RIAC2

CRIMINAL LAW FAMILY LAW

IMMIGRATION LAW

September 2019 Volume 3, Number 7

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UPCOMING EVENTS

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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.*

IN THE WEEDS: SORTING OUT THE TRUTH ABOUT IMMIGRATION CONSEQUENCES FOR MARIHUANA CONVICTIONS

On August 28, 2019, marihuana possession was decriminalized in the State of New York by amending Penal Law §§221.05 and 221.10. Additional provisions were enacted to allow for expungement and vacatur of convictions under the Criminal Procedure Law. Briefly, the changes are as follows:

- 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.

While this is good news for defendants in general, under federal law, marihuana is still on the federal list of controlled substances and therefore illegal. A non-citizen client is deportable from the U.S. for a marihuana conviction, even if only a "violation" under state law. 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. In Immigration Court, the government, using the "circumstance specific" approach, will look into the circumstances of the case to determine whether the exception applies. A non-citizen is also *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).

While the changes to the CPL provide that past and future convictions under 221.05 or 221.10 will be deemed a nullity and legally invalid, ICE counsel will continue to argue that these convictions are still

Chief Defenders & Assigned Counsel Administrators:

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"convictions." *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), vacated on other grounds sub nom., *Lujan-Armendariz v. INS*, 222 F.3d 728, 745-49 (9th Cir. 2000); *Matter of Pickering*, 23 I&N Dec. 621, 622–23 (BIA 2003). These cases follow the proposition that convictions "vacated because of post-conviction events, such as rehabilitation or immigration hardships" remain valid for immigration." *Pickering, supra*, at 624.

Regardless of the language of the CPL, which raises a rebuttable presumption that the expungement/vacaturs are based on legal and constitutional grounds to overcome *Roldan* and *Pickering* (and therefore do not constitute "convictions"), ICE counsel will argue the contrary in Immigration Court proceedings. For a non-citizen client, it is therefore best to avoid a plea to either of these charges, notwithstanding the pronouncements of the New York State legislature.

In addition, if your client is eligible for a green card or naturalization, the application forms specifically ask about prior *arrests*, convictions, withheld adjudications, expungement, etc. which will require your client to disclose the arrest on these forms and in an interview.

Options for immigration-safe pleas include:

- An outright dismissal of the charge without a plea. Because the conviction would be expunged by operation of law, it should not matter to the prosecutor whether the charge is dismissed with or without a plea, unless they are insistent on collecting a fine.
- ACD
- DisCon or simple Trespass
  Note, however that if you find out, during a proper intake, that your client is a DACA recipient (deferred action for childhood arrivals), violations under NY law are considered "insignificant misdemeanors" because a misdemeanor under federal law includes any offense punishable by more than 5 days in jail, and any DACA recipient convicted of three or more "insignificant" misdemeanors(including a DisCon or Trespass) is not eligible to renew DACA.

It remains to be seen how state legislation specifically drafted to decriminalize certain offenses or address the immigration consequences of those offenses will play out in the federal context of Immigration Court or in the application for other immigration benefits such as permanent residence or U.S. citizenship. If contemplating a 440 motion for a non-citizen client who is in ICE custody with a pending removal proceeding, time is of the essence, as a 440 motion or any state court proceeding attacking the validity of the conviction is deemed to be collateral and does not affect the finality of a conviction. In most cases, the removal proceeding will proceed with or without the vacatur of your client's conviction.

A detailed practice advisory regarding the new law is available at immigrantdefenseproject.org

As always, contact the RIAC at the earliest possible moment in the case!