

§10.8 *Petition to have a Marijuana or Concentrated Cannabis Offense Reduced or Dismissed*
H&S C §11361.8, Eff. 11-9-16

A person currently serving a sentence for a conviction of a marijuana or concentrated cannabis offense who would not have been guilty of an offense, or who would have been guilty of a lesser offense under Proposition 64, may petition for a recall or dismissal before the trial court that entered the judgment of conviction. (See, H&S §§11018. 11018.1, 11018.2 for the definitions of marijuana, marijuana product, and marijuana accessories.)

Determine the appropriate remedy by using the following table. (Note petitioner’s age at the date of the offense; the substance possessed; and quantity of the substance.)

Table 1. The Newly Enacted and Amended Prop. 64 Offenses

<i>New H&S Offense</i>	<i>Description</i>	<i>Punishment</i>
11357(a)(1), possession of marijuana or concentrated cannabis.	Age: Under 18. Substance & Quantity: Marijuana, 28.5 grams or less, or Concentrated cannabis 4 gr. or less.	1 st offense. Infraction. 4 hours drug education or counseling and up to 10 hours of community service within 60 days. 11357(a)(1)(A) 2d offense. Infraction. 6 hours drug education or counseling and up to 10 hours of community service within 90 days. (11357(a)(1)(B).)
11357(a)(2), same as 11357(a)(1).	Age: 18, 19 or 20. same as 11357(a)(1).	Infraction, \$100 fine max. (11357(a)(2).)
11357(b)(1), same as 11357(a)(1).	Age: Under 18. Substance & Quantity: Marijuana, over 28.5 grams, Concentrated cannabis, over 4 gr.	1 st offense. Infraction. 8 hours drug education or counseling and up to 40 hours of community service within 90 days. 2d offense. Infraction. 10 hours drug education or counseling and up to 60 hours of community service within 120 days. (11357(b)(1)(B).)
11357(b)(2), same as 11357(a)(1).	Age: 18 or older. Substance & Quantity: Marijuana, over 28.5 grams, Concentrated cannabis, over 4 gr.	Misdemeanor. 6 months maximum, \$500 fine maximum. (11357(b)(2).)
11357(c), possession upon the grounds or within a school, K 1-12.	Age: 18 or older. Substance & Quantity: Marijuana, 28.5 grams or less, or Concentrated cannabis 4 gr. or less.	1 st offense. Misdemeanor. \$250 fine. 2d offense. 10 days max., \$500 fine max. (11357(c)(1); (2).)
11357(d), possession upon the grounds or within a school, K 1-12.	Age: Under 18. Substance & Quantity: Marijuana, 28.5 grams or less, or Concentrated cannabis 4 gr. or less.	See 11357(b)(1) for punishment.
11358(a), cultivate, harvest, dry, or possess marijuana plants.	Age: Under 18. Substance & Quantity: Any number of plants.	See 11357(b)(1) for punishment.
11358(b), cultivate, etc., living plants.	Age: 18, 19 or 20. Substance & Quantity: 6 living marijuana plants or less.	Infraction. \$100 fine, max. (11358(b).) (See, H&S C§11362.2 for personal cultivation.)
11358(c), cultivate, etc., living plants.	Age: 18 or older. Substance & Quantity: More than 6 living marijuana plants	Misdemeanor. 6 months max., \$500 fine max. (11358(c).) See, H&S C§11362.2 for personal cultivation.
11358(d), cultivate, etc., living plants	11358(c), may be punished by 16-2-3 (h), if: ↓	

New H&S Offense	Description	Punishment
11358(d)	(1) Prior conviction for a <i>super strike</i> (Pen C §667(e)(2)(C)(iv), see Table 2, or 290 registrant. (2) Two or more prior 11358(c) convictions. (3) The offense resulted in: (A) Diversion of water. (Wat C §1052. (B) Discharge of waste in violation of Water Code §§13260, 13264, 13272, 13387 (this is the punishment for violations of §13375.). (C) Violation of Fish & Game §5650, 5652 depositing harmful materials... (D) Violation of Fish & Game §1602, notice of diversion of water. (E) Violation of Pen §374.8, deposit of hazardous substances. (F) Violation of Fish & Game §2080, possession, etc., endangered species; 3513, possession of migratory birds. (G) Intentionally or with gross negligence, cause environmental harm...	
11359(a), possession for sale of marijuana.	Age: Under 18. Substance & Quantity: Any quantity of marijuana.	See 11357(b)(1) for punishment.
11359(b), possession for sale of marijuana.	Age. 18 or older.	Misdemeanor. 6 months max., \$500 fine max.
11359(c), possession for sale of marijuana.	11359(b), may be punished by 16-2-3 (h), if: ↓ (1) Prior conviction for a <i>super strike</i> (Pen C §667(e)(2)(C)(iv), see Table 2, or 290 registrant. (2) Two or more prior 11359(b) convictions. (3) Knowing sale or attempt to sell to a person under the age of 18.	
11359(d), possession for sale of marijuana using a minor.	Age. 21 or older.	May be punished by 16-2-3 (h), if the offense involved the knowing hiring, employing or using a person 20 years of age or younger in unlawfully cultivating, transporting, carrying, selling, offering to sell, giving away, preparing for sale, or peddling marijuana. (11359(d).)
11360(a)(1), transport for sale, sale, etc.	Age: Under 18.	See 11357(b)(1) for punishment.
11360(a)(2), transport for sale, sale, etc.	Age. 18 or older.	Misdemeanor. 6 months max., \$500 fine max.
11360(a)(3), transport for sale, sale, etc.	11360(a)(2), may be punished by 2-3-4 (h), if: ↓ (A) Prior conviction for a <i>super strike</i> ((Pen C §667(e)(2)(C)(iv), see Table 2, or 290 registrant. (B) Two or more prior convictions under 11360(a)(2). (C) Knowing sale or attempt to sell to a person under the age of 18. (D) More than 28.5 grams of marijuana or more than 4 grams of concentrated cannabis.	
11360b), give away, ... transport for sale, 28.5 grams or less of marijuana.	Any age. Doesn't apply to concentrated cannabis.	Infraction, \$100 fine max. (11360b).)
11362.1, Legal, subject to §§11362.2, 11362.3, 11362.4, 11362.45	Age. 21 or older. It is legal to: (1) Possess, process, transport, purchase, obtain, or give away to persons 21 years of age or older without any compensation whatsoever, not more than 28.5 grams of marijuana not in the form of concentrated cannabis, or (2) not more than eight grams of marijuana in the form of concentrated cannabis, including as contained in marijuana products;	

New H&S Offense	Description	Punishment
	(3) Possess, plant, cultivate, harvest, dry, or process not more than six living marijuana plants and possess the marijuana produced by the plants; (4) Smoke or ingest marijuana or marijuana products; and (5) Possess, transport, purchase, obtain, use, manufacture, or give away marijuana accessories to persons 21 years of age or older without any compensation whatsoever.	
11362.2(a), <i>personal cultivation</i> of marijuana.	Any age. Age: Under 18. Restrictions on <i>personal</i> cultivation, H&S C §11362.2(a): (1) A person shall plant, cultivate, harvest, dry, or process plants in accordance with local ordinances, if any, adopted in accordance with subdivision (b). (2) The living plants and any marijuana produced by the plants in excess of 28.5 grams are kept within the person's private residence, or upon the grounds of that private residence (e.g., in an outdoor garden area), are in a locked space, and are not visible by normal unaided vision from a public place. (3) Not more than six living plants may be planted, cultivated, harvested, dried, or processed within a single private residence, or upon the grounds of that private residence, at one time.	Infraction. \$250 fine max. (H&S §11362.4(e).) H&S C §11362.4(f), states the punishment for a violation of a restriction on <i>personal cultivation</i> by a person less than 18, is under 11358(a). 11358(a), states the punishment is under 11357(b).
11362.3(a)(1), smoking marijuana in public, except in accordance with B&P §26200.	Any age. Age: Under 18. A local jurisdiction may allow for the smoking, vaporizing, and ingesting of marijuana or marijuana products on the premises of a retailer or microbusiness licensed under this division if: (1) Access to the area where marijuana consumption is allowed is restricted to persons 21 years of age and older; (2) Marijuana consumption is not visible from any public place or non-age restricted area; and (3) Sale or consumption of alcohol or tobacco is not allowed on the premises. (B&P C §26200(d))	Infraction. \$100 fine max. (11362.4(a);) 4 hours of drug ed. or counseling and up to 10 hours of community service, over a period not to exceed 60 days.
11362.3(a)(2), smoking marijuana where prohibited.	Any age. Age: Under 18.	Infraction. \$250 fine max. (11362.4(b).) 4 hours of drug ed. or counseling and up to 20 hours of community service, over a period not to exceed 90 days.(11362.4(b).)
11362.3(a)(3), Smoking marijuana or marijuana products within 1,000 feet of a school, day care center, or youth center while children are present ... except in or upon the grounds of a private residence or in accordance with Section 26200 of... and only if such smoking is not detectable by others on the grounds of such a school, day care center, or youth center while children are present.		See, 11362.3(a)(2) for age and penalty.
11362.3(a)(4), (4) Possess an open container or open package of marijuana or marijuana products while driving, operating, or riding in the passenger seat or compartment of a motor vehicle, boat, vessel, aircraft, or other vehicle used for transportation.		See, 11362.3(a)(2) for age and penalty.
11362.3(a)(5), possess, smoke or ingest marijuana. in or upon the grounds	Age: 18 or older. Age: Under 18.	1 st offense. Misdemeanor. \$250 fine max. 2 ^d offense. 10 days, \$500 max. (11362.4(c). refers to 11357(c) & (d).)

<i>New H&S Offense</i>	<i>Description</i>	<i>Punishment</i>
of a school, day care center, or youth center while children are present.		1 st offense. Infraction. 8 hours drug education or counseling and up to 40 hours of community service within 90 days. 2d offense. 10 hours drug education or counseling and up to 60 hours of community service within 120 days.
11362.3(a)(6), manufacture concentrated cannabis using a volatile solvent, unless done in accordance with a proper license.		3-5-7 (h), \$50,000 fine max. 11362.4(d) refers to 11379.6 for punishment.
11362.45, Nothing in §11362.1 shall be construed, or interpreted to amend, repeal, affect, restrict, or preempt certain laws.:	(a) Driving under the influence. (b) Sale, administering, furnishing, or giving away of marijuana, marijuana products, or marijuana accessories, or the offering to ... to a person younger than 21 years of age. (c) Person younger than 21 years of age from engaging in any of the actions or conduct otherwise permitted under Section 11362.1. (d) Smoking or ingesting marijuana or marijuana products on the grounds of, or within, any facility or institution under the jurisdiction of the Department of Corrections, etc. (e) Negligence or professional malpractice to undertake any task while impaired from smoking or ingesting marijuana or marijuana products. (f) The rights and obligations of public and private employers to maintain a drug and alcohol free workplace... (g) The ability of a state or local government agency to prohibit or restrict any of the actions or conduct otherwise permitted under §11362.1 within a building owned, leased, or occupied by the state or local government agency. (h) The ability of an individual or private entity to prohibit or restrict any of the actions or conduct otherwise permitted under Section 11362.1 on the individual's or entity's privately owned property. (i) Laws pertaining to the Compassionate Use Act of 1996.	

H&S §11368(b) "...the court shall presume the petitioner satisfies the criteria in subdivision (a) unless the party opposing the petition proves by clear and convincing evidence that the petitioner does not satisfy the criteria. If the petitioner satisfies the criteria in subdivision (a), the court shall grant the petition to recall the sentence or dismiss the sentence because it is legally invalid unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety."

H&S §11368(b)(1). In determining whether petitioner poses an unreasonable risk of danger to public safety, consider the criteria set out in Pen C §1170.118(b):

- (1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes.
- (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated.
- (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety.

H&S §11368(b)(2). "An unreasonable risk ... means, by clear and convincing evidence, that the petitioner will commit a new violent felony as set out in Penal Code §667(e)(2)(C)(iv), i.e., "Super Strikes". (Pen C §290 registrants are not included in this part of Prop. 64.)

Table 2, Super Strikes

<i>Prior Conviction</i>	<i>Description</i>	<i>Authority §Sections</i>
	Any Serious or Violent Felony punishable in California by life imprisonment or death.	667(e)(2)(C)(iv)(VIII)
187	Murder or attempt. (Any homicide or attempt from 187 to 191.5	667(e)(2)(C)(iv)(IV)
191.5	Vehicular manslaughter while intoxicated or attempt.	667(e)(2)(C)(iv)(IV)

<i>Prior Conviction</i>	<i>Description</i>	<i>Authority §Sections</i>
207	Kidnap to / §261, 262, 264.1, 286, 288, 288a, or 289. (Kidnap, as defined in Pen C §207 does not include attempts to commit a defined sex offense.)	667(e)(2)C)(iv)(I)
209	Kidnap to violate §261, 262, 264.1, 286, 288, 288a, or 289.	667(e)(2)C)(iv)(I)
220	Assault to violate 261, 262, 264.1, 286, 288, 288a, or 289. (Pen C § 220 specifies <i>rape</i> as a designated offense. It does not use a section number, 261 (rape) or 262 (spousal rape).	667(e)(2)C)(iv)(I)
245(d)(3)	Assault with a machine gun on a peace officer or firefighter	667(e)(2)C)(iv)(VI)
261(a)(2)	Rape by force.	667(e)(2)C)(iv)(I)
261(a)(6)	Rape by threat to retaliate.	667(e)(2)C)(iv)(I)
262(a)(2)	Spousal rape by force.	667(e)(2)C)(iv)(I)
262(a)(4)	Spousal rape by threat to retaliate.	667(e)(2)C)(iv)(I)
264.1	Rape in concert by force or violence	667(e)(2)C)(iv)(I)
269	Aggravated sexual assault of a child.	667(e)(2)C)(iv)(I)
286(c)(1)	Sodomy with child <14 + 10 years age differential.	667(e)(2)C)(iv)(II)
286(c)(2)(A)	Sodomy by force.	667(e)(2)C)(iv)(I)
286(c)(2)(B)	Sodomy by force upon child <14	667(e)(2)C)(iv)(I)
286(c)(2)(C)	Sodomy by force upon child >14	667(e)(2)C)(iv)(I)
286(c)(3)	Sodomy with threat to retaliate	667(e)(2)C)(iv)(I)
286(d)(1)	Sodomy in concert by force...., threat to retaliate.	667(e)(2)C)(iv)(I)
286(d)(2)	Sodomy in concert by force upon child <14	667(e)(2)C)(iv)(I)
286(d)(3)	Sodomy in concert by force upon child >14	667(e)(2)C)(iv)(I)
288(a)	Lewd act upon a child under the age of 14	667(e)(2)C)(iv)(III)
288(b)(1)	Lewd act upon a child by force...	667(e)(2)C)(iv)(I)
288(b)(2)	Lewd act by caretaker by force...	667(e)(2)C)(iv)(I)
288a(c)(1)	Oral copulation upon a child <14 + 10 years...	667(e)(2)C)(iv)(III)
288a(c)(2)(A)	Oral copulation by force	667(e)(2)C)(iv)(I)
288a(c)(2)(B)	Oral copulation by force... force upon child <14.	667(e)(2)C)(iv)(I)
288a(c)(2)	Oral copulation by force... force upon child >14.	667(e)(2)C)(iv)(I)
288a(d)	Oral copulation in concert by force.	667(e)(2)C)(iv)(I)
288.5(a)	Continuous sexual abuse of a child with force...	667(e)(2)C)(iv)(I)
289(a)(1)(A)	Sexual penetration by force, etc.	667(e)(2)C)(iv)(I)
289(a)(1)(B)	Sexual penetration upon a child <14 by force...	667(e)(2)C)(iv)(I)
289(a)(1)(C)	Sexual penetration upon a child >14 by force...	667(e)(2)C)(iv)(I)
289(a)(2)(C)	Sexual penetration by threat to retaliate.	667(e)(2)C)(iv)(I)
289(j)	Sexual penetration upon a child <14 + 10 years...	667(e)(2)C)(iv)(II)
653f	Solicitation to commit murder.	667(e)(2)C)(iv)(V)
664/191.5	Attempt vehicular manslaughter while intoxicated	667(e)(2)C)(iv)(IV)
664/187	Attempt murder	667(e)(2)C)(iv)(IV)
11418(a)(1)	Possession of a weapon of mass destruction	667(e)(2)C)(iv)(VII)

[CTS] A person who is serving a sentence and is resentenced pursuant to subdivision (b) shall be given credit for any time already served. (H&S §11361.8(c).)

[Parole or PRCS] A person who is serving a sentence and is resentenced pursuant to subdivision (b) shall be subject to supervision for one year following completion of his or her time in custody or shall be subject to whatever supervision time he or she would have otherwise been subject to after release, whichever is shorter, unless the court, in its discretion, as part of its resentencing order, releases the person from supervision. Such person is subject to parole supervision under Section 3000.08 of the Penal Code or post-release community supervision under subdivision (a) of Section 3451 of the Penal Code by the designated agency and the jurisdiction of the court in the county in which the offender is released or resides, or in which an alleged violation of supervision has occurred, for the purpose of hearing petitions. (H&S §11361.8(c).) [See, Pen C §§3000.08(d); (f)(2), (g), 3455(d); (f)(2), (g).]

Parole applies to those serving a term for a serious or violent felony, or a “3 strike” sentence, or is classified as an MDO or MDSO. (Pen C §3000.08(a).) Postrelease Community Supervision, (PRCS) applies to all others.

Application to Have Conviction Dismissed or Redesignated as a Misdemeanor or Infraction, Pen C §11361.8(e).

(e) A person who has completed his or her sentence for a conviction under Sections 11357, 11358, 11359, and 11360, ..., who would not have been guilty of an offense or who would have been guilty of a lesser offense under the ... Act ..., may file an application before the trial court that entered the judgment of conviction in his or her case to have the conviction dismissed and sealed because the prior conviction is now legally invalid or redesignated as a misdemeanor or infraction in accordance with Sections 11357, 11358, 11359, 11360, 11362.1, 11362.2, 11362.3, and 11362.4.... Use Table 1 to determine the current legality or punishment for the offense.

(f) The court shall presume the petitioner satisfies the criteria in subdivision (e) unless the party opposing the application proves by clear and convincing evidence that the petitioner does not satisfy the criteria in subdivision (e). Once the applicant satisfies the criteria in subdivision (e), the court shall redesignate the conviction as a misdemeanor or infraction or dismiss and seal the conviction as legally invalid as now established under the ... Act

(g) Unless requested by the applicant, no hearing is necessary to grant or deny an application filed under subdivision (e).

(h) Any felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor or infraction under subdivision (f) shall be considered a misdemeanor or infraction for all purposes. Any misdemeanor conviction that is recalled and resentenced under subdivision (b) or designated as an infraction under subdivision (f) shall be considered an infraction for all purposes.