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TO: **Mayor Jordan**
City Council
Greg Tabor, Police Chief
Brian Thomas, Fayetteville City Prosecutor

FROM: **Kit Williams, City Attorney**

DATE: **June 28, 2019**

RE: **Simple Possession of Less Than One Ounce of Marijuana Cases**

Even before the passage of the initiated ordinance codified as **Article II Lowest Law Enforcement and Prosecutorial Priority Policy** on November 4, 2008, the Fayetteville City Prosecutor exercised his discretion for leniency in prosecutions for misdemeanor marijuana offenses involving only adults. After our citizens voted to enact **§130.02 Arrests and Prosecutions of Marijuana Cases** in 2008, the City Prosecutor's office ensured that prosecution of misdemeanor marijuana offenses, where marijuana was intended for adult personal use, would be the lowest prosecution priority. Since 2008, imprisonment for misdemeanor amounts of marijuana was never sought and fines have steadily been reduced over the years. The vast majority of these simple possession cases were approved by the City Prosecutor for expungement or sealing under liberalized state laws which also reduced allowable penalties for even repeated convictions.

I rarely comment upon the Fayetteville City Prosecutor's discretionary power to determine proper prosecutorial decisions because I believe in his good judgment and I desire to shield his office from any political concerns. However, in the case of prosecutions of simple marijuana possessions of less than an ounce, I believe changed circumstances allow me to recommend that the City Prosecutor's office consider even further leniency for some small simple possession of marijuana cases.

These changed circumstances include the Arkansas Legislature's continuing lessening of the penalties under state law for marijuana possession. For example, possession of marijuana which previously would have been presumed to be sufficient for a felony conviction (prison time) for possession with intent to deliver would now be only simple possession, a misdemeanor (county jail time at the most). Arkansas citizens have also passed the legalization of medical marijuana with many Arkansans finally able to relieve certain maladies without violating the law.

There is another practical reason to lessen prosecution of cases of simple possession of less than an ounce of marijuana. No, this will not save much prosecution time or efforts since such prosecutions have remained such a low prosecution priority that very little prosecution time has been expended on these small, simple possession cases. However, increasing the number of dismissals could avoid some of the state required fingerprinting which costs our taxpayers thousands of dollars a year. Additionally, with increased crowding at the county jail, the City should do everything reasonably appropriate to continue to try to reduce the number of our citizens jailed even for short periods. We need to preserve jail space for dangerous and violent suspects, not non-violent minor offenders.

If the City Council desires that the Fayetteville City Prosecutor increasingly exercise his discretion to refrain, when appropriate, to prosecute cases involving possession of only small amounts of marijuana, the City Council will need to amend §31.45 (C) *Duties* (6) of the *Fayetteville City Code* which now states "to prosecute all cases whether civil or misdemeanor criminal cases involving violations of the state laws..." (emphasis added) I would recommend adding the following sentence: "The City Council recognizes and agrees that the City Prosecutor has the inherent discretionary power to determine whether or not to prosecute any criminal case and encourages the use of such power to ensure that appropriate cases of simple possession of less than one ounce of marijuana for personal, private, adult use be considered for dismissal in accordance with §130.02 **Arrests and Prosecutions of Marijuana Cases** passed by the Fayetteville voters."

Some may wish that we could do more than recognize and authorize the City Prosecutor to exercise his discretion more broadly to comply with the citizen enacted **Article II of General Offenses** of the *Fayetteville City Code* entitled **Lowest Law Enforcement and Prosecutorial Priority Policy**. But we cannot. A.C.A. §14-42-109(a)(1)(A) prohibits the willful and knowing refusal to execute state laws by elected officers of a city. I believe the City Council can change the *Fayetteville City Code* to modify the requirement to prosecute "all ...misdemeanor criminal cases" by recognizing a prosecutor's inherent discretionary power necessary for fair and just prosecution. However, neither the City Council nor I can demand that all misdemeanor marijuana cases be dismissed. Additionally, as I noted in the *Fayetteville City Code* after §130.02 was passed and enacted:

Editor's Note from City Attorney: §130.02 is the result of an initiated ordinance which is subject to the same constitutional and legal constraints as any ordinance passed by the City Council. This ordinance may be in violation of the Mayor's statutory power (A.C.A. §14-43-504) as chief executive officer and supervisor of the Police. City Attorney.

CONCLUSION

I believe it is lawful and appropriate for the City Prosecutor's office to use their discretion even more fully once the City Council has amended §31.45 (C)(6) to expressly recognize the City Prosecutor's inherent discretionary powers. No blanket policy to dismiss all cases involving the simple possession of a small amount of marijuana may be created or enforced until and unless the Legislature give cities such express powers which may never happen. In the meantime, my Legal Department remains committed to lowering the incarceration rate for all non-violent offenders and especially for simple possession of small amounts of marijuana for adult, private, personal use.