

To: Transition Team for Governor-elect Lamont and Lt. Governor-elect Bysiewicz
From: Working Group on Marijuana Legalization, Criminal Justice Policy Committee
Re: Legalization of Marijuana in Connecticut
Date: December 31, 2018

This memo considers implementation of the Governor-elect's policy goals with respect to legalization of marijuana. The Governor-elect's statement on Criminal Justice Reform provides that he will:

Legalize marijuana and remedy the harms caused by discriminatory criminalization. The war on drugs has been a failure, and its costs have fallen particularly hard on Connecticut's people of color. In my first year in office, I will not only follow neighboring states in responsibly regulating marijuana – I will also right historical wrongs by expunging non-violent marijuana convictions and ensuring communities victimized by criminalization receive their fair share of legalization's benefits, like new tax revenue and distributor licenses.

I. BACKGROUND

Adult recreational use of marijuana has been legalized in ten states and the District of Columbia.¹ In 2011, Connecticut decriminalized possession of less than one-half ounce of marijuana (possession of this amount is punishable now by only a fine).² Connecticut legalized medical marijuana in 2012.³ Currently in Connecticut, possession of one-half ounce or more of marijuana, like possession of other controlled substances, is punishable as a Class A misdemeanor.⁴ Sale of marijuana is a felony and punishable by up to seven years imprisonment.⁵ Nationally, nearly two-thirds of American voters support legalizing marijuana.⁶ A Quinnipiac Poll from August 2018 found that 59 percent of Connecticut voters support allowing adults to legally possess small amounts of marijuana for personal use.⁷

II. LEGALIZATION IN CONNECTICUT

The benefits of legalization of marijuana include: (1) reducing state spending on marijuana-related arrests, prosecutions, and punishment; (2) preventing people from facing barriers to jobs, licenses, and housing based on criminal records relating to marijuana; (3) reducing opioid-related harms (as people choose marijuana as a lower-risk way to manage pain);

¹ Colorado and Washington were the first states to legalize adult use in 2012. Alaska, Oregon, and Washington DC followed in 2014. In 2016, voters approved ballot initiatives in California, Massachusetts, Maine, and Nevada. Vermont and Michigan legalized in 2018. See Drug Policy Alliance, *From Prohibition to Progress: A Status Report on Marijuana Legalization* (January 2018) [hereinafter *Prohibition to Progress*], http://www.drugpolicy.org/sites/default/files/dpa_marijuana_legalization_report_feb14_2018_0.pdf.

² See Public Act 11-71 (codified at Conn. Gen. Stat. § 21a-279a).

³ See Public Act 12-55 (codified at Conn. Gen. Stat. § 21a-246 *et. seq.*).

⁴ Conn. Gen. Stat. § 21a-279(a)(1).

⁵ *Id.* § 21a-277(b).

⁶ Quinnipiac University Poll (April 26, 2018), https://poll.qu.edu/images/polling/us/us04262018_ufcq23.pdf/ (finding support at 63%); *Prohibition to Progress*, *supra*, at 37 (finding 64% support legalization)

⁷ Quinnipiac University Poll (August 23, 2018), https://poll.qu.edu/images/polling/ct/ct08232018_clup29.pdf/.

(4) raising tax revenue that can be devoted for social good; and (5) creating jobs in the legal marijuana industry. Legalization also raises potential concerns, and a decision to legalize should be accompanied by efforts to promote road safety,⁸ avoid accidental exposure to marijuana, support addiction treatment services, and prevent drug use by youth.

This Committee has not had sufficient time to develop the details of a comprehensive regulatory scheme to govern legalization. Different models exist nationwide and should be carefully studied.⁹ But regardless of these details, several provisions are critical to include in any legislation legalizing marijuana. First, it is essential that tax revenue be targeted at assisting communities disproportionately affected by past federal and state drug policies and that distributor licenses be accessible to these communities. Second, legalization should extend to community supervision systems so that people are not incarcerated for use of marijuana. Third, legislation should provide for the automatic erasure of marijuana convictions, without the need for people with such convictions to petition individually for relief from the courts. We address these issues in more detail below.

A. Tax Revenue and Distributor Licenses

The benefits of legalization—including tax revenue and distributor licenses—should be targeted at communities that have been disproportionately affected by past policies relating to drug arrests, prosecutions, and incarceration.¹⁰ The move to legalize will occur only once, and it provides a unique moment to work to remedy past harms. Provisions in several states provide useful models:

- Pursuant to Proposition 64, which legalized marijuana in **California** in 2016, a portion of marijuana tax revenues is distributed to a community reinvestment grants program to be allocated to “communities disproportionately affected by past federal and state drug policies.”¹¹ The grants “support job placement, mental health treatment, substance use disorder treatment, system navigation services, legal services to address barriers to reentry, and linkages to medical care.” In the first year, \$10 million was allocated to the fund, and this amount increases by \$10 million each year up to \$50 million annually.¹² In

⁸ Efforts to promote road safety should include: (1) a robust public awareness campaign to inform people that it is not safe to drive after using marijuana; (2) investigating and adopting accurate methods for detecting whether drivers are under the influence; and (3) enacting legislation that prohibits the use of marijuana in a vehicle that is being operated on a public roadway.

⁹ For a helpful chart outlining the different schemes in place nationally, see Assessment of the Potential Impact of Regulated Marijuana in New York State, App. C (July 2018),

https://www.health.ny.gov/regulations/regulated_marijuana/docs/marijuana_legalization_impact_assessment.pdf

¹⁰ See *From Prohibition to Progress*, supra, at 7 tbl. 1 (describing the allocation of tax revenue in the different states that have legalized).

¹¹ Cal. Rev. & Tax. Code § 34019(d); Proposition 64, <https://vig.cdn.sos.ca.gov/2016/general/en/pdf/text-proposed-laws.pdf#prop64>. A summary of Proposition 64 by the Attorney General’s office is available here: <https://vig.cdn.sos.ca.gov/2016/general/en/pdf/prop64-title-sum-analysis.pdf>.

¹² In addition to these funds, the following amounts are allocated: \$2 million annually to study of the risks and benefits of medical marijuana; \$10 million annually for 10 years to evaluate the impact of the measure; \$3 million annually for five years to create and adopt methods to determine if someone is driving while impaired. All remaining revenues are allocated as follows: 60% for youth programs (including substance abuse education, prevention, and treatment); 20% to clean up and prevent environmental damage resulting from the illegal growing of

2018, California passed legislation permitting local jurisdictions to apply for grants to support “local equity programs,” which focus on “inclusion and support of individuals and communities in California’s cannabis industry who are linked to populations or neighborhoods that were negatively or disproportionately impacted by cannabis criminalization.” The programs may help individuals secure business locations and capital investments, assist with regulatory compliance, pay or waive licensing and permitting fees, and help in “recruitment, training, and retention of a qualified and diverse workforce, including transitional workers.”¹³

- In **Massachusetts**, under legislation enacted in 2017 following the passage of the state’s ballot initiative legalizing marijuana, a share of tax revenues from marijuana sales will be allocated to “programming for restorative justice, jail diversion, workforce development, industry specific technical assistance, and mentoring services for economically-disadvantaged persons in communities disproportionately impacted by high rates of arrest and incarceration for marijuana offenses.” The legislation also requires the Cannabis Control Commission to “prioritize review and licensing decisions for applicants seeking retail, manufacturing, or cultivation licenses who are able to demonstrate experience in—or business practices that promote—economic empowerment in communities disproportionately impacted by high rates of arrest and incarceration for offenses under state and federal laws, including the Controlled Substances Act.”¹⁴

B. Parole and Probation Violations Based on Marijuana Use

The planning process to legalize recreational marijuana should address the critical area of community supervision. All across the state, people on community supervision—including individuals on bail release, probation, and parole—are subject to regular testing for marijuana use. In this context, a positive test for marijuana can violate a person’s bail conditions and lead to pretrial detention. Similarly, probation and parole officers can cite a positive test in a revocation petition, creating pathways for incarceration based on a person’s addiction.

Other jurisdictions examining how to equitably effectuate marijuana legalization are considering issues related to community supervision.¹⁵ On October 16, 2018, five former Commissioners of New York City Probation gave detailed testimony to the New York State Assembly on the implications of marijuana legalization for the probation and parole populations. In their testimony, these former heads of probation were strongly in favor of extending legalization to systems of community supervision. They wrote: “Under a legal regime in which marijuana consumption will no longer be a criminal act, we would urge you to codify protections for those under community supervision, to prevent needless violations and incarceration based

marijuana; 20 % for programs designed to reduce driving under the influence and a grant program designed to reduce any potential negative impacts on public health or safety resulting from the measure. *Id.*

¹³ SB1294 (Cal. 2018), https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1294.

Prior to this legislation, cities including Oakland, San Francisco, Sacramento, and Los Angeles had already started such programs.

¹⁴ H.3818 (Mass. 2017) (codified at Mass. Gen. Laws ch. 94G § 14(b)(v)), <https://malegislature.gov/Bills/190/H3818>.

¹⁵ Washington, for example, stopped testing parolees for marijuana use after legalization. *See* https://www.oregonlive.com/marijuana/index.ssf/2014/05/marijuana_news_parolees_in_was.html

on actions that would be legal for a member of the general public in our state.”¹⁶ The former commissioners stressed the importance of upfront codification to prevent uneven (and unequal) responses to marijuana legalization within and across probation and parole departments.

The effort to legalize recreational marijuana in Connecticut should extend to community supervision systems for the following reasons:

- *The Scale and Disparate Impact of Community Supervision:* Community supervision rates have skyrocketed nationally over the last several decades, with racial minorities disproportionately impacted by these systems. According to Pew, for example, “community corrections is marked by considerable growth and scale, disproportionate representation of men and people of color, and a majority of people who committed non-violent offenses.”¹⁷ In Connecticut, the community supervision population is more than twice the size of the custodial population, with 1 in 63 adults under either probation or parole supervision.¹⁸
- *Probation and Parole Violation Policies Feed Mass Incarceration:* Violations of probation are a leading cause – if not, *the leading cause*, of incarceration in Connecticut.¹⁹ Violations of parole are also a significant and persistent driver of our incarceration rates, despite ongoing efforts to reform Connecticut’s parole revocation system.²⁰
- *Disconnect between Marijuana Testing and Public Safety:* Although probation and parole offices routinely test people for marijuana, there is “no compelling evidence that marijuana use threatens public safety.”²¹ Instead, research indicates that “drug testing as a component of community supervision increases the likelihood of incarceration for violations, but does not reduce criminal behavior.”²²
- *Racial Disparities in Marijuana Enforcement:* Although marijuana use is roughly equivalent between Whites and Blacks in the United States, Blacks have been much more likely to get arrested for marijuana use. According to a 2013 report, for example, Blacks in Connecticut were 3.3 times more likely than Whites to be arrested for marijuana use.²³

¹⁶ Testimony of Vincent N. Schiraldi, on behalf of five former Commissioners of New York City Probation, before the New York State Assembly Standing Committees on Codes, Health, Governmental Operations, and Alcoholism and Drug Abuse (October 2018),

<https://thecrimereport.org/wp-content/uploads/2018/10/SCHJIRALDI-Marijuana-testimony-final-10.15.18.pdf>.

¹⁷ Pew Charitable Trusts, *Probation and Parole Systems Marked by High Stakes, Missed Opportunities*, 1 (Sept. 2018), <https://www.pewtrusts.org/research-and-analysis/issue-briefs/2018/09/probation-and-parole-systems-marked-by-high-stakes-missed-opportunities>.

¹⁸ *Id.* at 6.

¹⁹ Office of Policy & Mgmt., *Total Population by Controlling Offense March 12, 2015*, ST. CONN. (2015), http://www.ct.gov/opm/lib/opm/cjppd/cjabout/mainnav/total_pop_by_controlling_offense_20150312.pdf.

²⁰ See, e.g., Josh Kovner, *Malloy Seeks to Stem Tide of Parolees Returning to Prison on Rule Violations*, Hartford Courant, 4/3/2016; https://www.ct.gov/opm/lib/opm/cjppd/cjcjpac/20151030_cjpac_specialparole_presentation.pdf.

²¹ Testimony of former Commissioners of Probation, *supra* note 16, at 5.

²² *Id.* at 6 (citing studies).

²³ ACLU, *The War on Marijuana in Black and White*, Appx. B, 141 (2013).

- *Treating Addiction as a Public Health Issue:* Governor-elect Lamont has made clear that addiction is a “disease, not a choice, and should be treated as the public health crisis it is.”²⁴ His position comports with a recent report by the Surgeon General that emphasized: “addictions were once viewed largely as a moral failing or character flaw, but are now understood to be chronic illnesses characterized by clinically significant impairments in health, social function, and voluntary control over substance use.”²⁵

C. Erasure of Marijuana Convictions

Any legislation legalizing marijuana in Connecticut should include provisions relating to erasure of marijuana convictions. Under current Connecticut law, an individual with a conviction for an offense that is later decriminalized can petition the court for an order of erasure.²⁶ Currently, individuals convicted of marijuana possession can obtain an erasure order if they establish that the offense involved possession of less than a half-ounce of marijuana (as this conduct was decriminalized in 2011).²⁷ However, the burden is on the individual to file the petition in court and establish an adequate factual record showing that the conduct of conviction has been decriminalized.²⁸ Although courts have not tracked the number of petitions received seeking this form of relief, judges and lawyers have reported seeing few petitions filed.

In our view, should marijuana be legalized, the burden should be on the state to erase the prior marijuana convictions rather than on individuals to petition for relief. Ultimately, providing for automatic erasure of these records by the state will save time and resources for courts as well as individuals with records. Automatic erasure ensures that everyone eligible for relief obtains it—thus promoting the economy by removing barriers people with records face in accessing jobs, licenses, and housing. Connecticut law already provides for the automatic erasure of police and court records when a charge has been dismissed or nolle, or a defendant has been acquitted after trial.²⁹ If Connecticut legalizes marijuana, the state should similarly provide for automatic erasure of marijuana convictions. Given that the state possesses and disseminates information relating to criminal convictions, the state should undertake the effort of erasure when the conduct underlying the conviction is no longer criminal.

Legislation providing for automatic erasure needs to address which types of marijuana-related convictions should be erased.³⁰ There is some complexity to determining which prior convictions relate to marijuana because marijuana-related offenses are charged under statutory subsections that also cover various other drugs, and the substance involved is typically not

²⁴ ACLU Smart Justice, Connecticut Gubernatorial Candidate Questionnaire 1 (2017).

²⁵ U.S. Department of Health & Human Services, *Facing Addiction in America: The Surgeon General’s Report on Alcohol, Drugs, and Health* 2-1 (2016).

²⁶ Conn. Gen. Stat. § 54-142d. Such an order directs “all police and court records and records of the state’s or prosecuting attorney pertaining to such case to be physically destroyed.” *Id.*

²⁷ See *State v. Menditto*, 315 Conn. 861 (2015).

²⁸ *State v. Speilberg*, 323 Conn. 756 (2016). Because the statute of conviction covered possession of larger amounts of marijuana as well, petitioners must establish the quantity of marijuana involved in the offense.

²⁹ Conn. Gen. Stat. § 54-142a.

³⁰ Connecticut has separate offenses and/or penalties for possession, possession in a school zone, possession of drug paraphernalia, persistent offender for possession, and manufacturing/sale. See Conn. Gen. Stat. §§ 21a-279(b), 21-279(c), 21-277, 21a-267, 53a-40.

named in the charging document. Similarly, the records in the Judicial Branch’s database do not list the substance.

We suggest the following with respect to erasure of marijuana possession convictions: Prior to October 1, 2015, marijuana possession was charged under either Conn. Gen. Stat. § 21a-279(b) or § 21a-279(c), depending on the quantity of drugs involved. Although other substances could be charged under those subsections, the vast majority of offenses charged under those subsections involved marijuana. Confirming marijuana was involved in each case would be time consuming and in some instances impossible (if police reports or other records have been destroyed). Thus, as to those offenses, we suggest simply erasing them automatically. If these convictions were accompanied by conviction for possession of marijuana in a school zone (or other restricted area), those convictions can be erased as well.³¹ (Note: the erasure legislation would need to provide sufficient time for implementation and we anticipate some complexities involved with achieving automatic erasure of convictions prior to 1999 given the various databases involved).³²

Following legislation that took effect on October 1, 2015, possession of all types of drugs is charged under Conn. Gen. Stat. § 21a-279(a)(1) (simple possession) and § 21a-279(b) (possession in a school zone or other restricted area). To address erasure of these more recent offenses, we recommend that legislation require identification by the Judicial Branch of all convictions for violations of § 21a-279(a)(1) and § 21a-279(b). The State’s Attorney office would then have a period of time to review the cases and object to the erasure of those convictions that it can establish involved a substance other than marijuana. Those convictions for which there has been no objection made would be automatically erased. If there is an objection from the state’s attorney, the individual who is the subject of the record could file a petition with the court seeking erasure. In court, the burden would be on the prosecutor to establish that the conviction involved a substance other than marijuana.

There should also be a mechanism to address erasure of marijuana-related drug paraphernalia convictions. The statute of conviction, Conn. Gen. Stat. § 21a-267, covers all forms of drug paraphernalia—not just marijuana-related.³³ Whether automatic erasure of these convictions can be accomplished needs to be studied further.

The issue of erasure was not addressed upfront in jurisdictions that have legalized. In many of these jurisdictions, local or state officials are now undertaking efforts to assist in the erasure of records.³⁴ The California legislature passed a bill in August 2018 that requires the state Attorney General’s office to review records and “identify past convictions that are potentially eligible for recall or dismissal of sentence, dismissal and sealing, or redesignation.”³⁵

³¹ Prior to 2015 legislation, individuals convicted of possessing marijuana in a school zone had a mandatory two-year sentence imposed consecutive to their sentence for the underlying marijuana possession offense. See Conn. Gen. Stat. § 21a-279(d) (2014).

³² The Judicial Branch’s electronic database is complete back to 1999. We are investigating whether automatic erasure could be achieved for convictions before that date.

³³ “Drug paraphernalia” is defined in § 21a-240(20) and courts must consider factors set forth in § 21a-270.

³⁴ See, e.g., Andrew Kenney, *Denver Will Help Expunge Marijuana Convictions for 10,000-plus People*, Denver Post (Dec. 4, 2018).

³⁵ AB 1793 (Cal. 2018).

Should Connecticut move forward with legalization, the state should address the issue of erasure of prior convictions affirmatively in legislation.