



Decriminalization of Marijuana

October 30, 2017



Overview

- Background
- Key Findings
- Policy Considerations
- Virginia Data
- Collateral Consequences
- Policy Options



Background

- Crime Commission received a letter request from Senator Norment, as well as two bill referrals from Senate Courts of Justice during the 2017 Session of the General Assembly, to review the decriminalization of possession of small amounts of personal use marijuana:
 - SB 908 (Senator Lucas); and,
 - SB 1269 (Senator Ebbin).

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Background

- Decriminalization is NOT legalization.
- Decriminalization means the removal of criminal penalties for possessing small amounts of marijuana for personal use.
 - The punishment is amended from a criminal to a civil offense, but marijuana remains a prohibited substance.

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Background

- Marijuana is “any part of a plant of the genus Cannabis...its seeds or resin...and every compound...of such plant...” Va. Code § 18.2-247(D)
- The active component in marijuana is tetrahydrocannabinol (THC), which is classified as a Schedule I substance in Virginia’s Drug Control Act.
- Schedule I substances have a high potential for abuse and no accepted medical use in the U.S. or a lack of safety in supervised medical use.

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Background

- According to the National Institute on Drug Abuse, the possible effects of THC may include, in no specific order:
 - Enhanced sensory perception and euphoria followed by drowsiness/relaxation, slowed reaction time, problems with balance and coordination, increased heart rate and appetite, problems with learning and memory, hallucinations, anxiety, panic attacks, or psychosis.*

* Source: NIDA, Retrieved from <https://www.drugabuse.gov/drugs-abuse/commonly-abused-drugs-charts#marijuana>

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Background

- This study did NOT extensively examine:
 - Legalization of marijuana;
 - Medical marijuana;
 - CBD or THC-A oil;
 - The health effects of marijuana; or,
 - Industrial hemp.
- The Joint Commission on Health Care is conducting a study on medical marijuana.

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Background

- Staff utilized the following methodology:
 - Gathered relevant literature and data;
 - Reviewed Virginia law;
 - Examined the marijuana laws of the other 49 states, D.C., and the federal government;
 - Conducted informal surveys of prosecutors and criminal defense attorneys;
 - Consulted with practitioners; and,
 - Requested written public comments.

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Background

- Staff received over 5,665 written comments from the public. Of which:
 - 68% (3,850 of 5,665) were directly related to decriminalization.
 - 3,743 supported decriminalization
 - 107 did not support
 - The remaining 32% (1,815 of 5,665) were either duplicates or related to legalization, medical marijuana, or other topics.



Background

- The purpose of this presentation is to:
 - Provide a general overview of possession of personal use marijuana laws in the U.S.;
 - Highlight policy matters that will need to be examined in regard to decriminalization;
 - Present arrest, charge, and conviction data for possession of marijuana in Virginia; and,
 - Identify the consequences resulting from a conviction for possession of marijuana.



Background

- The debate over the use of marijuana in the United States has gone on for over a century.
- Based on staff analysis, laws governing possession of marijuana can be grouped into the following categories:
 - Criminal penalties (30 states and federal law);
 - Legal recreational possession (8 states and D.C.);
 - Civil or non-criminal penalties (7 states); and,
 - Blended civil and criminal penalties (5 states).



Background



Source: Map by Crime Commission staff based on legal analysis.



Key Findings

- Virginia's current criminal penalty structure for possession of marijuana was enacted in 1979.
- Per Va. Code § 18.2-250.1:
 - First conviction: maximum punishment is up to 30 days in jail and a \$500 fine.
 - Second or subsequent conviction: punished as a class 1 misdemeanor by a maximum of 12 months in jail and up to a \$2,500 fine.
- A defendant's driver's license is revoked for 6 months by DMV for a conviction or deferred disposition of a drug offense.



Key Findings

- First time drug possession offenders may enter into a statutory first offender program to have the charge deferred and dismissed.
- A first time marijuana offender represented by court-appointed counsel can expect to pay approximately \$400 to \$800 in costs and fees depending on the type of probation ordered.
 - Other optional fees can increase these costs.



Key Findings

- An extremely low number of offenders serve jail time solely for possession of marijuana offenses.
- According to the Compensation Board (LIDS), on July 20, 2017, the following number of inmates were in jail solely on a marijuana charge:
 - Pretrial: 96 inmates; and,
 - Post-trial: 31 inmates.
- The average cost to jail an inmate was \$79.28 per day in FY15.



Key Findings

- The vast majority of arrests for possession of marijuana in Virginia are for first offenses.
- Males, young adults, and Blacks are overrepresented in the total number of arrests for possession as compared to their overall general population in Virginia.
- There is a fairly large attrition rate in the number of charges resulting in convictions for first offense possession.



Key Findings

- According to informal survey results of prosecutors and defense counsel, first offense marijuana cases are commonly taken under advisement per statute, or may be:
 - Amended to another offense; or,
 - Continued generally with conditions.
- Jail time is frequently waived on a first offense charge.

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Key Findings

- The informal survey also indicated that the punishment for second or subsequent possession commonly varied between fine only, suspended jail time plus fine, or jail time plus fine.
- In FY16, 31.1% (578 of 1,859) of sentencing events for *subsequent* marijuana possession convictions resulted in an active jail term.*
 - The median *effective* jail sentence was 15 days.

* Source: Virginia Criminal Sentencing Commission staff analysis of Supreme Court of Virginia - General District Court Case Management System (CMS) data.

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Key Findings

- Virginia law does not include a specific quantity limit in relation to possession of marijuana.
 - No bright line rule or rebuttable presumption exists for what quantity constitutes personal use.
- Research is being conducted to determine whether the potency of marijuana has risen over time.
 - For instance, one nationwide study found that the THC content of cannabis plant material rose from ~4% in 1995 to ~12% in 2014.¹

¹ 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.



Key Findings

- Research on the specific impacts of marijuana *decriminalization* tends to be outdated.
 - Most current research focuses on legalization and medical usage of marijuana.
- States which have decriminalized possession of marijuana have adopted varying penalty structures, punishments, and quantity limits.



Key Findings

- According to a 2017 National Highway Traffic Safety Administration report, “[t]he scope and magnitude of the marijuana-impaired driving problem in this country cannot be clearly specified at this time.”¹
- Current research does not support a reliable correlation between THC blood levels and impairment while operating a motor vehicle.^{1,2}
- Because field sobriety tests for alcohol may not be indicative of impairment by some other substance, law enforcement may need additional training to recognize signs of drug-impaired driving.¹

¹ 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.

² AAA (2016, May). An Evaluation of Data from Drivers Arrested for Driving Under the Influence in Relation to *Per Se* Limits for Cannabis, Retrieved from <https://www.aaafoundation.org/sites/default/files/EvaluationOfDriversInRelationToPerSeReport.pdf>



Policy Considerations

- Legislation regarding decriminalization is a significant policy change that will impact numerous areas of Virginia law, including:
 - Punishment;
 - Enforcement;
 - Trial Procedures; and,
 - Administrative Procedures.



Policy Considerations

Which penalty structure could be enacted?

- Single civil offense
 - Illinois: \$100 to \$200 fine
- Escalating civil offense
 - Maryland: up to \$100 for 1st offense, \$250 for 2nd offense, and \$500 for 3rd or sub. offense
- Escalating civil/criminal offense
 - Nebraska: \$300 civil fine for 1st offense; 2nd and 3rd offenses are criminal with jail and fines

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Policy Considerations

What would be the quantity limit for civil possession?

State	Quantity of Marijuana
Illinois	10 grams (~0.35 ounce)
Maryland	10 grams (~0.35 ounce)
Connecticut	1/2 ounce
New Hampshire	3/4 ounce
New York	25 grams (~0.88 ounce)
Delaware	1 ounce
Nebraska	1 ounce
Rhode Island	1 ounce
Vermont	1 ounce
Mississippi	30 grams (~1.06 ounces)
Minnesota	42.5 grams (~1.5 ounces)
Ohio	100 grams (~3.53 ounces)

Source: Virginia State Crime Commission staff legal analysis.

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Policy Considerations

What would be the punishment for possession above the determined limit?

- Connecticut: possession of over ½ ounce is punishable by up to 1 year in jail and a \$2,000 fine.
- Delaware: possession of over 1 ounce is punishable by up to 3 months in jail and a \$575 fine.
- Creating weight differentiations within Virginia's marijuana possession statute will require policies and procedures regarding weight measurements.



Policy Considerations

Would decriminalization be based on the form of the marijuana?

- Marijuana can take many forms, such as plant material, hashish, hashish oil, edibles, or synthetic.
 - Note that per Va. Code § 18.2-247(D), marijuana includes any *oily* extract containing less than 12% THC by weight.
- Delaware: decriminalizes leaf marijuana.
- New Hampshire: decriminalizes marijuana and regulated marijuana-infused products.
- Vermont: decriminalizes marijuana and hashish.



Policy Considerations

- Between 12-01-2015 and 7-31-2016, the Department of Forensic Science analyzed 6,387 items which contained marijuana:
 - 6,127 plant material/packaging, residue, cigars/cigarettes, and cigar/cigarette butts;
 - 33 baked goods;
 - 44 candy;
 - 101 solid material; and,
 - 82 miscellaneous other items.

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Policy Considerations

Would law enforcement be able to search a vehicle based on the odor of marijuana?

- Courts in Maine, Oregon, California, Minnesota, Colorado, and Maryland have upheld such searches on the grounds that:
 - Marijuana remains contraband; or,
 - Several other marijuana-related activities remain illegal.

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Policy Considerations

- Conversely, the Supreme Judicial Court of Massachusetts noted 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.” 469 Mass. 16 (2014).
- The trial court’s ruling that the smell of unburnt marijuana did not justify the search of the defendant’s back seat was upheld.
 - Case remanded on other grounds.

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Policy Considerations

Would possession of marijuana remain criminalized in certain circumstances?

- Possession inside the passenger compartment of a vehicle;
- Possession in specified areas such as schools, public parks, or government buildings; or,
- Public use or consumption of marijuana.
- Virginia’s drug paraphernalia statutes may also need to be examined.

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Policy Considerations

How would trial procedures be effected?

- The burden of proof for civil possession.
- Consideration of prior marijuana convictions for purposes of any escalating penalties.
- Prosecution of a civil offense—the Commonwealth's Attorney, the City/County Attorney, or the law enforcement officer similar to a traffic offense.
- Civil or criminal discovery process.
- Use of a civil violation as grounds for the revocation of probation or a suspended sentence.



Policy Considerations

How would administrative procedures be impacted?

- If an escalating penalty structure is enacted, which agency would be the repository for the records?
 - The prompt availability of a prior record is paramount to an escalating penalty structure.
 - Consider Va. Code § 18.2-371.2(D) regarding the sale of tobacco or nicotine products to minors.
- Would a civil violation for possession of marijuana be treated as a "conviction" under Virginia law for purposes of purchasing or transporting a handgun or obtaining a concealed handgun permit?



Policy Considerations

Would any changes need to be made to Virginia's existing DUI laws?

- Virginia's DUI statute prohibits driving while:
 - Blood alcohol concentration is .08% or higher;
 - Under the influence of alcohol;
 - Under the influence of drug(s);
 - Under the influence of alcohol and drugs; or,
 - While having a blood alcohol concentration above a certain limit for specific substances.



Policy Considerations

- A conviction could be obtained under Virginia's existing DUI statute by proof that the driver was under the influence of THC to the extent that his ability to drive was impaired, which requires:
 - Blood test confirming the presence of THC;
 - Witness testimony as to impairment.
- THC blood levels could be added to the Virginia DUI statutes, but those levels are not supported by science and would create the risk of non-impaired individuals being convicted.



Policy Considerations

Would the driver's license be revoked?

- If a person is found guilty of a drug offense or enters into the first offender program, his license is revoked by DMV for 6 months.
 - Subject to change if HB 2051 and SB 1091 from the 2017 Session become effective.
- The court may grant a restricted license to drive for various purposes.

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Policy Considerations

Will highway funding to Virginia be impacted?

- Per VDOT's FY18 budget, the agency expects to receive \$1,057,087,914 from the federal fund.
- Federal law requires that states either:
 - Suspend a person's driver's license for 6 months for a drug "conviction"; or,
 - Opt out of the suspension requirement.
- Failure to follow one of these options could result in an 8% loss of certain federal highway funds.
 - See the fiscal impact for SB 1444 (2015) regarding the potential loss of certain highway funds.

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Policy Considerations

How is marijuana treated at the federal level?

- Marijuana (THC) is classified as a Schedule I drug in the federal Drug Control Act.
 - In August 2016, the DEA denied a petition to reschedule marijuana to a Schedule II drug.
- Measures have been introduced in both chambers of Congress to remove marijuana from the federal controlled substances list.
- The current direction of federal marijuana policy remains uncertain.



Virginia Data



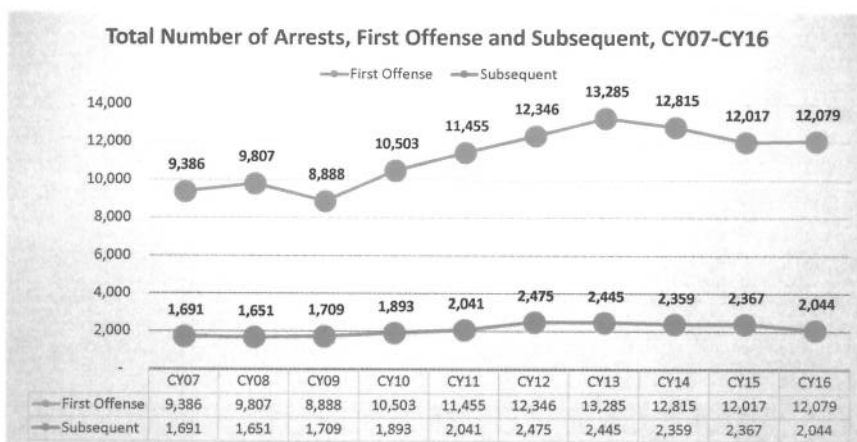
Virginia Data- Arrests

- Over the past ten years (CY07-CY16), there were 133,256 arrests for possession of marijuana under Va. Code section 18.2-250.1.*
 - 84% (112,581 of 133,256) of arrests were for first offense; and,
 - 16% (20,675 of 133,256) of arrests were for subsequent offenses.

*Source: Virginia State Police, Computerized Criminal History (CCH) Database. Analysis by Crime Commission staff.



Virginia Data- Arrests



*Source: Virginia State Police, Computerized Criminal History (CCH) Database. Analysis by Crime Commission staff.



Virginia Data- Arrests

- The U.S. Census Bureau estimated that as of 2016, Virginia's total population by sex was comprised of 51% female and 49% male.
- However, of the 112,581 first offense possession arrests (CY07-CY16):
 - 81% (90,904) of arrests were of males.
- Of the 20,675 subsequent offense possession arrests (CY07-CY16):
 - 91% (18,772) of arrests were of males.

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Virginia Data- Arrests

- 54% (60,868 of 112,581) of those arrested for first offense possession and 37% (7,628 of 20,675) of those arrested for subsequent possession (CY07-CY16) were between the ages of 18 to 24.

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. Analysis by Crime Commission staff.

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Virginia Data- Arrests

- The U.S. Census Bureau estimated that as of 2016, Virginia's total population was approximately 8.4 million people. Of which:
 - 70% was White;
 - 19.8% was Black/African American;
 - 6.7% was Asian or Native Hawaiian/Pacific Islander;
 - 2.9% was two or more races or other; and,
 - 0.5% was American Indian/Alaska Native.



Virginia Data- Arrests

- However, the 112,581 first offense possession arrests (CY07-CY16) were of:
 - 53.2% (59,883) White;
 - 45.5% (51,177) Black;
 - 1.0% (1,132) Asian/Pacific Islander;
 - 0.3% (323) American Indian/Alaska Native; and,
 - 0.1% (66) unknown race.

*Source: Virginia State Police, Computerized Criminal History (CCH) Database. Analysis by Crime Commission staff.



Virginia Data- Arrests

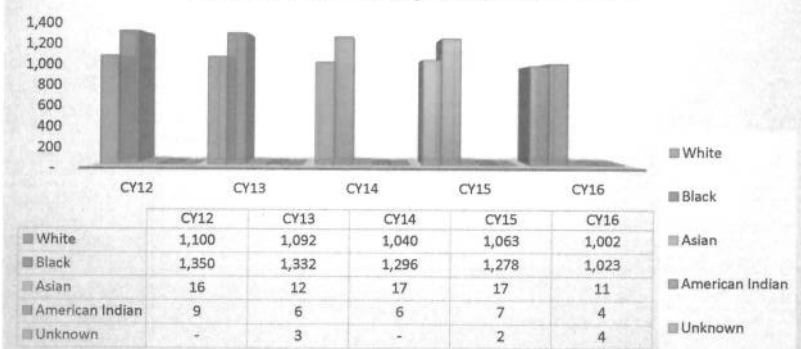
- Further, the 20,675 subsequent offense possession arrests (CY07-CY16) were of:
 - 52.7% (10,888) Black;
 - 46.4% (9,586) White;
 - 0.6% (120) Asian/Pacific Islander;
 - 0.3% (61) American Indian/Alaska Native; and,
 - 0.1% (20) unknown race.

*Source: Virginia State Police, Computerized Criminal History (CCH) Database. Analysis by Crime Commission staff.



Virginia Data- Arrests

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



*Source: Virginia State Police, Computerized Criminal History (CCH) Database. Analysis by Crime Commission staff.



Virginia Data- Arrests

- A number of theories exist that attempt to explain the racial disparity in drug arrests.¹
 - Theory #1 (Racial Inequality);
 - Theory #2 (Area of Residence); and,
 - Theory #3 (Conscious/subconscious racial bias).

¹ See, for overview, Mitchell, O., & Caudy, M.S. (2013). Examining racial disparities in drug arrests. *Justice Quarterly*. DOI: 10.1080/07418825.2012.761721.



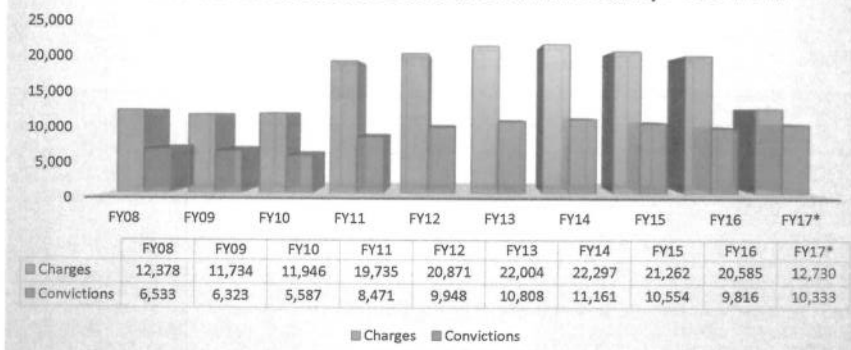
Virginia Data- Courts

- Staff requested data relating to marijuana-related charges and convictions from the Virginia Criminal Sentencing Commission.
- Most possession of marijuana charges are filed and concluded in general district courts.
- There appears to be a large attrition rate between total charges filed and total convictions obtained.
- Some localities have much greater total charges filed in general district court than others.
 - Numerous localities experienced a large spike in marijuana possession charges in FY11.



Virginia Data- Courts

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

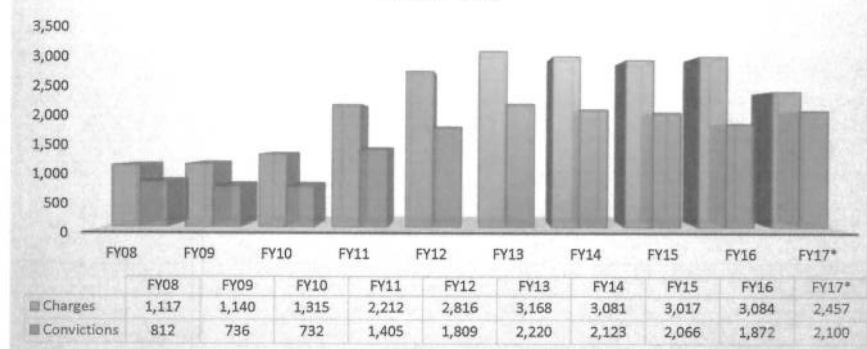


Source: Supreme Court of Virginia - General District Court Case Management System (CMS). * Fiscal year in which the charge was filed. Note: FY17 is preliminary and only includes charges that were both filed and concluded in FY17. Chart prepared by VSCC staff.

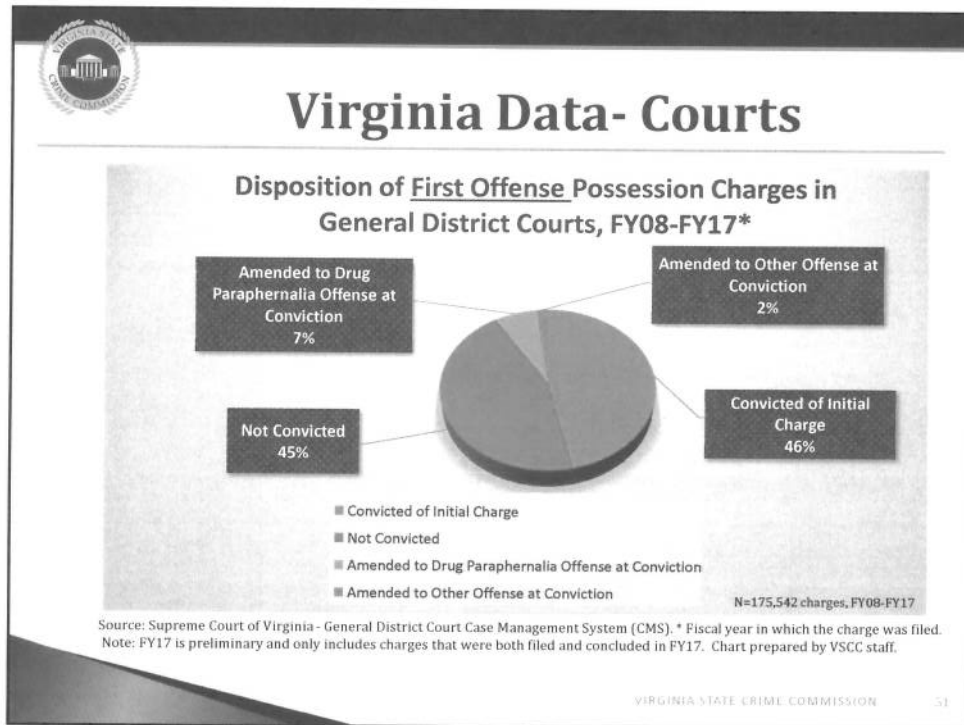



Virginia Data- Courts

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



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





Collateral Consequences

- Collateral Consequences of a Marijuana Conviction:
 - Employment;
 - Higher Education Financial Aid;
 - Housing;
 - Immigration;
 - Firearm Sales and Purchases;
 - Concealed Handgun Permit; and,
 - Other Potential Areas of Law.

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Collateral Consequences

Employment:

- Policies will vary by employer.
- Security Clearance: illegal drug possession is a consideration in the adjudication process.

Higher Education Financial Aid:

- Federal aid is suspended if the student is convicted for a drug offense which occurred while he was receiving federal financial aid.
- No impact to Virginia state financial aid.



Collateral Consequences

Housing:

- The Fair Housing Act prohibits discrimination in housing on the basis of race, color, religion, sex, disability, familial status or national origin.
 - Criminal conviction is not a protected class.

Immigration:

- Impact varies based on status, prior criminal record, and quantity of marijuana.



Collateral Consequences

Federal Firearm Sales or Purchases:

- Federal law prohibits the sale of firearms to or the purchase or possession of firearms by any person who is an unlawful user of or addicted to any controlled substance.

Virginia Handgun Purchases or Transportation:

- A person convicted of two misdemeanor drug offenses within 36 months is ineligible to purchase or transport a handgun for 5 years.




Collateral Consequences

Virginia Concealed Handgun Permit:

- A person who has been convicted of possession of marijuana or who has had a such a charge deferred is disqualified from obtaining a concealed handgun permit for 3 years.


Other Potential Areas of Law:

- Professional licenses, child custody matters, and other unknown consequences.



Policy Options

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Policy Options

Policy Option #1: Maintain the status quo.

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

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

- Proposed by SB 908 and SB 1269.

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Policy Options

Policy Option #1: Maintain the status quo.

- Possession of marijuana would remain a criminal offense with no changes to the law.
 - First offense: maximum 30 days in jail and a \$500 fine.
 - Second or subsequent offense: maximum 12 months in jail and a \$2,500 fine.
 - Deferred disposition remains an option.



Policy Options

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

- Possession of marijuana would remain a criminal offense.
- The Virginia Code includes misdemeanor offenses without the possibility of incarceration:
 - Class 3 misdemeanor: maximum \$500 fine; or,
 - Class 4 misdemeanor: maximum \$250 fine.
- *Consider: counsel and collateral consequences.*



Policy Options

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

- Legislation should address a penalty structure:
 - Civil offense with a single penalty;
 - Civil offense with escalating penalties; or,
 - Civil offense with escalating penalties up to a criminal offense.
- Escalating penalties will require:
 - Central repository for records; and,
 - Determination of repository costs.



Policy Options

Policy Option #3: Additional considerations in regard to decriminalization include:

- Quantity limit for personal use and punishments for possession over that limit;
- Development of weight measurement standards;
- Which forms of marijuana to decriminalize;
- Whether possession in vehicles, other areas, or public use should remain criminal;



Policy Options

Policy Option #3: Additional considerations in regard to decriminalization include:

- Trial matters such as the burden and proof and how to count prior marijuana convictions;
- Whether to suspend a person's driver's license as a result of a civil conviction;
- Any amendments to Virginia's first time drug offender statute;



Policy Options

Policy Option #3: Additional considerations in regard to decriminalization include:

- Any changes to Virginia's firearm and concealed handgun permit statutes;
- Any amendments to Virginia's DUI statutes;
- Providing training to law enforcement to recognize signs of drug-impaired driving; and,
- A delayed or emergency enactment.



Discussion