not foreclose

²² Va. Code §§16.1-305, 306 and 307.

²³ Va. Code §16.1-309.2.

that possibility when the totality of the circumstances dictate that such an agreement is the appropriate disposition.

No Grant of Additional Rights

This policy, like all policies of the Fairfax County Commonwealth's Attorney's Office, does not grant any rights, expectations, or privileges to any individual. This policy is not inviolable and may be amended or deviated from as is deemed necessary by the Fairfax County Commonwealth's Attorney.