Your Responsibility When Using the Information Provided Below:

When we wrote this information we did our best to give you useful and accurate information because we know that incarcerated people often have difficulty obtaining legal information and we cannot provide specific advice to everyone who requests it. The laws change frequently and are subject to differing interpretations. We do not always have the resources to make changes to the information we send every time the law changes. If you use this information it is your responsibility to make sure that the law has not changed and is applicable to your situation. Most of the information you need should be available in your institution law library.

Proposition 64: Cannabis (Marijuana) Legalization; Petitions for Resentencing or Dismissal

*Updated July 2019*

This letter provides information about Proposition 64, which was approved by a majority of California voters on November 8, 2016. We are unable to write individual responses to everyone who has contacted us about this new law. We also cannot send you copies of the initiative. We hope that the information in this letter will help answer your questions.

Proposition 64 legalizes possession and sale of cannabis for nonmedical use by adults over the age of 21, regulates and taxes cannabis sales, and allows people who were previously convicted of cannabis offenses to petition for resentencing in accord with the new laws. The new laws took effect on November 9, 2016. The sections of the law concerning legalization of cannabis for personal use and the circumstances in which possession is still a crime are in Health and Safety Code §§ 11357-11362.45. Possession and use of cannabis for medical purposes are covered in Health and Safety Code §§ 11362.5-11362.9.

I. It is Still a Rule Violation for People in State Prison or County Jail to Possess or Use Cannabis; People in Prison or Jail Should Also Presume That it is Still a Felony to Possess or Use Cannabis (Although There is a Legal Dispute Regarding Possession).

Cannabis is still listed in the law as a “controlled substance” (Health & Safety Code § 11054(d)(13)). It is still a serious violation of CDCR rules for a person in prison to possess, distribute, or use any “controlled substances.” (See 15 CCR § 3315(a)(2)(D) and (a)(3)(E)-(F).) It is also very likely to be a violation of local county jail rules.
Proposition 64 specifically stated that it did not change the laws about “smoking or ingesting cannabis or cannabis products” in a CDCR facility. (Health and Safety Code § 11362.45(d).) Also, there is still a law that makes it a felony for people incarcerated in state prison or county jail to possess alcoholic beverages and “drugs” without authorization by the prison or jail rules, the warden, superintendent, or other person in charge. (Penal Code § 4573.8; see also Penal Code § 4573 and § 4573.5 [felony for people to bring alcoholic beverages, drugs, or controlled substances into state prisons and county jails without authorization].)

As of June 2019, there are conflicting court cases about whether it is still a felony under Penal Code § 4573.6 for a person in prison to possess cannabis without authorization by the prison or jail rules, the warden, superintendent, or other person in charge. The dispute concerns whether cannabis is still a “controlled substance, the possession of which is prohibited by Division 10 (commencing with Section 11000) of the Health and Safety Code.” One court has held that it is a felony for people in prison or jail to possess cannabis; the California Supreme Court has decided not to review this decision and it has become final. (People v. Perry (2019) 32 Cal.App.5th 885.) Another court has held that possession of less than an ounce of cannabis in prison is not a felony; however, as of June 19, 2019, this case is not final law and may be reheard by the court of appeal or reviewed by the California Supreme Court. (People v. Raybon (2019) No. C084853.) Because we don’t know how this legal conflict will be decided, people in prison and jail should presume that they risk being convicted of a felony if they possess cannabis.

It is almost certain that officials may still impose parole, PRCS, and probation conditions barring use or possession of cannabis on a case-by-case basis, similar to conditions that may be imposed barring alcohol use.

II. Some Cannabis Activities are Now Lawful and the Penalties for Some Cannabis Crimes are Less Severe.

Proposition 64 creates Health & Safety Code § 11362, which makes it lawful for an adult 21 years of age or older to use cannabis or cannabis products, to possess up to six cannabis plants, and to possess, process, transport, purchase, obtain or give away to adults age 21 and older not more than 28.5 grams of cannabis, 8 grams of cannabis concentrates, and cannabis paraphernalia. Health and Safety Code §§ 11362.2-11362.3 place restrictions on the time, place and manner of these activities.

Health & Safety Code §§ 11357-11360 have been amended to reduce juvenile and criminal penalties for many of the acts that still remain a crime under the new laws. Most juvenile and adult offenses related to cannabis and concentrated cannabis - possession, planting, harvesting, processing, possession for sale, transportation, importation, gifts, and sales - are now infractions or misdemeanors. Some crimes for planting, harvesting, processing, possession for sale, transportation, importation, gifts, and sales remain felonies; generally, felony punishment applies to these crimes if a person has one, two, or more prior convictions for the same type of offense, for any offense that requires sex offender registration, for any “super strike” offense as defined in the Three Strikes Law (Penal Code § 667(e)(2)(C)(iv)), or in a few other circumstances. Proposition 64 does not change the penalties for driving a vehicle while under the influence of cannabis. Proposition 64 does not reduce the penalties
for participating in a conspiracy to commit a crime, such as a conspiracy to possess cannabis for sale. *(People v. Medina (2018) 24 Cal.App.5th 61.)* However, one court has held that Proposition 64 does eliminate the penalty for being an accessory (Penal Code § 32) to a cannabis offense that has been reduced to a misdemeanor. *(People v. Boatwright (June 25, 2019) No. A153352, __ Cal. App.5th __ [decision not yet final as of 7/8/2019].)*

III. **People Who Were Previously Convicted of Some Cannabis Crimes Can Petition for Resentencing, Re-designation, or Dismissal in Accord with the New Laws.**

Under Proposition 64, a person who was convicted of violating Health & Safety Code §§ 11357, 11358, 11359, or 1160, and who is serving a criminal or juvenile sentence for activities that are legal or subject to lesser penalties under the new laws can petition for resentencing or for dismissal. Also, a person who has already completed the sentence for cannabis activities that are now legal or subject to lesser penalties can petition to have the old conviction dismissed or re-designated as a misdemeanor or infraction. The rules are set forth in Health & Safety Code § 11631.8.

To start the process, the person must file a petition in the court in which conviction occurred; the state Judicial Council is supposed to develop forms for these petitions. There is no deadline for filing a petition. The court shall presume the petitioner is eligible to be considered for resentencing or dismissal unless the state presents clear and convincing evidence otherwise. Note that having a prior “super strike” makes a person ineligible for resentencing or dismissal, but a super strike conviction from the same time or later than the cannabis offense does not make a person ineligible. *(People v. Smit (2018) 24 Cal.App.5th 596.)*

If the person is eligible, the court must grant the petition unless the person is still serving the sentence and the state shows by a preponderance of the evidence that resentencing would pose an unreasonable risk of danger to public safety. *(People v. Saelee (2018) 28 Cal.App.5th 744 [preponderance of the evidence standard applies].)* The court can consider facts beyond the record of the conviction, including “reliable” hearsay. *(People v. Banda (2018) 26 Cal.App.5th 349 [unattributed hearsay statements in probation report not sufficiently reliable].)* An unreasonable risk of danger to public safety means an unreasonable risk that the person will commit a “super strike” felony as defined in the current Three Strikes Law. A person who is currently in prison or jail and who is resentenced will get credit for time already served, but will be subject to either parole, PRCS, or probation for up to one year following release, unless the court decides not to impose a supervision requirement.

Any person who may be eligible for resentencing, dismissal, or re-designation of a cannabis-related conviction should contact the trial attorney who handled the case or the Public Defender’s office in the county of conviction to request forms, advice, and/or representation.