DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
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December 6th, 2018

MEMORANDUM

TO: UNITED STATES ATTORNEYS
DIRECTOR OF THE BUREAU OF PRISONS

CC: STATE ATTORNEY GENERALS

FROM: THE ATTORNEY GENERAL SH

SUBJECT: Implementation of H.R. 074: Cannabis Legalization Act of 2018

INTRODUCTION

On November 26, 2018, President GuiltyAir signed H.R. 074, better known as the Cannabis Legalization Act of 2018 (hereafter CLA), into law. The act decriminalizes marijuana at the federal level. It has numerous provisions, but this memorandum and set of directives focuses on the implementation of Section VII of the law, which reads:

"(1) EARLY RELEASE. The Department of Justice shall be authorized to pursue the early release of certain prisoners that have either been arrested and jailed for either the possession, growing, use or all three of cannabis, provided that the prisoner being considered for release has not committed any further offenses while imprisoned. The Department of Justice shall work with county and state-level officials for carrying out this provision."

This memorandum explains the strategy of the Department of Justice in complying with this provision of the law, and, perhaps more importantly, what we are still barred by law from doing. Nothing in the memorandum below, including the directives, should be construed as applying to any individual outside of the class designated by Congress in Section VII. Additionally, the entirety of this memorandum, including the directives, only applies to the types of marijuana

related offenses decriminalized by the CLA, not to any other crimes committed by any person, whether connected or unconnected to the decriminalized provisions.

LIMITATIONS

We begin with an analysis of what the Department of Justice can and cannot do under the language of the provision in question. Unfortunately, while the law authorizes us to "pursue" the early release of certain prisoners being held for marijuana related offenses, it gives us no tools with which to do so, and thus comprehensive action is impossible.

1 U.S. Code § 109 provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty...incurred under such statute, unless the repealing Act shall so expressly provide." In simple terms, this states that when a statute is repealed, that repeal is not retroactive unless it is clearly stated in the statute. In the case of the CLA, there is no such express provision. While the legislature authorizes the Department of Justice to pursue the early relief of prisoners, it does *not* expressly extinguish their penalty. Therefore, based on the Department's reading of the statute, we are limited to the powers normally available to us when it comes to releasing prisoners early. Under federal law, those are few, even in situations where the crime an individual is being held for is decriminalized.

In fact, early release, as triggered by the Department of Justice, is only available under narrow circumstances. For instance, one of the only circumstances under which the government can motion to reduce a person's sentence, even under the minimum recommended sentence, if the person "offers substantial assistance in investigating or prosecuting another person." *See F.R.C.P* 35(b).

One body that *does* have the power to do what the legislation is requesting, at least to some extent, is the United States Sentencing Commission. 18 U.S.C. § 3582 provides that a "court may not modify the term of imprisonment once it has been imposed" but "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment."

The section cited also does allow the Department of Justice to make a motion, but requires that the court finds that "extraordinary and compelling reasons warrant such a reduction." 18 U.S.C. § 3582(c)(1)(A)(i). The Bureau of Prisons has traditionally interpreted this language as

applicable "only to those circumstances where the inmate is diagnosed with a serious medical condition. Ordinarily, the condition must be terminal, with a determinable life expectancy." *United States v. Maldonado,* 138 F. Supp. 2d 328, at 331 (2001).

While it might be within our power under *Chevron* deference to interpret the "extraordinary" language to include persons serving sentence for crimes that are no longer crimes, the Department will not drastically depart from this traditional interpretation in the interests of political expediency. Decriminalization of conduct that was previously illegal is by no means extraordinary, and indeed was specifically foreseen by Congress in 1 USC § 109. The Sentencing Commission is not limited by this "extraordinary and compelling" language.

Another avenue leading to release could be an amendment to the CLA by Congress, explicitly providing for an opportunity for the impacted class to be resentenced under the new law, possibly combined with an expungement of their records related to the relevant offenses.

Finally, we note that the Department of Justice is very limited in what we can do to effect the release of state or county level offenders. Those people were convicted under state or local laws, and it is the right of the states to keep their criminal statutes on the books so long as they are not unconstitutional. Therefore, there is only one mention of states and localities in my directives below, and it is purely optional on the part of the states.

DIRECTIVES

As explained above, we are limited in what we can do to effect the changes Congress has asked us to make. That said, we are not powerless. Department of Justice employees are hereby directed to follow the following guidance:

1. Whenever a person included in the class of prisoners mentioned in Section VII comes up for early release for any reason, the appropriate **employees of this department shall support the granting of said release unless directed otherwise by the Attorney General.** If an employee believes there is a compelling reason not to support early release for an individual, they shall bring such concerns to the Attorney General. **Where supervised release is required, employees shall also advocate for the least restrictive form of supervised release possible.**
2. 1 U.S.C. § 110 provides that individuals who are in the process of being prosecuted or who have committed offenses under the laws that have now been repealed "may" still be prosecuted as if the repeal had not happened. **Relevant department employees are directed to not prosecute the individuals in the class denominated by Section VII,**

and to drop the charges in any active prosecutions under the repealed statutes, even if they have the statutory authority to commence or continue said prosecutions.

3. State Attorneys Generals in states that have repealed or that are interested in repealing statutes similar to those repealed in the CLA are welcomed to contact the Attorney General, who, upon their request, will provide resources free of charge to assist them in locating relevant authority in their state as to their options for the early release of relevant prisoners. Some states have far more permissive rules for early release in the case of repeal than the federal government does.
4. For individuals who have been convicted of acts repealed by the law but not yet sentenced, **Department employees are directed to advocate for the minimum possible sentence available, including no sentence at all.** The Supreme Court has held that laws that reduce the penalties for a crime should be applied at sentencing, even if a person was convicted under the old law. *Dorsey v. United States*, 567 U.S. 260 (2012).
5. **The Director of the Bureau of Prisons is directed to commence proceedings to transfer individuals in the class specified in Section VII to minimum security prisons, community correctional facilities (under 18 U.S.C. § 3624 (c)(1) or to house arrest (under 18 U.S.C. § 3624 (c)(2)) to the greatest extent permissible by law.**
6. **The Director of the Bureau of Prisons shall use 18 U.S.C. § 3621 (e)(2)(B) to the greatest extent permissible by law to reduce the penalties on the class specified in Section VII.**
7. **The $10,000,000 appropriated by the CLA to the Department of Justice shall be distributed by the Director of the Bureau of Prisons to fund additional staffing and increase other resources necessary for the programs referred to in 18 U.S.C. § 3621 (e)(2)(B) to be more readily available to inmates.**

CONCLUSION

While there is not much more we can do at this time, the provisions above should provide some relief to certain individuals. Nothing in this memorandum shall be interpreted in a way that would require any action not allowed by law. The Director of the Bureau of Prisons and other relevant officials are directed to begin following the guidance in this memorandum immediately.

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ATTORNEY GENERAL