RIAC2

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HAPPY HOLIDAYS!

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2019 YEAR END REVIEW: NEW LEGISLATION AND YOUR NONCITIZEN CLIENT

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The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.

**RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

2019 YEAR END REVIEW: NEW LEGISLATION AND YOUR NONCITIZEN CLIENT

ONE DAY TO PROTECT NEW YORKERS:

Class A Misdemeanors are no longer possible "Aggravated Felonies" because maximum sentence is now LESS THAN one year under this new law. Thus, in New York, a misdemeanor "Crime Involving Moral Turpitude" within 5 years of admission to U.S. is no longer a ground of deportation. Additional provisions under this new law include:

- The law is retroactive to amend all prior maximum sentences for class A misdemeanors to LESS THAN one year; and
- Any amendment or vacatur of sentence under CPL §440 is deemed to be for constitutional reasons/defect in underlying proceeding.

CAUTION: Other misdemeanor offenses still make your client deportable (controlled substance offenses, firearms offenses, crimes against children, crimes of domestic violence and violation of protection order); and, felony CIMT within 5 years of admission still makes your client deportable.

DECRIMINALIZATION OF MARIHUANA

Penal Laws §§221.05 and 221.10 were amended to classify marihuana possession as a "violation." Additional provisions were enacted to allow for expungement and vacatur of convictions under the Criminal Procedure Law.

- Both sections make marihuana possession a violation, with possible fines of $50 (§221.05) and $200 (§221.10).
- Incarceration and enhanced fines were eliminated.
- The CPL was amended to provide for expungement (§160.50(5)) and vacatur (§440.10(1)(k)) of any conviction under PL §§ 221.05 and 221.10, based on legal and constitutional grounds.

CAUTION: Under **federal** law, marihuana is still a listed controlled substance and, therefore, illegal. A noncitizen client is ***deportable*** from the U.S. for a marihuana conviction, even if only a "violation" under state law (see, INA §237(a)(2)(B)(i); 8 U.S.C. §1227(a)(2)(B)(i)). There is an exception for anyone convicted of a SINGLE charge of possession of 30 grams or less of marihuana for one's own use. A noncitizen is also

Chief Defenders & Assigned Counsel Administrators:

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inadmissible to the U.S. for any "controlled substance" conviction, including marihuana, and there is no exception for 30 grams or less under the laws of inadmissibility unless the person qualifies for a waiver under INA §212(h).

If your client is charged with a violation marihuana possession (UPM), **avoid a plea to the charge altogether**, regardless of the statutory language decriminalizing marihuana.

BAIL REFORM

CPL §510.00 has been modified to require the release of a defendant: "the court shall release the principal (defendant) pending trial on the principal's own recognizance, unless it is demonstrated and the court makes an individualized determination that the principal poses a risk of flight to avoid prosecution. If such a finding is made, the court must select the least restrictive alternative and condition or conditions that will reasonably assure the principal's return to court. The court shall explain its choice of release, release with conditions, bail or remand on the record or in writing" (see CPL §510.10(1)). Thus, the court **shall** release the defendant under non-monetary conditions, or select the least restrictive alternative and conditions that will reasonably assure his/her return to court. However, this does **not apply** to those who are charged with "qualifying offenses" as enumerated in the statute (e.g. felonies, criminal contempt).

Noncitizen defendants who are "otherwise removable," but who are charged with minor offenses, often must be remanded to avoid being taken into ICE custody pending the outcome of your case. If ICE takes your client into custody before you conclude your local case, you cannot assure the court that your client will return to court. Thus, it is imperative to consult with your client and counsel them to remain in local custody while arguing for remand under CPL 510.10(5):

CPL 510.10(5): "5. Notwithstanding the provision of subdivisions three and four of this section, with respect to any charge for which bail or remand is not ordered, and for which the court would not or could not otherwise require bail or remand, *a defendant may, at any time, request that the court set bail in a nominal amount request by the defendant in the form specified in paragraph (a) of subdivision one of section 520.10 of this title; if the court is satisfied that the request is voluntary, the court* ***shall*** *set such bail in such amount" (emphasis supplied).*

New York is at the forefront of enacting legislation to protect noncitizen defendants. The reforms enacted will surely be challenged in Immigration Court by ICE attorneys, and it remains to be seen whether New York's reforms will hold up under federal standards. Stay tuned.

Contact the RIAC at the earliest possible moment in your client's case!