

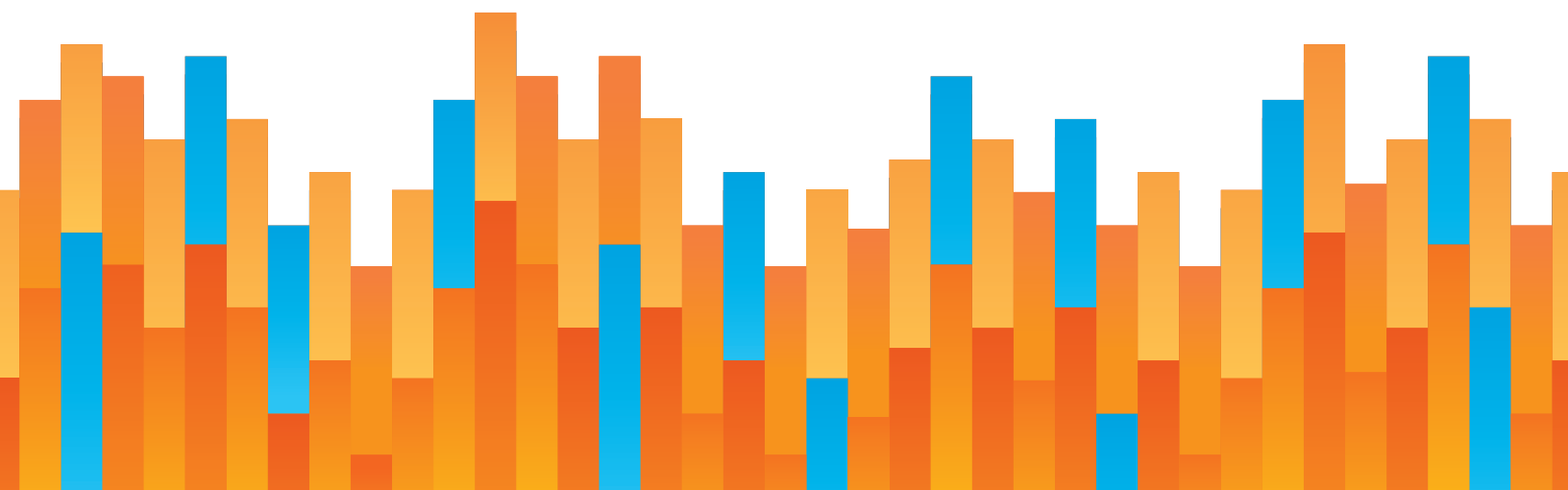


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# FORGIVENESS REMEDIES FOR MARIJUANA CRIMES

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by James Craven  
June 2018





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# PART 1

## INTRODUCTION

As more states have begun legalizing marijuana, many are asking whether it's time to revisit charges and convictions for the possession, sale, and cultivation of cannabis. A number of states that legalized marijuana for recreational use have followed up with measures to provide relief to those with prior convictions for marijuana crimes.<sup>1</sup> But beneath the umbrella of forgiveness are vastly different methods and results. This brief explores the methods by which states can implement forgiveness remedies for past marijuana crimes. It then takes a more in-depth look at how three states that have legalized cannabis for recreational use implemented such measures: California, Oregon, and Colorado.

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<sup>1</sup> National Conference of State Legislators. "Marijuana Overview." *ncsl.org*, National Conference of State Legislators. 30 Aug. 2017. Web. <<http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx>> Accessed 26 Apr. 2018.

## PART 2

# THE FORMS OF FORGIVENESS

There is a lot of nuance to forgiveness, and a lot depends on the stage of judicial proceedings. For a person charged with a marijuana crime but not convicted, forgiveness would be dismissing their case. For those convicted and serving probation or prison time, forgiveness becomes curtailing their sentence. And for those whose sentences have already been carried out, forgiveness takes the form of removing the crime from their record.

The first two cases fall under the umbrella of *abatement*: cutting a sentence short before or during its term. The latter is referred to as *expungement* (also *expunction*): removing past crimes from a person's public record.

### 2.1

## ABATEMENT BEFORE ADJUDICATION

It's intuitive that a person charged with a crime that no longer exists should not be punished. Indeed, this was the default state of affairs for much of America's history. In the early days of America's judicial system, when criminal laws were repealed, past transgressions not yet adjudicated by the courts were curtailed by default. This applied even when laws weren't expressly repealed, but were *de facto* repealed by laws that effectively replaced them. Legislatures could allow the previous laws to remain in effect for

crimes committed prior to the change by including a “saving clause,” but the presumption was that all charges generated from a law disappeared with it.<sup>2</sup>

States have moved away from this system, reversing the presumption so that legislatures must specify their intent for past charges to be dismissed. By and large, however, state legislatures still retain the power to abate any charge not yet adjudicated. And courts in many states have intervened, mandating that offenders facing prosecution benefit from any ameliorative changes to the law.<sup>3</sup>

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*Whether by intent of the legislature or prevailing case law, abatement before adjudication can reduce the need for attorneys, judges, clerks, prison guards and probation officers.*

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Little effort, then, is necessary to forgive those charged for marijuana crimes before adjudication, and one could argue much effort is spared by doing so. Whether by intent of the legislature or prevailing case law, abatement before adjudication can reduce the need for attorneys, judges, clerks, prison guards and probation officers. With financial incentives aligning with a psychology of fairness, and few barriers to implementation, a powerful case presents itself in favor of abatement at this stage.

## 2.2

### ABATEMENT AFTER ADJUDICATION

However, the situation changes once the charges have been adjudicated. Viewed in isolation, those tackling the question of forgiveness for past marijuana crimes would surely desire a consistent result regardless of whether or not a sentence has already been handed

<sup>2</sup> “Today’s Law and Yesterday’s Crime: Retroactive Application of Ameliorative Criminal Legislation.” *University of Pennsylvania Law Review* 121:120 (1972). Penn Law Legal Research and Scholarship Repository. Web.  
<[https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5103&context=penn\\_law\\_review](https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=5103&context=penn_law_review)> 6 Mar. 2018

<sup>3</sup> Ibid.

down. But a powerful presumption has long existed against legislative meddling with court judgments. This presumption is embodied in our Constitution's *ex post facto* clauses, which prevent both state and federal legislatures from altering the consequences for crimes committed.<sup>4</sup>



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*The executive branch has long held the power to pardon, by which a governor or president can absolve convictions or commute sentences. But doing so is wrought with risk, as the governor faces severe backlash if a pardoned offender goes on to commit another crime.*

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Remedies for these circumstances do exist, albeit by different mechanisms. The executive branch has long held the power to *pardon*, by which a governor or president can absolve convictions or commute sentences. But doing so is wrought with risk, as the governor faces severe backlash if a pardoned offender goes on to commit another crime. Pardoning *thousands* of former convicts leaves the head of state broadly vulnerable.<sup>5</sup>

Abatement at this stage thus requires some careful and creative political navigation. It is commonly done through joint effort of the legislature and judiciary, with the former instructing the latter to hold “resentencing” hearings for convicts.<sup>6</sup> Other potential remedies may exist, and have been tried, through the legislature alone. For instance, the state legislature of Washington, after lowering mandatory minimum sentences for some marijuana crimes in 1971, empowered its prison board to commute prison terms

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<sup>4</sup> U.S.CONST. art. I, § 9, c. 3; § 10, d. 1. Originally, the U.S. Constitution placed almost no restrictions directly on the states. The *ex post facto* clause is a rare exception to this rule, underscoring its importance in American jurisprudence.

<sup>5</sup> Clark, Maggie and Stateline. “Governors’ Pardons Are Becoming a Rarity.” *Governing.com*, Governing. 8 Feb. 2018. Web.  
<<http://www.governing.com/news/state/sl-governors-balance-politics-with-pardons.html>>

<sup>6</sup> California takes this approach (CA AB-64).

accordingly.<sup>7</sup> The legislature declined to implement a similar measure after legalization passed.<sup>8</sup> Still, this history raises an intriguing proposition: that state legislatures may be able to leverage the authority of corrections staff to curtail sentencing for marijuana crimes without relying on judicial or executive authority.

## 2.3 EXPUNCTIONS AND RECLASSIFICATION: CRIMES CONSIDERED

While expunction refers specifically to the sealing of previous convictions, it is often used interchangeably with the similar remedy of reclassification—redesignating a previous conviction as a lower charge. Both of these occur after judgment has been entered and complied with. While abatements generally pertain to any area where the criminal consequences for an act have changed, expungements may be limited by a wide variety of rationales. Many different approaches have been taken by states in determining which crimes should qualify for expunction or reclassification.

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Some states where recreational use has been legalized provide a remedy specifically for smaller possession charges which are no longer crimes. There is usually no wait time in pursuing such a remedy: because the conduct is now legal, petitions for expungement can

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<sup>7</sup> “Today’s Law and Yesterday’s Crime.”

<sup>8</sup> Washington is still considering forgiveness remedies at the time of this publication. HB 1260 (2017-18) would allow those convicted of misdemeanor marijuana offenses at the age of 21 or older to have their judgments reentered as not guilty.



generally be filed immediately.<sup>9</sup> These measures benefit from being fairly uncontroversial, but because these low-level charges usually did not have dire consequences in the first place, the impact of such changes is limited.<sup>10</sup>

Other states focus more broadly on misdemeanors, on the theory that these charges are less likely to be associated with violence or other, more dangerous drugs. Contrarily, a few efforts specifically center on reclassifying felony crimes, which are considerably more debilitating to ex-convicts and can preclude them from obtaining a job, a lease, or any kind of financing.

Typical Misdemeanors	Typical Felonies
Simple Possession ( $< 1-2$ oz)	Possession with Intent to Sell or Distribute ( $> 1-2$ oz)
Transfer without Sale	Sale
Possession of Paraphernalia	Cultivation
Public use	Involving a minor; committing a violation in a “school zone”



*States attempting to determine expungement or reclassification remedies based on the underlying charge face a few challenges. For instance, the charge that a person is convicted of may not match the actual offense committed.*



<sup>9</sup> This is true in both Colorado (CO HB 17-1266) and California (CA AB-64).

<sup>10</sup> California, Colorado, Oregon, Maine and Massachusetts all decriminalized small amounts of marijuana years before legalizing sale. There are still notable discretions between past and present possession law in many of these states, but they are often smaller than the banner of “legalization” might lead one to assume.

States attempting to determine expungement or reclassification remedies based on the underlying charge face a few challenges. For instance, the charge that a person is convicted of may not match the actual offense committed. Offenders frequently negotiate plea deals with the state on drug crimes, dropping the principal crime down a class or dismissing other charges. This can lead to disparate results: a state that decides to forgive misdemeanor possession charges might clear the record of someone who pled to a small possession charge but was actually carrying heavy enough weight to qualify as possession for sale, whereas someone carrying the same weight who went to trial for possession with intent and lost would be ineligible for the same program.

Of course, the original charges do remain on record as being dismissed, and can be re-examined. Someone charged with possession of cocaine and possession of marijuana, who pled to the latter charge and had the former charge dismissed, may raise a red flag. But assuming someone was guilty of the dismissed cocaine charge is also problematic. Charges are routinely dismissed because the state lacks the evidence to support its case. It may be that the cocaine was found in the same house as the offender, but in fact belonged to a roommate or family member, while the marijuana was on the offender's person. The state would almost certainly charge the offender with both possession of cocaine and marijuana. But it knows the cocaine charge may not stick, and it may have to spend considerable resources to pursue this charge at trial. If the state can secure a plea to the marijuana charge, it would likely be happy to forgo the costly court process by dropping the cocaine offense. Situations like these are one example of why plea negotiations are so common.

## 2.4

### AVENUES FOR EXPUNCTION

All of this suggests a rigorous process is necessary for expungements and reclassifications: a detailed dig by district attorneys into former charges and police reports, with a hearing before a judge where the petitioner makes their case. More conservative states also hedge the level of clemency expungement and reclassification provide by adding additional requirements to petitions for expunction, one of which is a wait period of some years after

completion of a sentence.<sup>11</sup> New Jersey went even further, requiring completion of a special probationary term for expunction, basically creating an after-the-fact diversion program.<sup>12</sup>

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*... a rigorous process is necessary for expungements and reclassifications: a detailed dig by district attorneys into former charges and police reports, with a hearing before a judge where the petitioner makes their case.*



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But such processes are costly, both for the petitioner and the state. Additional barriers like wait periods narrow the field even further, dissuading would-be applicants from taking advantage of the process. This has led to some interest in widening the net by implementing automatic expunction. States have been timid about embracing such an expansive measure, but trading the scrutiny of a hearing does provide two substantial benefits: it reduces the cost to the state, and it dramatically increases the forgiveness remedy's reach.

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<sup>11</sup> New Hampshire, for instance, has a wait period of two years before marijuana offenses can be considered for expunction (NH SB 16-391). Maryland sets the wait period for marijuana crimes at four years (MD SB 17-949).

<sup>12</sup> N.J.S.2C:35-14

## PART 3

# STATE SOLUTIONS

Now that we're familiar with the kinds of forgiveness remedies that have been crafted so far, let's take a look at what states that have legalized marijuana have chosen to implement.

### 3.1

## CALIFORNIA

Proposition 64, which legalized possession of marijuana in California and sale with the appropriate licenses, also contained a fairly comprehensive set of forgiveness remedies for prior marijuana convictions. First, it automated the destruction of records for possession and transfer of less than one ounce of marijuana, excluding synthetic cannabinoids and possession on school grounds. This provision provides that court records (barring transcripts and published opinions), arrest records, and records from pretrial diversion services of the aforementioned crimes be destroyed after two years, and specifically allows those convicted of such crimes to treat these arrests and convictions as nonexistent when responding to queries about their criminal record.<sup>13</sup>

Second, it allows anyone currently incarcerated for an offense that would either no longer be illegal under current law or would now be charged as a lesser offense to petition for resentencing. Post-trial supervision for those resentenced is truncated to a maximum term

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<sup>13</sup> CA AB-64

of one year. The statute specifically prohibits courts from reinstating charges that were dismissed as part of a plea deal, or taking any measure to resentence petitioners to a longer term.<sup>14</sup>

Existing case law in California requires abatement for those who have been charged but have not yet had their cases adjudicated.<sup>15</sup> This does not require prosecutions be dismissed where the underlying charge remains a crime, as the state otherwise follows the modern law on abatement.

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*Existing case law in California requires abatement for those who have been charged but have not yet had their cases adjudicated.*



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Finally, those who are not incarcerated but nonetheless want charges on their records cleared or reclassified can petition courts using the same process as those seeking resentencing. In both cases, this requires a court hearing.<sup>16</sup>

## ANALYSIS

California's forgiveness regime encompasses pending and prior convictions at all stages: before, after, and during adjudication. Its policy is largely aimed at bringing these charges in line with the current law. To this end, it's useful to examine precisely how the law has changed:

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<sup>14</sup> Ibid.

<sup>15</sup> In re Estrada 63 Cal.2d 740, 748 (1965). “[W]here the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed.”

<sup>16</sup> CA AB-64

**TABLE 1: CHANGES IN CALIFORNIA'S MARIJUANA LAWS, 2012–2018**

	<b>04/2012</b>	<b>03/2018</b>
<b>Possession, 1oz</b>	Infraction <sup>17</sup>	Fully legal <sup>18</sup>
<b>Possession on School Grounds</b>	Misdemeanor <sup>19</sup>	Misdemeanor <sup>20</sup>
<b>Possession, &gt; 1oz<sup>21</sup></b>	Misdemeanor <sup>22</sup>	Misdemeanor <sup>23</sup>
<b>Sale</b>	Felony <sup>24</sup>	Misdemeanor <sup>25</sup>
<b>Sale to minor</b>	Felony <sup>26</sup>	Felony <sup>27</sup>
<b>Sale of Paraphernalia</b>	Misdemeanor <sup>28</sup>	Misdemeanor <sup>29</sup>
<b>Cultivation, ≤ 6 plants</b>	Felony <sup>30</sup>	Fully legal <sup>31</sup>
<b>Cultivation, &gt; 6 plants</b>	Felony <sup>32</sup>	Misdemeanor <sup>33</sup>

<sup>17</sup> CA Health & Safety Code § 11357 (2012)

<sup>18</sup> CA AB-64

<sup>19</sup> CA Health & Safety Code § 11357 (2012)

<sup>20</sup> CA Health & Safety Code § 11357 (2017)

<sup>21</sup> There is technically no upper limit at which possession alone becomes a felony. California does have a “Possession with Intent to Distribute (PWISD)” law, but unlike other states, possession alone is not enough to prove intent. PWISD can be hard to prove, requiring things like kitchen scales or sealed bags evidencing a plan for sale. PWISD was formerly a felony carrying a sentence between 16 months to three years (CA Health & Safety Code § 11359 (2012)) and is now a misdemeanor with a six-month sentence (Health & Safety Code § 11359 (2017)). Of course, PWISD is not a crime for properly licensed vendors (CA AB-64).

<sup>22</sup> CA Health & Safety Code § 11357 (2012)

<sup>23</sup> CA Health & Safety Code § 11357 (2017)

<sup>24</sup> CA Health & Safety Code § 11360 (2012)

<sup>25</sup> CA Health & Safety Code § 11360 (2017). Sale is not a crime for properly licensed vendors (CA AB-64).

<sup>26</sup> CA Health & Safety Code § 11361 (2012)

<sup>27</sup> CA Health & Safety Code § 11361 (2017)

<sup>28</sup> CA Health & Safety Code § 11374 (2012)

<sup>29</sup> CA Health & Safety Code § 11374 (2017)

<sup>30</sup> CA Health & Safety Code § 11358 (2012)

<sup>31</sup> CA AB-64

<sup>32</sup> CA Health & Safety Code § 11358 (2012)

<sup>33</sup> CA Health & Safety Code § 11358

There has been little change in California's possession law, as smaller possession charges had already been decriminalized. Those who had previously been caught with a joint or small bag were charged only with infractions—no more serious than a speeding ticket. Possession charges for heavier weights actually carry the same penalties as before. The largest changes to the law are in sale (which is now only a misdemeanor, and would be legal with state and local licenses) and cultivation (formerly a felony in any amount, but now at most a misdemeanor). The poster child for forgiveness in California turns out not to be someone caught with a blunt on their dashboard, but a student caught trying to grow a pot plant in his dorm room. California's forgiveness regime recognizes and embraces this reality, allowing courts to examine any and all marijuana crimes previously on the books.

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*On the whole, California's forgiveness remedies are wide in scope and highly inclusive. The Drug Policy Alliance estimated that there are over 100,000 people eligible for resentencing or expunction.*

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On the whole, California's forgiveness remedies are wide in scope and highly inclusive. The Drug Policy Alliance estimated that there are over 100,000 people eligible for resentencing or expunction.<sup>34</sup> However, the state has encountered difficulty carrying these out, as the necessity of a hearing has proven a significant barrier in terms of cost, effort, and information. A report at the end of 2017 by the California Judicial Council indicated it had received only roughly 4,500 applications for resentencing or redesignation.<sup>35</sup>

As a response to this, California introduced a bill this year that would mandate courts track down convictions that would qualify for expunction or reclassification, and automatically redesignate them without requiring any action from the offender. This would undoubtedly

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<sup>34</sup> The Associated Press. "California Bill Would Ease Erasure of Cannabis Convictions." leafly.com, Leafly. 9 Jan. 2018. Web. <<https://www.leafly.com/news/politics/california-bill-would-ease-erasure-of-cannabis-convictions>> 27 Apr. 2018.

<sup>35</sup> "Proposition 64 Data Summary Report." Judicial Council of California. courts.ca.gov. 14 Dec. 2017. Web. <<http://www.courts.ca.gov/documents/Prop64-Filings.pdf>> 14 Mar. 2018.

be less costly than a hearing, though determinations would still require more than a glance at someone's criminal record. Recall, for instance, that the current law in California allows up to six marijuana plants to be grown for home use. The prior law did not distinguish cultivation by volume, and the growth of any number of plants was covered by a single felony charge. In order to find out how many plants someone charged with cultivation of marijuana was growing, it would be necessary to scour police records.

This expansive measure is likely to encounter some resistance, as its opponents would likely fear it would unfairly advantage those who pled to marijuana crimes in exchange for dismissal of other charges. Even so, proponents could reasonably argue that the harm of such a measure would be outweighed by its vastly increased efficacy at providing a remedy for those burdened with marijuana convictions on their records. Moreover, many counties aren't waiting for the legislature: San Francisco and San Diego prosecutors have already begun throwing out past marijuana convictions en masse.<sup>36</sup> Other counties may follow suit if the legislature provides no solution.

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## 3.2

### OREGON

Oregon updated its law on expungement in 2015 to help those charged with marijuana crimes clear their convictions. The update leaves the state's basic process for expunction largely unchanged:

<sup>36</sup> Parvani, Sarah and Rong-Gong Lin II and Cindy Chang. "San Francisco will wipe out thousands of marijuana crimes dating to 1975." *Latimes.com, The Los Angeles Times*. 31 Jan. 2018. Web. <<http://www.latimes.com/local/lanow/la-me-san-francisco-marijuana-20180131-story.html>> 05 Feb. 2018; Rice, Travis. "San Diego forgiving thousands of marijuana convictions." <<https://www.10news.com/news/san-diego-forgiving-thousands-of-marijuana-convictions>> 06 Mar. 2018.



1. The petitioner must have complied with the court's judgment;
2. The conviction is not a Class A or B felony, or a traffic crime;
3. Three years must have passed since the date of conviction;
4. The petitioner does not have any pending criminal charges; and
5. The petitioner has no other convictions (aside from traffic crimes) within the past ten years.

Arrest records can also be set aside through a vastly similar procedure. The only difference is that the petitioner must also be clear of new arrests in the same three-year period.<sup>37</sup>

While this process is stringent, the 2015 legislation has made expungement slightly more attainable for marijuana crimes. First, when considering if a crime is eligible for expunction, courts are directed to consider the crimes as if they occurred after 2013. If the conduct would no longer be a crime at all, it is considered a Class C Misdemeanor.<sup>38</sup> This is not done for the purpose of reclassifying these convictions as their modern counterparts; rather, this process simply lowers the bar for total expungement. It allows some higher-class felonies that would not normally be eligible to be considered for expunction, and indicates to courts a legislative preference for the expunction of other marijuana crimes. This process allows almost all marijuana crimes to be eligible for expunction. But sale or cultivation in a school zone and sale to a minor remain ineligible even under this lower standard.

Additionally, a separate provision was added to lower the wait period from three years to one for those who were convicted of marijuana crimes when they were under 21.<sup>39</sup> Finally, Oregon empowered courts to, at their discretion, enter judgment for Class B Felony possession of marijuana as a Class A Misdemeanor, provided the defendant successfully completes a probationary sentence.<sup>40</sup>

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<sup>37</sup> OR SB 15-364

<sup>38</sup> OR SB 16-1598

<sup>39</sup> OR SB 15-844

<sup>40</sup> OR SB 15-364

## ANALYSIS

Oregon's forgiveness remedies are mostly limited to expungement of convictions and arrest records. Its expungement regime is fairly broad in terms of the kind of conduct it is willing to consider. However, the requirement that the petitioner have no convictions within ten years dramatically limits the number of people who would be eligible for the process. It includes convictions arising out of the same set of circumstances, as well as other convictions already set aside. This effectively increases the wait time to ten years from the most recent offense for anyone who was convicted of more than one offense within a decade of their petition. A person with two possession charges, even minor ones, would have to wait ten years before they could get them set aside.

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*... the requirement that the petitioner have no convictions within ten years dramatically limits the number of people who would be eligible for the process.*

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Oregon's updated expungement method also continues to endorse "school zone" laws. While sale to minors is reasonably excluded from expungement (and remains a felony in most states where marijuana is legal today, due to concerns about marijuana's effects on the developing brain), the exclusion of these school zone crimes may warrant more debate. Oregon's school zone laws include any area within 1,000 feet of a school, regardless of whether the offender simply happened to live in that area or was pulled over near a school during a traffic stop.<sup>41</sup>

Oregon does provide a fairly narrow pre-adjudication abatement remedy in the form of a safety valve for Class B Felony possession of marijuana. This crime formerly carried a ten-

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<sup>41</sup> O.R.S. § 475.904

year sentence, so those awaiting judgment would surely find it a welcome change.<sup>42</sup> But like expungement, this appears to be an intentionally limited remedy.

Ultimately, the change in Oregon’s forgiveness regime is extremely conservative. It is unlikely to have much impact on those with previous marijuana convictions. The Oregon Judicial Department reported a rise of only 65 more successful applicants the year after the measure’s passage, bringing the overall number to 453 from 388.<sup>43</sup>

### 3.3

## COLORADO

Colorado created a special measure to reclassify felony drug offenses to a Class 1 Misdemeanor (the highest level misdemeanor in CO) in 2013. It only applies to felony possession charges, and there’s a two-time limit on the number of reclassifications granted. However, the process is straightforward and requires only that the petitioner complete their original sentence. No wait period is required; reclassification can occur immediately after an offender’s sentence is served.<sup>44</sup>

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*Colorado recently enacted legislation that allows those convicted of low-level possession crimes that would not be illegal under the present law to have those convictions sealed.*

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<sup>42</sup> O.R.S. § 475.864; O.R.S. § 161.605. Possession of one ounce or more of marijuana was a Class B Felony.

<sup>43</sup> Quinton, Sophia and Stateline. “In these states, past marijuana crimes can go away.” pewtrusts.org, The Pew Charitable Trusts. Web. <<http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/11/20/in-these-states-past-marijuana-crimes-can-go-away>> Mar. 10 2018.

<sup>44</sup> CO SB 13-250

Separately, Colorado recently enacted legislation that allows those convicted of low-level possession crimes that would not be illegal under the present law to have those convictions sealed.<sup>45</sup> As with the reclassification law, there is no waiting period for these petitions.<sup>46</sup>

While Colorado did not specifically provide for abatement for those previously convicted of marijuana crimes, existing law allows defendants to apply for post-conviction relief when “there has been significant change in the law, applied to the applicant’s conviction or sentence, allowing in the interests of justice retroactive application of the changed legal standard.”<sup>47</sup> The question of abatement prior to adjudication appears to have been settled by a 2014 Court of Appeals case, which threw out a conviction for a woman who had been found guilty of possession of less than one ounce of marijuana at trial and was awaiting appeal.<sup>48</sup>

## ANALYSIS

Colorado takes a moderate approach on providing forgiveness remedies for past marijuana crimes. No extraordinary measures are taken on abatement, as the state had a fairly robust structure for resentencing already in place before legalization.

Whereas Oregon’s expungement remedies were broad in scope but strict in their requirements, Colorado’s expunction and redesignation regime is specific about what it will consider but fairly loose in what it demands. Its earliest law in this area focused exclusively on felony possession crimes, with a bill that explicitly embraced the goal of reducing “the significant negative consequences of that felony conviction.”<sup>49</sup> It’s worth noting that this law applies just as well to felony possession charges received under the current law as the previous one—the main limitation is that it can only be used twice.<sup>50</sup> While a court hearing is required, the only role of the court is to confirm that the petitioner fully complied with their sentence before applying.

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<sup>45</sup> CO HB 17-1266

<sup>46</sup> CO HB 17-1266

<sup>47</sup> C.R.S. 18-1-410(1)(f)(I) (2013)

<sup>48</sup> Colorado v. Russel 396 P.3d 71 (2014)

<sup>49</sup> CO SB 13-250

<sup>50</sup> Ibid.

The follow-up legislation to allow expungement for low-level possession crimes that are now fully legal is a reasonable, uncontroversial measure that is unlikely to have a large impact. Colorado decriminalized possession of one ounce or less of marijuana in 1975, and possession of two ounces or more remains a misdemeanor.<sup>51</sup> This leaves misdemeanor crimes in the 1-2 ounce range eligible for the program. Interestingly, the combination of these two measures creates a two-to-eight ounce gap of misdemeanor possession crimes for which there is no forgiveness remedy.<sup>52</sup> Possession in this range remains a misdemeanor post-legalization, so the lack of a remedy in this range is unsurprising.

Colorado's biggest blind spot in its expunction regime is undoubtedly cultivation. Cultivation of up to six marijuana plants is now fully legal, but was previously a felony.<sup>53</sup> While those serving time for growing marijuana could be eligible for resentencing, no method exists for them to escape a felony record and its disastrous effects.

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<sup>51</sup> MacCoun, Robert and Peter Reuter. *Drug War Heresies: Learning from Other Vices, Times, and Places*. Cambridge University Press, 2001. 46; C.R.S.A. § 18-18-406 (2018).

<sup>52</sup> C.R.S.A. § 18-18-406 (2018); C.R.S.A. § 18-18-406 (2009). Possession in this range has been downgraded from a class 1 misdemeanor to a class 2, a relatively small change.

<sup>53</sup> CO SB 13-250; C.R.S.A. § 18-18-406 (2009).

## PART 4

# CONCLUSION

States are still exploring new forgiveness remedies for old marijuana charges, and they are far from reaching a consensus on how past cannabis crimes should be handled.

Nonetheless, interest is clearly growing in methods to mend those marred by the war on drugs. As the results of measures taken in various states begin to bear fruit, policymakers rethinking pot prohibition should be able to build a better road map for implementing forgiveness remedies for past marijuana crimes.

# ABOUT THE AUTHOR

**James Craven** is a Senior Fellow who writes about criminal justice and drug policy issues on behalf of Reason Foundation. His work includes a policy brief and presentation on driver's license suspension reform in Michigan, research on occupational licenses in Tennessee, and task force participation assessing mandatory minimum sentences in North Carolina. Craven is committed to helping states achieve cost-efficient solutions that maximize opportunity for their citizens.

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