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TO: All County Prosecutors

All Municipal Prosecutors

All County Sheriffs

All Police Chief Executives

Joseph R. Fuentes, Superintendent
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New Jersey Division of Criminal Justice

FROM: John J. Hoffman, Acting Attorney General

SUBJECT: Directive to Ensure Uniform Statewide Enforcement of the "Overdose Prevention Act"

DATE: June 25, 2013

1. Introduction and Overview

On May 2, 2013, Governor Christie signed into law the "Overdose Prevention Act" as P.L. 2013, c. 46. A copy of the new law is attached. Pursuant to my authority and responsibility under the Criminal Justice Act of 1970, N.J.S.A. 52:17B-97 *et seq.*, to ensure the uniform and efficient enforcement of the criminal laws, I hereby issue this Directive to ensure that all police and prosecuting agencies comply with the requirements of the new law.

The provisions of the Overdose Prevention Act that are most relevant to law enforcement officers and agencies are codified at N.J.S.A. 2C: 35-30 and 2C:35-31. The overarching purpose of the statute is to encourage persons to seek immediate medical assistance whenever a drug overdoes occurs. In the past, there have been instances where persons were reluctant or unwilling to call authorities for help for fear that this might lead to an arrest or prosecution for illegal drug use or possession. It is vitally important that medical assistance be rendered as quickly as possible to

persons who are experiencing a drug overdose. The Governor and Legislature have thus determined that lives can be saved by alleviating the fear of arrest and prosecution that might discourage or delay a call for help. To accomplish this vital goal, the new law provides legal protection in the form of immunity from arrest, prosecution, or conviction for a use or simple possession drug charge when a person, in good faith, seeks medical assistance for him/herself or for another. The request for medical assistance that triggers the law's immunity feature may be made by means of the 9-1-1 telephone emergency system or by any other means.

In order to achieve the salutary goal of the Drug Overdose Prevention Act, all law enforcement officers and prosecutors must be familiar with the new law and take steps to ensure that the legal protections afforded under the statute are respected and uniformly enforced throughout the State.

2. Specific Crimes and Offenses That Are Subject to Immunity From Arrest and Prosecution

The Overdose Prevention Act specifically provides that when a person, in good faith, seeks medical assistance for a person believed to be experiencing a drug overdose, whether the person is seeking assistance for him/herself or for another, the person calling for help and the person experiencing the overdose shall not be arrested, charged, prosecuted, or convicted for certain specified criminal offenses. The specified crimes and offenses are as follows:

1) obtaining, possessing, using, being under the influence, or failing to make lawful disposition of any controlled dangerous substance or analog in violation of subsection a., b., or c. of N.J.S.A. 2C:35-10;

2) inhaling the fumes or possessing a toxic chemical in violation of subsection b. of N.J.S.A. 2C:35-10.4;

3) using, obtaining, attempting to obtain, or possessing any prescription legend drug or stramonium preparation in violation of subsection b., d., or e. of N.J.S.A. 2C:35-10.5;

4) acquiring or obtaining a controlled dangerous substance or analog by fraud in violation of N.J.S.A. 2C:35-13;

5) unlawfully possessing a controlled dangerous substance that was lawfully prescribed or dispensed in violation of N.J.S.A. 2C:35-24; and

6) using or possessing with intent to use drug paraphernalia in violation of N.J.S.A. 2C:36-2, or having under control or possessing a hypodermic syringe or other instrument for using a controlled dangerous substance or analog in violation of subsection a. of N.J.S.A. 2C:36-6.

3. Crimes That Are Not Subject to the Statutory Immunity Feature

It is important to note that the immunity from arrest, prosecution, and conviction afforded under the statute applies only to those crimes and offenses that specifically are enumerated in N.J.S.A. 2C:35-30(a)(1-6) and 2C:35-31(a) (1-6), and that are comprehensively set forth in Section 2 of this Directive. These specified drug-related offenses commonly are referred to as "simple possession" offenses. It is critical to note that the statute does not apply to or in any way limit the authority or discretion of law enforcement officers or prosecutors to investigate, arrest or prosecute an offense involving the manufacture, distribution, or possession with intent to distribute an illicit substance or paraphernalia. The legislative findings set forth in the statute make clear in this regard that, "[i]t is not the intent of the Legislature to protect individuals from arrest, prosecution or conviction for other criminal offenses, including engaging in drug trafficking...." N.J.S.A. 24:6J-2.

Nor does the statute preclude an arrest, prosecution or conviction for the crime of strict liability for drug-induced death in violation of N.J.S.A. 2C:35-9, or the offense of driving while under the influence of an intoxicating substance in violation of N.J.S.A. 39:4-50 or any related drunk/drugged driving offense or indictable crime.

4. Uniform Statewide Enforcement Policy Where Multiple Persons Collaborate in a Request for Medical Assistance

The literal text of the statute affords immunity only to the specific individual who actually sought medical assistance (*e.g.*, the person who placed a 9-1-1 telephone call) and to the person who experienced a drug overdose and was the subject of a good faith request for medical assistance made by another. There may be situations, however, where two or more persons are present when the request for medical assistance is made. Consistent with the spirit of the law and its overriding purpose to reduce disincentives to seeking prompt medical help, where it can reliably be determined that two or more persons were present at the time that the request for medical assistance was made and were aware of and participating in that request, police and prosecutors should proceed as if those persons had collaborated in making the request for medical assistance, even though only one of them actually placed the call to the 9-1-1 emergency system or otherwise made the request for medical assistance. Persons who in this manner collaborated in making the request for medical assistance should not be arrested or prosecuted for an offense enumerated in Section 2 of this Directive.

This enforcement policy, while arguably not required by the literal terms of the statute, is hereby adopted for sound policy reasons. Persons present at the scene of a drug overdose might be chilled from making a request for medical assistance for fear that such a call to authorities might subject friends, family, or colleagues to arrest or prosecution for drug use or possession. It therefore makes sense to refrain from arresting and/or prosecuting persons who reasonably appear to be associated and collaborating with the person who actually places the call for medical help. This policy is not intended, however, to insulate from arrest and prosecution all persons who happen, for

example, to be in a "crack house" or at a party at which a person experiences an overdose. Rather, it is intended to apply only to those individuals who were aware of and collaborated in the request for medical assistance. For example, police should refrain from arresting a person who was aware that someone else had placed a 9-1-1 call for medical assistance and stayed with the person who was experiencing an overdose until help arrived. This enforcement policy would also apply where a person can demonstrate that he or she left the presence of the overdose victim for the purpose of seeking medical assistance, such as by going to a neighbor's house to make a 9-1-1 call. It would not apply, however, to those who flee the scene to avoid apprehension without collaborating in a good-faith effort to seek medical assistance, or to any person who had in any way or by any means *discouraged* others from making a call for assistance.

This enforcement policy is intended to effectuate the goal of encouraging persons to initiate timely requests for medical assistance to the greatest extent feasible. It must be recognized that as a practical matter, police investigating an incident may not be able to establish who is entitled to immunity from arrest and prosecution under the statute (*e.g.*, who placed a 9-1-1 call), much less to establish who may have collaborated in the request for medical assistance for purposes of applying the foregoing enforcement policy. Law enforcement officers and prosecutors are expected to apply the law and this enforcement policy in good faith, recognizing that for practical reasons, persons who seek the benefit of the law's immunity feature must bear responsibility for establishing the factual basis for immunity from arrest or prosecution.

Nothing herein shall be construed to create any rights, privileges, or immunities beyond those expressly established in the Overdose Prevention Act. Nor does the enforcement policy established in this section in any way limit the authority of prosecutors to argue in litigation that the statutory immunity feature does not apply to any individual.

5. Inapplicability of Statutory Immunity When Offense is Discovered Independent of a Request for Medical Assistance

The immunity provisions of the statute apply only when the evidence for an arrest, charge, prosecution or conviction had been obtained as a result of the seeking of medical assistance. N.J.S.A. 2C:35-30(b)(2) and 2C:35-31(b). The immunity feature thus does not extend to simple possession drug offenses that come to the attention of law enforcement by any independent means. Thus, for example, a prosecution for a simple possession drug offense may proceed if the evidence of that offense had been discovered and seized prior to the call for medical assistance (*e.g.*, where police during an encounter see a controlled dangerous substance in plain view and a person on the scene thereafter tells police that he/she or another person is experiencing an overdose and needs medical assistance).

6. Authority to Seize Contraband Even When Immunity Feature Applies

The statute makes clear that it in no way limits the authority of law enforcement officers to seize evidence or contraband, even if the person from whom the evidence was seized is immune from arrest or prosecution for possession of that evidence or contraband. See N.J.S.A. 2C:35-30(c) and 2C:35-31(c).

7. Effective Date and Application to Pending Cases

The new law took effect immediately upon its enactment on May 2, 2013. Any pending prosecution for a covered offense should be dismissed on motion of the prosecutor in any case where the evidence necessary to prove the offense had been discovered or learned about as a result of a good faith call for medical assistance, notwithstanding that the arrest occurred before the effective date of the statute. It is important to note in this regard that the law clearly precludes not only an arrest, but also an ensuing prosecution or conviction. However, any other pending charges relating to evidence seized before May 2, 2013 (*e.g.*, distribution or possession with intent to distribute charges) are not affected by the new law, and such prosecutions involving charges that are not specifically enumerated in N.J.S.A. 2C:35-30(a) or 2C:35-31(a) should be pursued in the normal course.

8. Questions and Controversies

Any questions by police officers or agencies or municipal prosecutors concerning the meaning or implementation of the Overdose Prevention Act should be directed to the appropriate County Prosecutor. Any questions by County Prosecutors concerning the statute should be directed to the Director of the Division of Criminal Justice, or his designee.

If a court invokes the statutory immunity feature over the prosecutor's objection (*i.e.*, in circumstances where the feature should not apply according to the explanation of the law provided in this Directive), the municipal or county prosecutor shall, through the appropriate chain of authority, promptly alert the Director of the Division of Criminal Justice or his designee and should take such actions as may be necessary to preserve the State's right to appeal the decision.

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