

# STATE OF NEW YORK

6579

2019-2020 Regular Sessions

## IN SENATE

June 16, 2019

Introduced by Sen. BAILEY -- read twice and ordered printed, and when printed to be committed to the Committee on Rules

AN ACT to amend the penal law and the criminal procedure law, in relation to vacating records for certain proceedings; and to amend the public health law, in relation to the definition of smoking

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Section 221.05 of the penal law, as added by chapter 360 of  
2 the laws of 1977, is amended to read as follows:

3 § 221.05 Unlawful possession of marihuana.

4 A person is guilty of unlawful possession of marihuana when he know-  
5 ingly and unlawfully possesses marihuana.

6 Unlawful possession of marihuana is a violation punishable only by a  
7 fine of not more than [~~one hundred~~] fifty dollars. [~~However, where the~~  
8 ~~defendant has previously been convicted of an offense defined in this~~  
9 ~~article or article 220 of this chapter, committed within the three years~~  
10 ~~immediately preceding such violation, it shall be punishable (a) only by~~  
11 ~~a fine of not more than two hundred dollars, if the defendant was previ-~~  
12 ~~ously convicted of one such offense committed during such period, and~~  
13 ~~(b) by a fine of not more than two hundred fifty dollars or a term of~~  
14 ~~imprisonment not in excess of fifteen days or both, if the defendant was~~  
15 ~~previously convicted of two such offenses committed during such period.~~]

16 § 2. Section 221.10 of the penal law, as amended by chapter 265 of the  
17 laws of 1979 and subdivision 2 as amended by chapter 75 of the laws of  
18 1995, is amended to read as follows:

19 § 221.10 Criminal possession of marihuana in the fifth degree.

20 A person is guilty of criminal possession of marihuana in the fifth  
21 degree when he knowingly and unlawfully possesses[+]

22 ~~1. marihuana in a public place, as defined in section 240.00 of this~~  
23 ~~chapter, and such marihuana is burning or open to public view; or~~

EXPLANATION--Matter in italics (underscored) is new; matter in brackets  
[-] is old law to be omitted.

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1 ~~2-~~] one or more preparations, compounds, mixtures or substances  
2 containing marihuana and the preparations, compounds, mixtures or  
3 substances are of an aggregate weight of more than [~~twenty-five grams~~]  
4 one ounce.

5 Criminal possession of marihuana in the fifth degree is a class B  
6 misdemeanor.

7 § 3. Subparagraph (ii) of paragraph (i) and paragraph (j) of subdivi-  
8 sion 1 of section 440.10 of the criminal procedure law, subparagraph  
9 (ii) of paragraph (i) as amended by section 3 of part 00 of chapter 55  
10 of the laws of 2019, paragraph (j) as amended by section 2 of part MMM  
11 of chapter 59 of the laws of 2019, are amended and a new paragraph (k)  
12 is added to read as follows:

13 (ii) official documentation of the defendant's status as a victim of  
14 trafficking, compelling prostitution or trafficking in persons at the  
15 time of the offense from a federal, state or local government agency  
16 shall create a presumption that the defendant's participation in the  
17 offense was a result of having been a victim of sex trafficking, compel-  
18 ling prostitution or trafficking in persons, but shall not be required  
19 for granting a motion under this paragraph; [~~or~~]

20 (j) The judgment is a conviction for a class A or unclassified misde-  
21 meanor entered prior to the effective date of this paragraph and satis-  
22 fies the ground prescribed in paragraph (h) of this subdivision. There  
23 shall be a rebuttable presumption that a conviction by plea to such an  
24 offense was not knowing, voluntary and intelligent, based on ongoing  
25 collateral consequences, including potential or actual immigration  
26 consequences, and there shall be a rebuttable presumption that a  
27 conviction by verdict constitutes cruel and unusual punishment under  
28 section five of article one of the state constitution based on such  
29 consequences[~~;~~]; or

30 (k) The judgment occurred prior to the effective date of this para-  
31 graph and is a conviction for an offense as defined by section 221.05 or  
32 221.10 of the penal law as in effect prior to the effective date of this  
33 paragraph in which case the court shall grant the motion.

34 § 4. Subdivision 6 of section 440.10 of the criminal procedure law, as  
35 added by chapter 332 of the laws of 2010, is amended to read as follows:

36 6. If the court grants a motion under paragraph (i) or paragraph (k)  
37 of subdivision one of this section, it must vacate the judgment and  
38 dismiss the accusatory instrument, and may take such additional action  
39 as is appropriate in the circumstances.

40 § 5. Paragraph (k) of subdivision 3 of section 160.50 of the criminal  
41 procedure law, as added by chapter 835 of the laws of 1977 and as relet-  
42 tered by chapter 192 of the laws of 1980, is amended to read as follows:

43 (k) (i) The accusatory instrument alleged a violation of article two  
44 hundred twenty or section 240.36 of the penal law, prior to the taking  
45 effect of article two hundred twenty-one of the penal law, or a  
46 violation of article two hundred twenty-one of the penal law; and (iii) the  
47 sole controlled substance involved is marijuana; and (iii) the  
48 conviction was only for a violation or violations[~~;~~ ~~and (iv) at least~~  
49 ~~three years have passed since the offense occurred~~] of section 221.05 or  
50 221.10 of the penal law. No defendant shall be required or permitted to  
51 waive eligibility for sealing pursuant to this paragraph as part of a  
52 plea of guilty, sentence or any agreement related to a conviction for a  
53 violation of section 221.05 or section 221.10 of the penal law and any  
54 such waiver shall be deemed void and wholly unenforceable.

55 § 6. Section 160.50 of the criminal procedure law is amended by  
56 adding a new subdivision 5 to read as follows:

1 5. (a) Notwithstanding any other provision of law except as provided  
2 in paragraph (d) of subdivision one of this section and paragraph (e) of  
3 subdivision four of section eight hundred thirty-seven of the executive  
4 law: (i) when the division of criminal justice services conducts a  
5 search of its criminal history records, maintained pursuant to subdivi-  
6 sion six of section eight hundred thirty-seven of the executive law, and  
7 returns a report thereon, all references to a conviction for a violation  
8 of section 221.10 of the penal law, shall be excluded from such report;  
9 and (ii) the chief administrator of the courts shall develop and promul-  
10 gate rules as may be necessary to ensure that no written or electronic  
11 report of a criminal history record search conducted by the office of  
12 court administration contains information relating to a conviction for a  
13 violation of section 221.10 of the penal law, unless such search is  
14 conducted solely for a bona fide research purpose, provided that such  
15 information, if so disseminated, shall be disseminated in accordance  
16 with procedures established by the chief administrator of the courts to  
17 assure the security and privacy of identification and information data,  
18 which shall include the execution of an agreement which protects the  
19 confidentiality of the information and reasonably protects against data  
20 linkage to individuals.

21 (b) Nothing contained in this subdivision shall be deemed to permit or  
22 require the release, disclosure or other dissemination by the division  
23 of criminal justice services or the office of court administration of  
24 criminal history record information that has been sealed in accordance  
25 with law.

26 § 7. Subdivision 8 of section 1399-n of the public health law, as  
27 amended by chapter 13 of the laws of 2003, is amended to read as  
28 follows:

29 8. "Smoking" means the burning of a lighted cigar, cigarette, pipe or  
30 any other matter or substance which contains tobacco or marihuana as  
31 defined in section thirty-three hundred two of this chapter.

32 § 8. This act, including but not limited to the amendments to subdivi-  
33 sion 1 of section 221.10 of the penal law made by section two of this  
34 act, are ameliorative in intent and effect. Any person who stands  
35 convicted under such subdivision 1 of section 221.10 as of the date this  
36 section takes effect, and any person who stands convicted under such  
37 subdivision 1 of section 221.10 and serving a sentence of imprisonment  
38 for such conviction on such date shall be entitled to judgment, which  
39 shall be granted promptly by the court: (a) vacating such conviction  
40 pursuant to paragraph (h) of subdivision 1 of section 440.10 of the  
41 criminal procedure law, on grounds that such conviction constitutes  
42 cruel and unusual punishment under the state constitution; and (b)  
43 releasing such person from custody under such sentence and, when sought  
44 from a superior court, granting any other appropriate, related habeas  
45 corpus relief pursuant to article 70 of the civil practice law and  
46 rules.

47 § 9. This act shall take effect on the thirtieth day after it shall  
48 have become a law.