

IMPACT OF MARIJUANA LEGALIZATION IN CRIMINAL AND IMMIGRATION LAW

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Following years of political debate and a State-wide referendum, on February 22, 2021, Governor Murphy officially signed into law three (3) bills effectively legalizing marijuana in the State of New Jersey. [The change in law has been applauded by legislative representatives and the ACLU as a long overdue measure addressing racial and social injustice that has plagued the State for years.](#) Like any legislation, it will take time and practice to understand the effects and unintended consequences of the law. In the meantime, the preliminary impact on criminal law should be significant, but for immigrants the laws may have a damaging effect.

Summary of the Laws

The Governor signed a trio of bills concerning marijuana. The first, A21 – “The New Jersey Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act”, amplified the powers of the Cannabis Regulatory Commission (“CRC”) in granting it authority to oversee the “development, regulation, and enforcement of activities associated with the personal use of cannabis...” The Governor also noted the legislation “will promulgate regulations to govern the medical and adult-use industries and oversee the applications for licensing of cannabis businesses. The legislation further provides for the Legislature to reinvest cannabis revenues in designated “impact zones”; directs the CRC to promote diversity and inclusion in business ownership; and contains critical employment protections for people who engage in lawful behavior with respect to cannabis.”

The second, A1897, legalizes possession of up to six (6) ounces of marijuana or hashish. The Law also eliminates the effect of marijuana use or possession in other aspects of the criminal justice system. For example, the Law prohibits possession or use of marijuana (in a legal manner) as forming the basis for a violation of parole or probation. It also prohibits a defendant from being restricted from use of marijuana while released on pre-trial detention. The Law prohibits prosecution of most marijuana cases wherein the crime was allegedly committed prior to the enactment of the Legislation. It requires the expungement of prior convictions. Finally, the Law dictates that the odor of marijuana alone does not justify a police officer’s search of a person.

The final Bill, S3454, addresses possession of marijuana by those under the age of 21 and the penalties associated therewith. First, the Law largely eliminates criminal consequences for possession of marijuana (within the confines of the Statute) for persons under the age of 21 and instead imposes civil penalties (fines). For those individuals found possessing or using marijuana or alcohol in certain locations, such as school, a motor vehicle or other public places, the Law imposes a \$250.00 civil penalty. In all other instances the Law imposes a civil penalty of \$50.00. The standard to issue the civil penalty is probable cause and is enforced in a summary proceeding. For those under the age of 18 the Law imposes escalating consequences. For a first offense the juvenile receives a written warning. For the second offense the written warning is also provided to the juvenile’s parents and the juvenile is provided access to certain social services (although

there is no enforcement or consequence if the services are declined). For a third offense the juvenile is issued a \$50.00 civil penalty or community service along with the penalties associated with a second offense. The Law also makes clear that a person under the age of 21 cannot give consent for law enforcement to conduct a search during an investigation into a violation of the Law and law enforcement is prohibited from seeking consent for a search. Finally, the Law prohibits the odor of marijuana as forming the basis to search either the person or property of a person under the age of 21.

Impact of Legislation in Criminal Law

The Law will have an immediate and substantial impact in several respects. First, all pending marijuana cases will be dismissed and all prior marijuana convictions will be expunged. Second, the Law immediately impacts search and seizure law by limiting law enforcement's ability to conduct searches pursuant to the odor of marijuana (although there are unanswered questions in that respect). Finally, the penalties for underage use or possession of marijuana and alcohol are dramatically reduced and now are subject (at most) to civil penalties as opposed to criminal or juvenile consequences.

Unanswered Questions in Criminal Law

Nevertheless, the Legislation leaves some questions unanswered.

- First, while the plain language of the Legislation makes clear that convictions and adjudications for possession of marijuana are to be expunged, it does not specifically address those defendants who utilized the Conditional Discharge Program. The Conditional Discharge Program is a diversionary program largely available to first time offenders wherein the case is held in abeyance for a period of up to one (1) year and the defendant is subject to monitoring by the courts. If the defendant successfully completes the program the case is dismissed. However, an individual can usually only use one diversionary program throughout their life. The Legislation does not specifically expunge the cases of those who utilized this program. Nor does it address whether their use of this program would bar them from utilizing Pre-Trial Intervention, as it ordinarily would do prior to its enactment. While the Attorney General has directed that these matters be expunged, the Law does not specifically afford him that authority. This issue should be clarified to determine if defendants who utilized the Conditional Discharge Program are prohibited from utilizing other diversionary programs in the future.
- Second, the Law specifically states that individuals under the age of 21 cannot legally consent to a search, and law enforcement cannot request consent from individuals under the age of 21 to conduct a warrantless search, during an investigation pursuant to this Statute. The logic of limiting this prohibition to this specific statute is not readily apparent. Why would a 20-year-old have the capacity to consent to a warrantless search for a firearm but not for marijuana?
- Third, there appears to be a distinction between those under the age of 21 and others with respect to the odor of marijuana serving as a basis to conduct a search. For those 21 years

old and older, the odor of marijuana cannot serve as reasonable and articulable suspicion to conduct a search of the suspect's person. However, for those under the age of 21 the odor of marijuana cannot serve as a reason to search their person, nor can it serve as probable cause to conduct a search of their property. Again, the reason for this distinction is not readily apparent and it is not clear whether this was a drafting error or an intentional act of the Legislature affording greater search and seizure protections to those under the age of 21.

- Fourth, the Law does not address those defendants convicted of Wandering, Remaining in or Prowling Public Places with Purpose of Obtaining or Selling Controlled Substances (commonly referred to as “drug loitering”). This disorderly persons offense was a common alternate charge negotiated in marijuana cases. While the new Law expunges marijuana convictions, it leaves untouched convictions of this nature wherein the defendant was simply looking for marijuana as opposed to possessing it. The absence is noteworthy.

Impact of Legislation in Immigration Law

For Immigration matters, the law has particular significance. On the positive side, the Law is beneficial to immigrants with pending marijuana cases who will see their charges dismissed. This is a very good thing, because a single marijuana conviction, with a limited exception, renders all noncitizens deportable from the United States. Under federal immigration law, a single marijuana conviction makes a noncitizen who has been a lawful permanent resident of the United States for decade deportable. It also makes a noncitizen who is seeking to obtain legal status inadmissible to the United States. Finally, a single marijuana conviction will cause a DACA recipient to lose their protected status and place them in the deportation proceedings. Immigration attorneys applaud the provisions of the Law that result in the dismissal of pending charges for noncitizens.

However, there are other aspects of the law for which immigration attorneys are weary. For example, the expungement and vacatur provisions of the Law raise serious concerns that were raised during the legislative process, but unfortunately appeared to have been ignored in the final bills. On February 22, 2021, Attorney General Grewal issued a Directive governing the dismissals of certain pending marijuana charges. In part B of the Directive, Attorney General Grewal states that for cases resolved prior to February 22, 2021 the Administrative Office of the Courts (“AOC”) will vacate by operation of law any guilty verdict, plea, placement in diversionary program, or other entry guilt. A marijuana conviction vacated under the new Law will likely still be considered a conviction for federal immigration purposes, thus defeating a portion of the Legislations intended purpose.

In 2003, the Board of Immigration Appeals (BIA) held in *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), that a conviction that has been vacated based on a procedural or substantive defect in the underlying criminal proceedings does not qualify as a conviction under § 101(a)(48)(A) of the Immigration and Nationality Act (INA). However, a conviction that is vacated for reasons solely related to the defendant's rehabilitation or immigration hardships is not eliminated from consideration for immigration purposes, which are civil rather than criminal in nature. In 2018, Board of Immigration Appeals (BIA) issued a published decision in *Matter of*

Marquez Conde, 27 I&N Dec. 251 (BIA 2018), which reaffirmed the holdings of *Matter of Pickering*.

To make matters worse for noncitizens, on November 3, 2020, the Third Circuit Court of Appeals issued a precedential decision addressing the impact of a vacated marijuana convictions under Connecticut's decriminalization law. *Khan v. Attorney General United States*, No. 19-1427 (3d Cir. 2020). Khan was a lawful permanent resident of the United States since 2000. In 2006 he pled guilty to possession of less than one-half ounce of marijuana. He was charged with deportation for having been convicted of a marijuana offense. Khan sought cancellation of removal claiming he had remained in the U.S. for seven years as an LPR and the "stop-time rule" did not apply to him because his original marijuana possession offense was vacated after Connecticut decriminalized these offenses. The Immigration Judge (IJ) held that, because the vacatur was due to a post-conviction event as opposed to a defect, pursuant to *Matter of Pickering*, the conviction still imposed immigration consequences. The Board of Immigration Appeals (BIA) affirmed the IJ's decision and Khan appealed the petition of review of his removal order to the Third Circuit Court of Appeals.

The Third Circuit agreed with the BIA, holding the vacatur did not affect the conviction that triggered the stop-time rule causing Khan to be ineligible for cancellation of removal. The Third Circuit determined that the vacatur has no effect on when an offense was "committed" because it only matters that the offense was illegal when committed, not whether the conviction itself still exists. Additionally, the Court ruled the vacatur has no effect on whether a noncitizen is rendered inadmissible or deportable because the immigration consequences at time of conviction remain, regardless if the law changes post-conviction.

Given the Third Circuit's analysis and reasoning in *Khan*, it appears that vacated convictions under New Jersey's decriminalization law will have no positive impact for noncitizens; and may in fact be harmful. Immigration attorneys are deeply concerned about the automatic vacatur provisions of the Law. It is not uncommon for a noncitizen to enter a guilty plea to a marijuana charge without adequate legal advice of the potential consequences. This would give rise to a motion for post-conviction relief that would be based on a substantive constitutional defect in the proceeding: ineffective assistance of counsel. This type of vacatur eliminates the immigration consequences of the conviction because of the constitutional defect of ineffective representation in the original proceeding. The automatic vacatur in the decriminalization law will not eliminate the immigration consequences, however, because it is not related to any substantive or constitutional defect in the original law. It is a rehabilitative statute and, similar to an expungement, it does not eliminate the immigration consequence of the conviction. Given the fact that vacatures under the new law are automatic, noncitizens who may have been able to vacate their convictions on substantive constitutional grounds will no longer have that ability.

In sum, the Law is good for noncitizens with pending marijuana cases, but it appears to be very bad for noncitizens with prior marijuana convictions.

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