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Virginia Cannabis Oversight Commission

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LAST PRISONER PROJECT



- A national nonpartisan nonprofit focused at the intersection of criminal justice and cannabis reform
- Our work includes policy technical assistance, as well as legal and reentry services
- We are committed to freeing every last prisoner of the unjust war on drugs, starting with the estimated 40,000 individuals imprisoned for cannabis



- Leading the statewide #LegalizeItRight coalition focused on repealing the prohibition on marijuana and redressing the ongoing harms inflicted by the War on Drugs
- We are committed to supporting resentencing and reparations for survivors of marijuana convictions
- We believe that true Marijuana Justice centers racial justice and social equity

Agenda

- Policy Overview
- Model Policy Components
- National Context
- Virginia's Landscape
- Policy Recommendations



Policy Overview

Policy Gap

- Virginia legalized marijuana, but there are still people serving sentences for marijuana-related offenses.

Policy Goal

- Review and modify marijuana-related sentences and release people from incarceration and supervision, where safe and appropriate.

Policy Options

- Clemency
- Parole
- **Resentencing**

Recommended Approach

A statutory framework for sentence modification and release from incarceration.

- Standardized eligibility, process, and outcomes-- as opposed to clemency and parole.

What is resentencing?

The court **reviewing the sentence** of someone who is currently incarcerated or on supervised release and potentially **issuing a new sentence**.

Resentencing could include time served, resulting in immediate release/discharge. It is also referred to as *sentence modification* or *sentence reconsideration*.

Model Policy Components

Clear Scheme

Explicit offense codes/case factors, to enable automation during implementation.

Broad Scheme

Inclusive of all convictions related to marijuana enforcement and prosecution.

Tiered Scheme

Those who remain incarcerated solely for marijuana convictions, e.g. possession with intent to distribute.

- Automatically modified to time served, without hearings.
- For example, those who remain incarcerated for possession with intent to distribute.

Those who remain incarcerated solely due to an enhancement as a result of an ancillary or prior marijuana-related offense

- Hearings with a strong presumption for modification to time served.

Those who remain incarcerated in part due to a marijuana-related enhancement

- Hearing with rebuttable presumption for modification to less time or time served.

State Identification of Candidates

Like automatic expungement, evidence shows that policy goals are more likely to be achieved if the State (e.g. DOC or prosecutors) *identifies* people and cases that meet objective criteria for possible resentencing and release, and *initiates* the process.

Clear Guidance & Limited Discretion

Clear judicial guidance with rebuttable presumptions of relief

- To effectuate appropriate releases within the provided eligibility scheme and factors for consideration

Limited stakeholder discretion

- To ensure the spirit of the policy is met and implementation is standardized as much as possible

Proactive Provision of Counsel

Counsel provided to any resentencing candidate who requests it when notified of their candidacy.

Enforceable Timelines

Explicit timelines for the
State/court to:

- Identify and notify resentencing candidates
- Provide counsel
- Schedule and hold hearings
- Issue decisions
- Facilitate releases/discharges
- Report progress to the legislature

Oversight and Reporting

Vested with an existing or new body capable of:

- Monitoring and incentivizing compliance with the process and timelines
- Tracking performance metrics that are reported to the legislature

National Context



Petitioner-Initiated Resentencing

New York

- Legalization statute (2021) allows eligible individuals to petition the court for vacatur.
- Court has a strong presumption to grant the petition.

Montana

- Legalization ballot initiative (2021) allows eligible individuals to petition the court for resentencing
- Court has a strong presumption to grant the petition.
- Individual must be given credit for time served and may not be subject to supervision.

Prosecutor-Initiated Resentencing

California

- Criminal procedure statute (2018) allows the prosecutor to initiate a resentencing petition on a defendant's behalf.
- Guidance for the prosecution and court regarding eligibility and outcome is limited.

Illinois

- Criminal procedure statute (2021) allows the prosecutor to initiate a resentencing petition on a defendant's behalf.
- Guidance for the prosecution and court regarding eligibility and outcome is limited.

Automatic Resentencing

New Mexico

- Legalization statute (2021) charges DOC and local jails with identifying individuals with qualifying cannabis cases for possible sentence modification.
- Individuals are entitled to dismissal/vacatur and expungement due to the legalization statute providing that cannabis cases are legally invalid.

Washington

- Criminal procedure statute (2020) charges the prosecutor (and allows the defendant) with identifying qualifying individuals and bringing petitions for resentencing on their behalf.
- There is clear and time-bound guidance for the court regarding the resentencing process.

Virginia's Landscape





Bryan Reid

Father of four

- LPP constituent currently incarcerated at Coffeewood Correctional Center for PWID 13 pounds of marijuana
- Medical marijuana patient with a valid medical card from California
 - No history of violence; priors are drug-related
- Sentenced to 12 years
 - Sentencing guidelines recommended 6-10 years

Statutory Framework

- Virginia Criminal Procedure Code, Section 19.2-303
 - Primary way courts modify sentences after a conviction
- Data collection on its use and outcomes would be informative for any resentencing policy development



Sentencing Guidelines

Marijuana

Also see Marijuana; Dist. Based on Quantity		§18.2-248(H)		
Manufacture - not for personal use	NAR-3004-F9	§18.2-248.1(c)	5Y-30Y	
Sell, distribute, etc., marijuana 3rd or subsequent felony	NAR-3085-F9	§18.2-248.1(d)	5Y-Life	5Y
Sell, distribute, etc., to inmate as accommodation	NAR-3034-F4	§18.2-248.1(b)	2Y-10Y	
Sell, distribute, PWI, as accommodation	NAR-3030-M1	§18.2-248.1(a,3)	0-12M	
Sell, distribute, PWI, one ounce or less	NAR-3031-M1	§18.2-248.1(a,1)	0-12M	
Sell, distribute, PWI, over 1 ounce but not over 5 pounds	NAR-3032-F5	§18.2-248.1(a,2)	1Y-10Y	
Sell, distribute, PWI, etc., - over 5 pounds	NAR-3033-F9	§18.2-248.1(a,3)	5Y-30Y	

Marijuana - Continuing Criminal Enterprise

Distribute etc., 100 kilograms, less than 250.0 kilograms marijuana mix	NAR-3119-F9	§18.2-248(H1,ii,4)	20Y-Life	20Y
Distribute etc., 250.0 kilograms or more marijuana mixture	NAR-3124-F9	§18.2-248(H2,ii,4)	40, Life	40, Life

Marijuana - Distribution Based on Quantity

Marijuana mixture, etc., distribute, etc., 100 kilograms or more	NAR-3114-F9	§18.2-248(H,4)	20Y-Life	20Y*
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Marijuana - Transport

Transport into Commonwealth - 5 lbs. or more marij.	NAR-3067-F9	§18.2-248.01	5Y-40Y	3Y
Transport into Commonwealth - 5 lbs. or more marij. - 2nd or subsq.	NAR-3086-F9	§18.2-248.01	5Y-40Y	10Y

Minors - Assist In Distribution

Sell <1 oz. of marijuana, minor assists in distribution	NAR-3126-F9	§18.2-255(A,ii)	10Y-50Y	2Y
Sell 1 oz. or more of marijuana, minor assists in distribution	NAR-3127-F9	§18.2-255(A,ii)	10Y-50Y	5Y
Sell imitation controlled substance, minor assists in distribution	NAR-3130-F6	§18.2-255(B,ii)	1Y-5Y	
Sell Sch. I/II drug, minor assists in distribution	NAR-3128-F9	§18.2-255(A,ii)	10Y-50Y	5Y
Sell Schedule III or IV drug, minor assists in distribution	NAR-3129-F9	§18.2-255(A,ii)	10Y-50Y	

Minors - Marijuana

Sell <1 oz. of marijuana to minor	NAR-3063-F9	§18.2-255(A,i)	10Y-50Y	2Y
Sell 1 oz. or more of marijuana to minor	NAR-3098-F9	§18.2-255(A,i)	10Y-50Y	5Y

MARIJUANA

Also see Narcotics

Cultivation

Possess between 5 to 10 marijuana plants, second offense	MRJ-1903-M3	§4.1-1101	Fine	
Possess between 5 to 10 marijuana plants, third/subsequent offense	MRJ-1904-M2	§4.1-1101	0-6M	
Possess between 11 to 49 marijuana plants	MRJ-1905-M1	§4.1-1101	0-12M	
Possess between 50 to 100 marijuana plants	MRJ-1906-F6	§4.1-1101	1Y-5Y	
Possess more than 100 marijuana plants	MRJ-1907-F9	§4.1-1101	1Y-10Y	

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DOC Data

First Tier	<ul style="list-style-type: none">• There are 10 individuals incarcerated in DOC facilities on a controlling marijuana offense.• It is unknown how many individuals remain on DOC supervised release for a controlling marijuana offense.
Second Tier	<ul style="list-style-type: none">• It is unknown how many individuals remain incarcerated solely due to an enhancement as a result of an ancillary or prior marijuana-related offense.
Third Tier	<ul style="list-style-type: none">• There are 42 ancillary marijuana convictions for individuals with a larceny/fraud MSO*.• There are 4 ancillary marijuana convictions for individuals with a conspiracy MSO.• There are 353 ancillary marijuana convictions for individuals with a drug sale MSO.• There are 10 ancillary marijuana convictions for individuals with a drug possession MSO.

Data as of 8/31/2021

*Most serious offense

Recent Legislative Proposal

In 2021, the Virginia Crime Commission endorsed legislation to eliminate all mandatory minimum sentences and allow for **retroactive resentencing**.

The legislation proposed a petitioner-initiated process, allowing an incarcerated individual to file a petition for **resentencing with the court**.

HB 1443 (Edwards) and HB 2331 (Mullin/Herring) would have **added to the existing sentence modification statute** (19.2-303) a retroactive resentencing process for repealed mandatory minimum sentences.

Neither bill passed the GA due to differences in the contemplated eligibility schemes.

Reenactment Language

§ 19.2-303. Suspension or modification of sentence; probation; taking of fingerprints and blood, saliva, or tissue sample as condition of probation.

Notwithstanding any other provision of law or rule of court, any person who has been sentenced to jail or to the Department of Corrections for a marijuana offense, except for (i) a violation of subdivision (a) (3) of former § 18.2-248.1, (ii) a violation of subsection (d) of former § 18.2-248.1, or (iii) a violation of former § 18.2-248.1 where the defendant gave, distributed, or possessed with intent to give or distribute marijuana to a minor, may, at any time before the sentence has been completely served, file a motion with the sentencing court that entered the final judgment or order for a resentencing hearing. If it appears compatible with the public interest and there are circumstances in mitigation of the offense, including the legalization of marijuana, such court may reduce, suspend, or otherwise modify such person's sentence at any time before such person's sentence has been completely served. If the petitioner claims to be indigent, the petitioner shall additionally file with the court a statement of indigency and a request for the appointment of counsel on forms provided by the Supreme Court of Virginia. If the petition is not summarily dismissed and the court finds that the petitioner is entitled to representation by counsel subject to the provisions of Article 3 (§ 19.2-157 et seq.) of Chapter 10 of Title 19.2, the court shall appoint counsel to represent the petitioner.

Policy Recommendations

- Clarify eligibility scheme
- Vest onus for identification and initiation of process with state
- Provide judicial guidance with limited discretion
- Proactively provide counsel
- Establish enforceable timelines
- Institute oversight and reporting

Summary

- Retroactive resentencing (or sentence reconsideration/modification) is an expanding area of interest in legal reform.
- It is especially popular in states that adopt cannabis legalization, to align criminal practice with its updated criminal code.
- Adoption of a meaningful cannabis resentencing process will bring Virginia's criminal justice *practice* into alignment with its legalization *policy*.

THANK YOU!

Questions?

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