
SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair

2017 - 2018 Regular

Bill No: AB 1793 **Hearing Date:** June 26, 2018
Author: Bonta
Version: May 25, 2018
Urgency: No **Fiscal:** Yes
Consultant: SJ

Subject: *Cannabis Convictions: Resentencing*

HISTORY

Source: Author

Prior Legislation: Proposition 64, approved by the voters on November 8, 2016
AB 813 (Gonzalez), Ch. 739, Stats. of 2016
SB 1242 (Lara), Ch. 789, Stats. of 2016

Support: ACLU of California; California Asian Pacific Chamber of Commerce; California Cannabis Industry Association; California Growers Association; California National Organization for the Reform of Marijuana Laws; California Public Defenders Association; Center on Juvenile and Criminal Justice; City of Los Angeles, Mayor Eric Garcetti; Conference of California Bar Associations; Harborside; Long Beach Collectives Association; Los Angeles County Board of Supervisors; Los Angeles County District Attorney's Office; Los Angeles Regional Reentry Partnership; MedMen; National Association of Social Workers, California Chapter; WeDrop; Youth Forward

Opposition: None known

Assembly Floor Vote: 43 - 28

PURPOSE

The purpose of this bill is to expedite the identification, review, and notification of individuals who may be eligible for recall or dismissal, dismissal and sealing, or redesignation of specified cannabis-related convictions.

Existing law allows a person currently serving a sentence for a cannabis-related conviction, who would not have been guilty of an offense, or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act (AUMA) had that act been in effect at the time of the offense, to petition for a recall or dismissal of sentence. (Health & Saf. Code, § 11361.8, subd. (a).)

Existing law requires the court to presume the petitioner satisfies the eligibility criteria unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. Provides that if the petitioner satisfies the eligibility criteria, the court must grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless

the court determines that granting the petition would pose an unreasonable risk of danger to public safety. (Health & Saf. Code, § 11361.8, subd. (b).)

Existing law provides that the court may consider, but is not be limited to evidence provided for in Penal Code Section 1170.18(b). (Health & Saf. Code, § 11361.8, subd. (b)(1).)

Existing law defines an “unreasonable risk of danger to public safety” as an unreasonable risk that the petitioner will commit a violent felony within the meaning of Section 667(e). (Health & Saf. Code, § 11361.8, subd. (b)(2).)

Existing law provides that a person who is serving a sentence and is resentenced shall be given credit for any time already served and shall be subject to supervision for one year following completion of his or her time in custody, or whatever supervision time he or she would have otherwise been subject to after release, whichever is shorter, unless the court, in its discretion, releases the person from supervision. (Health & Saf. Code, § 11361.8, subd. (c).)

Existing law provides that under no circumstances may resentencing result in the imposition of a term longer than the original sentence or the reinstatement of charges dismissed pursuant to a negotiated plea agreement. (Health & Saf. Code, § 11361.8, subd. (d).)

Existing law provides that a person who has completed his or her sentence for specified offenses, who would not have been guilty of an offense or who would have been guilty of a lesser offense under the Control, Regulate and Tax Adult Use of Marijuana Act had that act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction, as specified. (Health & Saf Code, § 11361.8, subd. (e).)

Existing law requires the court to presume the petitioner satisfies the eligibility criteria unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria. Requires the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid once the applicant satisfies the eligibility criteria. (Health & Safety Code, § 11361.8, subd. (f).)

Existing law provides that unless requested by the applicant, no hearing is necessary to grant or deny an application filed for dismissal or redesignation. (Health & Safety Code, § 11361.8, subd. (g).)

This bill requires that on or before July 1, 2019, the Department of Justice (DOJ) review the records in the state summary criminal history information database and identify past convictions that are potentially eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to Section 11361.8. Requires DOJ to notify the prosecution of all cases in their jurisdiction that are eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation.

This bill requires the prosecution to review all cases and determine whether to challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation by July 1, 2020.

This bill provides that the prosecution may challenge the resentencing of a person pursuant to this section when the person does not meet the criteria established in Section 11361.8 or presents an unreasonable risk to public safety.

This bill provides that the prosecution may challenge the dismissal and sealing or redesignation of a person pursuant to this section who has completed his or her sentence for a conviction when the person does not meet the criteria established in Section 11361.8.

This bill requires, on or before July 1, 2020, the prosecution to inform the court and the public defender's office in their county when they are challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation. Requires the prosecution to inform the court when they are not challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation.

This bill requires the public defender's office, upon receiving notice from the prosecution, to make a reasonable effort to notify the person whose resentencing or dismissal is being challenged.

This bill requires the court to reduce or dismiss the conviction pursuant to Section 11361.8 if the prosecution does not challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation by July 1, 2020.

This bill requires the court to notify the DOJ of the recall or dismissal of sentence, dismissal and sealing, or redesignation and the department shall modify the state summary criminal history information database accordingly.

This bill requires to DOJ to post general information on its website about the recall or dismissal of sentences, dismissal and sealing, or redesignation authorized in this section.

This bill provides that it is the intent of the Legislature that persons who are currently serving a sentence or who proactively petition for a recall or dismissal of sentence, dismissal and sealing, or redesignation pursuant to Section 11361.8 be prioritized for review.

COMMENTS

1. Need for This Bill

According to the author:

In November 2016, 57 percent of California voters approved Proposition 64 ("Prop. 64"), which legalized the adult-use of cannabis. Prop. 64 contained provisions that not only prospectively reduced or eliminated many cannabis law violations, but made those changes retroactive. Under the law, people with certain felonies or misdemeanors on their records are now legally entitled to petition the courts to expunge or reduce their cannabis convictions. Some offenses that were crimes but are now legal include possessing up to an ounce of cannabis and growing up to six cannabis plants for personal use.

Department of Justice estimates that 220,000 people in California have cannabis convictions eligible to be reduced or expunged from their records. According to a report issued by Drug Policy Alliance, there were approximately 500,000 people arrested for cannabis felonies and misdemeanors between 2006-2015. As of September 2017, only 4,885 people petitioned to the courts to have their records modified.

Data from that same report shows that penalties for cannabis-related offenses have disproportionately affected minority communities. . . .

While Prop. 64 included provisions that will either reduce or expunge hundreds of thousands of convictions, the majority of eligible individuals have not gone through the process of petitioning the courts, meaning thousands of Californians still live with convictions that could be changed on their records. Advocates state that many people are unaware of the newly created opportunity to change their records, are unsure of how to navigate the record change process on their own, or do not have access to free legal resources to engage in the process.

Adjusting records could have a significant impact on peoples’ lives. Felonies and misdemeanors create thousands of barriers to employment, housing, public benefits and more. Many low-income communities and people of color have been disproportionately criminalized by the drug war and have had to live with the ramifications. Now that California has legalized cannabis, the state should be doing all it can to provide people with the relief they deserve.

AB 1793 allows for cannabis-related offenses to be removed or reduced from a person’s record as long as they meet the criteria established by Prop. 64. AB 1793 will offer hundreds of thousands of people negatively impacted by the drug war a chance to reclaim their lives. . . .

2. Cannabis-Related Convictions After Proposition 64

The voters passed Proposition 64, the Adult Use of Marijuana Act, in November 2016. Among other things, the initiative legalized the possession, use, and cultivation of marijuana for people over age 21. Proposition 64 also reduced the penalties for possession, cultivation of cannabis and possession with the intent to sale, and transportation for sale. The changes to the criminal penalties for these offenses are provided in the chart below.

Offense	Old Penalty	Current Penalty
Possession	<p>Possession of concentrated cannabis was a misdemeanor, punishable by one year in jail, a \$500 fine, or both.</p> <p>Possession of 28.5 grams or less of cannabis was a \$100 infraction.</p> <p>Possession of more than 28.5 grams of cannabis by adults over 18 years old was a misdemeanor, punishable by \$500, six months in jail, or both.</p>	<p>Possession by persons under 18 years old is an infraction requiring drug education or community service.</p> <p>Possession of 28.5 grams or less of cannabis or eight grams or less of concentrated cannabis by persons age 18- 21 is a \$100 infraction.</p> <p>Possession of more than 28.5 grams of cannabis or eight grams of concentrated cannabis by adults over 18 years old is a misdemeanor, punishable by \$500 or six months in jail, or both.</p>

	<p>Possession on the grounds of a K-12 school, of less than 28.5 grams of cannabis, by adults over 18, was a misdemeanor punishable by a fine of \$250, or \$500 and 10 days in jail for repeat offenses.</p> <p>Possession on the grounds of a K-12 school, of less than 28.5 grams of cannabis, by minors under 18 was a misdemeanor punishable by a fine of \$250, or \$500 and commitment to a juvenile hall or camp.</p>	<p>Possession on the grounds of a K-12 school, of less than 28.5 grams of cannabis or eight grams of concentrated cannabis, by adults over 18 is a misdemeanor punishable by a fine of \$250, or \$500 and 10 days in jail for repeat offenses. (Health & Saf. Code, § 11357.)</p>
<p>Cultivation</p>	<p>Cultivation was a felony, punishable by imprisonment pursuant to subdivision (h) of Section 1170.</p>	<p>Cultivation by persons under 18 years old is an infraction requiring drug education or community service.</p> <p>Cultivation of six plants or less by persons age 18-21 is a \$100 infraction.</p> <p>Cultivation of more than six plants is a misdemeanor punishable by \$500, 6 months in jail, or both. Felony enhancements are permitted for repeat offenders and offenders with serious or violent prior convictions. (Health & Saf. Code, § 11358.)</p>
<p>Possession for Sale</p>	<p>Possession for sale was a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170.</p>	<p>Possession for sale by persons under 18 years old is an infraction requiring drug education or community service.</p> <p>Possession for sale by persons over 18 years old is a misdemeanor punishable by \$500 or 6 months in jail, or both. Felony enhancements are permitted for repeat offenders, offenders with serious or violent prior convictions, and sale to a minor under 18 years old. (Health & Saf. Code, § 11359.)</p>
<p>Transport for Sale</p>	<p>Transportation for sale was a felony punishable by imprisonment pursuant to subdivision (h) of Section 1170.</p> <p>Transport for sale of not more than 28.5 grams of cannabis, other than concentrated cannabis, was a misdemeanor, punishable by a \$100 fine.</p>	<p>Transport for sale by persons under 18 years old is an infraction requiring drug education or community service.</p> <p>Transport for sale of 28.5 grams of cannabis or less, other than concentrated cannabis, is a \$100 infraction.</p>

		Transport for sale is a misdemeanor punishable by \$500 or 6 months in jail, or both. Felony enhancements are permitted for importing, exporting, or transporting for sale more than one ounce of marijuana or four grams of concentrate. (Health & Saf. Code, § 11360.)
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Anyone who was convicted of one of the above-listed offenses prior to the enactment of the AUMA is eligible to petition for resentencing and/or dismissal or apply for redesignation. (Health & Safety Code, § 11361.8.)

It is estimated that between 1915 and 2016, California law enforcement made 2,756,778 cannabis-related arrests. (<http://sfdistrictattorney.org/district-attorney-george-gascón-applies-proposition-64-retroactively-every-marijuana-case-1975>.) According to a report by the Drug Policy Alliance, there were approximately 500,000 people arrested for cannabis-related felonies and misdemeanors between 2006-2015. (<http://www.drugpolicy.org/news/2016/08/its-not-legal-yet-nearly-500000-marijuana-arrests-california-last-decade>.) As of September 2017, only 4,885 people petitioned to the courts to have their records modified. (<http://www.latimes.com/local/lanow/la-me-san-francisco-marijuana-20180131-story.html>.)

a. Resentencing:¹

In order to be eligible for resentencing, a person must be currently serving a sentence for one of the above-mentioned cannabis offenses, and would not have been guilty of an offense, or would have been guilty of a lesser offense, had the AUMA been in effect at the time of the offense. Resentencing may depend on factors such as the type and quantity of cannabis involved, the date of the offense, the punishment imposed, and the age of the person at the time of the offense. Though the AUMA does not define “currently serving a sentence,” it has been interpreted to mean anyone serving a term of imprisonment in county jail, mandatory supervision, parole, postrelease community supervision, and probation.

There is a four step process for resentencing. First, the individual seeking resentencing must file a petition. Next, the court will conduct an initial screening for eligibility. Third, the court will hold a qualification hearing where the merits of the petition are considered. Finally, the court will resentence the petitioner. Resentencing must be granted if the court finds that the petitioner is eligible, unless granting the petition would pose an unreasonable risk that the person will commit a violent felony. Notably, the court is required to presume the petitioner is eligible unless a prosecutor opposes the petition and proves with clear and convincing evidence that the offense is not eligible for resentencing or if resentencing poses an unreasonable risk of danger to public safety.

If a petition for resentencing is granted, one of three things outcomes is possible based on the circumstances of the case. The court will: impose a new term of custody or supervision as authorized by the AUMA, redesignate an offense that was previously a felony but now a misdemeanor or infraction, or dismiss a sentence for a conviction that is no longer a crime.

¹For a more detailed information on the Proposition 64’s resentencing, redesignation, and dismissal procedures, see Retired Judge Richard Couzens and Presiding Court of Appeal Justice Tricia A. Bigelow’s memorandum on propositions 64’s resentencing procedures <<http://www.courts.ca.gov/documents/prop64-Memo-20161110.pdf>>

b. Redesignation

Individuals who have already completed a sentence for a cannabis-related conviction can apply for redesignation and/or dismissal. Individuals can have their cannabis-related felony conviction reduced to a misdemeanor or infraction, or dismissed and sealed if the conduct underlying the conviction is no longer a crime. Much like resentencing, redesignation requires a four step process that begins with the individual filing out an application, then the court will screen the application for eligibility and hold a hearing, if necessary and requested by the applicant. If the applicant is eligible for relief, the court must redesignate or dismiss and seal the conviction. (Health & Safety Code, § 11361.8 subd. (a)-(d).)

Proposition 64 offers millions of individuals the opportunity to clear their records of convictions for conduct that California no longer deems criminal. However, advocates argue that some individuals who are eligible for resentencing or redesignation may be unaware of the process established by the initiative, or lack the resources to navigate the process on their own.

3. Local Jurisdictions Have Started to Take Action

Proposition 64 modeled its redesignation and resentencing provisions after those in Proposition 47, which allows for reclassification and resentencing of wobbler offenses including simple drug possession, petty theft, shoplifting, forgery, and writing a bad check. As many as 1 million people were estimated to be eligible for reclassification under Proposition 47.

(<http://myprop47.org/reclassification/>) However, only a quarter of eligible people have petitioned the court for resentencing as of March 2017. (<http://myprop47.org/resources/second-chances-systems-change-proposition-47-changing-california/>) Some argue that the low percentage of people petition for resentencing under Proposition 47 indicates that there are too many barriers to petitioning the court for reclassification. Unlike Proposition 47, which reduced penalties for low-level offenses, Californians went a step further and decriminalized many cannabis-related offenses when enacting Proposition 64. Thus, the effects of petitioning the court for resentencing and redesignation under Proposition 64 are arguably more significant.

In recognizing the barriers to resentencing and redesignation, some district attorney's offices have taken the lead on undoing the damage of the failed war on drugs. For example, the San Francisco District Attorney's Office will dismiss and seal 3,038 misdemeanor convictions and will review 4,940 felony convictions to consider reducing them to misdemeanors, with no action necessary from those who were convicted. The San Diego District Attorney's Office has identified 4,700 cases, both felonies and misdemeanors, that it will ask the court and DOJ to dismiss or redesignate. (<http://www.sandiegouniontribune.com/news/marijuana/sd-me-pot-revocations-20180201-story.html>) However, the majority of California's 58 district attorneys, including in Los Angeles—with more than 40,000 cannabis felony cases alone since 1993—have made no indication that they will review their marijuana charges.

4. What This Bill Does

This bill establishes detailed procedures for the identification, review, and notification of individuals who may be eligible for resentencing or redesignation of their cannabis-related convictions. In addition, the bill establishes timelines for various agencies to act.

Specifically, this bill requires the DOJ to identify all Californians who might qualify for relief on or before July 1, 2019, and to provide this information to the courts and to notify the prosecution of all cases in their jurisdiction that are eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation.

This bill requires the prosecution to review all cases and determine whether to challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation by July 1, 2020, and permits the prosecution may challenge the resentencing of a person pursuant to this section when the person does not meet the established criteria or presents an unreasonable risk to public safety. The prosecution may challenge the dismissal and sealing or redesignation of a person pursuant to this section who has completed his or her sentence for a conviction when the person does not meet the established criteria. On or before July 1, 2020, the prosecution must inform the court and the public defender's office in their county when they are challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation. The prosecution must also inform the court when they are not challenging a particular recall or dismissal of sentence, dismissal and sealing, or redesignation. The public defender's office, upon receiving notice from the prosecution, must make a reasonable effort to notify the person whose resentencing or dismissal is being challenged.

The court is required to reduce or dismiss the conviction if the prosecution does not challenge the recall or dismissal of sentence, dismissal and sealing, or redesignation by July 1, 2020. The court must notify the DOJ of the recall or dismissal of sentence, dismissal and sealing, or redesignation and the DOJ must modify the state summary criminal history information database accordingly. Finally, the DOJ must post general information on its website about the recall or dismissal of sentences, dismissal and sealing, or redesignation authorized in this section.

5. Immigration Consequences

Criminal convictions can have significant immigration consequences for non-citizens. As the Supreme Court stated, “[d]eportation as a consequence of a criminal conviction has become an integral part of the penalty for a criminal conviction for noncitizens, sometimes the most important part.” (*Padilla v. Kentucky* (2010) 559 U.S. 356, 364.) For non-citizens, reducing or dismissing a criminal conviction is a powerful tool to avoid deportation.

Under federal immigration law, a non-citizen is deportable for a single conviction of a crime committed within five years of the first admission, if the offense has a maximum possible sentence of one year or more. (8 USC § 1227, subd., (a)(2)(A).) In California, felony drug convictions have a possible sentence of one year or more. A misdemeanor conviction has a maximum possible sentence of 364 days. (Pen. Code § 18.5.) The California Legislature intentionally limited the maximum sentence for misdemeanor convictions to 364 days so that immigrants can avoid immigration consequences for misdemeanor convictions. As stated in the Assembly Public Safety Committee Analysis for Senate Bill 1310 (Lara, Chapter 174, Statutes of 2014), “[t]his ... will ensure, consistent with federal law and intent, legal residents are not deported from the state and torn away from their families for minor crimes.” (Assem. Com. on Public Safety, Analysis on Sen. Bill No. 1310 (2013-2014 Reg. Sess.) as amended Feb. 21, 2014.)

Proposition 64 requires redesignation and dismissal orders to state “the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid...” (Health & Safe. Code, § 11361.8 subd. (d).) A court order that specifies that a conviction has been reduced or dismissed, *specifically because the conviction was “legally invalid,”* will help an individual with immigration matters. This is true even if the sentence reduction is sought solely for immigration purposes. (See *Matter of Cota-Vargas* (2005) 23 I&N Dec. 849 BIA.) As such, this bill would ensure that non-citizens, many of whom may be hesitant to initiate contact with the district attorney’s office, DOJ, and courts to apply for a dismissal or a sentence reduction, are also able to obtain the benefits of this relief.

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