



Legislative Testimony

Oregon Criminal Defense Lawyers Association

May 10, 2015

Representative Jeff Barker, Chair
House Judiciary Committee, Members

RE: Senate Bill 364-A

Dear Chair Barker and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and adults in delinquency, dependency, and criminal prosecutions and appeals throughout the state of Oregon. Thank you for the opportunity to submit the following comments in support of Senate Bill 364-A.

SB 364-A is a technical fix to unintended consequences in 2013 SB 40

1. Senate Bill 364-A is a technical fix to a technical fix; as a consequence, it is very technical. It cleans-up language in 2013 SB 40 that created unintended consequences with respect to the felony classification level of marijuana crimes. It does nothing more: no new policy is introduced. There is no opposition to the bill.

2. The background: felony classification of marijuana crimes prior to 2013 SB 40

A.) When Oregon's criminal code was enacted in 1971, the felony classification level for controlled substance crimes was determined by the schedule level of the controlled substance. At that time, marijuana was a Schedule I controlled substance. Manufacturing and delivery for all Schedule I controlled substances was a Class A Felony and possession was a Class B felony. [ORS 475.752 (1) (a) and (3) (a)]

B.) In 2005, the Oregon Legislature separated out ("broke out") certain controlled substances for purposes of tracking data on the frequency of their occurrence. Crimes relating to marijuana were "broken out" and codified in ORS 475.856 – ORS 475.864, consistent with marijuana being a Schedule I controlled substance.

C.) In 2009 SB 728, the Legislature directed the Oregon Board of Pharmacy to reschedule marijuana as something other than a Schedule I controlled substance [ORS 475.059]. Subsequently, as directed, the Board of Pharmacy rescheduled marijuana as a Schedule II controlled substance [OAR 855-080-0022 (1)].

D.) After doing so, a disparity existed between the felony classification level for “generic” Schedule II controlled substances in ORS 475.752 *et seq.*, and the “break-out” crimes for unlawful manufacturing, delivery or possession of marijuana in ORS 475.856 *et seq.* which still classified marijuana as a Schedule I controlled substance.

Correcting this disparity was important because it impacted the ability of persons with existing marijuana convictions to seek expungement of their old convictions.

E.) 2013 SB 40 sought to correct that disparity and recalibrate the “break-out” crimes for marijuana to be consistent with other Schedule II drugs. Manufacturing of marijuana would be a Class B felony instead of a Class A felony (consistent with other Schedule II drugs), and possession of marijuana more than an ounce would be a Class C felony (consistent with other Schedule II drugs).

F.) As originally introduced, 2013 SB 40 had no opposition. All stakeholders intended that 2013 SB 40 would apply retroactively to existing convictions of marijuana so that persons with old marijuana convictions would be eligible to have them set aside.

3. 2013 SB 40: along the way, things got complicated

A.) Along the way, 2013 SB 40 attracted the attention of others and became the vehicle to create a new structure of misdemeanor possession crimes for marijuana. In doing so, 2013 SB 40 eliminated altogether the crime of Class B felony possession of marijuana.

B.) As ultimately codified, there were two provisions in 2013 SB 40 that created unintended consequences:

(1) Problem #1: The applicability clause in Section 12 of 2013 SB 40 made the entirety of the bill prospective only to conduct occurring “on or after the effective date of the Act” (which was July 1, 2013).

(2) Problem #2: Section 5 of 2013 SB 40 eliminated the crime of Class B felony of possession of marijuana from ORS 161.705. ORS 161.705 gives authority to a court to reduce the classification level of a felony to a misdemeanor under certain circumstances. Upon initial read, it made sense to eliminate Class B felony convictions from ORS 161.705 because 2013 SB 40 eliminated altogether the crime of Class B felony possession of marijuana. OCDLA failed to appreciate at the time, however, that some offenders with existing Class B felony possession convictions would still want to utilize ORS 161.705 to seek misdemeanor treatment of their old convictions.

4. 2015 SB 364-A: the fix

A.) Fix to Problem #1: Section 1 Subsection 2 of SB 364-A clarifies that when a person seeks to set aside a conviction for a marijuana offense, the court shall consider the current felony classification level for the crime as though it occurred on July 1, 2013, the effective date of 2013 SB 40. Choosing July 1, 2013 as the relevant date assures that a person will not experience a windfall if their conduct becomes decriminalized once Ballot Measure 91 goes into effect.

B.) Fix to Problem #2: Section 2 reinstates the authority of the court under to ORS 161.705 to declare an old existing conviction of Class B possession of marijuana more than an ounce as a misdemeanor. This provision was unintentionally removed in 2013 SB 40.

We apologize that we did not catch these errors in 2013 SB 40. Please do not hesitate to contact me if you have any questions.

Respectfully submitted,

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