

## Removing the Stigma of Prior Marijuana Arrests and Charges in NJ

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A look at efforts to remove cannabis-related items from criminal records in New Jersey, from expedited expungement to amending the Pretrial Intervention statute.

By **Darren M. Gelber** | June 27, 2022

The New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act (CREAMMA) no doubt created a sea change in our state's laws concerning cannabis. In addition to legalizing and regulating adult purchase of cannabis from licensed sellers, the legislation contains more than a few provisions aimed at eradicating the stigmas and disabilities that affect the lives of those convicted of marijuana-related crimes. Indeed, under various provisions of CREAMMA, people with past convictions for most marijuana-related offenses became eligible for what is known as an "expedited expungement."

Newly eligible offenses for expungement include:

- Distribution or possession of, or having under one's control with intent to distribute, less than one ounce of marijuana, or less than five grams of hashish in violation of N.J.S.A. 2C:35-5b(12), or such violation and a school zone or public housing violation under N.J.S.A. 2C:35-7a or N.J.S.A. 2C:35-7.1a (i.e., distributing, or possessing, or having under one's control with intent to distribute, on or within 1,000 feet of any school property, or within 500 feet of a public housing facility, public park or public building); or
- Obtaining, possessing, using, being under the influence of, or failing to make lawful disposition of marijuana or hashish in violation of N.J.S.A. 2C:35-10a(3), N.J.S.A. 2C:35-10a(4) or N.J.S.A. 2C:35-10b or N.J.S.A. 2C:35-10c; or
- A violation involving marijuana or hashish as above, and using or possessing with intent to use drug paraphernalia in violation of N.J.S.A. 2C:36-2.

For those convicted for distribution of one ounce or more but less than five pounds of marijuana, or over five grams but less than one pound of hashish in violation of N.J.S.A. 2C:35-5(11), the conviction became expungable after a newly shortened three-year waiting period. According to reports, as of September 2021, the judiciary estimated that it had automatically expunged more than 360,000 low-level cases, and anticipated another 125,000 to 150,000 expungements were in the works.

These newly available opportunities to obtain an expungement of marijuana-related arrests and convictions is hardly surprising in light of the Legislature's findings in enacting CREAMMA that a "marijuana arrest in New Jersey can have a debilitating impact on a person's future, including consequences for one's job prospects, housing access, financial health, familial integrity, immigration status, and educational opportunities." N.J.S.A. 24:6I-32n.

Despite these salutary objectives, did CREAMMA go far enough, or did the Legislature neglect to address a key issue governing eligibility for diversionary programs? A recent decision from the Appellate Division cries out for legislative action.

The Pretrial Intervention Program (PTI) is a vital part of the criminal justice process in New Jersey. PTI provides people accused of crimes, generally first-time offenders, with opportunities for alternatives to the traditional criminal justice process of ordinary prosecution. Those who apply to the PTI Program and are accepted are placed on a period of probation, with the criminal charges placed in inactive status. If the accused

completes the probationary period, which may include counseling requirements, community service, or other conditions, the charges will be dismissed. One of the requirements for eligibility for PTI is that the accused must not have been granted the benefit of a prior diversionary program. Here lies the dilemma.

There is another type of diversionary program available to people charged with marijuana-related offenses. That program, known as a Conditional Discharge, assisted those facing minor marijuana charges in municipal court avoid convictions there. A person who was granted a conditional discharge in municipal court, and who stayed out of trouble for a one-year waiting period, has their minor marijuana charges dismissed at the municipal court level. Countless people charged with one minor offense have disposed of their municipal court cases through a conditional discharge. Unfortunately, having a prior conditional discharge for a minor marijuana offense has also caused those people to be ineligible for PTI to help resolve later criminal charges.

Although CREAMMA did not directly address the issue, attorneys representing defendants in criminal cases argued that the broad sweeping language designed to remove the stigma of past marijuana offenses demonstrated a legislative intent that those who received a prior conditional discharge should not continue to be deemed ineligible for PTI. At the trial court level, that argument met with success in some counties, but failure in others. As to be expected, the legal issue was brought before the Appellate Division, which issued a published opinion on June 9, 2022, in *State v. Richard Gomes*. In *Gomes*, the court ruled that the plain language of the applicable statutes, unchanged by CREAMMA, required that those who received a prior conditional discharge remain ineligible for PTI, despite the fact that the offenses for which the conditional discharge had been granted were no longer considered criminal offenses. Finding that if the Legislature had intended a contrary result, it would have explicitly said so.

However, all hope is not lost. Recognizing the issue, and perhaps also recognizing that CREAMMA neglected to address it, pending legislation, if enacted, would address the issue to remove the bar to PTI flowing from a prior conditional discharge. As noted by the court in *Gomes*, a proposed Assembly bill, A. 1978 (2022), would amend the applicable PTI statute: “A person who previously received ... a conditional discharge ... shall be eligible for supervisory treatment ... if the previous supervisory treatment concerned ... marijuana.” The bill synopsis explains, “that [a] defendant who participated in [a] diversion program for certain marijuana offenses on prior occasion may again participate under certain circumstances.” The Sponsor’s Statement to the proposed bill provides:

Under current law, these programs require that the person wishing to participate not have been a previous participant in that particular program or in another diversionary program. Under the bill, previous participation in a diversionary program would no longer bar participation on a second occasion if the first participation was for a marijuana ... offense that was subsequently decriminalized.

Since the courts have determined that this collateral consequence of a prior marijuana charge remains despite the enactment of CREAMMA, this bill should be prioritized by the Legislature to fulfill more fully one of CREAMMA’s important objectives—removing the stigma of prior marijuana arrests and charges.

**Darren M. Gelber** is a Shareholder and a member of the Criminal and Cannabis Law teams at Wilentz, Goldman & Spitzer, P.A. He devotes his practice to criminal, white-collar, healthcare and regulatory litigation, defending clients in federal and state courts and before administrative agencies.

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