



**“One Day to Protect New Yorkers” Legislation
Practice Advisory¹
April 29, 2019 (updated January 24, 2020)**

Introduction

As part of its 2019 budget, the State of New York enacted the One Day to Protect New Yorkers Act. The new law reduces the maximum sentence for class A and unclassified misdemeanors by one day—from 365 to 364—and thereby ensures that thousands immigrant New Yorkers will no longer be subject to extraordinarily harsh and disproportionate immigration consequences arising from such convictions. The Act was included in [Part OO](#) (page 50) of the Public Protection and General Government Article VII legislation with important Amendments added in [Part MMM](#) (page 152). It became effective immediately on April 12, 2019, when it was signed into law.

Previously, the one-year potential sentence associated with some misdemeanors in New York meant that such convictions would frequently trigger certain removal grounds, *see* INA §§ 237(a)(2)(A)(i), (iii), render individuals ineligible for certain forms of relief from removal, *see* INA § 240A(B), or even subject them to mandatory detention, INA § 236(c)(1)(C). Going forward, the law is clear that new misdemeanor convictions entered on or after April 12, 2019 can no longer trigger such disproportionate consequences based on an actual or potential one-year sentence.

In addition, the new law retroactively reduces the potential one-year sentence of any A misdemeanor conviction entered before April 12, 2019. However, because of a Board of Immigration Appeals (BIA) decision refusing to recognize California’s retroactive reduction in misdemeanor sentences, *Matter of Velasquez-Rios*, 27 I. & N. Dec. 470, 474 (BIA 2018), the Department of Homeland Security (DHS) will likely argue that the New York law cannot protect people with pre-enactment convictions. The Attorney General has also restricted the effect of state court modifications of sentences in a recent decision; DHS may also argue that reductions under the law to actual one-year sentences entered before April 12, 2019 should also not be recognized. *Matter of Thomas* and *Matter of Thompson*, 27 I. & N. Dec. 674 (A.G. 2019). Nevertheless, the new law creates several potential strategies for people facing adverse immigration consequences based on pre-enactment misdemeanor convictions that should overcome both *Velasquez-Rios* and *Thomas/Thompson*. This advisory focuses on exploring these strategies. The chart on the next page details the categories of individuals who may face adverse immigration consequences based on pre-enactment misdemeanor convictions, and where in the advisory you can find suggested strategies for such individuals.

¹ This Practice Advisory was authored by Peter Markowitz with assistance from Ryan Muennich and Manny Vargas, and updated by Patrick Baker. Practice Advisories identify select substantive and procedural immigration law issues that attorneys, legal representatives, and noncitizens face. They are based on legal research and may contain potential arguments and opinions of the authors. Practice Advisories do NOT replace independent legal advice provided by an attorney or representative familiar with a client’s case.

	Specific Adverse Immigration Consequence
<p>Immigration Consequences Triggered by the <u>Potential</u> Sentence for New York Class A or Unclassified Misdemeanor Convictions Entered Before April 12, 2019 (pp. 6-11)</p>	<p><i>One Crime Involving Moral Turpitude (CIMT) Removability:</i> People who may face removal for a single CIMT conviction committed within five years of admission with a <u>potential</u> sentence of one year or more. INA § 237(a)(2)(A)(i).</p> <p><i>Ineligibility for Non-Lawful Permanent Resident (LPR) & Violence Against Women Act (VAWA) Cancellation of Removal:</i> People who may be barred from seeking cancellation of removal for certain nonpermanent residents pursuant to INA § 240A(b) because of removability under INA § 237(a)(2)(A)(i) triggered by the one-year <u>potential</u> sentence formerly associated with their conviction.</p>
<p>Immigration Consequences Triggered by the <u>Actual</u> Sentence for New York Class A or Unclassified Misdemeanor Convictions Entered Before April 12, 2019 (pp. 11-14)</p>	<p><i>Aggravated Felony Removability or Other Consequences:</i> People who may face removal or other consequence (including ineligibility for naturalization) for an aggravated felony charge triggered by an <u>actual</u> one-year sentence. INA §§ 101(a)(43)(F) (crime of violence), (G) (theft offense), (R) (forgery and related offenses) and (S) (obstruction of justice and related offenses).</p> <p><i>Mandatory Detention:</i> People who may be subject to mandatory detention under INA § 236(c)(1)(B) or (C) because of an <u>actual</u> one-year sentence.</p> <p><i>Ineligibility for Petty Offense Exception to Inadmissibility or Ineligibility for Naturalization:</i> People who may not be able to take advantage of the petty offense exception to the CIMT inadmissibility ground, INA § 212(a)(2)(A)(ii)(II), or who may be deemed ineligible for naturalization because of an <u>actual</u> sentence of more than six months, INA § 101(f)(3).</p> <p><i>Ineligibility for Deferred Action for Childhood Arrival (DACA) Protection from Removal:</i> People who may be deemed ineligible for DACA based on a significant misdemeanor finding triggered by an <u>actual</u> sentence of ninety days or more.</p>
<p>Other Immigration Consequences Triggered by the <u>Nature</u> of New York Class A or Unclassified Misdemeanor Convictions Entered Before April 12, 2019 (pp. 14-15)</p>	<p><i>Other Immigration Consequences Based on a Past NY Misdemeanor Conviction:</i> People who may face removal or ineligibility for relief, for reasons unrelated to the actual or potential sentence, based on charges such as the following (examples only – list is not comprehensive):</p> <ul style="list-style-type: none"> -- <i>Controlled Substance Offense Removability or Inadmissibility</i> -- <i>Multiple CIMTs Removability or Inadmissibility</i> -- <i>Particularly Serious Crime Bar to Asylum or Withholding of Removal</i> -- <i>Denial of Discretionary Relief</i>

Section I of this advisory details the provisions of the One Day to Protect New Yorkers Act. Section II outlines the clear benefits of the law for people with post-enactment misdemeanor convictions. In Section III, the advisory surveys some of the various strategies available to people with pre-enactment misdemeanor convictions facing adverse immigration consequence based on the one-year potential sentence previously associated with such conviction; while Section IV focuses on such strategies for an immigration consequence based on the actual sentence associated with such conviction. Finally, Section V discusses strategies available to individuals facing adverse immigration consequence based on the substantive nature of pre-enactment misdemeanor convictions.

I. One Day to Protect New Yorkers Act: Changes to New York Misdemeanor Sentencing and Post-Conviction Schemes

The One Day to Protect New Yorkers Act amends various provisions of the New York Penal Law pertaining to sentencing and provisions of the New York Criminal Procedure Law pertaining to post-conviction remedies. Specifically:

- *Maximum Sentence for Misdemeanors Reduced to 364 Days*

The legislation reduces the maximum sentence of imprisonment for any New York class A or unclassified misdemeanor from one year to 364 days. *See* NYPL § 70.15(1) and (3), as amended by the Budget Bill, Part OO, § 1, and NYPL § 70.15(1-a)(a), as added by the Budget Bill, Part OO, § 2.

- *New Misdemeanor Maximum Sentence Applies Retroactively*

The legislation provides that the new 364 day maximum applies not only to persons sentenced after the new law but also to persons sentenced before enactment of the legislation. *See* NYPL § 70.15(1-a)(b), as added by the Budget Bill, Part OO, § 2.

- *Past Misdemeanor One-Year Sentences Reduced to 364 Days by Operation of Law*

The legislation provides that any sentence imposed for a past New York class A or unclassified misdemeanor conviction that is a definite sentence of imprisonment of one year shall, by operation of law, be changed to a sentence of 364 days. In addition, the legislation provides that the defendant shall be entitled to obtain from the criminal court a certificate of conviction setting forth the reduced sentence as the court's sentence. *See* NYPL § 70.15(1-a)(c), as added by the Budget Bill, Part OO, § 2.

- *Past Misdemeanor Sentences of Less than One Year May Be Set Aside to Allow Resentencing Under the New Law*

The legislation provides that any sentence imposed for a past New York misdemeanor conviction that is other than a definite sentence of imprisonment of one year may be set aside under NYCPL § 440.20, based on a showing that the judgment and sentence entered under prior law is likely to result in collateral consequences, in order to permit the court to resentence the defendant under the new law. *See* NYPL § 70.15(1-a)(d), as added by the Budget Bill, Part OO, § 2, as amended.

- *Past Misdemeanor Convictions May Be Vacated Pursuant to A Rebuttable Presumption of Unconstitutionality to Permit Re-Pleading and Resentencing Under the New Law*

The legislation provides that a past New York class A or unclassified misdemeanor conviction may be vacated under new NYCPL § 440.10(1)(j) if it satisfies the § 440.10(1)(h) ground that the judgment was obtained in violation of a right of the defendant under the state or federal constitution. The legislation provides that there shall be a rebuttable presumption that a plea conviction of such an offense was not knowing, voluntary and intelligent based on ongoing collateral consequences, including potential or actual immigration consequences, and that a conviction by verdict of such an offense constituted cruel and unusual punishment based on such consequences. The legislation further provides that, upon granting of a motion under NYCPL § 440.10(1)(j), the court may either (1) with the consent of the prosecution, vacate the judgment or reduce it to one of conviction for a lesser offense; or (2) with or without the consent of the prosecution, vacate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant under the new law. See NYCPL § 440.10(1)(j), as added by the Budget Bill, Part OO, § 3, as amended.

II. New York A Misdemeanor Convictions Entered on or After April 12, 2019.

The reduced maximum sentence associated with misdemeanor convictions in New York will have profound and relatively straight forward benefits for immigrants New Yorkers who are convicted of class A or unclassified misdemeanors in New York on or after April 12, 2019.² The benefits outlined in this section should be noncontroversial and we do not anticipate any significant DHS argument to the contrary.

- *Misdemeanors Will No Longer Subject Lawfully Admitted Immigrants to the One “Crime Involving Moral Turpitude” Deportability Ground, INA § 237(a)(2)(A)(I).*

A lawfully admitted immigrant is deportable from the United States under INA § 237(a)(2)(A)(i) for conviction of one CIMT if the crime was committed within five years of admission to the country so long as the potential maximum sentence is one year or longer, regardless of the actual sentence imposed. In the past, this ground of deportation reached lawfully admitted immigrants—particularly LPRs—convicted of New York class A or unclassified misdemeanors since the maximum sentence for these offenses was one year under prior state law. Under the new state legislation, conviction of these New York misdemeanors will be subject to a maximum potential sentence of 364 days (one day less than a year) and therefore will no longer trigger this consequence. This is important because a CIMT is an immigration law term of art that the Board of Immigration Appeals (BIA) has broadly interpreted to reach many low-level state misdemeanors that were so minor that the criminal court imposed little or no actual jail time. *See, e.g., Matter of Obeya*, 26

² Class B misdemeanors in New York (the only other type of misdemeanor in the jurisdiction) have long been punishable up to three months. *See* NYPL § 70.15(2). Accordingly, such misdemeanors cannot trigger immigration consequences based on an actual or potential one-year sentence. The One Day to Protect New Yorkers Act did not alter the sentencing scheme for Class B misdemeanors.

I&N Dec. 856 (BIA 2016) (misdemeanor petty larceny); *Matter of Solon*, 324 I&N Dec. 238 (BIA 2007) (misdemeanor simple assault).³

- *Applicants for Non-LPR Cancellation of Removal and VAWA Cancellation of Removal Under INA § 240A(b) Will No Longer Be Subject to Petty Offense “Crime Involving Moral Turpitude” Ineligibility*

Section 240A(b) of the Immigration and Nationality Act authorizes two principal groups of noncitizens to apply for cancellation of removal: undocumented immigrants with long residence in the country and family hardship, and undocumented and documented immigrants who have been battered by a documented spouse or parent. However, both forms of relief are barred if a person is deportable under INA § 237(a)(2)(A)(i) for having been convicted of a single CIMT offense that is potentially punishable by a year or more. *See* INA § 240A(b)(1)(C); *see also* *Matter of Cortez Canales*, 25 I&N 301 (BIA 2010) (applying this bar to relief even to individuals who qualify for the petty offense exception to inadmissibility). Thus, in the past, many New York immigrants convicted of New York class A or unclassified misdemeanors have been barred from cancellation relief. Under the new state legislation, since convictions of these New York misdemeanors will be subject to a maximum potential sentence of 364 days (one day less than a year), a single conviction will no longer categorically bar noncitizens with these convictions from presenting such applications for discretionary relief.

- *Generally the Federal Government Will Not Be Able to Apply the Immigration “Aggravated Felony” Provisions to New York Misdemeanor Convictions/Sentences*

“Aggravated felony” is an immigration law term of art that has particularly harsh immigration consequences, including deportability, ineligibility for virtually any form of relief from deportation (thus, deportation is mandatory), and long sentence enhancements for illegal reentry after deportation. The BIA has unfortunately broadly interpreted the aggravated felony definition to reach even low-level misdemeanor state offenses. *See, e.g.,* *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), *overruled by* *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Matter of Small*, 23 I&N Dec. 448 (BIA 2002). One reason for this is that certain aggravated felony grounds are defined to include certain categories of conviction where the sentence of incarceration imposed is one year or longer, even if the offense at issue is only a misdemeanor. Such aggravated felony grounds include those for a crime of violence, a theft offense, or an offense relating to forgery or obstruction of justice. INA § 101(a)(43)(F) (crime of violence), (G) (theft offense), (R) (forgery and related offenses) and (S) (obstruction of justice and related offenses). Thus, in the past, immigration authorities have applied the aggravated felony label to reach some New York class A misdemeanors whenever New York courts imposed a sentence of one year, e.g., New York misdemeanor petty larceny (NYPL § 155.25). This has led to hugely disproportionate consequences for New York immigrants convicted of such misdemeanor

³ Nothing in the One Day to Protect New Yorkers Act is likely to alter the calculation regarding whether a specific misdemeanor is, or is not, a CIMT. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992) (“[N]either the seriousness of a criminal offense, nor the severity of the sentence imposed, is determinative of whether a crime involves moral turpitude”). Accordingly, if an individual faces removal for multiple CIMTs under INA § 237(a)(2)(A)(i), the change in maximum sentences is not likely to provide any defense to removal.

state offenses and so sentenced. Under the new state legislation, conviction of these New York misdemeanors will no longer result in a sentence imposed of one year and therefore can no longer trigger aggravated felony consequences.

III. New Strategies for People Facing Adverse Immigration Consequences Triggered by the Potential Sentence for New York Class A or Unclassified Misdemeanor Convictions Entered Before April 12, 2019

Despite the law’s clear and explicit retroactive application, *see* NYPL § 70.15(1-a)(b), we anticipate significant DHS efforts to deny its protections to individuals whose misdemeanor convictions pre-date the One Day to Protect New York Act (entered before April 12, 2019). Such individuals may include people who face removal charges under INA § 237(a)(2)(A)(i) for having been convicted of a single CIMT offense within five years of admission because the potential sentence originally associated with their conviction was one year, as well as individuals who face efforts to preterm applications for non-LPR or VAWA cancellation of removal under INA § 240A(b)(1)(C) because of asserted deportability on the same theory. In this section, we survey the strategies available to such individuals—individuals who face adverse immigration consequences based on the one-year *potential* sentence originally associated with their past convictions—to obtain the full protections of the One Day to Protect New Yorkers Act.

Confronting a similar state law, the BIA recently refused to recognize the effectiveness of California’s retroactive reduction in the maximum sentence associated with its misdemeanor convictions. *See Matter of Velasquez-Rios*, 27 I&N Dec. 470, 474 (BIA 2018) (pending review before the Ninth Circuit in *Velasquez-Rios v. Barr*, No. 18-72990 (9th Cir. 2019)). Accordingly, we anticipate that DHS will argue that, under *Matter of Velasquez-Rios*, New York’s retroactive reduction in the potential sentence associated with its misdemeanor convictions is similarly ineffective for immigration purposes. We recommend that practitioners consider the following non-exhaustive list of strategies to address such DHS arguments.

Strategy #1: Preserve the Argument that New York’s Retroactive Reduction in the Maximum Potential Sentence Associated with Misdemeanor Convictions is Effective

There is no question that New York intended its one-day reduction in the potential sentence associated with misdemeanors to apply to past convictions. NYPL § 70.15(1-a)(b) (“The amendatory provisions of this subdivision are ameliorative and shall apply to all persons who are sentenced before, on or after the effective date of this subdivision, for a crime committed before, on or after the effective date of this subdivision.”). However, in *Matter of Velasquez-Rios*, 27 I&N Dec. 470, the BIA considered the effect of a California law that, like New York, retroactively reduced the maximum sentence for misdemeanors to 364 days. *See* Cal. Penal Code § 18.5(a). The BIA ruled that, for purposes of determining whether the past offense was a CIMT for which the maximum potential sentence was one year or more as required under INA § 237(a)(2)(A)(i)(II), it was the potential sentence at the time of conviction that matters. *Id.* at 474 (“Section 237(a)(2)(A)(i)(II) . . . requires a backward-looking inquiry into the maximum possible sentence the respondent could have reached for his forgery offense at the time of his conviction”). The BIA acknowledged and left undisturbed the then-long-standing rule in *Matter of Song* and *Matter of Cota-Vargas* that sentencing reductions in other contexts remain effective, *id.* at 474 n.9, and thus

limited its holding to the specific language of INA § 237(a)(2)(A)(i)(II). *Matter of Cota-Vargas*, 23 I. & N. Dec. 849 (BIA 2005); *Matter of Song*, 23 I. & N. Dec. 173 (BIA 2001).⁴

In reaching its holding in *Velasquez-Rios*, the Board relied almost exclusively on two federal court decisions; both of which are readily distinguishable. First the BIA looked to *United States v. Diaz*, 838 F.3d 968, 973, 975 (9th Cir. 2016), where the Ninth Circuit analyzed an effort to amend a criminal sentence enhancement entered pursuant to 21 U.S.C. § 841(b)(1)(A), which imposes a mandatory life sentence on a defendant who “commits [a violation of § 841] after two or more prior convictions for a felony drug offense have become final.” One of the triggering felony drug crimes that Diaz had been convicted of was, at some time after the conviction and after the federal enhancement that resulted therefrom, reclassified as a misdemeanor under California law. The Ninth Circuit refused to disturb the federal sentence. However, the court’s analysis was informed in significant part by the fact that state statutory language regarding California’s reclassification suggested it was not intended to affect the federal sentence. *Diaz*, 838 F.3d 968, 974 (9th Cir. 2016) (“[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act.” (quoting the state statute at issue with alteration in the original)). In addition, the *Diaz* court relied on the specific language of the federal sentencing statute at issue, which suggested a “backward-looking” inquiry, by specifically noting that the enhancement is triggered at the time “two or more prior convictions for a felony drug offense *have become final*.” *Id.* at 973 (quoting and adding emphasis in the original to 21 U.S.C. § 841(b)(1)(A)). In contrast, unlike the California law, the One Day to Protect New Yorkers Act strongly suggests an intention to make this retroactive change effective for immigration purposes, *see* NYCPL § 440.10(1)(j), and unlike the sentencing enhancement, the operative language in INA § 237(a)(2)(A)(i)(II) (“a crime for which a sentence of one year or longer *may be imposed*”) does not suggest a backward looking inquiry.

The other case relied upon by the BIA in *Velasquez-Rios* is even more far afield. In *McNeill v. United States*, 563 U.S. 816 (2011), the Supreme Court considered a federal sentencing enhancement triggered if an individual has previously been convicted of prior drug offenses for which a “maximum term of imprisonment of ten years or more is prescribed by law.” *Id.* at 817 (quoting 18 U.S.C. § 924(e)(2)(A)(ii)). McNeill faced the sentencing enhancement because he had been convicted of such prior offenses in North Carolina. However, subsequent to McNeill’s conviction for the triggering state drug offenses, the state reduced the maximum sentence below the ten-year threshold. However, in *McNeill*, his actual sentence was and remained in excess of the statutory trigger because, unlike the One Day to Protect New Yorkers Act, the state law was not retroactive and explicitly did not apply to crimes committed at the time of the incident in the case at bar. *Id.* at 821. In fact, the Court was explicit that it was not addressing the situation where “a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense.” *Id.* at 825 n.1.

⁴ In *Matter of Thomas* and *Matter of Thompson*, 27 I. & N. Dec. 674 (A.G. 2019), Attorney General Barr overturned *Song* and *Cota-Vargas*, holding that retroactive modifications of imposed sentences may only be given effect if based on a procedural or substantive error. *Thomas/Thompson*, discussed further below, does not speak to *potential* sentences, only sentences that were actually *imposed*, so it should not affect the holding of *Velasquez-Rios* or the strategies discussed in this section.

Accordingly, strong arguments remain available that the retroactive reduction in the maximum sentence for misdemeanor convictions in New York should be sufficient to defeat an INA § 237(a)(2)(A)(i)(II) charge (or any claim that a person is disqualified for non-LPR or VAWA cancellation on such basis). Practitioners should advance and preserve such claims before the immigration courts and the BIA. However, as long as *Velasquez-Rios* remains good law in a circuit, practitioners would be wise to not rest solely on the arguments outlined above but instead should consider simultaneously pursuing the below strategy.

Strategy #2: Use NYCPL § 440.10(1)(h) to Vacate a Pre-enactment New York State Misdemeanor Conviction that May Trigger Adverse Immigration Consequences Because of the Previous Maximum One-Year Sentence by Utilizing the New Statutory Presumption in NYCPL § 440.10(1)(j)

Section 440.10 of the New York Criminal Procedure Law is the mechanism by which an individual can seek to vacate a legally defective conviction in New York. In *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000), the Board held vacatur under NYCPL § 440.10 are effective for immigration purposes because vacated judgments are not convictions under INA § 101(a)(48)(A). See also *Matter of Pickering*, 23 I&N Dec. 621, 622–23 (2003) (reaffirming the effectiveness of NYCPL § 440.10 vacatur). *Velasquez-Rios* did nothing to disturb this well-established precedent that vacatur under NYCPL § 440.10, which are merit-based by definition, remain effective. Accordingly, even if an immigration court feels bound by *Velasquez-Rios* to hold that New York’s retroactive reduction in potential misdemeanor sentences is ineffective to defeat a charge under INA § 237(a)(2)(A)(i), see discussion *supra*, the charge may still be defeated if the conviction in question is vacated pursuant to NYCPL § 440.10.⁵

The One Day to Protect New Yorkers Act has opened up new tools for practitioners seeking to vacate past class A or unclassified misdemeanor convictions (entered prior to April 12, 2019). Section 440.10(1)(h), which pre-dates the One Day to Protect New Yorkers Act, permits vacatur whenever a “judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.” This is the provision commonly used to attack convictions that were obtained as the result of ineffective assistance of counsel or through a plea that was not knowing, voluntary and intelligent. It is the mechanism, for example, by which the many immigrant New Yorkers who enter pleas without understanding the immigration consequences can later vacate their unlawful convictions. See *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that noncitizen defendants are entitled to affirmative immigration advice from their defense attorneys); *Reyes v. Keane*, 118 F.3d 136, 139 (2d Cir. 1997) (“New York provides a mechanism for collaterally attacking a judgment that is in violation of constitutional rights, see N.Y. Crim. Proc. Law § 440.10(1)(h).”)

⁵ In addition, such vacatur may open up the possibility of attacking prior removal orders. See generally 8 C.F.R. § 1003.2(c)(1) (allowing motions to reopen based on previously unavailable evidence); American Immigration Council, *Practice Advisory: The Basics of Motions to Reopen EOIR-Issued Removal Orders*, (February 7, 2018) (available at: https://www.americanimmigrationcouncil.org/sites/default/files/practice_advisory/the_basics_of_motions_to_reopen_eoir-issued_removal_orders_practice_advisory.pdf) (last accessed April 26, 2019); sample motion to reopen available from the National Immigration Project of the National Lawyers Guild at https://www.nationalimmigrationproject.org/PDFs/practitioners/our_lit_impact_litigation/2014_28Jul_mx-to-reopen-redacted.pdf (last accessed April 26, 2019)

The new subdivision NYCPL § 440.10(1)(j) creates a rebuttable presumption that a conviction by plea to class A or unclassified misdemeanor entered prior to April 12, 2019 “was not knowing, voluntary and intelligent, based on ongoing collateral consequences, including potential or actual immigration consequences.” This presumption reflects the reality that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes” and that most noncitizens would not knowingly, voluntarily and intelligently subject themselves to potential immigration consequences by pleading guilty to a misdemeanor offense. *Padilla*, 559 U.S. at 364. Because the defendant must establish the existence of “ongoing collateral consequences,” which is evidence outside the record, a collateral appeal is the proper procedural mechanism. See *People v. Gravino*, 14 N.F.3d 546, 558 (2010) (“[M]atters not apparent from the face of the record... are therefore properly fleshed out by affidavit in support of a CPL 440.10 motion rather than raised on direct appeal”); NYCPL § 440.10(2)(b). This section further provides for a “rebuttable presumption that [such] a conviction by verdict constitutes cruel and unusual punishment” under the state constitution. NYCPL § 440.10(1)(j). The presumption created by § 440.10(1)(j) is not a free-standing basis for vacatur but rather a new evidentiary presumption of a specific constitutional violation relevant to vacatur under the pre-existing § 440.10(1)(h).

As a general matter, immigration courts are not required to, and will often decline to, stay removal proceedings to allow an individual to pursue post-conviction relief in state court. *Matter of L-A-B-R-*, 27 I&N Dec. 405, 417 (A.G. 2018) (Stating “an alien’s pending collateral attack on a criminal conviction is too ‘tentative’ and ‘speculative’ to support a continuance of removal proceedings.”)⁶ Accordingly, practitioners are advised to move swiftly in considering and, where appropriate, pursuing motions under § 440.10. Movants under § 440.10 bear the burden of proof, NYCPL § 440.30(6), and at times it has been challenging to satisfy that burden particularly where, *inter alia*, convictions are old or where the only proof of the asserted violation is your client’s own recollection. See NYCPL § 440.30(4)(d) (The court may deny a motion without a hearing if “[a]n allegation of fact essential to support the motion (i) is contradicted by a court record or other official document, or is made *solely by the defendant and is unsupported by any other affidavit or evidence*, and (ii) under these and all the other circumstances attending the case, there is no reasonable possibility that such allegation is true”); *People v. Chu-Joi*, 26 NY3d 1105, 1107 (2015) (A court does not have to credit “self-serving and uncorroborated” evidence.)⁷ Accordingly, the

⁶ The Attorney General misstates the relevant holdings of the circuit opinions cited in *L-A-B-R-*. In the cases cited, courts did not hold that “a” collateral attack is too speculative, but rather that *the* collateral attacks specific to those cases were speculative. In one, the court found that “the record (specifically the plea agreement) belie[d] any claim of ineffective assistance” forming the basis of the post-conviction motion. *Jimenez-Guzman v. Holder*, 642 F.3d 1294, 1298 (10th Cir. 2011). In another, the court noted that “the IJ quoted the portion of the guilty plea transcript where [the respondent] admit[ted] to the judge that he waived any claim to ineffective assistance of counsel.” *Palma-Martinez v. Lynch*, 785 F.3d 1147, 1150-1151 (7th Cir. 2015). Both cases evaluated the specific merits of the post-conviction motion at issue in finding relief was too “speculative,” and not that *all* post-conviction motions are too speculative. The Second Circuit has not issued a decision on this precise question.

⁷ Courts may forget to apply the second requirement, that there be “no reasonable possibility that such allegation is true,” which can be remedied only via successful appeal. See, e.g., *People v. Reynoso*, 88 A.D. 3d 1162, 1164 (3d Dept. 2011). When filing a motion, the best practice is to anticipate denial on this basis and address it in advance.

new statutory presumption in § 440.10(1)(j) provides new and very promising opportunities for individuals who fall within its purview.

Practitioners pursuing relief under § 440.10 should think carefully about the strategic choices presented as to what claims to assert, as individuals generally are only entitled to a single motion under this section. *See generally* NYCPL § 440.10(3)(c) (permitting denial of motion if “[u]pon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so”). In particular, the issue of whether to assert an ineffective assistance of counsel claim should be carefully weighed since on the one hand, the law is clear and favorable regarding failure to present immigration advice, *Padilla*, 559 U.S. 356, *but cf. People v. Baret*, 23 N.Y.3d 777 (2014) (holding that *Padilla* is not retroactive), and thus it has been a fruitful claim in many such motions; but, on the other hand, the statutory presumption does not operate on the claim of ineffective assistance, and asserting ineffective assistance may impact the scope of attorney client privilege and invite the testimony of prior defense counsel as necessary to address the ineffectiveness claim. *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) (en banc) (Finding an implicit waiver of attorney-client privilege only as to confidential information relevant to the specific ineffective assistance claims). In addition, practitioners should carefully consider whether and what evidence to put forward in support of the motion or whether to rest exclusively or primarily on the statutory presumption. *See generally* NYCPL § 440.30(1)(a) (“If the motion is based upon the existence or occurrence of facts, the motion papers *must contain* sworn allegations thereof, whether by the defendant or by another person or persons.” (emphasis added)); NYCPL § 440.30(4)(b) (“[T]he court may deny [the motion] without conducting a hearing if . . . [t]he motion is based upon the existence or occurrence of facts and the moving papers do not contain sworn allegations substantiating or tending to substantiate all the essential facts, as required by subdivision one”). Practitioners should also consult additional resources on general considerations related to motions under NYCPL § 440.10.⁸

As always, it is of course advantageous to have the prosecution support any such motion. However, motions that rest upon the new statutory presumptions created by NYCPL § 440.10(1)(j) create new incentives and consequences to the prosecutor’s position. Under the new NYCPL § 440.10(9), where a motion is granted based on the new statutory presumption the court may “vacate the judgment or modify the judgment by reducing it to one of conviction for a lesser offense” with the consent of the prosecutor *or* it may “[v]acate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant.” However, without the prosecution’s consent, only the latter option is available. *Id.* Either result, however, includes a vacatur of the judgment of conviction, § 440.10(9), upon a finding that the conviction was “obtained in violation of a right of the defendant under the constitution of this state or of the United States,” § 440.10(1)(h), (1)(j). Accordingly, either mechanism should fall within the holding of *Rodriguez-Ruiz* and satisfy the requirements of *Pickering*. At minimum, the vacatur order should reflect that the conviction was vacated pursuant to CPL § 440.10 in order to rely on the holding in *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000), and to provide the proper statutory basis for the court’s order. If filing a motion to reopen, the BIA places the burden of proof on respondents to establish the basis for the vacatur. *Matter of Chavez*, 24 I&N Dec. 272,

⁸ Immigrant Defense Project, *Post-Padilla Post-Conviction Relief in New York State Courts* (available at: https://immigrantdefenseproject.org/wp-content/uploads/2012/04/Model-Motion-Doc.-0.5-Guide-to-Accompany-Motion.final_.pdf)

274 (BIA 2007) (“[T]he burden of proving why the conviction was vacated is appropriately placed on the respondent as the party seeking reopening.”) In that circumstance, it is more important that the vacatur order state the legal basis and statute or constitutional provision that was violated; if based on one of the presumptions, it could state “because the plea was not knowing, voluntary, and intelligent” or “constituted cruel and unusual punishment.”⁹ Consistent with the language from *Rodriguez-Ruiz*, the order can also state that the conviction “is in all respects vacated, on the legal merits.” *Id.* at 1379.

To the extent DHS seeks to attack the validity of a vacatur under § 440.10(1)(h) that rests on the presumption newly established by § 440.10(1)(j), practitioners have multiple strong arguments available regarding the validity of the vacatur for immigration purposes. First, the new provision does nothing to alter the substantive grounds requiring vacatur under § 440.10, and thus does nothing to alter the binding BIA precedent respecting such vacaturs. The statutory presumptions merely reflect legislative intent relating to satisfaction of the substantive standards already set forth in § 440.10(1)(h). *See* § 440.10(1)(j) (setting forth presumptions applicable to the pre-existing substantive standards in subdivision (h)). Accordingly, the BIA’s holding in *Rodriguez-Ruiz* must control. *Id.* at 1380. Further, the statutory recognition that immigration consequences are relevant to the legality of the underlying conviction does not transform the vacatur into a rehabilitative measure or undermine the merit-based nature of the challenge. *See Matter of Adamiak*, 23 I. & N. Dec. 878, 878, 880 (BIA 2006) (holding that a conviction vacated for failure of the trial court to advise the alien defendant of the possible immigration consequences of a guilty plea constitutes a defect in the underlying proceedings).

IV. New Strategies for People Facing Adverse Immigration Consequences Triggered by the Actual Sentence for New York Class A or Unclassified Misdemeanor Convictions Entered Before April 12, 2019

There are several categories of individuals who may face negative immigration consequences associated the *actual* sentence imposed for a past New York misdemeanor conviction. These individuals include people who were actually sentenced to the previous maximum one-year sentence and now:

- a) May face removal for an aggravated felony charge triggered by their one-year sentence. *See, e.g.*, INA §§ 101(a)(43)(F) (crime of violence), (G) (theft offense), (R) (forgery and related offenses) and (S) (obstruction of justice and related offenses); and
- b) May be subject to mandatory detention under INA § 236(c)(1)(B) or (C) because of an actual one-year sentence.

In addition, some individuals may face negative immigration consequences associated with an actual sentence imposed for a past New York misdemeanor conviction that is less than one year. These individuals include people:

⁹ In addition, while the presumption requires evidence of “ongoing collateral consequences,” in order to avoid confusion or to provide an opportunity for the court to misapply *Pickering*, practitioner should attempt to keep the court’s vacatur order (and the § 440.10 record generally) as focused as possible on the constitutional violation rather than the immigration consequences.

- c) Who received an actual sentence of ninety days or more and, as a result, may be deemed ineligible for DACA based on a significant misdemeanor finding; and
- d) Who received an actual sentence of more than six months and, as a result, may not be able to take advantage of the petty offense exception to the CIMT inadmissibility ground, INA § 212(a)(2)(A)(ii)(II), or who may be deemed ineligible for cancellation of removal, INA § 240A(a)(2) and (d)(1) (stopping clock for cancellation residence requirement based on commission of an offense referred to in section 212(a)(2)), or who may be deemed ineligible for naturalization, INA § 101(f)(3) (barring the requisite good moral character finding for naturalization based on an offense described in 212(a)(2)(A)).

Regardless of whether the actual sentence imposed was one year or less, in this section, we survey the strategies available to such individuals—individuals who face adverse immigration consequences based on the *actual* sentence originally associated with their past convictions—to obtain the full protections of the One Day to Protect New Yorkers Act. Unfortunately, under the Attorney General’s recent decision in *Matter of Thomas* and *Matter of Thompson*, 27 I. & N. Dec. 674 (A.G. 2019) (“*Thomas/Thompson*”), retroactive changes to sentences are no longer required to be recognized for immigration purposes regardless of rationale. DHS will likely argue that the Act’s sentence reductions by operation of law and under NYCPL § 440.20 are ineffective under the new *Thomas/Thompson* rule. These strategies are intended to address such arguments.¹⁰

Strategy #3: Preserve Arguments that the Automatic One-Day Sentence Reduction Required under NYPL § 70.15(1-a)(c) Is Effective Notwithstanding *Matter of Thomas/Thompson*

The new NYPL § 70.15(1-a)(c) provides that “[a]ny sentence for a misdemeanor conviction imposed prior to April 12, 2019 that is a definite sentence of imprisonment of one year . . . shall, by operation of law, be changed to, mean and be interpreted and applied as a sentence of three hundred sixty-four days.” (emphasis added). The section further provides individuals who are automatically resentenced under this provision are entitled to a certificate of disposition that reflects their new 364 days sentence. *Id.*

Prior to the AG’s decision in *Matter of Thomas* and *Matter of Thompson*, which was issued in October 2019, well-established BIA precedent had held that such resentencing for any reason was sufficient to overcome an aggravated felony charge or other adverse immigration consequences requiring an actual one-year sentence. *See Matter of Cota-Vargas*, 23 I. & N. Dec. 849 (2005) (resentencing defeated a theft aggravated felony charge), *overruled by Matter of Thomas/Thompson*; *Matter of Song*, 23 I. & N. Dec. 173 (2001) (same). Furthermore, the BIA had been explicit that such resentencing was effective even if the resentencing court was motivated by a desire to mitigate immigration consequences. *Matter of Cota-Vargas*, 23 I. & N. Dec. at 851-52 (distinguishing *Pickering* and recognizing resentence specifically entered to defeat an aggravated felony charge).

¹⁰ A forthcoming practice advisory will describe in more detail the effects of the Attorney General’s holding in *Thomas/Thompson*, as well as potential challenges to the decision.

In *Thomas/Thompson*, the AG considered two sentence reductions by Georgia state courts. In both cases, the individual faced deportation based on an actual sentence of one year, and the modification would have prevented that consequence. In *Matter of Thomas*, after the sentencing court “clarified” its original sentence, the BIA did not give effect to the order, citing *Matter of Estrada*, 26 I. & N. Dec. 749 (BIA 2016) (setting out a test for whether a sentence clarification should be credited). *Matter of Thomas/Thompson*, 27 I. & N. Dec. at 678. By contrast, the state court in *Matter of Thompson* “modified” the sentence and was credited by the BIA under *Cota-Vargas*. *Id.* at 679.

The AG’s opinion argued that these standards were inconsistent with the INA, and held that the *Pickering* test for vacatur must apply to all sentence modifications. In other words, a modification will only be given effect by the immigration court if “the state court alters the [] sentence because of a procedural or substantive defect in the original proceeding.” *Id.* at 684. Modifications for rehabilitative or other purposes, however, will no longer be effective. Although *Thomas/Thompson* addresses modifications by state courts, DHS will likely argue that it also applies to sentences that are retroactively reduced “by operation of law,” including those covered by NYPL § 70.15(1-a)(c).¹¹

As *Thomas/Thompson* is likely to face federal court challenges and may be reversed, practitioners at the immigration courts and the BIA should preserve arguments that the automatic one-day reduction under the One Day to Protect New Yorkers Act should be given effect. For example, practitioners could argue that the BIA’s analysis of the INA in *Cota-Vargas* was correct as a matter of law, and that the AG wrongly interpreted INA § 101(a)(48)(B) as declining to give effect to sentence modifications. *See Matter of Cota-Vargas*, 23 I. & N. Dec. at 852. Additionally, practitioners should argue that *Thomas/Thompson* is a new rule that should not apply retroactively to sentence modifications that occurred before October 25, 2019. This would include all sentences automatically reduced by operation of law as of April 12, 2019—the effective date of NYPL § 70.15(1-a)(c). *See Obeya v. Sessions*, 884 F.3d 442 (2d Cir. 2018) (using a five-factor test to determine that a BIA decision would not apply retroactively). However, as long as *Thomas/Thompson* is good law, practitioners should not rely on these arguments but should make use of the following strategy as well.

Strategy #4: Vacate Pre-Enactment New York State Misdemeanor Convictions that May Trigger Adverse Immigration Consequences Because of the Previous Actual Sentence Under NYCPL § 440.10(1)(h) by Utilizing the New Statutory Presumption in NYCPL § 440.10(1)(j)

Even if DHS successfully argues that *Thomas/Thompson* controls and that an automatic one-day sentence reduction is not effective, practitioners should make use of the vacatur strategy set forth

¹¹ Similarly, sentencing reductions for actual sentences of *less than* one year, which are provided for in the new NYPL § 70.15(1-a)(d), are unlikely to be credited under *Thomas/Thompson*. This section permits such sentences to be set aside under NYCPL § 440.20 based on a showing that the sentence “is likely to result in collateral consequences.” Unlike a vacatur pursuant to NYCPL § 440.10(1)(h), a § 440.20 resentencing based on “collateral consequences” would not be resentencing based on a “procedural or substantive defect” in the original proceeding and arguably does not satisfy the *Pickering* test. As discussed *infra*, a § 440.10 vacatur is therefore the preferable vehicle when sentences under one-year trigger adverse immigration consequences.

above at Strategy #2 as an alternative mechanism to alter a sentence. Under the new NYCPL § 440.10(9)(b), if an individual is successful in pursuing a motion under NYCPL § 440.10(1)(h), (j), the court may enter a new, reduced sentence for the same offense without exposing the individual to potential re-prosecution on the original charges, even without the consent of the prosecution. As discussed above, any vacatur and resentencing pursuant to § 440.10 necessarily goes to the merits of the conviction, and will therefore satisfy the requirements added by *Thomas/Thompson*.

This resentencing strategy will protect individuals who face aggravated felony charges triggered by a prior actual one-year sentence for a misdemeanor offense—which includes crime of violence, INA § 101(a)(43)(F), theft offense, INA § 101(a)(43)(G), forgery and related offenses, INA § 101(a)(43)(R), and obstruction of justice and related offenses, INA § 101(a)(43)(S). It can also benefit any individual with a prior class A or unclassified misdemeanor conviction and an actual sentence of more than 90 days, which could be deemed a “significant misdemeanor” disqualifying the person from DACA, if the court reduces the sentence to less than 90 days. Finally, the strategy can be used by any individual with an actual sentence of more than six months who would otherwise be unable to rely on the “petty offense” exception to the CIMT inadmissibility ground, INA § 212(a)(2)(A)(ii)(II), or deemed ineligible for naturalization, INA § 101(f)(3).

Individuals can also face mandatory detention if they are removable on the basis of an aggravated felony charge (including those triggered by an actual one year sentence), INA § 236(c)(1)(B), or on the basis of the one CIMT removal ground, INA § 237(a)(2)(A)(i) if they have “been sentence[d] to a term of imprisonment of at least 1 year” for that CIMT, INA § 236(c)(1)(C). Individuals in this category should likewise be able to defeat a mandatory detention by seeking vacatur and resentencing under NYCPL 440.10(h),(j).

Notwithstanding the relation between mandatory detention under INA § 236(c)(1)(C) and the one CIMT ground at issue in *Velasquez-Rios*, the Board explained that “237(a)(2)(A)(i)(II) differs from other provisions of the Act that require us to consider the *actual* sentence imposed, necessitating a fact-based inquiry into a State court judge's specific sentence or into subsequent modifications to that sentence.” *Matter of Velasquez-Rios*, 27 I. & N. Dec. 470, 474 n.9 (emphasis in original). Thus, *Velasquez-Rios* supports the conclusions that the language of § 236(c)(1)(C) pertaining to the “actual” sentence turns on any “subsequent modifications to that sentence.” Accordingly, vacatur and resentencing under NYCPL § 440.10 should be sufficient to protect individuals for one-year aggravated felony charges and from mandatory detention under INA § 236(c)(1)(C).¹²

V. New Strategies for People Facing Other Adverse Immigration Consequences Triggered by the Nature of New York Class A or Unclassified Misdemeanor Convictions Entered Before April 12, 2019

¹² The small category of individuals with previous actual one-year sentences, who face removal under INA § 237(a)(2)(A)(i), may also consider arguments that their vacatur and resentencing distinguishes their situation from the situation considered in *Velasquez-Rios*. 27 I. & N. Dec. at 474 n.3 (declining to consider portion of the California law not at issue that provided for actual resentencing); *id.* at 474 n.9 (distinguishing “actual” resentencing).

For individuals with a past misdemeanor conviction that may trigger adverse immigration consequences based, not on the actual or potential sentence, but rather on the nature of the conviction, practitioners may consider exploring the vacatur strategy set forth above at Strategy #2. Such individuals may include, but are not limited to, people who face removal because of prior misdemeanor marijuana convictions, people with more than one crime deemed to involve moral turpitude, people whose convictions may be deemed particularly serious crimes, or people whose crimes may trigger a negative exercise of discretion. For example, someone seeking refuge from a credible fear of persecution abroad, but who pleaded guilty to a minor New York misdemeanor that is then deemed a “particularly serious crime” barring asylum and/or withholding of removal relief in subsequent removal proceedings, could very legitimately argue for application of the presumption that his or her plea to the misdemeanor was not knowing, voluntary and intelligent, particularly if he or she pled without any warning of such consequences. If such individuals can, pursuant to NYPL § 440.10(9)(a), obtain the consent of the prosecutors to either decline to re-prosecute or to permit a replead to a lesser offense, then a motion under NYCPL § 440.10(1)(h) utilizing the new statutory presumption in NYCPL § 440.10(1)(j) may provide a path to protect an individual from these immigration consequences.