



40 West 39th Street, Fifth Floor, New York, NY 10018  
Tel: 212.725.6422 • Fax: 800.391.5713  
[www.ImmigrantDefenseProject.org](http://www.ImmigrantDefenseProject.org)

## FREQUENTLY ASKED QUESTIONS:

# The Impact of Marihuana Decriminalization and Expungement on Criminal Defense of Non-U.S. Citizens

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### 1. How does the 2019 New York Marihuana Decriminalization Bill change the laws around marihuana possession?

The law changes the way marihuana possession is punished under NYPL §§ 221.05 and 221.10. The law also includes provisions for expungement and vacature of marihuana convictions.

The maximum fine imposed under NYPL § 221.05 is reduced to a maximum of \$50. In addition, the enhanced fine and possible jail time for those convicted of a prior Article 220 or 221 offense are eliminated. NYPL § 221.10 is reduced from a B misdemeanor to a violation. The specific prohibitions against possession of marihuana burning or open to public view are eliminated. It covers possession of up to one ounce of marihuana and is punishable only by a fine of up to \$200. IDP has a copy of the final bill text available [here](#).

### 2. Do I need to provide immigration advice to clients who plead guilty to a marihuana violation (Unlawful possession of marihuana in the first or second degree)?

Yes. New York violations are considered convictions for immigration purposes. In addition, because marihuana is considered a controlled substance under immigration law, the immigration consequences of a marihuana violation conviction can be severe. As a result, it is important to advise your clients of the consequences of their guilty plea or conviction after trial. The Supreme Court in *Padilla v. Kentucky* affirmed that attorneys who do not provide immigration advice about the consequences of convictions are ineffective.

### 3. What are the possible consequences of a marihuana violation?

The consequences for each individual depend on their immigration status, immigration history, and prior criminal legal system contacts. In general, a marihuana violation is a “controlled substance offense” for immigration purposes, subjecting non-U.S. citizens to negative immigration consequences that may include deportability, ineligibility for immigration status, inability to enter the U.S. from a trip abroad, and mandatory immigration detention.

In addition, police still have discretion to arrest people for low-level marihuana possession offenses. Each time a person at risk of deportation is fingerprinted by police their name and address are sent to ICE,

placing them at high risk of a home raid or other ICE enforcement action, regardless of the outcome of the arrest. IDP has know your rights information for clients here: [www.immdefense.org/kyr](http://www.immdefense.org/kyr).

#### 4. How can I get expert immigration advice in these cases?

All assigned counsel in New York State have access to free immigration experts for individualized immigration advice. Assigned counsel who cannot access an expert in-house through their public defender organization can contact the state's Regional Immigration Assistance Centers (RIACs).

- IDP provides advice to 18b panel attorneys in New York City cases. Assigned counsel can contact us by filling out our webform here: [www.immdefense.org/webform](http://www.immdefense.org/webform).
- Assigned counsel elsewhere in New York State can find contact information the appropriate RIAC here: <https://www.ils.ny.gov/content/regional-immigration-assistance-centers>.

#### 5. But what if taking a marijuana violation is the best deal the client can get?

Even if you believe that your client benefits from pleading guilty to a marijuana violation, you must still provide complete and accurate advice about the immigration consequences. Your client can use the information you provide about negative immigration consequences to make plans for the future, even if it is not possible to avoid the consequences. These plans help to ensure that negative immigration consequences don't take your client by surprise in the future.

#### 6. What if I don't have time to get advice?

As a zealous advocate, it is your job to try as hard as possible to make sure that pressure from the prosecution and judge don't curtail your ability to provide effective representation to your client. However, if you are unable to contact an immigration expert:

- Try to negotiate for an ACD or dismissal.
- If possible, provide some advice to your client using [IDP's flowchart on marijuana violation convictions](#). Record the advice you give your client for your notes.
- Make a record that you were unable to give your client complete and accurate advice about collateral consequences.
- Get contact information from your client and explain you will follow up with them.
- Contact an immigration expert as soon as possible after your appearance to get information about the consequences of the plea and options for next steps (such as an appeal).

#### 7. What should I tell my client about expungement?

Generally, immigration consequences do not disappear when a conviction is expunged. While New York law allows for expungement of marijuana offenses, this kind of automatic, blanket erasure of convictions will not necessarily be recognized by immigration courts and agencies. In addition, if your client was fingerprinted, immigration enforcement and other agencies already have a record of the case that they can use against your client. ***For this reason, it is important to warn clients that they should not ask the court to destroy their court records and they should consult with an immigration attorney about the impact of any conviction, even those that were expunged, on their eligibility for immigration benefits and citizenship, and their ability to travel internationally.***