

**New York City Council
Committee on Public Safety Jointly with the Committee on Justice System,
the Committee on Civil and Human Rights and
the Committee on Consumer Affairs and Business Licensing**

**Hearing re: Marijuana Legalization: Equity and Justice for NYC.
February 27, 2019**

**Written Testimony of The Bronx Defenders
By Eli Northrup, Associate Special Counsel to the Criminal Defense Practice**

Chairmans Richards, Lancman, Eugene, and Espinal, my name is Eli Northrup and I am Associate Special Counsel of the Criminal Defense Practice at The Bronx Defenders. The Bronx Defenders (“BxD”) has provided innovative, holistic, and client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to indigent people in the Bronx for more than 20 years. Our staff of close to 400 represents nearly 28,000 people every year and reaches thousands more through community outreach. The primary goal of our model is to address the underlying issues that drive people into the various legal systems and to mitigate the devastating impact of that involvement, such as deportation, eviction, the loss of employment and public benefits, or family separation and dissolution. Our team-based structure is designed to provide people seamless access to multiple advocates and services to meet their legal and related needs.

I. Marijuana Legalization Must Address Past Harms

As a holistic defense organization we have seen the ways that the disparate enforcement of marijuana laws have hurt our clients—not only in criminal court, but in family court, housing court, civil proceedings, and especially in immigration proceedings. We are encouraged that lawmakers are finally acknowledging what we have known for a long time: that despite similar rates of marijuana usage across racial lines, marijuana enforcement overwhelmingly and disproportionately targets only certain people for arrest—namely black and hispanic men.¹

¹ *Unjust and Unconstitutional: 60,000 Jim Crow Marijuana Arrests in Mayor de Blasio’s New York*, Drug Policy Alliance and Marijuana Arrest Research Project, July 2017 (https://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf) (“*To sum up: In New York City neighborhoods with low rates and numbers of arrests for marijuana possession, and with relatively few black and Latino residents, blacks and Latinos were most of the people police arrested in 2016 for possessing marijuana. And in neighborhoods with high rates and numbers of arrests for marijuana possession, and with high percentages of black and Latino residents, nearly all of the people arrested for possessing, marijuana were blacks and Latinos.*”)

Let's just be honest here: Marijuana has effectively been legal for white people in New York City for years. As referenced in the New York State Department of Health's Regulated Marijuana Impact Assessment, submitted to Governor Cuomo in July of last year, in 2017 alone 86% of people arrested for misdemeanor possession of marijuana were people of color.² And white people who were arrested for marijuana offenses were 50% more likely to resolve their case with an adjournment in contemplation of dismissal than black defendants. In large part, the recognition of this racial bias is what finally led to this legalization effort. But simply changing the law to make it legal to possess and smoke marijuana going forward is not enough. Any reform must be restorative—it must repair the harm caused by decades of racially disparate enforcement.

A. Criminal Records Must be Automatically Sealed

We support Resolution 0641-2018 which calls on the coordination of the New York State Division of Criminal Justice Services (DCJS), the New York State Office of Court Administration, and New York City District Attorneys to expunge the records of all city misdemeanor marijuana convictions. No one should ever have a criminal record for marijuana possession—either in the past or the future. It is critical that any legislation legalizing marijuana also automatically seals past marijuana convictions. Otherwise the disparity in enforcement from the past will continue to haunt people in the future. Marijuana legalization should mark an end to the host of collateral consequences faced by New Yorkers who were previously swept into the criminal justice system for marijuana use. Having a criminal record can lead to loss of housing, employment opportunities, and the ability to get student loans.

Moreover, expungement must be automatic to ensure that all New Yorkers with past marijuana convictions benefit from criminal record clearing. If expungement is not automatic, only a fraction of the population eligible for expungement will benefit from it. It is also vital that these sealing provisions be crafted to ensure immigrant New Yorkers can also benefit. To protect immigrant New Yorkers, marijuana reform legislation must preserve the right to challenge the constitutionality of marijuana-related convictions. Convictions that are vacated solely for rehabilitative or policy reasons or sealed by the state are not eliminated for immigration purposes.³ The sealing language proposed in the Marijuana Regulation and Taxation Act has been carefully crafted to address these concerns.

The impact of a marijuana possession conviction can be devastating for non-citizen New Yorkers, even green card holders. For example, a green-card holder with a *single* marijuana violation could be held at the airport after returning from a trip abroad, placed in removal proceedings, and detained for months or years while those proceedings are resolved. We have

² *Assessment of the Potential Impact of Marijuana in New York State*, New York State Department of Health, July 2018 (https://www.health.ny.gov/regulations/regulated_marijuana/docs/marijuana_legalization_impact_assessment.pdf).

³ *Effective Marijuana Reform: Challenging the Constitutionality of Convictions After Automatic Expungement*, Immigrant Defense Project, Marie Mark, accessed February 26, 2019 (<https://www.immigrantdefenseproject.org/blog-0005/>).

seen this happen. Clients who have lived lawfully in the United States for years, who have a family here, and just traveled back to visit their home country briefly are detained and placed in ICE custody.

But we don't have to wait for any sort of legislation to pass to start this process. While the District Attorneys of Manhattan and Brooklyn have held events in their boroughs to vacate past misdemeanor marijuana convictions, our District Attorney Darcel Clark has thus far been unwilling to take this step. If she is serious about providing justice to the citizens of the Bronx, she should take action and clear the records of thousands of citizens of the Bronx who have been targeted for marijuana enforcement because of where they live and the color of their skin. We are calling on DA Clark to use her power to ameliorate these harms.

B. Tax Revenue Must be Reinvested in the Communities Most Affected

We are troubled by reports that came out yesterday indicating that there is an agreement between Governor Cuomo and Mayor De Blasio that a portion of the tax revenue derived from the legalization of marijuana will be going to fund the MTA. This money should go back to the communities that have been most targeted and affected by decades of racially discriminatory marijuana enforcement.

This is in line with the recommendations of a December 2018 report prepared by the Office of the New York City Comptroller which concluded that

the neighborhoods most impacted by prohibition are among the most economically insecure and disenfranchised in the city. It is precisely these New Yorkers then—those to whom the benefits of legalization should be targeted—who are most likely to face barriers to accessing opportunities in the industry, in particular financing. In addition to reinvesting tax revenue from legalization in these disproportionately impacted communities, steps should therefore be taken to equip those impacted by prohibition to secure the funding and other resources needed to become cannabis licensees.⁴

Many of these neighborhoods are in the Bronx. According to the report, four out of the eight neighborhoods in New York City with the highest marijuana-related arrest rate between 2010 and 2017 were in the Bronx.⁵ Given the legacy of immense harm caused by marijuana prohibition in New York — nearly one million New Yorkers have had contact with the criminal justice system under the marijuana arrest crusade — any effort to legalize the substance must be responsive to the damage perpetrated on individuals and help communities and fund their recovery.

⁴ *Addressing the Harms of Prohibition: What NYC Can Do to Support an Equitable Cannabis Industry*, New York City Comptroller Scott M. Stringer, December 2018 (<https://comptroller.nyc.gov/wp-content/uploads/documents/Marijuana-justice-brief.pdf>).

⁵ *Id.*

II. If Marijuana is Legalized, Criminal Penalties Must be Removed

The Bronx Defenders supports Resolution 0075-2018 which calls on for the passage of the MRTA. Unfortunately, the current version of the Cannabis Regulation and Taxation Act (CRTA) which was proposed by the Governor suffers from some serious flaws, especially when it comes to criminal penalties.

Although the proposed framework of the CRTA legalizes marijuana in certain circumstances, in other situations the criminal penalties are *harsher than when it was illegal*. This is a backwards move that undermines the critical opportunity for racial justice through legalization. We know that one of the main reasons for marijuana legalization is that the laws were not being enforced equally. This same racism is going to persist for these new classes of harsher crimes that are created under the CRTA.

For instance, currently, it is a misdemeanor to sell a small amount of marijuana to anyone over 18 years of age. Under the CRTA the age for criminal sale to a minor pursuant to P.L. § 221.50 would be raised from 18 to 21 and the penalties would be harsher than under the current law. Thus, under the Governor's proposal, it would be a Class D felony for two 20 year-olds to pass a joint between each other. Why should this behavior be punished more harshly when marijuana is legalized than it was when it was illegal?

This is especially troubling in light of a recent report by The Data Collaborative for Justice at John Jay which found that between 1990-2017, 18-20 year olds were arrested for marijuana offenses at a much higher rate than any other age group.⁶ We have found this to be true in our own practice as well. In 2016, 17% of our clients arrested on marijuana charges were under the age of 21. In 2017 the number was 17%, and in 2018 it was 14%. This harsher penalty, likely meant to discourage use by and sale to minors, will only impact racially and economically marginalized people.

We must also prevent law enforcement from using the odor of marijuana as a pretext to stop and search people on the street. We're not talking about people who are smoking marijuana in public. We're talking about people who the police claim "smell" like marijuana. This practice is de facto stop and frisk. As public defenders, we know that the "odor of marijuana" is one of the most common rationales police officers give for approaching and searching our clients. As the body that oversees the NYPD, this Council should enact legislation that states that if marijuana is legalized, its mere "odor" does not provide law enforcement with reasonable suspicion to search or arrest someone except in investigations of use in DWI cases

⁶ Trends in Marijuana Enforcement in New York State, 1990 to 2017, The Data Collaborative for Justice, John Jay College of Criminal Justice, February 2019 (http://datacollaborativeforjustice.org/wp-content/uploads/2019/02/MARIJUANA.REPORT.FINAL_.pdf) ("In 2017, in New York City and the Rest of the State, 18-20 year-olds had the highest arrest rate for marijuana possession, followed by 21-24 year-olds, relative to other age groups (i.e., 16-17, 25-34, and 35-65 year-olds). The arrest rate for 18-20 year-olds was 1,003 per 100,000 in New York City").

While it's true that marijuana arrests are down since last year following the Mayor's policy change, the racial disparities in enforcement still persist, confirming that the easiest way to be arrested for marijuana or receive a criminal summons for it is to be Black or Latinx.

III. Conclusion

The truth is that marijuana enforcement is rarely about marijuana. It has always been a vehicle for policing and surveillance and social control of certain communities. If we want to get to heart of problem, we need to address these issues. Our clients have long been targeted by the NYPD for marijuana enforcement based on their race and socioeconomic status. The legalization effort must take this into account and make them whole. Anything short of this is unacceptable.

Finally, we must recognize that the disparate enforcement of marijuana laws is equally problematic in the Family Court system—where mothers of color get charged with child abuse or neglect based solely on even limited marijuana use. We understand that the Council will be taking this issue up on March 4 and we look forward to providing further testimony at that time.

Thank you for your consideration.