



New York State
Unified Court System

OFFICE OF COURT ADMINISTRATION

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To: All Town and Village Judges ****COURT USE ONLY: NOT FOR DISTRIBUTION****

From: Office of Justice Court Support

Re: Marihuana Legislation 2019

Date: August 27, 2019

Summary and Operationalization of the New Marihuana Legislation

This memo summarizes two bills that the Governor signed into law on July 29, 2019, as well as details how Town and Village Courts should process and treat cases involving marihuana convictions.

Collectively, these bills:

- (1) Reduce the penalties for possession of small amounts of marihuana and reclassify certain marihuana-related offenses;
- (2) Require the court to vacate, dismiss and expunge new convictions (after August 28, 2019) of Penal Law (PL) § 221.05 and PL § 221.10; and
- (3) Require the Chief Administrator of the Courts to vacate the prior convictions of certain loitering and marihuana-related convictions and expunge records of those convictions; and
- (4) Permit an individual previously convicted of certain marihuana related offenses to make a motion to vacate pursuant to Criminal Procedure Law (CPL) § 440.10 (1) (k).

These laws go into effect on **August 28, 2019**.

Part One: Reducing Penalties for Possession of Small Amounts of Marihuana and Reclassifying Certain Marihuana-related Offenses

Effective August 28, 2019, PL § 221.05 “Unlawful possession of marihuana,” is now titled “Unlawful possession of marihuana in the second degree.” The elements of this offense remain unchanged (a person is guilty of unlawful possession of marihuana in the second degree when he knowingly and unlawfully possesses marihuana), and this conduct remains a violation. A person guilty of PL § 221.05 faces a **punishment only** by a **maximum fine of up to \$50** plus a surcharge of \$125. Penal Law § 221.05 is further modified by removing provisions that imposed higher fines if the defendant has previously been convicted of unlawful possession of marihuana.

The title for PL § 221.10 has changed from “Criminal possession of marihuana in the fifth degree” to “Unlawful possession of marihuana in the first degree.” Under the amended Penal Law § 221.10, a person is guilty of unlawful possession of marihuana in the first degree when he knowingly and unlawfully:

- possesses one or more preparations, compounds, mixtures or substances containing marihuana; AND
- the preparations, compounds, mixtures or substances are of an aggregate weight of more than one ounce.

Before this change in the law, a person who violated PL § 221.10 (*Criminal possession of marihuana in the fifth degree*) was guilty of a class B misdemeanor. Under the new law a person convicted on a charge of PL § 221.10 is guilty of a **violation**. A person who now violates PL § 221.10 faces **punishment only** by a fine of not more \$200 and a surcharge of \$125. Since this conviction is now a violation, the court is no longer required to order DNA collection for any PL § 221.10 convictions.

Part Two: Vacating, Dismissing and Expunging Judgments of Conviction for cases on or after August 28, 2019; Sealing

For convictions on or after August 28, 2019 of PL § 221.05 or § 221.10, the Court may impose a fine based on the fine schedule for the charge, as well as the mandatory surcharge of \$125. Upon conviction and sentence (even if the fine has not been paid), the Court **must immediately** mark in the case management system and the physical file that the case is expunged pursuant to CPL § 160.50 (5). The Court must also immediately send notification to law enforcement of the vacatur, dismissal and expungement using the new CPL § 160.50 (5) form available in the case management system and treat the case as sealed to the public¹. As with any sealed case, the individual named as the defendant, or the individual’s designated agent, is entitled to access the court record. The term expungement is now defined in CPL § 1.20 (45) and means that the arrest and any enforcement activity of the case is deemed a nullity and cannot act as a “...disqualification of any person so accused to pursue or engage in any lawful activity, occupation, profession or calling.” Any person who has had a record expunged shall not be required to divulge information about their case, unless specifically required or permitted by statute or authorized by a superior court.

If the defendant pays the fine and surcharge at the time of sentencing, the Court closes the file. If the defendant requests time to pay, the Court may grant an adjournment and/or convert the unpaid fine and/or surcharge to a civil judgment. Considering the sealing of these cases, the Office of Justice Court Support has modified the civil judgment form to eliminate any reference to a conviction. The new civil judgment form will be available on the City, Town and Village Courts website, as well as in the CourtRoom Program. As the penalty section does not allow for a jail sentence, a warrant should not be issued for any reason on a PL § 221.05 or § 221.10 case.

¹ For cases sealed to the public, the Court’s response to a public inquiry is “**No Record Found.**” For an inquiry from the Office of Children and Family Service (OCFS), the FBI when conducting a Criminal History Records check, the Office of Mental Health (OMH), and/or the Office of Persons with Developmental Disabilities (OPWDD), the Court’s response is “**Case Concluded; Record Sealed.**”

Once the defendant pays the fine, the Court closes the file. A flowchart was developed by OJCS regarding this process which is included at the end of this memo and will be available on the “For Judges and Clerks” portion of the City, Town and Village Courts website: www.nycourts.gov/justicecourts.

The new law pursuant to CPL § 160.50 (5) (b) (i) provides:

Upon the written request of the individual whose case has been expunged or their designated agent, such records shall be destroyed. Such records and papers shall not be made available to any person, except the individual whose case has been expunged or such person’s designated agent.

The Office of Court Administration is working with Records Management on a process to comply with the destruction provision of the law. If your Court receives a written application to destroy a record related to marihuana, please contact the Office of Justice Court Support at 1-800-232-0630.

Part Three: Vacating, Dismissing and Expunging Judgments of Conviction for certain prior conviction; Sealing

The new law also requires certain prior marihuana-related convictions to be vacated, dismissed and expunged pursuant to CPL § 160.50 (5) (b) (i). The law requires the Chief Administrator of the Courts to develop a process to vacate, dismiss and expunge these prior convictions, and gives a deadline of no later than one year for this to be accomplished. As such, cases deemed dismissed and vacated under this provision will be sealed automatically by the Office of Court Administration Division of Technology and the Division of Criminal Justice Services and, as such, need not be individually addressed by the town and village courts, nor should court orders be issued refunding previous fines and surcharges paid, absent a CPL 440 motion having been granted, as discussed below in part four of this memo.

While the Office of Court Administration is developing a plan to efficiently comply with the law on a global level, Town and Village Courts are to treat prior convictions of marihuana related offenses as sealed to the public. For cases sealed to the public, the Court’s response to a public inquiry is “**No Record Found.**”² As with any sealed case, the individual named as the defendant, or the individual’s designated agent, is entitled to access to the court record.

² For an inquiry from the Office of Children and Family Service (OCFS), the FBI when conducting a Criminal History Records check, the Office of Mental Health (OMH), and/or the Office of Persons with Developmental Disabilities (OPWDD), the Court’s response is “**Case Concluded; Record Sealed.**”

**Part Four: Motion to Vacate prior convictions of certain marihuana-related offenses;
Court process**

Pursuant to CPL § 440.10 (1) (k), a defendant may file a motion to vacate prior convictions of certain marihuana-related offenses that occurred prior to August 28, 2019. The law states that:

the court shall presume that a conviction by a 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, and shall presume that a conviction by verdict for the aforementioned offenses constitutes cruel and unusual punishment under section five of article one of the state constitution, based on those consequences. The people may rebut these presumptions.

If a Motion to Vacate pursuant to this section is filed with the Court the court should acknowledge receipt of the motion, provide the local District Attorney's Office an opportunity to respond, and thereafter issue a decision in consideration of the above standard. A hearing may or may not be required, depending on the individual facts of each case.

If the Motion to Vacate is granted, the Court pursuant to CPL § 440.10 (6) must vacate the judgment, dismiss the accusatory instrument, and then seal the case pursuant to CPL § 160.50 (1). If a conviction is vacated pursuant to CPL Article 440, the Court must aid the defendant in obtaining a refund of any fine and surcharge paid from the Office of State Comptroller.

Please review these changes and contact the Office of Justice Court Support at 1-800-232-0630 to discuss further.