



**MODEL CPL § 440 MOTION TO VACATE JUDGEMENT
USING THE REBUTTABLE PRESUMPTIONS IN § 440.10(1)(k)**

This motion is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case. It is not intended as, nor does it constitute, legal advice. **DO NOT TREAT THIS MODEL MOTION AS LEGAL ADVICE.** If you are filing this motion in criminal court, you must also perform your own legal research to ensure that this motion is appropriate.

This motion is applicable to:

Cases in which a non-citizen was sentenced before August 28, 2019 based on a conviction for N.Y.P.L. §§ 221.05 and 221.10 that has immigration consequences. In any 440 motion, counsel must fully investigate whether any other errors can be raised, because the subsequent motion bar at CPL § 440.10[3] may preclude a subsequent motion from being considered.

This sample motion is intended for filing with the New York criminal court that entered the judgment.

<court type> OF THE STATE OF NEW YORK
<county>: PART __

-----X		
THE PEOPLE OF THE STATE OF NEW YORK	:	
	:	
-against-	:	NOTICE OF MOTION
	:	
<defendant name>,	:	Docket No. _____
Defendant-Petitioner.	:	
-----X		

PLEASE TAKE NOTICE that, upon the annexed affirmation of <attorney>, Esq., the exhibits thereto, and all the prior proceedings had herein, the undersigned will move this Court, at the Courthouse and at a time and date set by the Court, for an order pursuant to C.P.L. § 440.10(1)(j), vacating <defendant>'s judgment of conviction under the above-referenced docket number, and for such other and further relief as this Court deems just and proper.

DATED: _____
<city>, NEW YORK

RESPECTFULLY SUBMITTED,

<attorney contact info>

TO: MOTIONS CLERK
 <court address>

HON. <District Attorney>
District Attorney, <county>
<address>
Attn: ADA _____

<court type> OF THE STATE OF NEW YORK
<county>: PART __

-----X
THE PEOPLE OF THE STATE OF NEW YORK :
 :
 -against- : NOTICE OF MOTION
 :
<defendant name>, : Docket No. _____
 Defendant-Petitioner. :
-----X

STATE OF NEW YORK)
) ss.:
COUNTY OF <county>)

<attorney>, an attorney admitted to practice in the Courts of this State, affirms under the penalties of perjury that the following statements are true, except those expressly attributed to others or made on information and belief, which s/he believes to be true:

1. I represent <defendant> on a motion to vacate the judgment of the <court type>, <county> rendered <date of sentence>, convicting her/him, upon guilty plea, of one count of <offense name> (Penal Law § <221.05/221.10>, a <violation/class B misdemeanor>), and sentencing her/him to <sentence imposed> (<presiding judge>, J., at plea and sentence).

2. I submit this affirmation in support of <defendant>'s motion, pursuant to C.P.L. § 440.10(1)(k), to vacate this judgment of conviction, as it was obtained by a not knowing, voluntary and intelligent guilty plea and in violation of <defendant>'s right to due process under the United States Constitution and the Constitution of the State of New York. See C.P.L. § 440.10(1)(k); U.S. Const. amend. XIV; N.Y. Const. art. I, § 6.

3. As set forth herein, <defendant>'s guilty plea presumptively was not knowing, voluntary or intelligent because <defendant>, a non-U.S. citizen, faces ongoing negative immigration consequences as a result of her/his conviction. See C.P.L. § 440.10(1)(k).

Personal History

4. <defendant> was born in <birthplace> on <date>. See Exhibit A, Affidavit of <defendant>, at ¶ [#]. On <date>, s/he came to the United States <manner of entry>. See Exhibit B, <evidence of entry or affidavit if EWI>. S/he has built her/his entire adult life in the New York City area. Now <age> years old, s/he lives in the Bronx with her/his U.S.-born children _____ and _____. Id. at ¶ [#]. S/he remains on close terms with her/his mother, who lives a few blocks away from them. Id. at ¶ [#]. S/he has worked hard to provide for her/his family, working in a number of different factories over the years. Id. at ¶ [#]. And s/he has dutifully paid her/his incomes taxes. Id. at ¶ [#]. Since her/his conviction in this case, now a decade old, <defendant> has led a law-abiding and productive life dedicated to her/his family.

The Instant Case

5. On or about <date>, <defendant> was arrested and, on <date>, arraigned in criminal court and charged with <original charges>. See Exhibit [], Complaint, Dkt. No. _____. S/he was assigned counsel by the Court and, on that same day, pled guilty to <statute of conviction> and was sentenced to <sentence>. See Exhibit [], Certificate of Disposition; Exhibit [], Criminal Court Arraignment Sheet; **[add Plea Minutes at discretion only if not harmful]**.

Because <defendant>'s Guilty Plea Was Not Knowing, Voluntary, or Intelligent, Her/His Conviction And Sentence Are Unconstitutional Under Federal and State Law

6. Almost a decade has passed since <defendant>'s criminal conviction in <year>, and s/he has now resided in the United States for almost <number> years. S/he has been working steadily to support her/himself and provide a stable upbringing for her/his two children. Yet because of her/his conviction in this case, s/he is subject to the risk of mandatory deportation

and forced separation from her/his children, to be sent alone to a country s/he has not known since s/he was a teenager.

7. Newly enacted C.P.L. § 440.10(1)(k) provides that the Court may vacate a judgment of conviction for a marijuana possession offense under either NYPL §§ 221.05 or 221.10 prior the law’s effective date on August 28, 2019. C.P.L. § 440.10(1)(k). For such offenses, “the court shall presume that a conviction by plea for the aforementioned offenses was not knowing, voluntary and intelligent if it has severe or ongoing consequences, including but not limited to potential or actual immigration consequences.” *Id.*

8. <defendant>’s judgment of conviction is for a marijuana offense under NYPL § <221.05/221.10> entered on <date>, before the August 28, 2019 effective date of this new law. See Exhibit [], Certificate of Disposition. Her/his conviction by plea must be presumed not to have been a knowing, voluntary, or intelligent plea because <defendant> faces ongoing negative immigration consequences as a result of her/his conviction.

9. Specifically, **[add discussion of all ongoing relevant potential immigration consequences, supported by case citations or evidence, including but not limited to an immigration court Notice to Appear I-864. See IDP’s Practice Advisory: New York Marihuana Decriminalization, Vacatur, and Expungement Legislation (August 28, 2019), located at www.immdefense.org/practice-advisory-2019-mj-decrim.pdf for a discussion of many marijuana-based immigration consequences]**

10. <defendant>’s conviction constitutes a “controlled substance offense” (“CSO”) under the immigration laws. See *Matter of Elgendi*, 23 I&N Dec. 515, 520 (BIA 2002) (acknowledging that N.Y.P.L. § 221.10 criminalizes marijuana, which is a federally controlled substance under 21 USC § 812(c), sch. I(c)(10)). <Defendant> is therefore permanently

inadmissible to the United States. See 8 U.S.C. § 1182(a)(2)(A)(i)(II). <Because s/he has more than one marijuana conviction, s/he is also deportable. See 8 U.S.C. § 1227(a)(2)(B).>

11. As <defendant> attests, permanent separation from her/his children would be devastating not only for <defendant> but also her/his children, who rely on her/him as their only parent and provider. See Exhibit A at ¶ [#]; Exhibits [] – [], Letters of Support and Photos). Her/his son, who has been diagnosed with learning disabilities and requires special education and significant extra care by <defendant> would suffer most. Exhibit A at ¶ [#].

12. Subsection (6) of C.P.L. § 440.10 provides for a remedy specific to vacatur under rebuttable presumption in C.P.L. 440.10(1)(k): the court “must vacate the judgment and dismiss the accusatory instrument, and may take such additional action as is appropriate in the circumstances.”

WHEREFORE, FOR THE REASONS STATED ABOVE, IT IS RESPECTFULLY REQUESTED THAT THIS COURT VACATE <defendant>'S CONVICTION AND DISMISS THE ACCUSATORY INSTRUMENT. IN THE ALTERNATIVE, A HEARING SHOULD BE ORDERED.

Dated: <city>, New York
<date>

<attorney>