

TO: Public Defenders / Criminal Defense Attorneys in CA
RE: Criminal Justice Provisions of Prop. 64
DATE: August 15, 2016



Proposition 64, or the Control, Regulate and Tax Adult Use of Marijuana Act (“Prop. 64”), legalizes the responsible use of marijuana by adults 21 and over and establishes a strict regulatory system to facilitate the transition to a legal market.¹ Prop. 64 authorizes the possession, transport, purchase, consumption and sharing of up to one ounce of marijuana and up to eight grams of marijuana concentrates. Adults 21 and over may also grow up to six plants per household out of public view.² Most relevant for criminal defense attorneys, Prop. 64 reduces criminal penalties for marijuana offenses and makes them retroactive.

Should Prop. 64 pass on November 8, 2016, the criminal justice provisions—namely, the legal personal possession for adults 21 and over, the reductions of criminal penalties in the Health and Safety Code and the retroactivity of those reductions—go into effect *the very next day*.³ This memo provides a short overview of the provisions of Prop. 64 most relevant to criminal defense attorneys representing people charged with marijuana offenses in California.

(1) REDUCTION AND ELIMINATION OF CRIMINAL PENALTIES

In addition to legalizing the personal possession of small amounts of marijuana, Prop. 64 reduces most felony and misdemeanor penalties for marijuana offenses—specifically, Health and Safety Code §§ 11357, 11358, 11359, and 11360 are all amended by the measure. (Criminal penalties do not apply to commercial businesses operating in compliance with the law as set forth under Prop. 64.) The actual penalty imposed depends whether the defendant is an adult aged 21 and over, an adult between 18 and 20 years old, or a juvenile under 18 years old.

A detailed chart is attached to the end of this memo.

¹ Prop. 64 comprehensively addresses the regulation and licensing of businesses, taxation, allocation of significant new revenue and reduction of criminal penalties. In October 2015, Governor Jerry Brown signed into law a series of bills that together established the first statewide regulatory system for medical marijuana in California. Prop. 64 utilizes the same framework provided for in those laws.

² Local governments may ban outdoor cultivation, but they may not ban cultivation that takes place at private residences within the home or an enclosed accessory structure.

³ See CAL CONST., Art. 2, § 10(a) (“An initiative statute...takes effect the day after the election unless the measure provides otherwise.”). The licensing of commercial marijuana businesses will not take effect until January 1, 2018.

(a) Penalties for Adults

The criminal justice reforms of Prop. 64 do not just apply to conduct that is legalized (i.e. possession and cultivation of up to six plants), but they also extend to some felony crimes that are not legalized, such as sales of marijuana (H&S Code § 11360) and possession of marijuana with intent to sell (H&S Code § 11359). Each of those felony crimes will become misdemeanors under Prop. 64. They become wobblers in certain circumstances: (1) on a third offense for the same crime⁴; (2) if a defendant is required to register as a sex offender under Penal Code § 290(c); (3) if a defendant has previously been convicted of a super strike; (4) if the offense involved the transport of more than 28.5 grams of marijuana out of the state; or (5) the offense involved a sale to a person under 18. Felony penalties will remain for sales to minors (H&S Code § 11361) and manufacturing concentrates by chemical synthesis without a license (H&S Code § 11379.6).

Prop. 64 generally reduces penalties for adults aged 18 to 20 years old to infractions for conduct otherwise made legal for adults 21 and over. For example, cultivation of marijuana is currently a felony in California. Prop. 64 legalizes the cultivation of up to six plants for adults 21 and over, but 18 to 20 year olds will be subject to an infraction with a max fine of \$100. For offenses that are still unlawful for adults, e.g. unlicensed sale of marijuana, the penalties for adults 18 to 20 years old will remain the same as adults aged 21 and over.

(b) Penalties for juveniles

Prop. 64 regards youth under the age of 18 much differently than adults. For marijuana offenses contained within Health and Safety Code §§ 11357-11360, youth may *only* be charged with infractions. There are no misdemeanor or felony penalties for youth under Prop. 64, including for sales and possession with intent to sell of marijuana.

In addition, juveniles will not be threatened with incarceration or fines; instead, juveniles will be required to attend drug awareness education, counseling, and/or be required to complete community service. Prop. 64 mandates that the drug education will be free to participants and based on science and evidence-based principles and practices.

(c) Intersection with Prop. 215

Neither the recent legislative bills nor Prop. 64 change the possession limits or affirmative defenses provided by Prop. 215 (the Compassionate Use Act). A genuine patient retains an affirmative defense to possess an amount necessary for their medical use, subject to the current requirements under state law and any local regulation.

⁴ Amendments to Health and Safety Code sections 11358, 11359, and 11360 create new subsections to provide for the lesser penalties. A person may then be punished pursuant to Penal Code section 1170(h) if they have two or more prior convictions for an offense specified in the new subsection. This arguably wipes the slate clean for purposes of the internal recidivism structure. On November 9, 2016, a person could not have a prior conviction under the new subsection because it did not yet exist.

(2) RETROACTIVITY

The reduction of, or in some cases, elimination of, criminal penalties by Prop. 64 is made retroactive by the measure for convictions under Health and Safety Code §§ 11357, 11358, 11359, and 11360. Prop. 64 adopts a similar judicial process to that created by Prop. 47 where applicants can petition a court to reduce or remove convictions from their records.⁵ The structure created in Prop. 64 is the exact same as Prop. 47 except for two crucial aspects.⁶

First, there is no time limit placed on the availability of the court process to change records under Prop. 64.

Second, Prop. 64 states that a court shall presume a petitioner eligible “unless the party opposing the petition provides by clear and convincing evidence that the petition does not satisfy the criteria.” The burden is on the prosecutor to prove by clear and convincing evidence that a petitioner is ineligible. This will be especially helpful in possession or cultivation convictions where the record of conviction may not establish the amount of marijuana possessed or number of marijuana plants cultivated by the petitioner. Unfortunately, the clear description of the burden of proof does not apply to suitability, but only to eligibility. The standard for suitability remains the same as in Prop. 47—“unreasonable risk of danger to public safety”—by incorporating Penal Code § 1170.18(c) by reference in proposed Health and Safety Code § 11361.8.

(3) REVENUE ALLOCATION

Prop. 64 assigns a 15 percent retail tax on the purchase of medical and nonmedical marijuana, in addition to state and local sales taxes and a separate tax on cultivation. The state’s independent Legislative Analyst’s Office estimates that Prop. 64 will generate up to \$1 billion in revenue and up to tens of millions in savings annually.

Some revenue from the taxation of marijuana will be allocated to a grant program—starting at \$10 million and increasing by an additional \$10 million a year for the first five years until it reaches \$50 million annually—that will support communities disproportionately harmed by previous federal and state drug policies. Grants will support economic development, job placement, mental health treatment, and most relevant to reentry advocates, legal services that address barriers to reentry. Organizations may apply for funds to support their work

⁵ Proposed Cal. H&S Code § 11361.8.

⁶ There is also a third aspect that *may* have some beneficial immigration impact for non-citizens. The measure states that if the court determines the petitioner is eligible and suitable, the court shall redesignate or dismiss the conviction because “it is *legally invalid*.” In general, federal immigration law does not recognize state “rehabilitative” relief that reduce or expunge convictions. However, immigration law does recognize convictions that have been vacated for legal defects, such as a constitutional or procedural error. Whether immigration authorities will recognize the reduction or vacating of a conviction under the “legally invalid” language set forth in Prop. 64 is purely speculative. Nonetheless, the issue will likely be litigated and could provide some relief in immigration court for non-citizens with prior marijuana convictions.

implementing the retroactivity provisions of Prop. 64 once revenue begins generating through the tax in 2018.

The remainder of the revenue is directed primarily to youth drug education and treatment programs (60 percent), protecting and restoring the environment (20 percent), and local governments to assist with implementation (20 percent).

(4) MISCELLANEOUS PROVISIONS

(a) Marijuana No Longer Considered to Be Contraband

Prop. 64 states that marijuana used in a lawful way is not contraband subject to seizure, and conduct deemed lawful by Prop. 64 cannot constitute the basis for detention, search or arrest.⁷

(b) New Infractions Created to Regulate Public Use of Marijuana

Prop. 64 creates five new infractions to regulate public use of marijuana—smoking or ingesting in public; smoking where tobacco is prohibited; smoking within 1,000 feet of a school, day care or youth center while children are present (excluding private residences); possessing an open container or package of marijuana while driving, operating, or riding in a vehicle, and failing to keep plants in a locked space away from public view.⁸ Adults will be sanctioned with max fines of \$100 or \$250, depending on the offense, and juveniles will be sanctioned with drug awareness education, counseling, and/or community service.

(c) Destruction of Records

Prop. 64 amends Health and Safety Code § 11361.5 to include expungement for concentrated marijuana and to include expungement for all marijuana offenses for juveniles under the age of 18, except for synthetic marijuana.

Please visit www.letsgetitrightca.org for more information on Prop. 64, including the full text of initiative, or contact Joy Haviland at the Drug Policy Alliance at jhaviland@drugpolicy.org or (510) 679-2317.

⁷ Proposed Cal. H&S Code § 11362.1(c).

⁸ Proposed Cal. H&S Code § 11362.3

Proposed Changes to Criminal Penalties Under Prop. 64

CRIMINAL OFFENSE ¹	PENALTY UNDER CURRENT LAW ²	PROPOSED PENALTY UNDER PROP. 64 ^{2,3}
POSSESSION OF MARIJUANA - H&S Code § 11357		
Possession of ≤ 28.5 g marijuana (adults)	Infraction with \$100 fine	21 + = Legal 18 to 20 = Infraction with \$100 fine
Possession of ≤ 28.5 g marijuana (under 18)	Infraction with \$100 fine	1 st offense: 4 hours drug education + up to 10 hours community service 2 nd offense (or more): 6 hours drug education + up to 20 hours community service
Possession of > 28.5 g marijuana (adults)	Misdemeanor (max 6 months jail and/or \$500 fine)	18 + = Misdemeanor (max 6 months jail and/or \$500 fine)
Possession of > 28.5 g marijuana (under 18)	Misdemeanor (max 6 months jail)	1st offense: infraction with 8 hours drug education + up to 40 hours community service 2nd or more: infraction with 10 hours drug education + up to 60 hours community service
POSSESSION OF CONCENTRATED MARIJUANA - H&S Code § 11357		
Possession of concentrated cannabis (adults)	Any amount = Misdemeanor (max 1 year jail and/or \$500); wobbler if registered sex offender under 290(c) or prior super strike	21 + = Up to 8 grams is legal; more than 8 grams is a misdemeanor (max 6 months jail and/or \$500 fine) 18 to 20 = ≤ 4 grams is an infraction with \$100 fine; more than 4 grams is a misdemeanor (max 6 months jail and/or \$500)
Possession of concentrated cannabis (under 18)	Any amount = Misdemeanor (max 1 year jail and/or \$500); wobbler if registered sex offender under 290(c) or prior super strike	≤ 4 grams: 1 st offense: 4 hours drug education + up to 10 hours CS; 2nd offense: 6 hours drug education + up to 20 hours CS > 4 grams: 1 st offense: 8 hours drug education + up to 40 hours CS; 2nd offense: 10 hours drug education + up to 60 hours CS
POSSESSION ON SCHOOL GROUNDS - H&S Code § 11357		
Possession of ≤ 28.5 g marijuana and/or ≤ 4g concentrates on school grounds (18 and older)	Misdemeanor (max 10 days jail and/or \$500 fine)	1 st offense: Misdemeanor (max. \$250 fine) 2 nd (or more) offense: Misdemeanor (max 10 days jail and/or \$500 fine)
Possession of ≤ 28.5 g marijuana and/or ≤ 4g concentrates on school grounds (under 18)	1 st offense: Misd. (max \$250 fine) 2 nd (or more) offense: Misd. with \$500 fine and/or 10 days juvenile hall/camp/group home	1st offense: infraction with 8 hours drug education + up to 40 hours community service 2nd or more: infraction with 10 hours drug education + up to 60 hours community service

Notes:

1. Shaded cells represent penalties for juveniles under age 18.
2. Prop. 215 protections remain in effect.
3. Licensed activity in accordance with state law will not be subject to these penalties.

Proposed Changes to Criminal Penalties Under Prop. 64

CRIMINAL OFFENSE ¹	PENALTY UNDER CURRENT LAW ²	PROPOSED PENALTY UNDER PROP. 64 ^{2,3}
POSSESSION WITH INTENT TO SELL MARIJUANA - H&S Code § 11359		
Possession with intent to sell (adults)	Felony (16 mos / 2 yrs / 3 yrs)	Misdemeanor (max 6 months jail and/or \$500 fine).
		Wobbler if (1) prior super strike, (2) if a registered sex offender under 290(c), (3) two prior convictions under this subsection, (4) offense occurred in connection with knowing sale or attempted sale of marijuana to a person under 18, or (5) adult 21 + if knowingly hire, employ, or use a persons under 21 in unlawfully cultivating, selling, etc. any marijuana
Possession with intent to sell (by someone under 18)	Felony (16 mos / 2 yrs / 3 yrs)	1st offense: infraction with 8 hours drug education + up to 40 hours community service
		2nd or more: infraction with 10 hours drug education + up to 60 hours community service
SALES OF MARIJUANA - H&S Code § 11360		
Sales/ giving away of marijuana to adults (by adults 18 and over)	Felony (2/3/4 years) If amount is < 28.5 g and it is given away (i.e. no sale) = Misdemeanor with max fine of \$100	Misdemeanor (max 6 months jail and/or \$500 fine).
		It becomes a wobbler (2/3/4 yrs) IF (1) prior super strike (2) a registered sex offender, (3) two prior convictions under this subsection, (4) involved sale to person under 18; OR (5) involved import into this state or transport out of this state of more than 28.5 grams.
		**The section providing that if amount is < 28.5 g and it is given away (i.e. not sold) is an infraction with max fine of \$100. This will likely apply to adults aged 18 to 20 who share marijuana.
Sales/ giving away of marijuana to adults (by someone under 18)	Felony (2/3/4 years) If amount is < 28.5 g and it is given away (i.e. no sale) = Misdemeanor with max fine of \$100	1st offense: infraction with 8 hours drug education + up to 40 hours community service
		2nd or more: infraction with 10 hours drug education + up to 60 hours community service
Sales to a minor (adults 18 and over) § 11361	Felony (3/5/7 years) for sales to a minor under 14 if the adult is over 18. Felony (3/4/5 years) for sales to a minor over 14 if the adult is over 18.	No change to current law.

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CRIMINAL OFFENSE ¹	PENALTY UNDER CURRENT LAW ²	PROPOSED PENALTY UNDER PROP. 64 ^{2,3}
CULTIVATION OF MARIJUANA - H&S Code §11358		
Cultivation (adults)	Felony (16 mos/2 yrs/3 yrs)	<u>6 plants or less</u> 21+ = Legal 18 to 20 = Infraction with \$100 fine
		<u>More than 6 plants (18 +)</u> Misdemeanor (max 6 months jail and/or \$500 fine). BUT it is a wobbler if (1) prior super strike or if a registered sex offender, (2) two prior convictions under this subsection, OR (3) offense resulted in intentional division of public waters, introduction of harmful chemical into waters or otherwise caused substantial environmental harm to public lands.
Cultivation (under 18)	Felony (16 mos/2 yrs/3 yrs)	1st offense: infraction with 8 hours drug education + up to 40 hours community service
		2nd or more: infraction with 10 hours drug education + up to 60 hours community service
Cultivation restrictions on growing at home	All non-medical cultivation is illegal and charged as a felony.	If adult cultivates no more than 6 plants for personal use but (1) plants are visible to public or (2) not kept in a locked space = infraction with \$250 fine
NUISANCE PENALTIES		
Opening or maintaining place for unlawfully selling, giving away or using drugs (§ 11366)	For marijuana = wobbler	No change to current law.
Renting, leasing, or making building/room/space available for unlawful manufacturing or storing of drugs (§ 11366.5)	For marijuana = wobbler Second offense is a felony punishable by 2, 3, or 4 years.	No change to current law.
MANUFACTURING: H&S Code § 11379.6		
Manufacturing concentrates by chemical synthesis	Felony (3/5/7 years)	No change to current law.

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CRIMINAL OFFENSE ¹	PENALTY UNDER CURRENT LAW ²	PROPOSED PENALTY UNDER PROP. 64 ^{2,3}
PUBLIC USE INFRACTIONS CREATED BY PROP. 64: H&S Code § 11362.3		
Smoking or ingesting in public	No specific penalty for marijuana. Charged with possession or same as tobacco.	Infraction with max fine of \$100
		Under 18 = 4 hours of drug education and up to 10 hours of community service
Smoking where tobacco prohibited	No specific penalty for marijuana. Charged with possession or same as tobacco.	Infraction with max fine of \$250
		Under 18 = 4 hours of drug education and up to 20 hours of community service
Smoking within 1,000 feet of a school, day care or youth center while children are present	No specific penalty for marijuana. Charged with possession or same as tobacco.	Infraction with max fine of \$250
		Under 18 = 4 hours of drug education and up to 20 hours of community service
Possess open container or package of marijuana while driving, operating, or riding in vehicle	No specific penalty. Charged with possession.	Infraction with max fine of \$250
		Under 18 = 4 hours of drug education and up to 20 hours of community service
RETROACTIVITY		
The reductions in criminal penalties in Prop. 64 will be retroactive. Prop. 64 establishes a judicial process for people to ask a court to reduce or remove--depending on how the measure treats the relevant conduct--convictions on their records. This applies to both people currently in jail, prison, or on probation, and to people who have completed their sentences. The legal standard is the same as in Prop. 47 and weighs heavily in favor of reducing convictions. There is no time limit on when to apply.		
EXPUNGEMENT OF RECORDS		
Prop. 64 amends § 11361.5 to include expungement for concentrated marijuana and to include expungement for all marijuana offenses for minors under the age of 18, except for synthetic marijuana.		

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