

Half a Century after Marijuana Conviction, Pro Bono Client's Record Expunged

News

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Fifty-four years after Jenner & Block Partner Tom Sullivan agreed to fight Tom McCabe's drug conviction, Illinois has now expunged Mr. McCabe's conviction.

The expungement wipes Tom McCabe's record clean, meaning he will never again have to worry about declaring a past conviction when traveling or filling out applications that ask if the applicant has ever been convicted of a crime.

The journey started when Tom McCabe's tearful wife, cradling a baby, approached Tom Sullivan to explain that her husband was facing 10 years in prison for selling \$40 of marijuana to an undercover officer.

In February 1969, when Tom McCabe was arrested in Kane County, the firm's pro bono program that Tom Sullivan helped launch as an associate was already around a decade old. Tom Sullivan passed away in 2021 at age 91, but the firm's commitment to work with Tom McCabe continued. Lawyers who were mentored by Tom Sullivan – who had not been born when he took the original case – led the effort.

At a CLE in 2019 revisiting the original case, Tom Sullivan recalled asking his future client's wife: "Did he kill somebody?" Because I had represented people who had murdered someone and didn't get 10 years. And she said, "No. It was just selling marijuana." 'He must have had a long record.' 'No. It was his first conviction.'"

"It can't be," Tom said. "I read the statute. There it was: cocaine, morphine, heroin, marijuana. Ten years."

As it turns out, those drugs were all listed in the Narcotic Drug Act, which required a 10-year minimum sentence upon a first conviction. In contrast, drugs including depressants, stimulants, and hallucinogens were listed in the Drug Abuse Control Act, which called for a maximum one-year jail term with the possibility of probation.

"Ridiculous" is how Tom Sullivan described the plight of 20-year-old Tom McCabe.

That summer, Tom Sullivan hired a young law student to research the known effects of marijuana and other drugs in the Narcotic Drug Act. They amassed a 300-page brief that featured scientific research and proved, Tom Sullivan said, that marijuana was misclassified. Therefore, his client's conviction was unconstitutional.

Tom Sullivan asked the Illinois Supreme Court to take the appeal directly.

The Illinois Supreme Court has seven justices, but one of those –a close friend of Tom Sullivan—recused himself. That meant that Tom Sullivan had to persuade four justices to reverse Mr. McCabe's conviction.

On October 15, 1971, four justices agreed with Tom Sullivan –the exact number he needed.

In their opinion, the majority wrote a detailed comparison of marijuana and harder drugs, describing the chemical properties, withdrawal symptoms, addictive qualities, and criminal activity associated with each.

Ultimately, they concluded that the absence of a “rational basis” for distinguishing first convictions for sales of marijuana from sales of drugs in the Drug Abuse Control Act showed that Mr. McCabe's conviction was unconstitutional.

“We hold that the present classification of marijuana is arbitrary and deprives the defendant of equal protection of the law,” the opinion read.

Now, more than 50 years later, Tom McCabe turned to Jenner & Block to assist with expunging his conviction. Recent changes in Illinois drug laws have led to automatic expungement for some cannabis-related convictions, but these changes did not squarely apply to Tom McCabe.

Partner Andrew Vail and Associate Paige Zielinski, a former prosecutor, led the effort to secure Tom McCabe's expungement. They filed a request for the expungement and supportive materials, and secured the expungement in the fall of 2023.

“For fifty plus years, despite the Illinois Supreme Court overturning his conviction, Tom faced uncertainty and worry every time he encountered a form or was otherwise asked to disclose if he had ever been convicted of a crime,” said Paige. “Now in his 70s, Tom's record is finally clear.”

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