



PRACTICE ALERT FOR CRIMINAL DEFENSE ATTORNEYS MARIJUANA LEGALIZATION & CONSIDERATIONS FOR IMMIGRANT NEW YORKERS

On March 30, 2021, the New York State legislature passed the Marihuana Regulation and Taxation Act (“MRTA”), legalizing recreational use of marijuana¹ by people 21 years of age and older. The MRTA also includes provisions to expunge and vacate prior convictions related to marijuana. Under the MRTA there will still be criminal and civil punishments at the state level related to possession of large amounts of marijuana and unauthorized sale of marijuana. In addition, marijuana remains illegal under federal law.

Marijuana prohibition has been used to target, criminalize, and arrest thousands of New Yorkers, disproportionately impacting communities of color. Immigrant communities have faced the devastating consequences of this criminalization, including deportation, detention, and denial of immigration benefits.

Even after New York legalizes recreational marijuana use, marijuana-related arrests and convictions may still cause serious immigration consequences. Criminal defense attorneys play an integral part in ensuring immigrants are advised about the immigration consequences of their criminal cases under *Padilla v. Kentucky*. The MRTA was passed in the hopes of making marijuana-related arrests and convictions less common and rectifying many of the past harms of prohibition. Criminal defense attorneys will be an integral part of ensuring that the intent of the law, including the provisions creating paths for immigration effective vacatures and minimizing the immigration consequences of future marijuana-related convictions, is fully recognized.

This resource will provide general information for criminal defense attorneys about how changes in the law may impact their advocacy for their immigrant clients.

I. Changes in the Laws Governing Marijuana-Related Activity

Legalization of recreational use of marijuana will mean that individuals may legally possess small amounts of marijuana and the state will license businesses to legally cultivate, process, and sell marijuana. However, some marijuana-related activity will continue to be illegal. Possession of large amounts of marijuana and unlicensed sale of marijuana will carry criminal penalties under the new law. In addition, there may be criminal penalties for failing to adhere to regulations related to the legalized market. **These new criminal articles may carry potential of immigration consequences that can seriously and negatively impact immigrant clients.**

¹ The MRTA and N.Y. Pen. Law refer to “marihuana.” Throughout this advisory we use the spelling “marijuana” to refer to cannabis and cannabis concentrate, as defined in the MRTA.



II. Addressing Prior Convictions for Marijuana

Under the MRTA, some old marijuana convictions will be automatically expunged and vacated. Individuals may also individually apply for resentencing and/or vacature of their prior marijuana convictions. However, because of the unique definition of conviction used in the immigration law, the fact that New York has expunged and vacated a marijuana conviction may not be enough to ensure that the conviction cannot be used to impose harsh immigration consequences on an immigrant client. However, the MRTA does include special pathways for immigrants to vacate convictions using procedures that will be effective for immigration purposes. Attorneys representing immigrant clients with marijuana convictions should advise them to explore options for vacating those convictions in state court and developing arguments about why those convictions are no longer valid for immigration purposes.

The expungement of old New York marijuana convictions also presents a challenge for criminal defense attorneys. In order to provide complete and accurate advice about immigration consequences, the criminal defense attorney must understand their client's full immigration history. Because New York will expunge many old marijuana convictions, those arrests and convictions will not be visible in the rap sheet. This makes the intake process that much more important. The absence of conviction on a rap sheet does not mean that a client will not suffer immigration consequences from those contacts. Criminal defense attorneys need to obtain the most accurate information from your clients regarding marijuana related arrests and convictions, even if they do not appear on the rap sheet.

III. Considerations for Clients Currently Facing Marijuana-related Charges

The MRTA may create new, time sensitive opportunities for negotiation for clients currently facing charges under N.Y. Pen. Law Art. 221 or charges alleging activity related to concentrated cannabis under sections of N.Y. Pen. Law Art 220. Criminal defense attorneys representing immigrant clients should reach out to an immigration attorney to understand how the MRTA may impact their case. In addition, there may be additional time sensitive considerations for safeguarding the rights of immigrant clients who have pled guilty to a marijuana-related offense but have not yet been sentenced.

IV. Constitutional Duty under *Padilla v. Kentucky* Still Applies

The duty criminal defense attorneys have to clients under *Padilla v. Kentucky* remains essential to protecting immigrants from the devastating consequences of marijuana-related convictions. Criminal defense attorneys have a duty to advise on the immigration consequences of criminal cases - including marijuana related contacts - to their immigrant clients. Criminal defense attorneys can seek out assistance from immigration attorneys to properly advise their clients on the potential immigration consequences of marijuana related contacts.

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Even after New York legalizes recreational use of marijuana, certain marijuana-related activity will still be illegal under state law. Marijuana related contacts with the criminal legal system will continue to pose a threat for immigrants clients. Criminal defense attorneys cannot assume that because recreational marijuana use is legal under New York law, immigrants will not be negatively impacted by marijuana-related arrests and convictions. It is important to remain vigilant for your immigrant clients who have marijuana related cases and contacts - be it pending cases, future cases, and in some cases prior convictions.

Next Steps

1) Identify cases in which immigrant clients are currently facing marijuana-related charges.

The MRTA may impact your defense strategy for clients charged with offenses under N.Y. Pen. L. Art 221 and those including allegations of activity related to concentrated cannabis under sections of N. Y. Pen. Law Art 220. Reach out to an immigration attorney as soon as possible to discuss how the advice related to immigration may have changed based on the MRTA.

2) Identify immigrant clients with prior New York convictions for marijuana-related activity.

The MRTA may impact the advice about immigration consequences and options for clients with open cases if they have a prior conviction under N.Y. Pen. L. Art 221 and those including allegations of activity related to concentrated cannabis under sections of N. Y. Pen. Law Art 220. Reach out to an immigration attorney as soon as possible to discuss how the advice related to immigration may have changed based on the MRTA.

3) Consult with an immigration attorney about consequences for every immigrant client

Criminal defense attorneys should continue to consult with immigration attorneys in every case in which they represent an immigrant. Immigration attorneys can provide information the criminal defense attorney can use in negotiations with the prosecution and to help advise the client about their options. In addition, an immigration attorney can help identify options the client may have to vacate New York marijuana convictions. An immigration attorney can ensure the vacature is recognized by immigration courts and agencies for clients who want to avoid deportation or apply for immigration status or citizenship. Regardless of New York's actions to legalize marijuana within the state, marijuana-related charges and convictions can still negatively impact noncitizens because marijuana remains illegal under federal law.

4) Conduct thorough and complete intakes with new clients

With changes in the law, certain marijuana-related arrests and convictions will not be reported on the rap sheet. This will make the intake process that much more important. Criminal defense attorneys will need to obtain the accurate information from clients regarding marijuana related arrests and convictions, even those that have been expunged.