

Montana Judicial Branch

Expungement and Re-sentencing Update – November 2021

Goal: Develop forms and rules for expungement and redesignation process under MMRTA

Authority created by HB701:

- 3-5-113 provides scope of authority for judges pro tempore and special masters
- 3-5-115(4) authorizes Supreme Court to appoint “a judge to determine the expungement or resentencing of marijuana convictions”
- 16-12-101(2)(l) authorizes courts to resentence people currently serving sentences or redesignate or expunge offenses of people who have completed their sentences
- 16-12-113(1)-(4) permits people to petition for expungement or resentencing of convictions for which they are currently serving sentences
- 16-12-113(5) permits people to petition for expungement or redesignation of past convictions
- 16-12-113(6)-(8) provides basic structure for courts to consider petitions for expungement, resentencing, or redesignation
- 16-12-114 defines expungement and petition for expungement
- 16-12-115 provides for the appointment of a judge pro tempore or special master to hear petitions for expungement or resentencing
- 16-12-116 provides that venue can be by stipulation

Implementation:

- Identify which convictions are eligible for expungement, resentencing, or redesignation
Comment: See HB701 charts for identification of convictions.
- Outline rule structure / Determine types of forms needed
Comment: Currently considering whether a single, universal form is sufficient or if forms should be: status-based (currently serving sentence, fully served sentence); relief-based (expungement, resentencing, redesignation); or conviction-based (possession, distribution, paraphernalia, etc.). Presently proceeding on theory that forms should be both status-based and conviction-based: one set of forms for people desiring expungement or resentencing of current conviction, and one set of forms for people desiring expungement or redesignation of past conviction, and within each set of forms are individual forms for the particular conviction at issue (see HB701 charts).
- **Draft rules / Create forms*****
- Seek input / feedback
- Incorporate suggestions
- Circulate revised rules / forms for final comment
- Incorporate final suggestions
- Publish rules / forms
- Educate and Advertise

Other Observations:

The previous and current statutory schemes do not line up cleanly, which will add some difficulty to the expungement/redesignation process as the judge may have to delve into the underlying facts of the case. For example:

- *Under old 45-9-102, the cut-off for misdemeanor vs. felony possession was 60 grams. Under current 45-9-102, the cut-off amounts are defined in ounces: possessing 1 ounce or less is legal (see 16-12-106(1)(a)), possessing more than 1 ounce but less than two ounces is a civil infraction (see 16-12-106(7)), possessing more than 2 ounces is a felony (see 45-9-102(1)-(2)). Note that 60 grams = 2.12 ounces.*
- *Under old 45-9-101, it was a felony to distribute marijuana in any fashion, including sale, barter, and gifting. Under current 45-9-101, this is except as provided in Title 16, Chapter 12, which makes it legal to gift 1 ounce or less (see 16-12-106(1)(b)). Consequently, a felony distribution conviction should be expungeable if the marijuana was gifted while ostensibly the same conviction is not expungeable if the marijuana was sold.*
- *Technically, 16-12-115 only provides authority for expungement or resentencing and is silent concerning authority for redesignation.*

HB 701 – Changes to legal status of enumerated activities – DRAFT 11/2021

Things that are now legal	Things that are civil infractions	Things that remain illegal
Possession of 1 oz or less of marijuana if 21 or older	Cultivating or storing marijuana outside of a locked space	Operating or being in physical control of motorized transport while under the influence of marijuana
Gifting 1 oz or less of marijuana to someone 21 or older	Smoking marijuana in a public place	Consuming marijuana while operating motorized transport
Possessing up to 2 mature plants and 2 seedlings at a private residence	Possessing 1 oz or less of marijuana if under 21	Smoking or consuming marijuana while a passenger in an enclosed motorized transport
Possessing paraphernalia if 18 or older	Possessing paraphernalia if under 18	Delivering marijuana to a person under 21
Selling or gifting paraphernalia to someone 18 or older	Possessing more than 1 oz but less than 2 oz of marijuana if over 21	Consumption of marijuana if under 21
	Possessing with the intent to deliver more than 1 oz but less than 2 oz of marijuana if age 21 or older	Transporting marijuana if under 21 and not an employee of a licensed marijuana business
	Gifting more than 1 oz or less than 2 oz of marijuana if age 21 or older	Possessing or consuming marijuana on school property
		Possessing or consuming marijuana on public transportation
		Possessing or consuming marijuana in a health care facility
		Possessing or consuming marijuana in a hotel room
		Using marijuana where tobacco is prohibited
		Consuming marijuana in a public place
		“Conduct that endangers others”
		Cultivating marijuana where it is visible from the street or public area

HB 701 – Effect of Amendments to Criminal Statutes

Statute	Title	What was previously illegal	Eligible for Expungement	Eligible for Redesignation	No eligibility
45-9-101	Criminal distribution of dangerous drugs	Giving away up to 60g to a person age 21 or older	If 1 oz or less is gifted to a person age 21 or older	If more than 1 oz but less than 2 oz is gifted to a person age 21 or older	If more than 2 oz but less than 2.116 oz is gifted
		Selling up to 60g			Selling up to 60g (2.116 oz)
45-9-102	Criminal possession of dangerous drugs	Possessing any quantity of marijuana (misdemeanor for 60g or less / felony for over 60g)	Possessing 1 oz or less if age 21 or older	Possessing more than 1 oz but less than 2 oz	Giving away or selling to a person under age 21 Possessing more than 2 oz
45-9-103	Criminal possession with intent to distribute	Possessing with intent to distribute any quantity of marijuana	If intent was to gift 1 oz or less to a person age 21 or older	If intent was to gift more than 1 oz but less than 2 oz to a person age 21 or older	If intent was to sell, barter, etc., any quantity of marijuana If intent was to gift more than 2 oz to a person age 21 or older
45-9-110	Criminal production or manufacture of dangerous drugs	Growing marijuana	Possessing, planting or cultivating up to 2 mature plants and 2 seedlings in or on the grounds of a private residence if the defendant owns the residence or has written permission from the owner		Possessing, planting or cultivating more than 2 mature plants and 2 seedlings Growing or storing the plants in a place other than a private residence Growing without permission from the residence's owner

45-10-103	Criminal possession of drug paraphernalia	Possession of anything constituting paraphernalia	Possession of anything constituting marijuana paraphernalia if age 18 or older	Possession of anything constituting marijuana paraphernalia if under 18	
45-10-104	Manufacture or delivery of drug paraphernalia	Manufacturing or delivering, or possessing with intent to deliver, anything constituting paraphernalia	Manufacturing or delivering, or possessing with intent to deliver, anything constituting marijuana paraphernalia to a person age 18 or older		Manufacturing or delivering, or possessing with intent to deliver, anything constituting marijuana paraphernalia to a person under age 18