



Defender update on New York “narcotic drug” convictions (September 2023)

Offenses under NYPL § 220 are common prosecutions in the state of New York. A recent Second Circuit decision, *U.S. v. Minter*, will benefit many immigrants who have prior convictions under some of those statutes, including common ones like: §§ 220.06(1), 220.06(5), 220.09(1), 220.16(1), 220.16(12), 220.18, 221.21, 220.39(1), 220.41, and 220.44. [No. 21-3102](#), (2nd Cir. Sept 6, 2023). This update explains the effect of *Minter* on your non-citizen clients. **Although the *Minter* decision will benefit many non-citizens, you should still obtain an individualized *Padilla* analysis to determine the immigration consequences for every non-citizen client facing criminal charges.**

Summary of the decision

The petitioner in *Minter* had a prior conviction for criminal sale of cocaine under P.L. § 220.39(1), and was being sentenced as a felony predicate under federal law. Predicate offenses must involve a federally-controlled substance. This is relevant to non-citizens because immigration courts use the same categorical analysis for determining federal immigration consequences.

Because New York has criminalized certain isomers of cocaine since May 2, 1978 that are not criminalized under federal law, the Second Circuit found that petitioner’s conviction for criminal sale of cocaine was not a predicate. The federal court examined the specific *element*, “narcotic drug.” It did not try to determine the petitioner’s actual conduct (or, in this case, the actual substance), but instead compared the state definition of cocaine to the federal definition of cocaine and found that New York criminalizes conduct (certain cocaine isomers) that fall outside the federal definition. Because New York’s “cocaine” definition is overbroad, the court found that the § 220.39(1) conviction was not a predicate offense.

Effect on New York prosecutions going forward

The primary effect of the decision is that clients with *prior* convictions under the above-enumerated statutes who reside in the Second Circuit (New York, Connecticut, and Vermont), especially those involving cocaine, should no longer trigger certain immigration consequences, and therefore resolving open criminal matters in an immigration-safe way is still critical. **You should not assume your client is already deportable, inadmissible, or ineligible for relief because of a prior drug conviction.** If you are consulting with an immigration expert, they should assist with this analysis.

Going forward, some pleas to “narcotic drug” convictions will also not trigger certain immigration consequences for non-citizens who reside in the Second Circuit. That safety is based on another decision from the Second Circuit, *U.S. v. Gibson*, 60 F.4th 720 (2d Cir. 2023). You should reach out for an expert immigration consult prior to any plea to learn how your client can benefit from this decision.

There may be other immigration consequences for “narcotic drug” offenses in the Second Circuit, including being charged as a crime involving moral turpitude, supporting a drug-trafficker inadmissibility finding, or opposition by ICE when the substance is not cocaine and the offense is not covered by *U.S. v. Gibson*.

Because of the potential range of consequences and complications, which depend on your client’s immigration status and/or where they reside, getting an immigration consult from a *Padilla* attorney is more critical than ever.

Attorneys assigned through the 18b panel to a case in New York City Criminal or Family Court should contact IDP for free, expert immigration assistance through our online [webform](http://www.immdefense.org/webform) (<http://www.immdefense.org/webform>) (preferred), email us at attorneyadvice@immdefense.org, or call 212-725-6422.