



PRISON LAW OFFICE  
General Delivery, San Quentin, CA 94964  
Telephone (510) 280-2621 • Fax (510) 280-2704  
www.prisonlaw.com

Director:  
Donald Specter

Managing Attorney:  
Sara Norman

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 request 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.

Staff Attorneys:  
Rana Anabtawi  
Laura Bixby  
Patrick Booth  
Steven Fama  
Alison Hardy  
Sophie Hart  
Jacob Hutt  
Rita Lomio  
Margot Mendelson

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

*Updated August 2021*

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 Felony for People in State Prison or County Jail to Possess or Use Cannabis. It is also Still a Rule Violation to Possess or Use Cannabis in Prison or Jail.**

Proposition 64 stated that it did *not* change the laws prohibiting “*smoking or ingesting* cannabis or cannabis products” in a CDCR facility. (Health and Safety Code § 11362.45(d).) Cannabis is still listed in the law as a “controlled substance” (Health & Safety Code § 11054(d)(13)). Proposition 64 did not repeal laws that make it a felony for people incarcerated in state prison or county jail to *possess* certain “controlled substances” or “drugs” in general without authorization by the prison or jail rules, the warden, superintendent, or other person in charge. (Penal Code §§ 4573.6-4573.8; 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].) In August 2021, the California Supreme Court confirmed that possession of cannabis in prison is still a felony that can be charged under either Penal Code § 4573.6 or Penal Code § 4573.8. (*People v. Raybon* (2021) Cal.5th [No. S256978].)

*Board of Directors*

Harlan Grossman, President and Treasurer • Christiane Hipps, Vice President  
Vanita Gaonkar • Nick Gregoratos • Michael Marcum • Jean Lu  
Claire McDonnell • Ruth Morgan • Seth Morris • Adrienne Yandell

It is still a serious violation of CDCR rules for a person in prison to possess, distribute, or use any “controlled substances,” including cannabis. (See 15 CCR § 3315(a)(2)(D) and (a)(3)(E)-(F).) Those activities are also very likely to violate local county jail rules.

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* (2019) 36 Cal. App.5th 848.)

## **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. The fact that a gang enhancement was attached to the cannabis conviction does not make the conviction ineligible for Proposition 64 redesignation or resentencing. (*People v. Jessup* (2020) 50 Cal.App.5th 83.)

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. Saelee* (2018) 28 Cal.App.5th 744; but see *People v. Banda* (2018) 26 Cal.App.5th 349 [unattributed hearsay statements in probation report not sufficiently reliable].) Under, Proposition 64, 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.

If the petition is granted, all court records pertaining to the cannabis charge must be destroyed or redacted to remove all indications that the charge ever existed; covering the information with a black marker does not satisfy this requirement. (Health & Safety Code § 11361.5, (c); *All of Us or None v. Hamrick* (2021) 64 Cal.App.5th 751.)

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.