# Decriminalization of Possession of Marijuana

## Executive Summary

Based upon a letter request[1] and two bills referred during the Regular Session of the 2017 General Assembly,[2] the Executive Committee of the Crime Commission authorized a study on decriminalizing possession of marijuana. Decriminalization, for purposes of this study, is defined as the removal of criminal penalties for possessing small amounts of marijuana for personal use; it is not the same as legalization.[3]

Staff identified four penalty structures during a review of the possession of marijuana laws for all 50 states, the District of Columbia, and the federal government, including the following:

- Criminal penalties (30 states and federal law);
- Legal recreational possession (9 states and D.C.);
- Civil or non-criminal penalties (6 states); and,
- Blended civil and criminal penalties (5 states).[4]

Staff found that a conviction for possession of marijuana can impact a person in a variety of ways, including the following: court costs and fees, driver's license revocation, difficulties obtaining or maintaining employment, security clearance implications, loss of federal higher education financial aid, struggles obtaining housing, immigration impediments, restrictions on purchasing and possessing firearms, and obtaining concealed handgun permits. Staff also noted that concerns have been raised over racial disparities in the criminal enforcement of marijuana laws in Virginia.[5]

Study findings were presented to the Crime Commission at the October meeting. Crime Commission members were provided with three policy options at the December meeting; however, no motions were made on any of the options.

**Policy Option 1:** Maintain the status quo.

Virginia currently punishes possession of marijuana as a criminal offense and authorizes incarceration for a violation of this law.[6] As such, an indigent defendant charged with this offense must be provided with court-appointed counsel, unless the potential jail sentence is waived.[7] Virginia law also includes a mechanism for first time drug offenders to have their criminal drug charge deferred and dismissed so that a conviction will not appear on their criminal record.[8]

Data demonstrated that males, young adults, and Blacks/African Americans are overrepresented in the total number of arrests for first and subsequent possession of marijuana as compared to their overall general population in Virginia. Data further revealed that the majority of possession of marijuana charges are filed and concluded in the general district courts. The vast majority of these charges are for first offense possession of marijuana and there appears to be a large attrition rate between the total first offense charges filed and total convictions obtained. Staff also found that an extremely low number of offenders serve jail time solely for possession of marijuana.

**Policy Option 2:** Remove the jail sentence as punishment for possession of marijuana.

Virginia law includes criminal offenses which authorize a fine but not incarceration.[9] The jail sentence could be removed as a punishment under Virginia's possession of marijuana statute; however, concerns have been raised that jail time is rarely imposed in current practice and that indigent defendants would be most impacted because they would no longer be entitled to court-appointed counsel.

**Policy Option 3:** Decriminalize possession of small amounts of personal use marijuana.

The Code of Virginia could be amended to decriminalize possession of small amounts of marijuana for personal use. Staff was unable to identify any specific effects other states experienced solely as the result of decriminalizing possession of personal use quantities of marijuana. Eleven states have decriminalized possession of marijuana in some manner using varying penalty structures, punishments, and quantity limits.[10] The laws of these eleven states could serve as models to guide policy decisions relating to decriminalization in Virginia. Any legislation that decriminalizes possession of marijuana should consider implications to current possession laws and enforcement practices, as well as other areas of the Code that may be impacted. Even if Virginia were to decriminalize possession of marijuana, such possession would remain a criminal offense under current federal law.[11]

## Background & Methodology

In November 2016, Senator Thomas K. Norment, Jr., sent a letter to the Crime Commission requesting that the agency study a potential change to the Code of Virginia in relation to the criminal penalties for possession of small amounts of marijuana. Additionally, during the Regular Session of the 2017 General Assembly, legislation was introduced by Senators L. Louise Lucas (Senate Bill 908) and Adam P. Ebbin (Senate Bill 1269) to decriminalize possession of marijuana in Virginia. Both of these bills

were referred to the Crime Commission by the Senate Courts of Justice Committee. Based on the letter request and the two bill referrals, the Executive Committee of the Crime Commission authorized a study on decriminalizing possession of small amounts of marijuana for personal use.

Decriminalization of marijuana for purposes of this study means the removal of criminal penalties for possessing small amounts of marijuana for personal use. Decriminalization does not mean legalization of marijuana. In jurisdictions that have decriminalized marijuana, possession of small quantities for personal use is punishable as a civil offense; however, marijuana remains a prohibited substance. Staff did not extensively examine other issues relating to marijuana as part of this study, such as legalization, medical usage, cannabidiol or THC-A oils, health effects, or industrial hemp. The Virginia Joint Commission on Health Care conducted a study on the medical use and health effects of cannabis during 2017.[12]

Virginia currently punishes possession of marijuana as a criminal offense and authorizes incarceration for a violation of this law.[13] As such, an indigent defendant charged with this offense must be provided with court-appointed counsel, unless the potential jail sentence is waived on the charge.[14] Staff reviewed possession of marijuana laws for all 50 states, the District of Columbia, and the federal government.[15] Staff identified four penalty structures, including the following:

- Criminal penalties (30 states and federal law);
- Legal recreational possession (9 states and D.C.);
- Civil or non-criminal penalties (6 states); and,
- Blended civil and criminal penalties (5 states).

It is important to note that current Virginia law also includes a mechanism for first time drug offenders to have their criminal drug charge deferred and dismissed so that a conviction will not appear on their criminal record.[16] If the court determines that sufficient evidence exists to find the offender guilty of the drug charge, the court may defer a finding of guilt and place the offender on probation under terms and conditions.[17] The terms commonly include drug testing, drug education and/or treatment, and community service.[18] If the offender is compliant with these terms, the court may dismiss the drug charge.[19] This process is commonly referred to as the first offender program.

Crime Commission staff conducted various activities during this study, including the following:

- Examined relevant literature and reports relating to decriminalization;
- Obtained and analyzed data regarding arrests, charges, and convictions for first and subsequent possession of marijuana;
- Reviewed possession of marijuana and related statutes under Virginia law;
- Researched the marijuana laws of the other 49 states, District of Columbia, and the federal government;
- Conducted informal surveys of prosecutors and criminal defense attorneys; and,
- Consulted with practitioners and subject-matter experts.

Staff also requested written comments from the public in relation to this study. Over 5,665 comments were received. Staff reviewed these comments and found the following:

- 68% (3,850 of 5,665) were directly related to decriminalization; and,
  - 3,743 supported decriminalization
  - 107 did not support decriminalization
- 32% (1,815 of 5,665) were duplicative or related to legalization, medical marijuana, or other topics.[20]

## Consequences of a Conviction for Possession of Marijuana

Staff found that a conviction for possession of marijuana can impact a defendant in a variety of ways. Decriminalization of marijuana has been proposed as a potential solution to mitigate these consequences,[21] which can include the following:

- Court Costs and Fees
- Driver's License Revocation
- Employment
- Security Clearance
- Higher Education Financial Aid
- Housing
- Immigration
- Federal Firearm Purchases and Sales
- Virginia Handgun Purchases and Transportation
- Virginia Concealed Handgun Permit

## Court Costs and Fees

Currently a conviction for possession of marijuana or entry into the first offender program results in a variety of court costs and fees.[22] Some of these costs and fees are mandatory while others are discretionary. For example, a defendant who was represented by court-appointed counsel and convicted of first offense possession of marijuana can expect to pay approximately $400 to $800 in costs and fees depending on whether probation was ordered.

## Driver's License Revocation

If a person is convicted of possession of marijuana, or if the court finds that the person possessed marijuana while operating a motor vehicle, the person's driver's license must be revoked for six months.[23] However, the court may grant that person a restricted license to operate a motor vehicle for certain purposes.[24] If a person enters the first offender program and was not operating a motor vehicle while in possession of marijuana, the court may impose additional community service in lieu of revoking that person's driver's license.[25]

## Employment

Staff was unable to determine specifically how a conviction for possession of marijuana affects employment. A person's employment or ability to obtain employment may be impacted as a result of a conviction for possession of marijuana; however, policies on drug use and criminal history vary by employer.[26] Additionally, based upon discussions with stakeholders, staff found that some employers will use private data mining companies to screen whether potential employees have had any prior contacts with the criminal justice system.

## Security Clearance

Illegal drug use or possession is a consideration when screening an individual for a security clearance.[27] Such use or possession is not an automatic disqualifier and depending on the clearance level or employer, can be mitigated by time, completion of a drug treatment program, or a demonstrated intent not to use drugs in the future.[28]

## Higher Education Financial Aid

A college student who was convicted of possession of a controlled substance for an offense that occurred while receiving any federal grant, loan or work assistance is ineligible to receive any federal grant, loan, or work assistance for 1 year for the first offense, 2 years after the second offense, and indefinitely after a third or subsequent offense.[29] A student whose federal aid has been suspended can regain eligibility by completing an approved drug rehabilitation program, passing two unannounced drug tests administered by an approved program, or having the conviction reversed, set aside, or rendered invalid.[30] A student's Virginia state financial aid is not impacted by a conviction for possession of marijuana.[31]

## Housing

A criminal conviction can serve as a basis for the denial of housing. The Fair Housing Act prohibits discrimination in the sale, rental, or financing of housing on the basis of race, color, religion, sex, disability, familial status, or national origin.[32] While the presence of a conviction on a person's criminal record is not a protected characteristic under this Act, in April 2016 the U.S. Department of Housing and Urban Development issued guidance which concluded that "arbitrary and overbroad criminal history-related bans are likely to lack a legally sufficient justification" if the application of the ban results in a discriminatory effect.[33]

## Immigration

The impact of a conviction for possession of marijuana to a non-United States citizen will depend on that person's status (green card, visa, student, refugee, undocumented, visa overstay, etc.), the person's prior criminal record, and whether the quantity of marijuana possessed was greater than 30 grams.[34] A conviction will render a non-United States citizen inadmissible, which means that the person will not be eligible to seek admission to the United States, whether applying for status or returning from travel abroad.[35] Under immigration law, the term "conviction" includes a charge where a finding of guilt was withheld, such as a deferred disposition under Virginia's first offender program.[36]

### Federal Firearm Purchases and Sales

Federal law prohibits the purchase or possession of firearms by any person who is an unlawful user of or addicted to any controlled substance.[37] Similarly, federal law forbids the sale of firearms to any person who is an unlawful user of or addicted to any controlled substance.[38] The National Instant Background Check System provides various examples of what constitutes an unlawful drug user or addict, such as a person who has been convicted of unlawful drug possession or who has submitted a positive drug screen within the past year.[39]

### Virginia Handgun Purchases and Transportation

A person who has been convicted of two or more charges of misdemeanor drug possession within a 36 consecutive-month period is ineligible to purchase or transport a handgun.[40] This prohibition expires after five years from the date of the second conviction, provided that no more convictions occur during those five years.[41]

### Virginia Concealed Handgun Permit

A person who has been convicted of possession of marijuana or who has had such a charge deferred and dismissed is disqualified from obtaining a concealed handgun permit for three years.[42] Similarly, anyone who is addicted to or is an unlawful user of marijuana is also disqualified from obtaining a concealed handgun permit.[43]

## Virginia Laws and Enforcement Data

The term "marijuana" as defined by the Code of Virginia means "any part of a plant of the genus Cannabis, whether growing or not, its seeds or resin; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or its resin."[44] Tetrahydrocannabinol (THC) is the active ingredient in marijuana and is classified in Schedule I of Virginia's Drug Control Act.[45] Drugs in this schedule have a high potential for abuse and either no accepted medical use in the United States or a lack of accepted safety for use under medical supervision.[46]

The current criminal penalty structure in Virginia for possession of marijuana has been in place since 1979.[47] Under the current law, first offense possession of marijuana is punishable by up to 30 days in jail and a maximum $500 fine.[48] Subsequent offense possession of marijuana is punishable as a Class 1 misdemeanor by up to 12 months in jail and

a maximum $2,500 fine.[49] As such, an indigent defendant charged with this offense must be provided with court-appointed counsel, unless the potential jail sentence is waived.[50]

## Arrest Data

Over the past ten years (CY07-CY16), there were 133,256 arrests for possession of marijuana under Virginia Code § 18.2-250.1,[51] and of those arrests:

- 84% (112,581 of 133,256) were for a first offense; and,
- 16% (20,675 of 133,256) were for a subsequent offense.[52]

The number of first offense arrests may be overrepresented because a law enforcement officer may not be aware of prior violations at the time of arrest. If a defendant is charged with first offense possession of marijuana and it is discovered that he has a prior conviction for possession of marijuana, the Commonwealth can request permission from the court to amend the charging document to possession as a subsequent offense. However, if jail time is waived for the offense, the Commonwealth's Attorney may not be involved in the prosecution of the offense.

Data demonstrated that males, young adults, and Blacks/African Americans are overrepresented in the total number of arrests for possession as compared to their percentage of the overall general population in Virginia.

The U.S. Census Bureau estimated that as of 2016, Virginia's total population of approximately 8.4 million was comprised of 51% females and 49% males.[53] When examining the sex of persons arrested for possession of marijuana over the past ten years (CY07-CY16), the data showed the following:

- 81% (90,904 of 112,581) of first offense arrests were of males; and,
- 91% (18,772 of 20,675) of subsequent offense arrests were of males.[54]

When analyzing the data based on the age of persons arrested for possession of marijuana over the past ten years (CY07-CY16), it showed the following:

- 54% (60,868 of 112,581) of first offense arrests were of persons aged 18 to 24; and,
- 37% (7,628 of 20,675) of subsequent offense arrests were of persons aged 18 to 24.[55]

The U.S. Census Bureau estimated that as of 2016, approximately 70% of Virginia's population of 8.4 million was White and 19.8% was Black/African American.[56] When considering the race of persons arrested for possession of marijuana over the past ten years (CY07-CY16), the data showed the following:[57]

- First offense arrests:
  - 46% (51,177 of 112,581) were of Blacks/African Americans; and,
  - 53% (59,883 of 112,581) were of Whites.

- Subsequent offense arrests:
  - 46% (9,586 of 20,675) were of Whites; and,
  - 53% (10,888 of 20,675) were of Blacks/African Americans.

A number of theories exist that attempt to explain the racial disparity in drug arrests. Those theories include, but are not limited to, the following: racial inequality, area of residence of the offender, and conscious/subconscious racial bias.[58] Staff did not specifically examine the rationale behind these theories in relation to Virginia arrest data.

## Charge and Conviction Data

Data revealed that the majority of possession of marijuana charges were filed and concluded in the general district courts.[59] The vast majority of these charges were for first offense possession of marijuana.[60] There appeared to be a large attrition rate between the total first offense charges filed and total convictions obtained. Of the first offense charges filed in the general district courts from FY08-FY17, approximately 55% (97,147 of 175,542) resulted in a conviction for possession of marijuana or some other related offense, and 45% (78,395 of 175,542) resulted in dismissal, *nolle prosequi,* or a finding of not guilty.[61]

Staff was unable to ascertain how many of these first offense possession of marijuana charges were of defendants who previously had a

possession of marijuana charge dismissed pursuant to the first offender statute. Staff was able to ascertain from OES' Court Management system data that there were approximately 3,423 charges of possession of marijuana dismissed under the first offender statute in CY15.[62] For reference purposes, it is important to note that there were over 21,000 charges of first offense possession of marijuana filed in the general district courts during CY15.[63]

### Jail Sentences

While the existing statute allows for incarceration, staff found that an extremely low number of offenders serve jail time solely for possession of marijuana offenses. According to the Compensation Board (LIDS database), on July 20, 2017, there were a total of 96 pre-trial and 31 post-trial inmates in Virginia jails solely on a charge or conviction for possession of marijuana. The average operating cost per jail inmate per day was $85.17 in FY16.[64]

An informal survey of Commonwealth's Attorneys, Public Defenders, and court-appointed counsel found that jail time is frequently waived for first offense possession of marijuana. Oftentimes persons charged with a first offense are permitted to enter into the first offender program. Other times the charge is disposed of by amending it to another Code section or a general continuance with conditions.

This informal survey also indicated that the punishment for subsequent possession of marijuana commonly varied between a fine only, suspended jail time plus a fine, or jail time plus a fine. Data revealed that in FY16, 31% (578 of 1,859) of sentencing events for subsequent possession of marijuana convictions resulted in an active jail term, with a median effective jail sentence of 15 days.[65]

## Removal of Jail Penalty for Possession of Marijuana

As an alternative to decriminalization, Virginia could continue to punish possession of marijuana as a criminal offense, but remove the jail penalty by reclassifying the charge as a Class 3 or Class 4 misdemeanor. Under current Virginia law, a Class 3 misdemeanor is punishable by up to a $500 fine and a Class 4 misdemeanor by up to a $250 fine.[66] Neither a Class 3 nor a Class 4 misdemeanor carry the potential for any term of incarceration.[67]

Two primary concerns were raised in regard to this option. First, jail time is rarely imposed in current practice in Virginia solely for possession of marijuana charges. Second, if jail time is removed as a penalty, then indigent defendants would no longer be entitled to court-appointed counsel on such charges.[68]

Three other states have adopted penalty structures where possession of marijuana is treated as a criminal offense, but incarceration is not authorized for at least the first offense, including the following:

- Missouri: first offense possession of not more than 10 grams of marijuana is punishable by up to a $500 fine. [69]
- Montana: first offense possession of 60 grams or less of marijuana is punishable by up to a $500 fine.[70]
- North Carolina: possession of ½ ounce or less of marijuana is punishable by up to 30 days incarceration and up to a $200 fine; however, any term of imprisonment which is imposed must be suspended.[71]

# Considerations Related to Decriminalization

## Effects of Decriminalization

Staff was unable to identify any specific effects other states experienced solely as the result of decriminalizing possession of personal use quantities of marijuana. When examining literature related to marijuana policy, staff found that legalization and medical use of marijuana has been at the forefront of recent studies. Literature specifically relating to decriminalization was mostly outdated and referenced the wave of decriminalization during the 1970's and 1980's in the United States.[72] A more recent publication focused on trends in marijuana use and attitudes among youth before and after decriminalization of marijuana in California; however, the authors noted three significant limitations and caveats to the study.[73] Additionally, states such as Connecticut (2011),[74] Rhode Island (2012),[75] Vermont (2013),[76] Maryland (2014),[77] Delaware (2015),[78] Illinois (2016),[79] and New Hampshire (2017),[80] only recently decriminalized possession of marijuana. Due to the recentness of these changes, reliable information was not available on the short and long-term effects of decriminalization.

## Policy Considerations Related To Decriminalization

The Code of Virginia could be amended to decriminalize possession of small amounts of marijuana for personal use. Eleven states have decriminalized possession of marijuana in some manner using varying

penalty structures, punishments, and quantity limits.[81] The laws of these eleven states could serve as models to guide policy decisions relating to decriminalization in Virginia. Any legislation that decriminalizes possession of marijuana in Virginia should consider implications to current possession laws and enforcement practices, as well as other areas of the Code that may be impacted, including the following:

- Penalty Structure
- Quantity Limit for Civil Possession
- Punishment for Possession over the Quantity Limit
- Penalties for Possession in Certain Locations
- Forms of Marijuana to Decriminalize
- Potency of Marijuana
- Drug Paraphernalia
- Searches Based on the Odor of Marijuana
- Trial Matters
- Revocation of Driver's License and Federal Highway Funding
- DUI Statutes
- First Offender Drug Statute
- Firearms Statutes: Handguns and Concealed Handgun Permits

It must be noted that even if Virginia were to decriminalize possession of marijuana, such possession would remain a criminal offense under current federal law.[82]

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## *Penalty Structure*

Three different penalty structures were identified in states that have decriminalized possession of marijuana. Examples of these three penalty structures include the following:

- Single civil offense: Illinois punishes possession of not more than 10 grams of marijuana by a civil fine of $100 to $200, regardless of the number of prior offenses.[83]

- Escalating civil offense: Maryland punishes possession of less than 10 grams of marijuana by a civil fine of up to $100 for a first offense, up to $250 for a second offense, and up to $500 for a third or subsequent offense.[84]

- Escalating civil and criminal blended offense: Nebraska punishes possession of one ounce or less of marijuana by a civil fine of $300 for a first offense.[85] Second and third offense convictions are punished criminally by up to 5 days in jail and a $400 fine for a second offense[86] and up to 7 days in jail and a $500 fine for a third or subsequent offense.[87]

In addition to determining a penalty structure, an agency will need to be selected to serve as a repository of records for these civil violations. For example, Mississippi records are kept by the Mississippi Bureau of Narcotics[88] while Rhode Island records are maintained by the Rhode Island traffic tribunal.[89] Staff conducted a search of the Code of Virginia for a similar escalating civil offense and found that the sale of nicotine or tobacco to minors is punishable by a civil penalty up to $100 for a first offense, $200 for a second offense, and $500 for a third or subsequent offense.[90] However, staff determined that no central repository of records exists or the sale of nicotine or tobacco to minors.

## *Quantity Limit for Civil Possession*

States have enacted various weight thresholds for what constitutes civil versus criminal possession of marijuana. The weight limits in these states vary from 10 grams to 100 grams.[91]

Currently, the Virginia statute prohibiting possession of marijuana does not include any bright line weight measurement.[92] If such a weight limit was added to the statute to differentiate between civil and criminal possession, then other policy matters relating to weight limits must be considered. Those matters include the development of weighing practices and procedures,[93] calibration of all equipment used to weigh the contraband, and training for law enforcement on uncertainty of weight measurements.[94]

## *Punishment for Possession over the Quantity Limit*

Similar to the quantity limits, states that have decriminalized possession of marijuana have also established varying penalties when the quantity of marijuana exceeds a weight threshold. For example, possession of more than ½ ounce of marijuana in Connecticut is punishable by up to 1 year in jail and a $2,000 fine.[95] Similarly, possession of more than 1 ounce of marijuana in Delaware is punishable by up to 3 months in jail and a $575 fine.[96]

## *Penalties for Possession in Certain Locations*

While certain states have decriminalized possession of marijuana, some of those states continue to maintain penalties for possession or use in specified locations. In Minnesota, possession of more than 1.4 grams of marijuana "within the area of the vehicle normally occupied by the driver or passengers" is a criminal offense punishable by incarceration up to 90 days and a $1,000 fine.[97] In New York, possession of burning marijuana in a public place is a criminal offense punishable by up to 3 months incarceration and a $500 fine.[98] In Maryland, smoking marijuana in a public place is a civil offense punishable by up to a $500 fine.[99]

## *Forms of Marijuana to Decriminalize*

Marijuana can take many forms, such as plant material, hashish, hashish oil, edibles, or synthetic. States that have decriminalized possession of marijuana have done so in varying forms. For example, Delaware solely decriminalized leaf marijuana,[100] while New Hampshire decriminalized marijuana, hashish, and marijuana-infused products.[101]

## *Potency of Marijuana*

Research is being conducted to determine whether the potency of some marijuana has risen over time. For instance, one nationwide study found that the THC content of cannabis plant material has risen from approximately 4% in 1995 to approximately 12% in 2014.[102] Current Virginia law provides that an oily extract that contains less than 12% of THC by weight falls under the definition of marijuana; however, there is no THC content limit for leaf marijuana or non-oily extracts.[103]

## *Drug Paraphernalia*

States have adopted varying approaches for possession of drug paraphernalia. Illinois punishes possession of drug paraphernalia in relation to marijuana use as a civil offense by a $100 to $200 fine.[104] Conversely, Maryland specifically excludes possession of drug paraphernalia from punishment if it was involved in the use or possession of marijuana.[105]

## *Searches Based on the Odor of Marijuana*

The odor of marijuana provides law enforcement with probable cause to conduct a search.[106] During this study, the question was raised whether decriminalization of marijuana would negate probable cause to conduct a search based on the odor of marijuana. Courts in California,[107] Colorado,[108] Maine,[109] Maryland,[110] Minnesota,[111] and Oregon[112] have upheld such searches on the grounds that marijuana remained a prohibited substance and that several other marijuana-related activities aside from possession remain illegal. Conversely, while the Supreme Judicial Court of Massachusetts remanded a case on this issue on other grounds, the Court noted in its ruling that it was "not confident…that a human nose can discern reliably the presence of a criminal amount of marijuana, as distinct from an amount subject only to a civil fine."[113]

## *Trial Matters*

### *What will be the burden of proof if possession of marijuana becomes a civil offense?*

Currently, possession of marijuana is a criminal offense in Virginia requiring proof beyond a reasonable doubt. Both Maryland[114] and Connecticut[115] have lowered the burden of proof for this offense to a preponderance of the evidence standard. Compare this with Virginia's approach to civil refusal of a blood or breath test, which requires proof beyond a reasonable doubt.[116]

### *Who will prosecute the offense?*

Both Senate Bills 908 and 1269 authorized the attorney for the Commonwealth or the county, city, or town attorney to prosecute the civil violation of possession of marijuana. Staff inquired about this practice in Maryland and were advised that only 3 of the 24 State's Attorney's Offices engage in the prosecution of civil marijuana offenses.[117] In the remainder of the jurisdictions, the charging officer handles the case much like a traffic summons.[118]

### *Which discovery process will apply?*

The rules of discovery for criminal cases[119] in Virginia are much narrower than the rules of discovery in civil proceedings.[120] Any legislation decriminalizing possession of marijuana should specify which rules will apply during the discovery process.

### *What other trial-related matters should be considered?*

In addition to the above questions, any legislation decriminalizing possession of marijuana in Virginia should consider various other matters incidental to trial, including the following:

- Will the Virginia Department of Forensic Science continue to conduct laboratory testing of suspected marijuana material in civil possession cases?
- If an escalating penalty structure is adopted, how will convictions for possession of marijuana that were incurred prior to the effective date of decriminalization be counted toward future charges and convictions?
- Will a "conviction" for civil possession of marijuana constitute a violation of a defendant's probation or suspended sentence for a criminal offense?

## ***Other Areas of the Code of Virginia Impacted by Decriminalization***

### *Revocation of Driver's License and Federal Highway Funding*

As previously noted, if a person in Virginia is found guilty of possession of marijuana, or if the court finds that the person possessed marijuana while operating a motor vehicle, the person's driver's license must be revoked for six months.[121] Under federal law, states receiving federal highway funds must either revoke the driver's license of a person convicted of a drug offense for six months or formally opt out of this revocation requirement.[122] Failure to follow one of these two requirements will result in an 8% withholding of federal highway funds under the National Highway Performance Program and the Surface Transportation Block Grant Program.[123]

This federal law contains a definitions section; however, the term "conviction" is not specifically defined, other than to note that it includes juvenile adjudications.[124] Therefore, it is unclear whether a finding of guilt for civil possession of marijuana would qualify as a "conviction" under the federal statute.

When the Virginia legislature sought to remove the license suspension for individuals placed in the first offender program for possession of marijuana during the Regular Session of the 2017 General Assembly, that legislation included a second enactment clause requiring written assurance from the Federal Highway Administration that Virginia would not lose any federal funds as a result of implementing the law.[125] Those written assurances were received and that legislation has taken effect.[126]

### *DUI Statutes*

A conviction for driving under the influence of marijuana can be obtained under Virginia's existing DUI statute[127] by proof that the driver was under the influence of THC to the extent that his ability to drive was impaired. This typically requires a blood test confirming the presence of THC and witness testimony as to the degree of impairment. A specific level of THC could be added to the Virginia presumption statute for DUI;[128] however, current research does not support a reliable correlation between THC blood levels and degree of impairment while operating a motor vehicle.[129]

### *First Offender Drug Statute*

If possession of marijuana were decriminalized in Virginia, the first offender drug statute would need to be amended to clarify whether a person found guilty of a civil violation for such possession would later be disqualified from entering into the first offender program on a subsequent criminal drug charge. Virginia law allows for a person who has never been convicted of a drug offense or had a drug offense deferred and dismissed to enter into the first offender program.[130] If the offender successfully completes the requirements of the program, their current drug charge may be dismissed.[131]

### *Firearms Statutes: Handguns and Concealed Handgun Permits*

If possession of marijuana is amended to a civil offense in Virginia,

then the legislation would need to clarify whether a civil violation is a disqualifying offense for purposes of purchasing or possessing a handgun or obtaining a concealed handgun permit. Under Virginia law a person convicted of two or more charges of misdemeanor drug possession within a 36 consecutive-month period is ineligible to purchase or transport a handgun.[132] Similarly, a person who has been convicted of possession of marijuana or who has had such a charge deferred and dismissed is disqualified from obtaining a concealed handgun permit for 3 years.[133]

## Conclusion

Study findings were presented to the Crime Commission at the October meeting. Crime Commission members were provided with three policy options at the December meeting; however, no motions were made on any of the options.

**Policy Option 1:** Maintain the status quo.

Virginia currently punishes possession of marijuana as a criminal offense and authorizes incarceration for a violation of this law.[134] As such, an indigent defendant charged with this offense must be provided with court-appointed counsel, unless the potential jail sentence is waived.[135] Virginia law also currently includes a mechanism for first time drug offenders to have their criminal drug charge deferred and dismissed so that a conviction will not appear on their criminal record.[136]

Data demonstrated that males, young adults, and Blacks/African Americans are overrepresented in the total number of arrests for first and subsequent possession of marijuana as compared to their overall general population in Virginia. Data further revealed that the majority of possession of marijuana charges were filed and concluded in the general district courts. The vast majority of these charges are for first offense possession of marijuana and there appears to be a large attrition rate between the total first offense charges filed and total convictions obtained. Staff also found that an extremely low number of offenders serve jail time solely for possession of marijuana offenses.

**Policy Option 2:** Remove the jail sentence as punishment for possession of marijuana.

Virginia law includes criminal offenses which authorize a fine but not incarceration.[137] The jail sentence could be removed as a punishment under Virginia's possession of marijuana statute; however, concerns have been raised that jail time is rarely imposed in current practice and that indigent defendants would be most impacted because they would no longer be entitled to court-appointed counsel.

**Policy Option 3:** Decriminalize possession of small amounts of personal use marijuana.

The Code of Virginia could be amended to decriminalize possession of small amounts of marijuana for personal use. Staff was unable to identify any specific effects other states experienced solely as the result of decriminalizing possession of personal use quantities of marijuana. Eleven states have decriminalized possession of marijuana in some manner using varying penalty structures, punishments, and quantity limits.[138] The laws of these eleven states could serve as models to guide policy decisions relating to decriminalization in Virginia. Any legislation that decriminalizes possession of marijuana should consider implications to current possession laws and enforcement practices, as well as other areas of the Code that may be impacted. Even if Virginia were to decriminalize possession of marijuana, such possession would remain a criminal offense under current federal law.[139]

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Department of Alcoholic Beverage Control

Fairfax County Police Department

Joint Commission on Health Care

Maryland State's Attorneys' Association

Maryland State Police

Office of the Attorney General of Virginia

Office of the Chief Medical Examiner of Virginia

Office of the Executive Secretary of the Supreme Court of Virginia

State Council of Higher Education for Virginia

Virginia Alcohol Safety Action Program

Virginia Commonwealth University, Division of Strategic Enrollment Management

Virginia Community Criminal Justice Association

Virginia Criminal Sentencing Commission

Virginia Department of Forensic Science

Virginia Department of Motor Vehicles

Virginia Department of Transportation

Virginia Division of Capitol Police

Virginia Indigent Defense Commission

Virginia Sheriffs' Association

Virginia State Police

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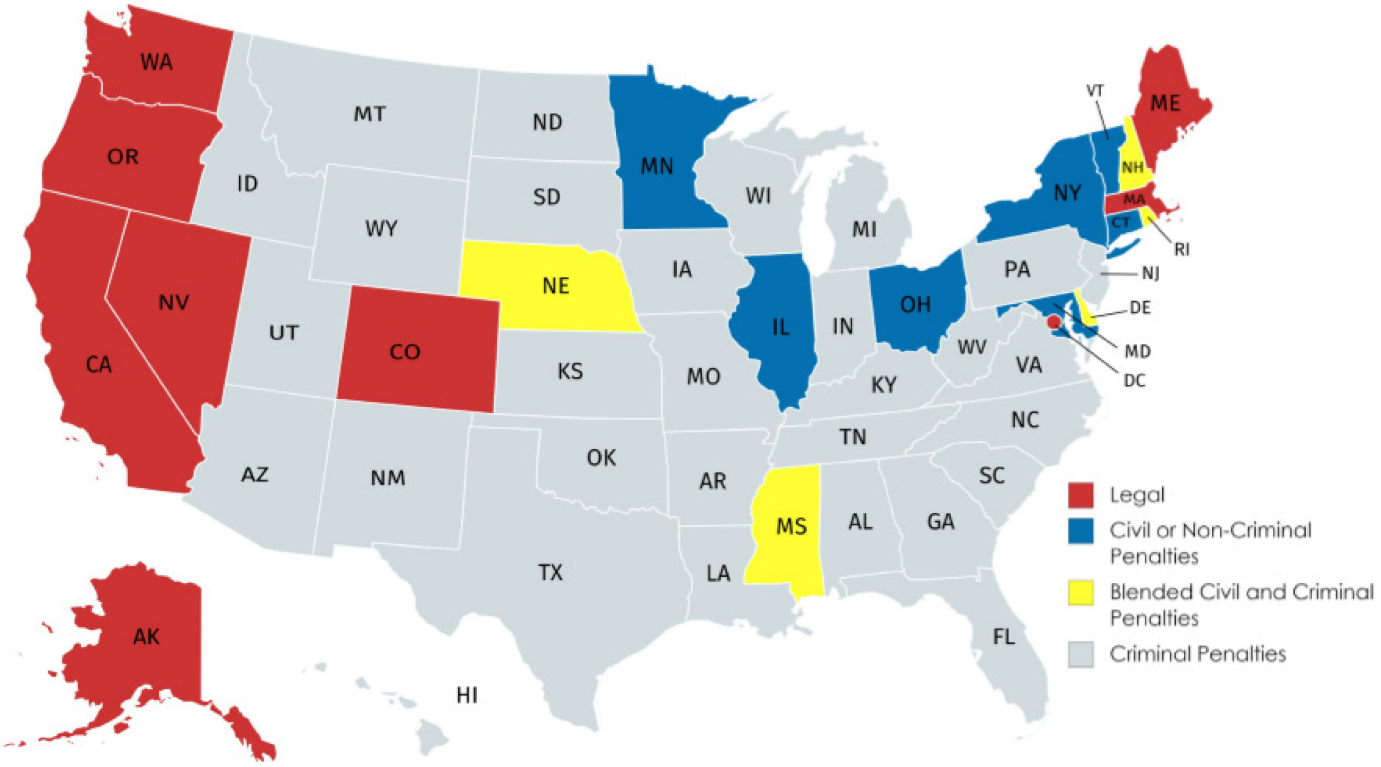
**The Crime Commission would also like to thank all individuals, agencies, and entities that provided either written or public comment and/or completed informal surveys during this study.**

# APPENDIX A

## Possession of Marijuana Laws by State (Including the District of Columbia)




| Legal | Blended Civil and Criminal | Civil |
|---|---|---|
| Alaska | Delaware | Connecticut |
| California | Mississippi | Illinois |
| Colorado | Nebraska | Maryland |
| District of Columbia | New Hampshire | Minnesota |
| Maine | Rhode Island | New York |
| Massachusetts | | Ohio |
| Nevada | | |
| Oregon | | |
| Vermont | | |
| Washington | | |

Source: Virginia State Crime Commission staff analysis.

# APPENDIX B

## Possession of Marijuana Penalties by State (Including the District of Columbia and Federal Law)

| Jurisdiction | Penalty | Primary Statute(s) |
|---|---|---|
| Alabama | Criminal | Ala. Code § 13A-12-214 (2018)<br>Ala. Code § 13A-12-213(c) (2018) |
| Alaska | Legal | Alaska Stat. § 17.38.020 (2018) |
| Arizona | Criminal | Ariz. Rev. Stat. § 13-3405 (2018) |
| Arkansas | Criminal | Ark. Code Ann. § 5-64-419(b)(5) (2018) |
| California | Legal | Cal. Health & Safety Code § 11362.1 (West 2018) |
| Colorado | Legal | Colo. Const. Art. XVIII, § 16(3) (West 2018) |
| Connecticut | Civil | Conn. Gen. Stat. Ann. § 21a-279a (2018) |
| Delaware | Blended Civil & Criminal | Del. Code Ann. tit. 16, § 4764(c) (2018)<br>Del. Code Ann. tit. 16, § 4701(34) (2018) |
| District of Columbia | Legal | D.C. Code Ann. § 48-904.01(a)(1) (2018) |
| Federal Law | Criminal | 21 U.S.C. § 844(a) (2018) |
| Florida | Criminal | Fla. Stat. Ann. § 893.13(6)(b) (West 2018) |
| Georgia | Criminal | Ga. Code Ann. § 16-13-2(b) (2018) |
| Hawaii | Criminal | Haw. Rev. Stat. § 712-1249 (2018)<br>Haw. Rev. Stat. § 712-1248(1)(c) (2018) |
| Idaho | Criminal | Idaho Code § 37-2732(c)(3) (Michie 2018)<br>Idaho Code § 37-2732(e) (Michie 2018) |
| Illinois | Civil | 720 Ill. Comp. Stat. 550/4 (2018) |
| Indiana | Criminal | Ind. Code Ann. § 35-48-4-11 (Michie 2018) |
| Iowa | Criminal | Iowa Code § 124.401(5) (2018) |
| Kansas | Criminal | Kan. Stat. Ann. § 21-5706(c)(3) (2018) |
| Kentucky | Criminal | Ky. Rev. Stat. Ann. § 218A.1422 (Michie 2018) |
| Louisiana | Criminal | La. Rev. Stat. Ann. § 40:966(C)(2) (West 2018) |
| Maine | Legal | ME. Rev. Stat. Ann. Tit. 7, § 2452 (West 2018) |
| Maryland | Civil | Md. Code Ann., Crim. Law § 5-601.1(b)(1) (2018) |
| Massachusetts | Legal | Mass. Ann. Laws ch. 94G, § 7 (Law. Co-op. 2018) |
| Michigan | Criminal | Mich. Comp. Laws § 333.7403(2)(d) (2018) |

| Jurisdiction | Penalty | Primary Statute(s) |
|---|---|---|
| Minnesota | Civil | Minn. Stat. § 152.027(4)(a) (2018)<br>Minn. Stat. § 152.01(16) (2018)<br>Minn. Stat. § 609.02(4a) (2018) |
| Mississippi | Blended Civil & Criminal | Miss. Code Ann. § 41-29-139(c)(2)(A)(1) (2018) |
| Missouri | Criminal | Mo. Ann. Stat. § 579.015 (West 2018) |
| Montana | Criminal | Mont. Code Ann. § 45-9-102(2) (2018) |
| Nebraska | Blended Civil & Criminal | Neb. Rev. Stat. § 28-416(13) (2018) |
| Nevada | Legal | Nev. Rev. Stat. § 453D.110 (2018) |
| New Hampshire | Blended Civil & Criminal | N.H. Rev. Stat. Ann. § 318-B:26(II)(d) (2018)<br>N.H. Rev. Stat. Ann. § 318-B:2-C(II) (2018)<br>N.H. Rev. Stat. Ann. § 318-B:2-C(V) (2018) |
| New Jersey | Criminal | N.J. Stat. Ann. § 2C:35-10(a)(4) (West 2018)<br>N.J. Stat. Ann. § 2C:43-8 (West 2018) |
| New Mexico | Criminal | N.M. Stat. Ann. § 30-31-23(B) (Michie 2018) |
| New York | Civil | N.Y. Penal Law § 221.05 (McKinney 2018)<br>N.Y. Penal Law § 221.10(2) (McKinney 2018) |
| North Carolina | Criminal | N.C. Gen. Stat. § 90-95(d)(4) (2018) |
| North Dakota | Criminal | N.D. Cent. Code § 19-03.1-23(8)(d) (2018) |
| Ohio | Civil | Ohio Rev. Code Ann. § 2925.11(C)(3)(a) (West 2018)<br>Ohio Rev. Code Ann. § 2925.11(D) (West 2018) |
| Oklahoma | Criminal | Okla. Stat. tit. 63, § 2-402 (2018) |
| Oregon | Legal | Or. Rev. Stat. § 475B.337 (2018)<br>*See* 2017 Or. Laws 21 |
| Pennsylvania | Criminal | 35 Pa. Stat. Ann. § 780-113(g) (West 2018) |
| Rhode Island | Blended Civil & Criminal | R.I. Gen. Laws § 21-28-4.01(c)(2) (2018) |
| South Carolina | Criminal | S.C. Code Ann. § 44-53-370(d)(4) (Law. Co-op. 2018) |
| South Dakota | Criminal | S.D. Codified Laws § 22-42-6 (Michie 2018) |
| Tennessee | Criminal | Tenn. Code Ann. § 39-17-418(a) (2018)<br>Tenn. Code Ann. § 39-17-418(c)(1) (2018) |
| Texas | Criminal | Tex. Health & Safety Code Ann. § 481.121 (Vernon 2018) |
| Utah | Criminal | Utah Code Ann. § 58-37-8(2)(d) (2018) |

| Jurisdiction | Penalty | Primary Statute(s) |
|---|---|---|
| Vermont | Legal | VT. STAT. ANN. tit. 18, § 4230a(a)(1) (2018) |
| Virginia | Criminal | VA. CODE § 18.2-250.1(A) (2018) |
| Washington | Legal | WASH. REV. CODE § 69.50.4013(3) (2018) |
| West Virginia | Criminal | W. VA. CODE § 60A-4-401(c) (2018) |
| Wisconsin | Criminal | WIS. STAT. § 961.41(3g)(e) (2018) |
| Wyoming | Criminal | WYO. STAT. ANN. § 35-7-1031(c) (Michie 2018) |

Source: Virginia State Crime Commission staff analysis.

# APPENDIX C

## Court Costs and Fees for Possession of Marijuana in Virginia

General Costs and Fees for Possession of Marijuana:

- Fixed drug misdemeanor:[140] $136
- Court-appointed counsel:[141] $120
- Internet Crimes Against Children Fund:[142] $15
- Electronic summons:[143] $5
- DMV license reinstatement:[144] $145

Other Potential Costs and Fees for Possession of Marijuana:

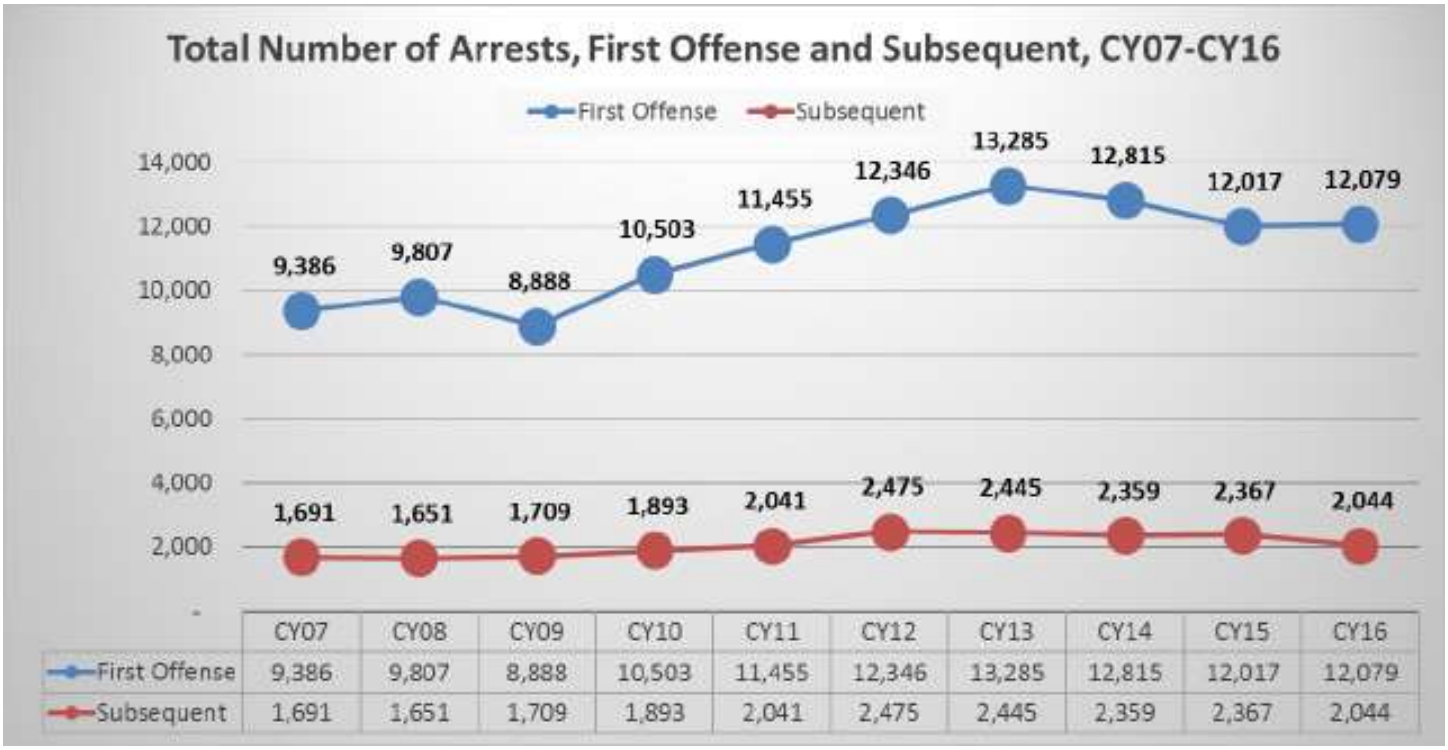
- Local probation or ASAP:[145] $0-$400
- Regional Criminal Justice Academy:[146] $5
- Courthouse security renovation:[147] $3
- Courthouse security:[148] $10
- Jail admissions (if jail imposed):[149] $25
- Payment plan fee (if plan established):[150] $10
- Lab witness fee (if summonsed):[151] $50
- Drug testing fee per test (ASAP):[152] $25/test

Source: Virginia State Crime Commission staff analysis.

Note: This lists the potential costs and fees that a defendant may incur as a result of being convicted or placed into the first offender program on a possession of marijuana charge. The actual costs and fees will vary based on the particular circumstances of each individual case.

# APPENDIX D

## Total Number of Arrests for Possession of Marijuana, First Offense and Subsequent, CY07-CY16




| | CY07 | CY08 | CY09 | CY10 | CY11 | CY12 | CY13 | CY14 | CY15 | CY16 |
|---|---|---|---|---|---|---|---|---|---|---|
| First Offense | 9,386 | 9,807 | 8,888 | 10,503 | 11,455 | 12,346 | 13,285 | 12,815 | 12,017 | 12,079 |
| Subsequent | 1,691 | 1,651 | 1,709 | 1,893 | 2,041 | 2,475 | 2,445 | 2,359 | 2,367 | 2,044 |

Source: Virginia State Police, Computerized Criminal History (CCH) Database. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

Note: The number of first offense arrests may be overrepresented because a law enforcement officer may not be aware of prior violations at the time of arrest. If a defendant is charged with first offense possession of marijuana and it is discovered that he has a prior conviction for possession of marijuana, the Commonwealth can request permission from the court to amend the charging document to possession as a subsequent offense. However, if jail time is waived for the offense, the Commonwealth's Attorney may not be involved in the prosecution of the offense.

# APPENDIX E

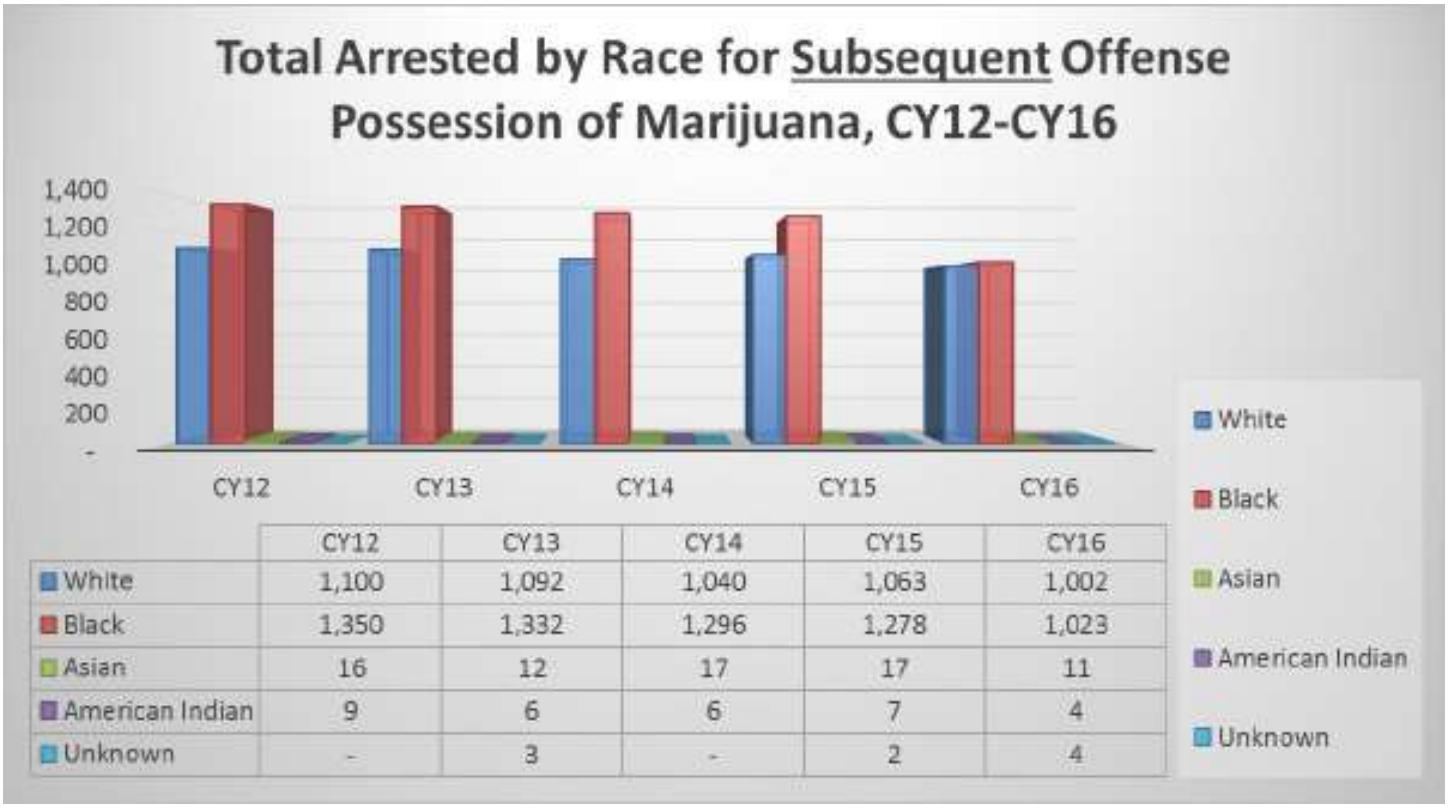
## Age at Arrest for Possession of Marijuana, First Offense and Subsequent, CY07-CY16

| Age at Arrest | First Offense Arrests (N=112,581) | % | Subsequent Offense Arrests (N=20,675) | % |
|---|---|---|---|---|
| Under 18 | 1,942 | 2% | 250 | 1% |
| **18-24** | **60,868** | **54%** | **7,628** | **37%** |
| 25-29 | 19,362 | 17% | 4,870 | 24% |
| 30-34 | 10,749 | 10% | 2,991 | 14% |
| 35-39 | 6,438 | 6% | 1,667 | 8% |
| 40 and over | 13,222 | 12% | 3,269 | 16% |

Source: Virginia State Police, Computerized Criminal History (CCH) Database. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

# APPENDIX F

## Total Arrested by Race for Subsequent Offense Possession of Marijuana, CY12-CY16

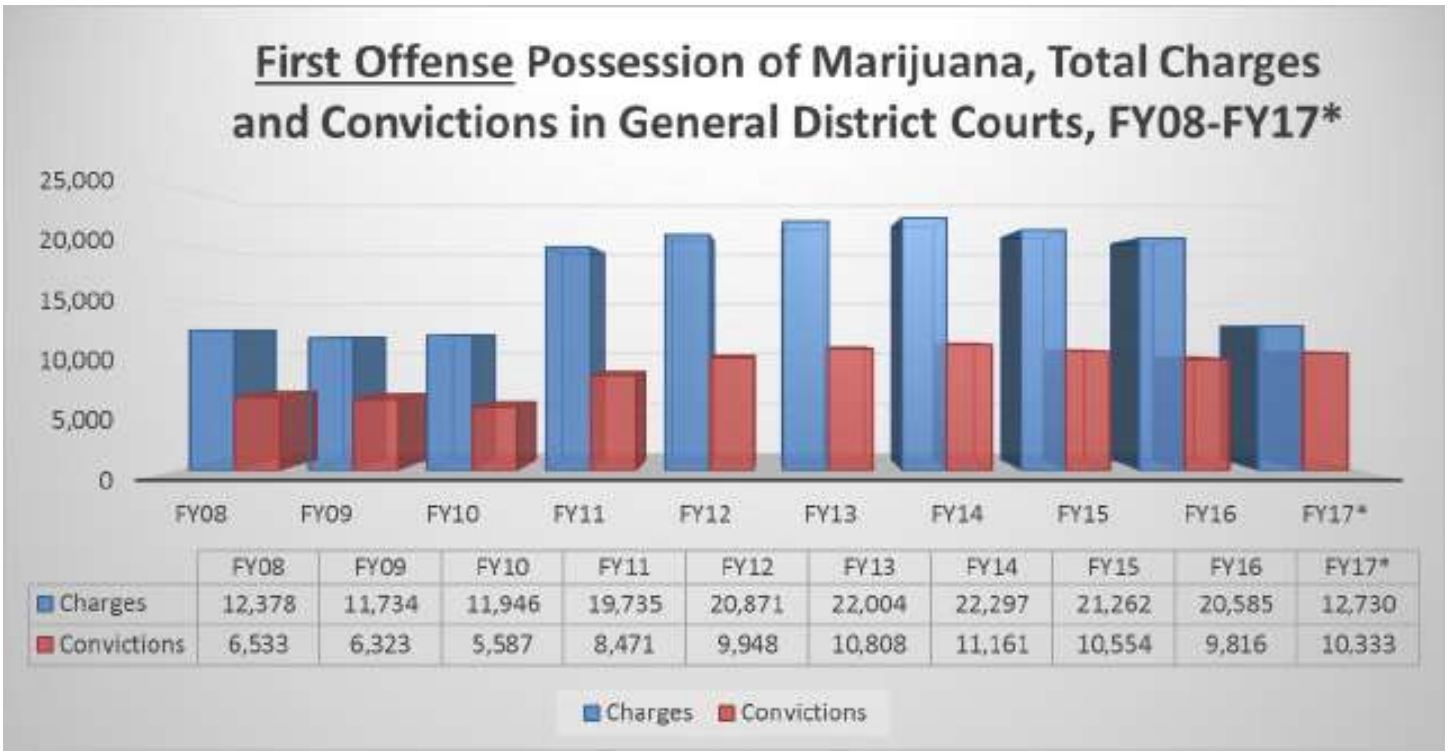



| | CY12 | CY13 | CY14 | CY15 | CY16 |
|---|---|---|---|---|---|
| White | 1,100 | 1,092 | 1,040 | 1,063 | 1,002 |
| Black | 1,350 | 1,332 | 1,296 | 1,278 | 1,023 |
| Asian | 16 | 12 | 17 | 17 | 11 |
| American Indian | 9 | 6 | 6 | 7 | 4 |
| Unknown | - | 3 | - | 2 | 4 |

Source: Virginia State Police, Computerized Criminal History (CCH) Database. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

# APPENDIX G

## First Offense Possession of Marijuana
## Total Charges and Convictions in General District Courts, FY08-FY17

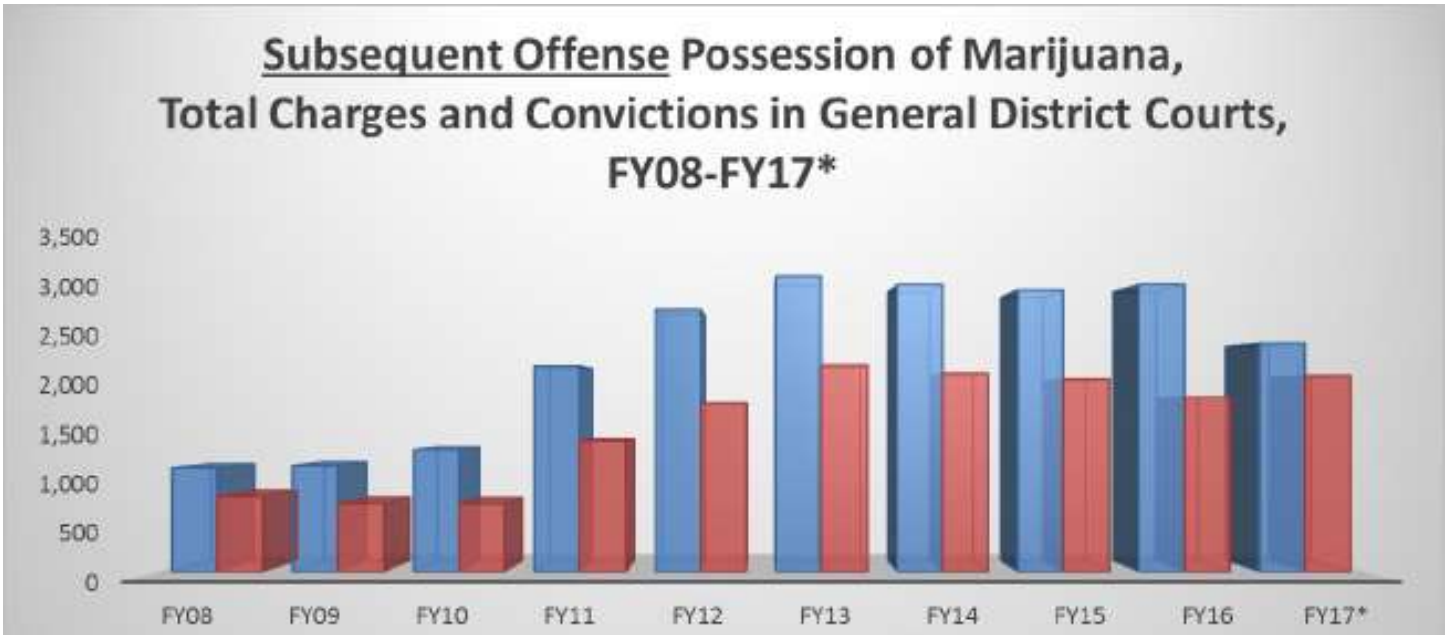



| | FY08 | FY09 | FY10 | FY11 | FY12 | FY13 | FY14 | FY15 | FY16 | FY17* |
|---|---|---|---|---|---|---|---|---|---|---|
| Charges | 12,378 | 11,734 | 11,946 | 19,735 | 20,871 | 22,004 | 22,297 | 21,262 | 20,585 | 12,730 |
| Convictions | 6,533 | 6,323 | 5,587 | 8,471 | 9,948 | 10,808 | 11,161 | 10,554 | 9,816 | 10,333 |

Source: Supreme Court of Virginia - General District Court Case Management System (CMS). Data provided by Virginia Criminal Sentencing Commission. * Fiscal year in which the charge was filed. Note: FY17 is preliminary and only includes charges that were both filed and concluded in FY17. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

# APPENDIX H

## Subsequent Offense Possession of Marijuana
## Total Charges and Convictions in General District Courts, FY08-FY17

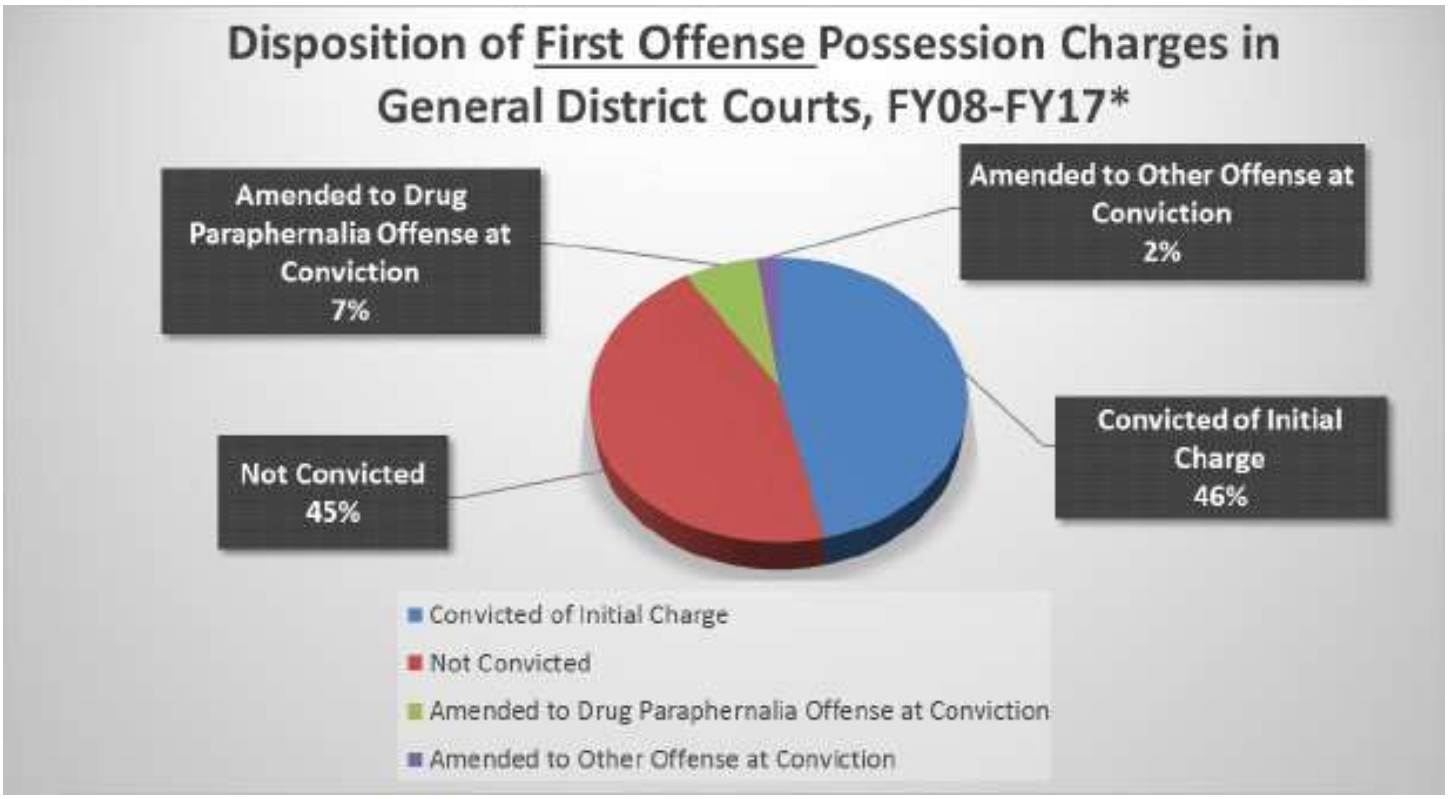



| | FY08 | FY09 | FY10 | FY11 | FY12 | FY13 | FY14 | FY15 | FY16 | FY17* |
|---|---|---|---|---|---|---|---|---|---|---|
| Charges | 1,117 | 1,140 | 1,315 | 2,212 | 2,816 | 3,168 | 3,081 | 3,017 | 3,084 | 2,457 |
| Convictions | 812 | 736 | 732 | 1,405 | 1,809 | 2,220 | 2,123 | 2,066 | 1,872 | 2,100 |

Source: Supreme Court of Virginia - General District Court Case Management System (CMS). Data provided by Virginia Criminal Sentencing Commission. * Fiscal year in which the charge was filed. Note: FY17 is preliminary and only includes charges that were both filed and concluded in FY17. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

# APPENDIX I

## Disposition of First Offense Possession of Marijuana Charges in General District Courts, FY08-FY17 (N=175,542 charges)




Source: Supreme Court of Virginia - General District Court Case Management System (CMS). Data provided by Virginia Criminal Sentencing Commission. *Fiscal year in which the charge was filed. Note: FY17 is preliminary and only includes charges that were both filed and concluded in FY17. Virginia State Crime Commission staff analysis. Chart prepared by Virginia State Crime Commission staff.

# APPENDIX J

## Civil Possession of Marijuana - Weight Limit By State

| State | Quantity of Marijuana | Statutes |
|---|---|---|
| Illinois | 10 grams (~0.35 ounce) | 720 Ill. Comp. Stat. 550/4(a) (2018). |
| Maryland | 10 grams (~0.35 ounce) | Md. Code Ann., Crim. Law § 5-601.1(b)(1) (2018). |
| Connecticut | 1/2 ounce | Conn. Gen. Stat. Ann. § 21a-279a(a) (2018). |
| New Hampshire | 3/4 ounce | N.H. Rev. Stat. Ann. § 318-B:26(II)(d) (2018). *See also* N.H. Rev. Stat. Ann. § 318-B:2-C(II) (2018). |
| New York | 25 grams (~0.88 ounce) | N.Y. Penal Law §§ 221.05 and 221.10(2) (McKinney 2018). |
| Delaware | 1 ounce | Del. Code Ann. tit. 16, §§ 4764(c) and 4701(34) (2018). |
| Nebraska | 1 ounce | Neb. Rev. Stat. § 28-416(13) (2018). |
| Rhode Island | 1 ounce | R.I. Gen. Laws § 21-28-4.01(c)(2)(iii) (2018). |
| Mississippi | 30 grams (~1.06 ounces) | Miss. Code Ann. § 41-29-139(c)(2)(A)(1) (2018). |
| Minnesota | 42.5 grams (~1.5 ounces) | Minn. Stat. §§ 152.01(16) and 152.027(4)(a) (2018). |
| Ohio<br>West | 100 grams (~3.53 ounces) | Ohio Rev. Code Ann. §§ 2925.11(C)(3)(a) and 2925.11(D) (West 2018). |

Source: Virginia State Crime Commission staff analysis.

# Endnotes

[1] This letter was sent to the Crime Commission by Senator Thomas K. Norment, Jr., on November 30, 2016.
[2] The two bills referred to the Crime Commission were Senate Bill 908 (Senator L. Louise Lucas) and Senate Bill 1269 (Senator Adam P. Ebbin).
[3] Staff did not extensively examine other issues relating to marijuana as part of this study, such as legalization, medical usage, cannabidiol or THC-A oils, health effects, or industrial hemp.
[4] *See* Appendix A for a map and Appendix B for a list of possession of marijuana penalties by state, including the District of Columbia and federal law.
[5] *See* Martin, S. & Capital News Service. (2017, May 15). The numbers behind racial disparities in marijuana arrests across Va. *CBS 6 News Richmond*. Available at https://wtvr.com/2017/05/15/racial-disparities-in-marijuana-arrests-seen-across-virginia/. *See also* Gettman, J. Racial Disparities in Marijuana Arrests in Virginia (2003-2013). *Drug Policy Alliance*. Available at https://www.drugpolicy.org/sites/default/files/Racial_Disparities_in_Marijuana_Arrests_in_Virginia_2003-2013.pdf.
[6] Va. Code § 18.2-250.1(A) (2018).
[7] Va. Code §§ 19.2-159 and 19.2-160 (2018).
[8] Va. Code § 18.2-251 (2018).
[9] Va. Code § 18.2-11 (2018). A Class 3 misdemeanor is punishable by up to a $500 fine and a Class 4 misdemeanor by up to a $250 fine.
[10] The eleven states include the following: Connecticut, Delaware, Illinois, Maryland, Minnesota, Mississippi, Nebraska, New Hampshire, New York, Ohio, and Rhode Island.
[11] 21 U.S.C. § 844(a) (2018).
[12] *See* Joint Commission on Health Care. (2017, October 17). *Medical Use and Health Effects of Cannabis*. Available at http://jchc.virginia.gov/4.%20Cannabis%20Study.pdf.
[13] Va. Code § 18.2-250.1(A) (2018).
[14] Va. Code §§ 19.2-159 and 19.2-160 (2018).
[15] *See* Appendix A for a map and Appendix B for a list of possession of marijuana penalties by state, including the District of Columbia.
[16] Va. Code § 18.2-251 (2018).
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] These figures represent a breakdown of the comments received by Crime Commission staff. The numbers should not be interpreted as a scientific poll. Staff did not conduct any public opinion polls as part of this study.
[21] *See* Knaack, F. (2015, January 13). Why Virginia should decriminalize marijuana. *ACLU of Virginia*. Available at https://acluva.org/en/news/why-virginia-should-decriminalize-marijuana.
[22] *See* Appendix C for a list of court costs and fees that may be imposed for possession of marijuana in Virginia.
[23] Va. Code §§ 18.2-251, 18.2-259.1(A) and 46.2-390.1(A) (2018).
[24] Va. Code §§ 18.2-259.1(C) and 18.2-271.1(E) (2018).
[25] Va. Code § 18.2-251 (2018).
[26] *See, e.g.,* Shortell, D. (2017, June 5). Secret Service relaxes marijuana policy in bid to swell ranks. *CNN*. Available at https://www.cnn.com/2017/06/01/politics/secret-service-new-marijuana-policy/index.html. The U.S. Secret Service recently modified its prior marijuana use policy in an attempt to increase its pool of applicants.

[27] 10 C.F.R. Part 710 Appendix A (H)(25) (2018).
[28] 10 C.F.R. Part 710 Appendix A (H)(26) (2018).
[29] 20 U.S.C. § 1091(r)(1) (2018).
[30] 20 U.S.C. § 1091(r)(2) (2018).
[31] Various criteria for Virginia state financial aid on the State Council of Higher Education for Virginia website, available at http://www.schev.edu/index/tuition-aid/financialaid/state-student-aid. *See also* Virginia Commonwealth University, Division of Strategic Enrollment Management, personal communication, January 26, 2018.
[32] 42 U.S.C. § 3601 *et al.* (2018).
[33] Office of General Counsel. (2016, April 4). Application of Fair Housing Act standards to the use of criminal records by providers of housing and real estate-related transactions. *U.S. Department of Housing and Urban Development*. Available at https://www.hud.gov/sites/documents/HUD_OGCGUIDAPPFHASTANDCR.PDF.
[34] 8 U.S.C. § 1227(a)(2)(B)(i) (2018).
[35] 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2018).
[36] 8 U.S.C. § 1101(a)(48)(A) (2018).
[37] 18 U.S.C. § 922(d)(3) (2018).
[38] 18 U.S.C. § 922(g)(3) (2018).
[39] Additional examples of persons deemed to be unlawful drug users or addicts can be found on the Federal Bureau of Investigations website, available at https://www.fbi.gov/services/cjis/nics/about-nics.
[40] Va. Code § 18.2-308.1:5 (2018).
[41] *Id.*
[42] Va. Code §§ 18.2-308.09(19) and 18.2-308.09(20) (2018).
[43] Va. Code § 18.2-308.09(8) (2018).
[44] Va. Code § 18.2-247(D) (2018). Note that marijuana "shall not include any oily extract containing one or more cannabinoids unless such extract contains less than 12 percent of tetrahydrocannabinol by weight, or the mature stalks of such plant, fiber produced from such stalk, oil or cake made from the seed of such plant, unless such stalks, fiber, oil or cake is combined with other parts of plants of the genus Cannabis."
[45] Va. Code § 54.1-3446(3) (2018).
[46] Va. Code § 54.1-3445 (2018).
[47] 1979 Va. Acts. Ch. 435.
[48] Va. Code § 18.2-250.1(A) (2018).
[49] *Id. See also* Va. Code § 18.2-11(a) (2018).
[50] Va. Code §§ 19.2-159 and 19.2-160 (2018).
[51] Virginia State Police, Computerized Criminal History (CCH) Database. *See* Appendix D for the total number of arrests for first and subsequent offense marijuana possession over CY07-CY16.
[52] *Id.* Virginia State Crime Commission staff analysis.
[53] United States Census Bureau (2017). *QuickFacts: Virginia*. Available at https://www.census.gov/quickfacts/VA.
[54] Virginia State Police, Computerized Criminal History (CCH) Database. Virginia State Crime Commission staff analysis.
[55] *Id. See* Appendix E for a breakdown of age at arrest for first and subsequent offense possession of marijuana over CY07-CY16.
[56] United States Census Bureau (2017). *QuickFacts: Virginia*. Available at https://www.census.gov/quickfacts/VA.

[57] Virginia State Police, Computerized Criminal History (CCH) Database. Virginia State Crime Commission staff analysis. Figures do not equal 100% due to rounding.
[58] *See, e.g.*, Mitchell, O., & Caudy, M.S. (2013). Examining racial disparities in drug arrests. *Justice Quarterly*, 32(2), 288-313. Available at https://www.gmuace.org/documents/publications/2013/examining.pdf. *See also* Gettman, J. (2015). Racial disparities in marijuana arrests in Virginia (2003-2013). *Drug Policy Alliance*. Available at https://www.drugpolicy.org/sites/default/files/Racial_Disparities_in_Marijuana_Arrests_in_Virginia_2003-2013.pdf.
[59] Data from Supreme Court of Virginia-General District Court Case Management System (CMS) data provided by the Virginia Criminal Sentencing Commission. Virginia State Crime Commission staff analysis.
[60] *See* Appendix G for the total charges and convictions for first offense possession of marijuana in the General District Courts over FY08-FY17. *See* Appendix H for the total charges and convictions for subsequent offense possession of marijuana in the General District Courts over FY08-FY17.
[61] *See* Appendix I for the dispositions of first offense possession of marijuana charges in the General District Courts over FY08-FY17.
[62] Supreme Court of Virginia - General District Court Case Management System (CMS) data provided by OES. It is important to note that the figure provided does not include cases where the original charge under Va. Code § 18.2-250.1 was amended to § 18.2-251. If it is presumed that the cases were originally charged under § 18.2-250.1 and were amended to § 18.2-251 were first offender deferrals, there were an additional 86 cases in 2015 in which the final disposition was "dismissed."
[63] Supreme Court of Virginia - General District Court Case Management System (CMS). Data provided by OES.
[64] Compensation Board. (2017, November 1). *FY 2016 Jail Cost Report*: *Annual Jail Revenues and Expenditures Report.* Available at https://rga.lis.virginia.gov/Published/2017/RD520/PDF.
[65] Virginia Criminal Sentencing Commission staff analysis of Supreme Court of Virginia - General District Court Case Management System (CMS) data. A "sentencing/conviction event" is defined by the VCSC as "the conviction/sentencing or the delinquent adjudication of an offender in a particular court at a particular time for one or more offenses. If an offender is convicted/sentenced or adjudicated delinquent in different courts, before different judges, or at different times, each court appearance is counted as a separate event." *See* Virginia Criminal Sentencing Commission. (2017). *Virginia Sentencing Guidelines*. Available at http://bycell.mobi/wap/default/item.jsp?entryid=ECMTg2OQ==&itemid=42097&t=1528823947339#m.
[66] Va. Code § 18.2-11 (2018).
[67] *Id.*
[68] *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972), holding "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial." *See also* Va. Code § 19.2-159 (2018).
[69] Mo. Ann. Stat. § 579.015(4) (West 2018). *See also* Mo. Ann. Stat. §§ 557.021(3)(2)(d) and 558.002(1)(5) (West 2018).
[70] Mont. Code Ann. § 45-9-102(2) (2018).
[71] N.C. Gen. Stat. § 90-95(d)(4) (2018).
[72] *See,* for overview, Inciardi, J. A. (1981). Marijuana decriminalization research: A perspective and commentary. *Criminology,* 19(1), 145-59; Single, E. W. (1989). The impact of marijuana decriminalization: An update. *Journal of Public Health Policy*, 10(4), 456-66. Suggs, D. L. (1981). A qualitative and quantitative analysis of the impact of Nebraska's decriminalization of marijuana. *Law and Human Behavior*, 5(1), 45-71;

[73] Miech, R. A., Johnston, L., O'Malley, P. M., Bachman, J. G., Schulenberg, J., Patrick, M. E. (2015). Trends in use of marijuana and attitudes toward marijuana among youth before and after decriminalization: The case of California 2007-2013. *International Journal of Drug Policy*, 26, 336-44. The limitations and caveats noted by the authors were as follows: "First, the results of this study do not establish causation between increases in youth marijuana prevalence and decriminalization and/or its associated publicity. Second, the data are self-reported, and are thus subject to bias. Third, Monitoring the Future [the survey from which data for the study was obtained] is not specifically designed to provide state-level estimates. Instead, the sample is designed to be representative of the four major census areas of the United States." p. 343.
[74] 2011 Conn. Pub. Acts 71.
[75] 2012 R.I. Pub. Laws 221.
[76] 2013 Vt. Acts & Resolves 76.
[77] 2014 Md. Laws 158.
[78] 2015 Del. Laws 38.
[79] 2015 Ill. Laws 697.
[80] 2017 N.H. Laws 248.
[81] The eleven states include the following: Connecticut, Delaware, Illinois, Maryland, Minnesota, Mississippi, Nebraska, New Hampshire, New York, Ohio, and Rhode Island.
[82] 21 U.S.C. § 844(a) (2018).
[83] 720 Ill. Comp. Stat. 550/4(a) (2018).
[84] Md. Code Ann., Crim. Law § 5-601(c)(2)(ii) (2018).
[85] Neb. Rev. Stat. § 28-416(13)(a) (2018).
[86] Neb. Rev. Stat. § 28-416(13)(b) (2018).
[87] Neb. Rev. Stat. § 28-416(13)(c) (2018).
[88] Miss. Code Ann. § 41-29-139(c)(2)(A)(1) (2018).
[89] R.I. Gen. Laws § 8-8.2-21 (2018).
[90] Va. Code § 18.2-371.2(D) (2018).
[91] *See* Appendix J for the weight limits in the eleven states that have decriminalized possession of marijuana.
[92] Va. Code § 18.2-250.1(A) (2018).
[93] *See, e.g.,* Virginia Department of Forensic Science. (2018 Feb. 16). *Controlled Substances Procedures Manual,* pp. 17-18. Available at http://www.dfs.virginia.gov/wp-content/uploads/2018/03/221-D100-Controlled-Substances-Procedures-Manual.pdf.
[94] *See,* Virginia Department of Forensic Science. (2017 Jan. 1). *Weighing Event Uncertainty of Measurement Calculation*. Available at http://www.dfs.virginia.gov/wp-content/uploads/2017/01/221-F126-Controlled-Substances-Weighing-Worksheet-2017.pdf.
[95] Conn. Gen. Stat. Ann. §§ 21a-279(a)(1), 53a-36, and 53a-42 (2018).
[96] Del. Code Ann. tit. 16 §§ 4701(34) and 4764(b) (2018).
[97] Minn. Stat. §§ 152.027(3) and 609.02(3) (2018).
[98] N.Y. Penal Law § 221.10 (McKinney 2018). *See also* N.Y. Penal Law §§ 70.15(2) and 80.05(2) (McKinney 2018).
[99] Md. Code Ann., Crim. Law § 5-601(c)(4) (2018).
[100] Del. Code Ann. tit. 16 § 4701(34) (2018).
[101] N.H. Rev. Stat. Ann. § 318-B:26(II)(d) (2018). Note that N.H. Rev. Stat. Ann. § 318-B:2-c(I)(a) (2018) provides that marijuana shall not include the resin extracted from the cannabis plant or any compound prepared with that resin. Further note that N.H. Rev. Stat. Ann. § 318-B:2-c(I)(b) (2018) defines

"personal-use amount of a regulated marijuana-infused product" as a product comprised of marijuana, marijuana extracts, or resins and other ingredients intended for consumption which contains no more than 300 milligrams of tetrahydrocannabinol.

[102] *See*, for overview, ElSohly, M.A., *et al.* (2016). Changes in cannabis potency over the past 2 decades (1995-2014): Analysis of the current data in the United States. *Biological Psychiatry*, 79, 613-619.

[103] Va. Code § 18.2-247(D) (2018). *See* Va. Code § 54.1-3446. An oily extract containing 12% or over THC by weight is classified as a Schedule I drug.

[104] 720 Ill. Comp. Stat. 600/3.5(c) (2018).

[105] Md. Code Ann., Crim. Law § 5-619(c)(1) (2018).

[106] *See, e.g.*, U.S. v. Humphries, 372 F.3d 653 (4th Cir. 2004); U.S. v. White, 836 F.3d 437 (4th Cir. 2016); Evans v. Commonwealth, 290 Va. 277, 776 S.E.2d 760 (2015).

[107] People v. Waxler, 224 Cal. App. 4th 712, 168 Cal. Rptr. 3d 822 (Cal. App. 1st Dist. 2014).

[108] People v. Zuniga, 372 P.3d 1052 (Colo. 2016).

[109] State v. Barclay, 398 A.2d 794 (Me. 1979).

[110] Robinson v. State, 451 Md. 94, 152 A.3d 661 (Md. 2017).

[111] State v. Ortega, 749 N.W.2d 851 (Minn. Ct. App. 2008).

[112] State v. Smalley, 225 P.3d 844, 233 Ore. App. 263 (Or. Ct. App. 2010).

[113] Commonwealth v. Overmyer, 469 Mass. 16, 23, 11 N.E.3d 1054, 1059 (2014).

[114] Md. Code Ann., Crim. Law 5-601.1(i)(1) (2018).

[115] Conn. Gen. Stat. Ann. § 51-164n(h) (2018).

[116] Va. Code § 18.2-268.4(B) (2018).

[117] Maryland State's Attorneys' Association, personal communication, August 9, 2017.

[118] *Id.*

[119] Va. Sup. Ct. R. 3A:11 and 7C:5.

[120] *See, e.g.,* Va. Sup. Ct. R. 4:1.

[121] Va. Code §§ 18.2-251, 18.2-259.1(A) and 46.2-390.1(A) (2018).

[122] 23 U.S.C. § 159 (2018).

[123] 23 U.S.C. § 159(a)(2) (2018). For an analysis of the potential impact to Virginia, see the fiscal impact statement for Senate Bill 1444 introduced during the Regular Session of the 2015 General Assembly, which estimated that a non-compliance ruling could result in a $68 million dollar loss in highway funding to Virginia. Available at https://lis.virginia.gov/cgi-bin/legp604.exe?151+oth+SB1444F122+PDF.

[124] 23 U.S.C. § 159(c)(3) (2018).

[125] House Bill 2051 and Senate Bill 1091 from the Regular Session of the 2017 General Assembly.

[126] *See* Freedman, E. (2017, Nov. 21). Law removing mandatory license suspension with marijuana charges goes into effect. *NBC29.*com. Available at http://www.nbc29.com/story/36787104/law-removing-mandatory-license-suspension-with-marijuana-charge-goes-into-effect.

[127] Va. Code § 18.2-266 (2018).

[128] Va. Code § 18.2-269 (2018).

[129] *See,* for overview, Compton, R. (2017, July). Marijuana-Impaired Driving: A Report to Congress. (DOT HS 812 440). *Washington, D.C.: National Highway Traffic Safety Administration,* p. 20; 26-27. Available at https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/documents/812440-marijuana-impaired-driving-report-to-congress.pdf. *See also* AAA (2016, May). An evaluation of data from drivers arrested for driving under the influence in relation to per se limits for cannabis. Available at https://www.aaafoundation.org/sites/default/files/EvaluationOfDriversInRelationToPerSeReport.pdf.

[130] Va. Code § 18.2-251 (2018).

[131] *Id.*

[132] Va. Code § 18.2-308.1:5 (2018).
[133] Va. Code §§ 18.2-308.09(19) and 18.2-308.09(20) (2018).
[134] Va. Code §18.2-250.1(A) (2018).
[135] Va. Code §§ 19.2-159 and 19.2-160 (2018).
[136] Va. Code § 18.2-251 (2018).
[137] Va. Code § 18.2-11 (2018). A Class 3 misdemeanor is punishable by up to a $500 fine and a Class 4 misdemeanor by up to a $250 fine.
[138] The eleven states include the following: Connecticut, Delaware, Illinois, Maryland, Minnesota, Mississippi, Nebraska, New Hampshire, New York, Ohio, and Rhode Island.
[139] 21 U.S.C. § 844(a) (2018).
[140] Va. Code § 16.1-69.48:1(C) (2018).
[141] Va. Code § 19.2-163(1) (2018).
[142] Va. Code § 17.1-275.12 (2018).
[143] Va. Code § 17.1-279.1 (2018).
[144] Va. Code § 46.2-411 (2018).
[145] Va. Code § 18.2-251 (2018). A person convicted of possession of marijuana or placed into the first offender program can be supervised by a local community corrections program, an ASAP office, or a program licensed by the Department of Behavioral Health and Development Services. Pursuant to Va. Code § 18.2-271.1(B) (2018), ASAP charges a $400 fee for supervision; however, per an ASAP representative, the supervision fee for offenders ages 18-21 for a non-driving offense is $200. An informal survey of local community corrections agencies found that the supervision fee for those programs generally varied from no fee up to $150.
[146] Va. Code § 9.1-906 (2018).
[147] Va. Code § 17.1-281(C) (2018).
[148] Va. Code § 53.1-120(D) (2018).
[149] Va. Code § 15.2-1613.1 (2018).
[150] Va. Code § 19.2-354(A) (2018).
[151] Va. Code § 19.2-187.1(F) (2018).
[152] The ASAP drug testing fee was based on a personal communication with an ASAP representative on June 29, 2017. An informal survey of local community corrections agencies found that generally no drug testing fees were charged, or the fees were minimal, unless the sample needed to be sent to a laboratory for testing.