SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JUAN GOMEZ-GARCIA, JAMES McPHERSON, WILLIE SPENCE, MOSHESH HARRIS, and MAHENDRA SINGH, Plaintiffs,	VERIFIED COMPLAINT
-- against --	
THE NEW YORK CITY POLICE DEPARTMENT; RAYMOND W. KELLY, New York City Police Department Commissioner, in his official capacity; and THE CITY OF NEW YORK, Defendants.	

PRELIMINARY STATEMENT

1. This is an action for declaratory and injunctive relief brought by individuals victimized by the New York City Police Department's illegal marijuana arrest practices. Those practices, which Police Commissioner Raymond W. Kelly has admitted violate the law, have subjected plaintiffs, and thousands of other persons suspected of possessing small quantities of marijuana, to the full arrest process, including many hours, if not days, in squalid holding pens. The law mandates that these individuals promptly be issued a Desk Appearance Ticket, akin to a traffic ticket, and be released from custody and sent on their way. The police, however, repeatedly failed, and continue to fail to follow the law and,

as a result, subject these individuals to the full arrest process, with all of its direct and collateral negative consequences.

2. All of the plaintiffs were arrested and charged with a violation of PL § 221.10(1), a B misdemeanor that the Legislature reserves for possession of a small quantity of marijuana that is "burning or open to public view." None of the plaintiffs possessed marijuana that was burning or open to public view when they were stopped by the police. Only after the police stop, and a search, directive, or instruction by the police, did the marijuana become "open to public view."

3. In such circumstances, the police are restricted by state law to charge a violation-level infraction, PL § 221.05. CPL § 150.75 requires that a Desk Appearance Ticket be issued promptly to the individual charged under that section. The expressed legislative purpose for limiting process to a Desk Appearance Ticket (similar to a traffic ticket) was to prevent the needless scarring of lives as well as the waste of millions of dollars of law enforcement resources that could otherwise be devoted to the prosecution of serious crimes.

4. Nevertheless, plaintiffs were charged with the misdemeanor, PL § 221.10(1), instead of a violation. As a result, they were subject to the full arrest process, including, among other things, hours or days of detention in harsh and

squalid conditions, loss of wages, disruption of home and family life, and the stigma of having an arrest record.

5. Plaintiffs' experience is hardly unique. In April 2011, WNYC News reported that "[p]olice arrest 140 people every day in New York City for possessing small amounts of marijuana. It's now by far the most common misdemeanor charge in the city."[1] Instead of saving resources, the report cited one study which found that the "city continues to spend more than $75 million a year to keep arresting people for misdemeanor marijuana possession."[2] The report identified "more than a dozen men" arrested for alleged violations of PL § 221.10(1), all of whom stated that the marijuana in their possession was concealed until the police themselves uncovered it.[3] A recent study showed that 44% of arrests for marijuana possession were for marijuana that was only brought into "public view" after the police either performed a search or directed the individual to empty his pockets.[4] In each case, the person should have received a Desk

[1] Alisa Chang, Alleged Illegal Searches by NYPD May Be Increasing Marijuana Arrests, WNYC News (April 26, 2011), http://www.wnyc.org/articles/wnyc-news/2011/apr/26/marijuana-arrests/.

[2] Id.

[3] Id.

[4] Daniel Beekman, Study Claims NYPD Made Hundreds of Unlawful Pot Arrests, N.Y. Daily News (April 3, 2012), http://articles.nydailynews.com/2012-04-03/news/31282994_1_marijuana-arrests-pot-study.

Appearance Ticket but instead was subjected to the full arrest process.

6. On June 3, 2012, Governor Andrew M. Cuomo announced that he planned to ask the New York State legislature to pass a bill that would make the possession of small amounts of marijuana even "in public view" a violation-level infraction, which would result in a Desk Appearance Ticket rather than a full arrest process. If that bill had passed, individuals could no longer be subjected to the full arrest process even when marijuana comes into "public view." That is because the process to be followed for individuals charged with possessing marijuana in small amounts would be the same — a Desk Appearance Ticket — regardless of whether the marijuana was in public view or not. New York City Mayor Michael R. Bloomberg, Police Commissioner Kelly, the five district attorneys in New York City, and the Patrolmen's Benevolent Association all publicly supported this legislation. The bill was blocked in the State Senate and did not pass. The bill's broad support in the law enforcement community, however, demonstrates that the relief sought in this lawsuit is warranted.

7. The treatment of plaintiffs, and thousands of others like them, violates the law. Indeed, the law is so clear, and the violation of the law so chronic, that Commissioner Kelly issued OPERATIONS ORDER Number 49 in September 2011 (the

"OPERATIONS ORDER").[5] The OPERATIONS ORDER directed that any "individual who is requested to or compelled to engage in the behavior that results in the public display of marihuana" be charged under PL § 221.05. (OPERATIONS ORDER at ¶ 2.) It further stated that officers "may not charge the individual with PL 220.10(1) . . . if the marihuana recovered was disclosed to public view at an officer's direction." (OPERATIONS ORDER at ¶ 3.) "To support a charge of PL § 220.10(1) the public display of marihuana must be an activity undertaken of the subject's own volition." (Id.)

8. Despite the OPERATIONS ORDER, large numbers of illegal arrests continue to occur, including those of plaintiffs, and appear to be increasing. On April 3, 2012, The New York Daily News reported that illegal arrests "actually increased in the month after the order . . . from 33% to 44%."[6] Indeed, the data shows that in October 2011, "after the Kelly order – the NYPD arrested 2,661 people . . . [t]hat number dipped slightly in November and December, but was still higher than the same months in previous years."[7]

[5] A copy of the Order is attached hereto as Exhibit A.

[6] See Beekman, supra at n.4.

[7] Alice Brennan, New York Police Officers Defy Order to Cut Marijuana Arrests, The Raw Story (March 30, 2012), http://www.rawstory.com/rs/2012/03/30/new-york-police-officers-defy-order-to-cut-marijuana-arrests/.

9. Plaintiffs ask this Court pursuant to CPLR § 3001 to declare that it is unlawful to subject to the full arrest process someone who possesses a small quantity of marijuana that was not "burning or open to public view" at the outset of the police-citizen encounter. Furthermore, the Court should declare that the practice of Defendants in effecting such arrests violates the governing law, as embodied in PL § 221.05, PL § 221.10(1), and CPL § 150.75. By issuing OPERATIONS ORDER 49, Commissioner Kelly has already admitted the truth of this assertion.

10. Plaintiffs also seek an injunction ordering Defendants to comply with the law as declared by the Court, and to take any and all steps necessary to ensure that New York City police officers refrain from subjecting plaintiffs and others possessing a small quantity of marijuana on their person to the full arrest process. OPERATIONS ORDER 49 contains no mechanism or procedure to ensure the correct enforcement of the law. The arrest of plaintiffs and thousands of others since OPERATIONS ORDER 49 was issued demonstrates that such injunctive relief is necessary.

THE STATUTORY SCHEME

11. The statutory scheme governing the possession or sale of marijuana was enacted in 1977 with the passage of "The

Marihuana Reform Act of 1977." A salient goal of the law was to reduce penalties for the possession of small quantities of marijuana.

12. The legislative purpose was incorporated into the text of the law, the first paragraph of which states: "The legislature finds that arrests, criminal prosecutions, and criminal penalties are inappropriate for people who possess small quantities of marihuana for personal use. Every year, this process needlessly scars thousands of lives and wastes millions of dollars in law enforcement resources, while detracting from the prosecution of serious crimes." L.1977, c.360, § 1.

13. The decriminalization of possession of small quantities of marijuana was to be effectuated by several provisions in the newly-created Penal Law Article 221. PL § 221.05 ("Unlawful Possession of Marihuana") is the lowest possession offense on an ascending scale; PL § 221.10(1) (Criminal Possession of Marihuana in the Fifth Degree") is the next lowest. Both cover possession of any amount of marijuana less than 25 grams.

14. The difference between the two sections is whether the possession is in public, and conspicuously so. PL § 221.05 covers possession of less than 25 grams of marijuana that is neither burning nor open to public view. To effect the

legislative purpose of the Marihuana Reform Act, this conduct was not made a crime by the legislature, but only a "violation," akin to a traffic violation. The maximum penalty for the violation is a fine of $100. A jail sentence is not an option, unless an offender also had two prior drug convictions in the previous three years.

15. The Marihuana Reform Act created a companion provision to PL § 221.05 in the Criminal Procedure Law. CPL § 150.75 requires that, "in any case wherein the defendant is alleged to have committed an offense defined in section 221.05 of the penal law . . . an appearance ticket shall promptly be issued . . . . " The appearance ticket spares the person the full arrest process that culminates in an arraignment before a judge. The appearance ticket, like a traffic ticket, requires instead that a defendant appear in court on some future date.[8]

16. PL § 221.05 and CPL § 150.75 are consistent with the Legislature's explicit finding that "arrests, criminal prosecutions, and criminal penalties are inappropriate for people who possess small quantities of marihuana for personal use." PL § 221.05 rules out any jail sanction for first or second offenders, and CPL § 150.75, through the prompt issuance

[8] CPL § 150.75 provides for making the appearance ticket conditional on the posting of bail only in those cases where a defendant's true identity or residence cannot be ascertained.

of an appearance ticket, avoids the custody and other negative consequences of the full arrest process.

17. For a decade and a half after passage of the law, arrests for possession of small amounts of marijuana in New York City were low, in conformity with the legislative directive. In the years before passage, the number of marijuana arrests had averaged approximately 25,000 per year, mostly for small amounts.[9] In 1990 there were only 1,000 such arrests, and 900 in each of the following two years, 1991 and 1992.[10]

18. But by the end of the decade, arrests for possession of small quantities of marijuana had surged. There were 33,200 such arrests in 1998.[11] During the decade after 2000, the arrest figure was in the approximate range of 30,000 to 50,000 per year.[12] In 2010, the police arrested over 50,000 individuals, who were subjected to the full arrest process, for possession of

[9] Harry G. Levine & Deborah Peterson Small, Marijuana Arrest Crusade: Racial Bias and Police Policy In New York City 1997-2007, 60 (April 2008), http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf.

[10] Id. at 7.

[11] Id.

[12] Id.; Drug Policy Alliance, $75 Million a Year: The Cost of New York City's Marijuana Possession Arrests, 11 (March 2011), http://marijuana-arrests.com/docs/75-Million-A-Year.pdf.

small amounts of marijuana.[13] In 2011, the police surpassed that figure making more than 50,680 arrests.[14]

19. Such arrests now represent roughly one-seventh of all offenses arraigned in the New York City Criminal Court.

20. No change in the law authorized this fifty-fold increase in arrests for an offense that had been decriminalized. CPL § 150.75, requiring prompt issuance of a Desk Appearance Ticket for possession of small quantities of marijuana instead of the full arrest process, remains the law.

POLICE CONDUCT INCONSISTENT WITH THE GOVERNING LAW

21. The skyrocketing number of arrests that has occurred — in direct contravention of the statutory scheme explicitly designed to diminish the number of such arrests — is the result of police illegally charging possessors of marijuana under PL § 221.10(1) where marijuana is neither burning nor "open to public view" at the outset of the encounter.

22. The recurring scenario culminating in a PL § 221.10(1) charge is a police-citizen encounter in which marijuana is taken from the pocket, bag, or person of the citizen. The marijuana

[13] Drug Policy Alliance, supra, n.12.

[14] Drug Policy Alliance, New Data Released: NYPD Made More Marijuana Possession Arrests in 2011 than in 2010; Illegal Searches and Manufactured Misdemeanors Continue Despite Order By Commissioner Kelly to Halt Unlawful Arrests, (Feb. 1, 2012), http://www.drugpolicy.org/news/2012/02/new-data-released-nypd-made-more-marijuana-possession-arrests-2011-2010-illegal-searche.

is not burning and is concealed from public view at the outset of the encounter. But either by a police search of the person, or by an order or request from the police to empty one's pockets, the marijuana becomes visible to the police. Rather than promptly issuing an appearance ticket for a PL § 221.05 violation, the police arrest the person for the PL § 221.10(1) misdemeanor and subject him or her to the full arrest process.

23. The result is that a significant portion of the thousands of marijuana related arrests per year arise out of circumstances where the marijuana only becomes visible to a police officer following a search, request or directive.

24. The marijuana arrest practices of the police are contrary to the law, as Commissioner Kelly has acknowledged in the OPERATIONS ORDER.

CONSEQUENCES OF THE ILLEGAL POLICE CONDUCT

25. Subjecting a person detained for possession of a small quantity of marijuana to the full arrest process imposes consequences dramatically different from release with an appearance ticket. The immediate consequence is enforced detention for a period of approximately 24 hours. This period has often exceeded 24 hours, particularly on weekends.

26. The physical conditions of the pre-arraignment holding cells are squalid. The cells are lined with benches along the

walls and usually have a single doorless toilet. They are often very crowded. Misdemeanor arrestees are confined with accused felons. The First Department has noted the "notoriously harsh" condition of such confinement and that it is "a deprivation frequently more severe than would be exacted from a defendant whose guilt has been proven" and is "likely" to involve "extraordinary physical and emotional strain." People ex rel. Maxian v. Brown, 164 AD2d 56, 63-64 (1st Dept. 1990), aff'd, 77 NY2d 422 (1991).

27. The Appellate Division recognized that "the deprivation entailed by prearraignment detention is very great with the potential to cause serious and lasting personal and economic harm to the detainee." Id. at 63. Besides the immediate disruption to work, school, or family caused by the arrest, it leaves the person with an arrest record. In contrast to the recipient of a Desk Appearance Ticket pursuant to CPL § 150.75, who is not fingerprinted, the arrestee is photographed and fingerprinted. The information thus becomes part of the database maintained by the State Division of Criminal Justice Services.

28. The resulting arrest record can mean the loss of a job or be an impediment to obtaining a job. Government agencies, in particular, often require the reporting of an arrest by an

employee. And "Have you ever been arrested?" is a question commonly posed on employment applications.

29. The arrest can also lead to deportation. The fingerprints of any arrestee are transmitted by the Police Department to federal immigration authorities, as required by the "Secure Communities" law. But PL § 221.05 is not a fingerprintable offense. Individuals properly charged under that section do not face the deportation consequences that will follow an arrest for possession of a small amount of marijuana.

30. One's entitlement to public housing can similarly be jeopardized. The New York City Housing Authority (NYCHA) is regularly informed of arrests in its properties by the New York City Police Department. A misdemeanor marijuana arrest can be grounds for NYCHA to evict the arrestee — as well as his or her family — or to deny an application for an apartment.

31. Many individuals who are parents arrested for possession of violation-level marijuana amounts have been subjected to child neglect proceedings, and some have even lost custody of their children as a result.[15]

32. Car drivers from whom marijuana is seized are subject to loss of their vehicles because of the arrest. The Police Department, under Administrative Code § 14-140, can confiscate

[15] See Mosi Secret, No Cause for Marijuana Case, But Enough for Child Neglect, N.Y. Times, Aug. 18, 2011, at A1.

and seek forfeiture of any vehicle allegedly used as the instrumentality of the "crime" of marijuana possession. PL § 221.10(1) is a "crime," while PL § 221.05, a violation, cannot be the basis for forfeiture.

33. Individuals on parole release are in a particularly vulnerable position when improperly charged with the PL § 221.10(1) misdemeanor instead of the PL § 221.05 violation. The misdemeanor can result in revocation of parole — and substantial imprisonment — while the violation (because it is subject to a fine but not a prison sentence) does not carry that consequence under parole rules. Casual misuse of the misdemeanor charge can mean the difference between liberty (with a potential $100 fine) on the one hand, and possibly lengthy incarceration on the other.

THE INEFFECTIVE OPERATIONS ORDER

34. On September 19, 2011, the Police Commissioner issued OPERATION ORDER Number 49. That order acknowledged that "[q]uestions have been raised about the processing of certain marihuana arrests. At issue is whether the circumstances under which uniformed members of the service recover small amounts of marihuana (less than 25 grams) from subjects in a public place support the charge of Criminal Possession of Marihuana in the Fifth Degree Penal Law section 221.10(1) (CPM 5th). The

specific circumstances in question include occasions when the officers recover marihuana pursuant to a search of the subject's person or upon direction of the subject to surrender the contents of his/her pockets or other closed container." (OPERATIONS ORDER at ¶¶ 1-2.)

35. The OPERATIONS ORDER, consistent with the statutory scheme, stated that "[s]uch circumstances may constitute a violation of Penal Law section 221.05 — Unlawful Possession of Marihuana, a violation[,] not Penal Law section 221.10(1) — Criminal Possession of Marihuana in the 5th degree, a class B misdemeanor." (Id. at ¶ 2 (emphasis in original).)

36. The OPERATIONS ORDER continued, "To support a charge of PL 221.10(1) the public display of marihuana must be an activity undertaken of the subject's own volition. Thus, uniformed members of the service lawfully exercising their police powers during a stop may not charge the individual with PL 221.10(1) CPM 5th if the marihuana recovered was disclosed to public view at an officer's direction." (Id. at ¶ 3 (emphasis in original).)

37. The OPERATIONS ORDER emphasized that violation of PL § 221.05 is a non-fingerprintable offense punishable by a fine and that the violator is generally entitled to receive a Desk Appearance Ticket. (See OPERATIONS ORDER ¶ 4.)

38. Nevertheless, as the experiences of plaintiffs and numerous others have shown, the issuance of OPERATIONS ORDER Number 49 has not resulted in police compliance with the law.

39. Countless individuals are still subjected to the full arrest process for possession of small amounts of marijuana found on their person that was neither burning nor "open to public view" as a result of the subject's own volition. These individuals are wrongly charged with a misdemeanor and face a possible sentence of 90 days in jail, instead of the violation carrying a penalty of no more than a $100 fine. Their lives are disrupted, they are held for arraignment in harsh and squalid conditions, and their records are permanently stained — the precise consequences that the marijuana reform law of 1977 was intended to address.

40. Recent statistics from the Division of Criminal Justice Services confirm that the current marijuana arrest situation is essentially unchanged from that preceding the issuance of OPERATIONS ORDER Number 49.

41. In August 2011, the month before the order, arrests under PL § 221.10(1) totaled 4,189. Figures showed a decline for a few months after September: the December arrest figure was 2,974. But that decline was only temporary. The number of PL § 221.10(1) arrests for March 2012 was 4,186. This figure is

virtually identical to the 4,189 arrests made in August 2011, before the order was issued.

THE PARTIES

PLAINTIFFS

42. JUAN GOMEZ-GARCIA, 27, was arrested in the Bronx on May 16, 2012. He lives in the Bronx, New York. He was waiting outside a Kennedy Fried Chicken restaurant while his order was being prepared. A police officer approached, and, after confirming that he was waiting for his order, asked if Mr. Gomez-Garcia had any drugs on him.

43. When he responded that he had marijuana in his pocket, the officer reached inside the pocket and removed a ziplock bag containing marijuana. Mr. Gomez-Garcia was arrested and charged with "open to public view" possession under PL § 221.10(1) for having marijuana "in his right hand."

44. He was taken to the 46th Precinct. He protested to a sergeant that he should be issued a ticket instead of being transported to Central Booking.

45. He was taken to Central Booking and arraigned roughly 12 hours after his arrest. He pled guilty to a Disorderly Conduct violation and was released.

46. Mr. Gomez-Garcia fears that he will be subjected to further improper arrests under PL § 221.10(1).

47. JAMES McPHERSON, 26, was arrested in Richmond County on May 8, 2012. He had been walking back to his home after buying cigarettes at a gas station when the police stopped him. They asked him what he was doing; he told them he was going home. He lives in Staten Island, New York.

48. The police then made him stand with his hands against a wall and frisked him. He had a small quantity of marijuana and a small pipe inside his pockets. The police pulled the items out.

49. He was arrested and charged with violating PL § 221.10(1) for "open to public view" possession, although the officer's supporting deposition specified that the items were "recovered from" his pockets.

50. Mr. McPherson had never been arrested before. He was held in police custody about 24 hours, from about 3:30 p.m. on May 8 until his arraignment at about 3:30 p.m. on May 9.

51. He accepted an "adjournment in contemplation of dismissal," commonly known as an "ACD," to dispose of the case at arraignment.

52. Mr. McPherson is employed as a restaurant delivery person. He is concerned about being subjected to further improper arrests under PL § 221.10(1).

53. WILLIE SPENCE, 47, was arrested on May 2, 2012 in Kings County and charged with violating PL § 221.10(1).

54. He was riding a bicycle and talking on a cellphone when stopped by the police. The police conducted a full search of his person on the street and found a bag of marijuana concealed in his sock.

55. The Criminal Court complaint alleged that the marijuana was "recovered from defendant's hand."

56. Mr. Spence offered I.D. to the police and gave them his address, which is in Brooklyn, NY. Nevertheless he was put through the full arrest process. He spent two days in custody before his arraignment on May 4. He pled not guilty, and the case was adjourned until June 28.

57. Mr. Spence has had prior marijuana-related arrests. He believes that he will be subjected to improper arrest in the future under PL § 221.10(1).

58. MOSHESH HARRIS, 33, was arrested in Kings County on April 18, 2012. He had left his neighbor's house and was walking on the street when a police officer stopped him and asked if had "weed." The officer searched him, and found marijuana in his pocket.

59. The Criminal Court complaint stated that the marijuana was "recovered from DEFENDANT'S PERSON." (Emphasis in original.)

60. Nevertheless, Mr. Harris was charged with PL § 221.10(1) "open to public view" possession and put through

the full arrest process. He was taken to the 67th Precinct and not arraigned until 24 hours after his arrest. He pled guilty to Disorderly Conduct, PL § 240.20, a violation, and was released.

61. He resides in Brooklyn, New York.

62. He also had a September 2011 arrest for PL § 221.10(1). He had had marijuana in his pocket, which was recovered by the police when they searched him. That case terminated in a plea to the violation, PL § 221.05.

63. Given his two arrests in less than a year for "open to public view" possession of marijuana that was in fact on his person, Mr. Harris fears that he will be subjected to further improper marijuana arrests in the future.

64. MAHENDRA SINGH was arrested on May 2, 2012 in Kings County and charged with violating PL § 221.10(1).

65. He had been sitting in the driver's seat of his car; a friend was in the passenger's seat. The police ordered them out of the car and searched them. Mr. Singh had no marijuana or contraband in his possession. His friend had a small quantity of marijuana concealed on his person.

66. Nevertheless, Mr. Singh was arrested and charged with possessing marijuana that was "open to public view." The complaint alleged that marijuana was "recovered from defendant's hand."

67. The arrest process began at about 9 p.m. on May 2. It culminated with his arraignment at about 10:30 a.m. on May 4, two days later, following detention at the 77th Precinct and Central Booking. He spent two nights in police custody, over a span of 37 hours.

68. Mr. Singh is 22 years old and had never been arrested before. At his arraignment he was offered, and he accepted, an ACD.

69. He resides with his family in Jamaica, Queens. He is a part-time student at Kingsborough Community College, and is employed on weekends as a waiter at a restaurant.

70. During the arrest process, Mr. Singh's mother, Latchmee Singh, went to the 77th Precinct to find out why her son was arrested. The arresting officer told her that if one person in the car had "weed" on him, all others in the car would be arrested.

71. Mr. Singh fears that he will again be subject to improper arrest under PL § 221.10(1).

72. All of the plaintiffs were charged with both PL § 221.10(1) ("open to public view") and PL § 221.05 (not open to public view). The charges are mutually exclusive.

73. There is no legal reason to accuse a person of also violating PL § 221.05 if the marijuana was genuinely "open to public view."

74. All of the plaintiffs were arrested and charged after the OPERATIONS ORDER was issued.

DEFENDANTS

75. Defendant The New York City Police Department (the "Police Department" or the "NYPD") has unlawfully subjected plaintiffs to the full arrest process for purported violations of PL § 221.10(1). In a similar fashion, its officers annually arrest thousands of other individuals for possession of small quantities of marijuana that are neither burning nor in public view at the outset of the police encounter.

76. Defendant New York City Police Commissioner Raymond W. Kelly has admitted the illegality of the arrests but has failed to take adequate steps to stop these illegal practices.

77. Defendant The City of New York is a municipal corporation within the State of New York. It is authorized under the laws of the State of New York to maintain a police department, the NYPD. The City of New York is responsible for the acts of the NYPD.

VENUE

78. This Court has subject-matter jurisdiction over Plaintiffs' claims pursuant to Article 30 of the New York Civil Practice Law and Rules, section 3001.

79. Venue is proper pursuant to Article 5 of New York Civil Practice Law and Rules. Defendants all have their headquarters and/or principal place of business or business address in New York County, which is where the cause of action arose.

NO MEANINGFUL REMEDY IN CRIMINAL COURT

80. The arrest process culminates, chronologically, in the Criminal Court arraignment. The Criminal Court is ostensibly the forum in which the adjudication of guilt or innocence of the accused will play out. In actuality, the arraignment is usually the end of that process, and no meaningful adjudication of guilt or innocence, or the legitimacy of the arrest for marijuana possession, ever takes place.

81. Most cases originating as "open to public view" marijuana arrests terminate at arraignment because the arrestee receives an offer from the prosecutor to effectively dismiss the case, an offer that is usually impractical to turn down. The most common disposition is an "adjournment in contemplation of dismissal," known as an "ACD." The parties agree that the case will be automatically dismissed in six months, or one year, as long as no offenses are committed during the period. Records in the case are sealed upon dismissal.

82. The acceptance of an ACD is by far the most common disposition of the marijuana case for the first offender. Another frequent disposition at arraignment is a guilty plea to the PL § 221.05 violation, with payment of a fine not to exceed $100. A plea to a Disorderly Conduct violation (PL § 240.20) with "time served" is a similar resolution.

83. The small percentage of cases that go past arraignment almost never address the merits of the "open to public view" accusation, or the legitimacy of having made the accused undergo the full arrest process. There are virtually no trials or suppression hearings held in cases in which a PL § 221.10 "open to public view" possession is the top count.

84. Rather than trials or hearings, what occurs is a series of court appearances at which the individual charged makes a mandatory appearance, but the case is adjourned to another date. This scenario of numerous fruitless court appearances is not uncommon in Criminal Court. It is virtually universal in cases involving possession of small amounts of marijuana.

85. The usual conclusion of this process is a dismissal pursuant to the "speedy trial" law, CPL § 30.30. Even a defendant who insists on vindication in court cannot force the prosecution to bring the case to trial if it chooses not to do so.

86. In the ordinary criminal process, therefore, the legal and factual issues inherent in the multitude of "open to public view" marijuana arrests are virtually never confronted or resolved.

THE NEED FOR A DECLARATORY JUDGMENT

87. Even if litigation of marijuana possession cases in Criminal Court were not virtually nonexistent, the prospect of adjudication in that forum would not detract from the need for relief in this case. This action challenges the legitimacy of the arrest. That process is completed by the time of arraignment, and the harms flowing from that arrest have either already occurred or will occur regardless of the ultimate disposition of the case, including loss of liberty, jail time, lost wages, and a permanent arrest record, as well as — in some cases — child neglect or deportation proceedings, eviction from public housing, and revocation of parole.

88. The fate of the criminal prosecution cannot undo the injury that has been suffered by those wrongly put through the full arrest process. Nor are the Defendants in this action bound by any ruling made in the course of an individual criminal case, to which they are not parties.

89. The practice of Defendants is to subject plaintiffs and others possessing small amounts of marijuana to the full

arrest process instead of promptly issuing an appearance ticket and releasing the individual. Police officers violate the law when they charge a person with possession of marijuana "open to public view" if the marijuana only became visible to the police after a police search, directive, or request.

90. Therefore, this Court should declare that subjecting any person to the full arrest procedure under PL § 221.10(1) for possession of marijuana "open to public view," which was on the person or in the clothing or in a closed container at the outset of the police-citizen encounter, is illegal and in violation of Penal Law Article 221 and CPL § 150.75.

THE NEED FOR AN INJUNCTION

91. Ordinarily, the issuance of a declaratory judgment should be sufficient to notify public officials as to the governing law that binds them, without the need for an accompanying injunction to mandate that they follow it. Circumstances and practical experience following the issuance of the OPERATIONS ORDER, however, demonstrate the necessity for an injunction to ensure that the Defendants act within the law as declared by the Court.

92. The OPERATIONS ORDER contains no procedure or mechanism to ensure that police officers comply with the law.

93. As experience demonstrates, without means to enforce the OPERATIONS ORDER, there has been virtually no difference in the number of PL § 221.10(1) arrests now as compared to the number of PL § 221.10(1) arrests prior to the issuance of the OPERATIONS ORDER.

94. Accordingly, this Court should issue an injunction ordering Defendants to comply with the law as declared by the Court and to take any and all steps necessary to ensure that all police officers under their authority refrain from subjecting to the full arrest process any person possessing the requisite small quantity of marijuana concealed on his or her person at the outset of the encounter with the police.

DEMAND FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

95. Declare, that the "open to public view" arrest practice outlined above is illegal, and that any individual possessing the requisite small amount of marijuana that is not burning and is concealed on his or her person at the outset of the police encounter should promptly receive a Desk Appearance Ticket pursuant to CPL § 150.75 and not be subjected to the full arrest process.

96. Issue an injunction ordering Defendants to ensure that all NYPD police officers comply with the law as declared by the Court.

97. Grant such other relief as the Court deems proper.

Dated New York, New York
June 21, 2012

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VERIFICATION

THOMAS M. O'BRIEN, being duly sworn, deposes and says:

That he is the attorney for the plaintiffs in the above-entitled action with offices located at The Legal Aid Society, 199 Water Street, City of New York, County of New York, State of New York; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his knowledge, except as to the matters stated to be alleged upon information and belief, and that as to those matters he believes them to be true.

That the reason why this verification is made by deponent instead of the plaintiffs is because the plaintiffs are not within the County of New York, which is the county where deponent has his office. Deponent further says that the grounds of his belief as to all matters in the complaint not stated to be upon his knowledge are based upon conversations with plaintiffs, records regarding their arrests, and other writings relevant to this action.

Thomas M. O'Brien

Thomas M. O'Brien

State of New York
County of New York
Sworn to before me this 21st day of June, 2012.

Charmaine Barrett
Notary Public

CHARMAINE BARRETT
Notary Public, State of New York
No. 01BA6033297
Qualified in Bronx County
Certificate Filed in New York County
Commission Expires November 15, 2013

Exhibit A

OPERATIONS ORDER

SUBJECT: CHARGING STANDARDS FOR POSSESSION OF MARIHUANA IN A PUBLIC PLACE OPEN TO PUBLIC VIEW	
DATE ISSUED:	NUMBER:
09-19-11	49

1. Questions have been raised about the processing of certain marihuana arrests. At issue is whether the circumstances under which uniformed members of the service recover small amounts of marihuana (less than 25 grams) from subjects in a public place support the charge of Criminal Possession of Marihuana in the Fifth Degree Penal Law section 221.10 (1) (CPM 5th).

2. The specific circumstances in question include occasions when the officers recover marihuana pursuant to a search of the subject's person or upon direction of the subject to surrender the contents of his/her pockets or other closed container. A crime will not be charged to an individual who is requested or compelled to engage in the behavior that results in the public display of marihuana. Such circumstances may constitute a violation of Penal Law section 221.05 - Unlawful Possession of Marihuana, a violation *not* Penal Law section 221.10 (1) – Criminal Possession of Marihuana in the 5th degree, a class B misdemeanor.

3. To support a charge of PL 221.10 (1) the public display of marihuana must be an activity undertaken of the subject's own volition. Thus, uniformed members of the service lawfully exercising their police powers during a stop *may not* charge the individual with PL 221.10(1) CPM 5th if the marihuana recovered was disclosed to public view at an officer's direction.

4. In such situations, uniformed members of the service must charge the violation, Unlawful Possession of Marihuana (UPM), Penal Law section 221.05. Unlawful Possession of Marihuana is a non-fingerprintable offense and is punishable by a fine. As a general matter, the defendant is entitled to a criminal court summons for the violation Unlawful Possession of Marihuana. Alternately, *Patrol Guide 208-27, "Desk Appearance-General Procedure"* (see *NOTE* at the top of page "6"), provides for the defendant to be released when $100 pre-arraignment bail is posted under certain circumstances. Finally, a field test on the recovered substance must be conducted pursuant to *Patrol Guide 218-08, "Field Testing of Marijuana by Selected Uniformed Members of the Service Within the Patrol Services and Housing Bureaus."*

5. Where there is uncertainty regarding what provision of Penal Law Article 221 Offenses Involving Marihuana to charge, members of the service are directed to contact the Legal Bureau.

6. Commanding officers will ensure a sufficient supply of marihuana field test kits are available at their commands. Additionally, commanding officers will ensure and sufficient personnel are trained and available on all tours to conduct marihuana field tests and prepare the relevant reports.

7. Commanding officers will ensure that the contents of this Order are brought to the attention of members of their commands.

BY DIRECTION OF THE POLICE COMMISSIONER

DISTRIBUTION
All Commands