



**BROOKLYN
DEFENDER
SERVICES**

TESTIMONY OF:

**Jacqueline Caruana – Senior Trial Attorney, Criminal Defense Practice
*BROOKLYN DEFENDER SERVICES***

Presented before

**The New York City Council Committees on Public Safety, Justice System, Consumer Affairs &
Business Licensing, and Civil & Human Rights**

Public Hearing on Marijuana Legalization

February 29, 2019

My name is Jacqueline Caruana and I am a Senior Staff Attorney in the Criminal Defense Practice at Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, social work support and advocacy, for over 35,000 clients in Brooklyn every year. This includes thousands of people arrested for marijuana possession or sale, or fighting deportation, eviction, or a loss of custody or parental rights due to marijuana-related allegations or convictions. I thank Chairpersons Donovan Richards, Rory Lancman, Rafael Espinal, and Mathiew Eugene, and members of their respective committees for the opportunity to testify on the legalization of adult marijuana use.

NEW YORKERS NEED AND WANT URGENT REFORM

There is broad popular support for marijuana legalization. Across the country, a large majority (64%) support full legalization of marijuana; this includes a slim majority of Republicans (51%).¹ A recent Emerson College poll showed two to one support for legalization among New York State residents.² Yet more than 800,000 people have been arrested for low-level marijuana possession over the past 20 years. The vast majority were people of color, despite government surveys showing equal or greater use by white people.³ Untold numbers of people are being detained and deported by ICE, losing their children to foster care, or suffering eviction from subsidized housing, in whole or in part, because of marijuana prohibition. Meanwhile, states with legal marijuana markets are benefiting from more than \$1 billion in new—or newly above-ground—economic activity and hundreds of millions of dollars in taxes and fees every year.^{4,5} The Governor’s public support of legalization has helped to expand momentum and we are hopeful that a comprehensive bill can pass this year.

BDS is proud to support the Marijuana Regulation and Taxation Act (MRTA), S.1747/A.3089 and the city council’s resolution urging the Governor to sign and enact the MRTA, **Reso 0075-2018**. The key components of the MRTA include:

- Allowing adult marijuana use and ending criminalization;
- Automatically vacating as many marijuana convictions as possible;
- Ending punitive responses to marijuana use or possession by child protective services agencies, absent clear and convincing evidence of unreasonable danger to children;
- Ending adverse housing impacts of marijuana use wherever possible;
- Creating an inclusive industry in which people who have been targeted under marijuana prohibition can use their experience and profit from legalization; and
- Reinvesting marijuana tax revenue in the communities that have been most harmed under prohibition.

Accordingly, BDS also supports and urges the coordination of the New York State Division of Criminal Justice Services (DCJS), the New York State Office of Court Administration, and the New York City District Attorneys to vacate the records of all city misdemeanor marijuana convictions, as proposed in **Reso 0641-2018**. Furthermore, BDS supports the City Council’s resolution calling on Congress and the President to sign the Marijuana Justice Act of 2017, so

¹ Justin McCarthy, *Record-High Support for Legalizing Marijuana Use*, U.S. GALLUP NEWS, Oct. 25, 2017, <http://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx>.

² Marijuana Policy Project of New York & Drug Policy Alliance, *New Poll Shows 2 to 1 Support for Legal Marijuana Use in New York State* (2017), <http://www.drugpolicy.org/press-release/2017/11/new-poll-shows-2-1-support-legal-marijuana-use-new-york-state>.

³ Melissa Moore, *Lawmakers Must Legalize Marijuana in New York to Support Racial and Economic Justice*, N.Y. DAILY NEWS, Nov. 27, 2017 at <http://www.nydailynews.com/opinion/lawmakers-legalize-marijuana-new-york-support-justice-article-1.3661162>.

⁴ Tom Huddleston, Jr., *Colorado Topped \$1 Billion in Legal Marijuana Sales in 2016*, FORTUNE, Dec. 13, 2016 at <http://fortune.com/2016/12/13/colorado-billion-legal-marijuana-sales/>.

⁵ Aaron Smith, *Colorado Passes a Milestone for Pot Revenue*, CNN MONEY, July 19, 2017 at <http://money.cnn.com/2017/07/19/news/colorado-marijuana-tax-revenue/index.html>.

long as this federal legislation comports with the protections and guarantees specifically outlined in the MRTA. (**Reso 0743-2019**).

We urge the city and the state to pass legislation that will automatically vacate all marijuana convictions, including felonies and violations, not just misdemeanors. However, before these convictions are vacated, there must be a procedure in place for someone who is an immigrant to challenge their marijuana conviction based upon procedural and substantive violations of their constitutional rights. The city and state must establish a framework for the automatic relief from prior marijuana convictions, because no one should ever have a criminal record for marijuana – past or future. It is critical that the MRTA and any future legislation by the city automatically vacate past marijuana convictions. It is paramount that marijuana legalization should mark an end to the host of consequences faced by New Yorkers who were previously swept into the criminal justice system for marijuana use.

RACIAL DISPARITIES IN MARIJUANA ENFORCEMENT ACROSS NEW YORK CITY

We know that one of the main reasons for marijuana legalization is that the laws were not being enforced equally. A report commissioned by the Drug Policy Alliance examining the 60,000 low-level marijuana possession arrests in New York City in the first three years of the de Blasio administration found that 86% involved Black or Latinx people—a racial disparity that has remained roughly constant for decades. This follows deliberate policing strategies targeting both neighborhoods in which people of color are a majority of residents and individual people of color within majority-white neighborhoods. In 2016, the New York Police Department (NYPD) arrested 362 people in West Harlem for this offense, yet only 14 in the Upper East Side, which has more than three and a half times as many residents. Of those 14 arrests, 50% involved Black and Latinx people, despite these groups making up only 10% of residents. Throughout Manhattan, Black people are 13% of the population and 45% of the people arrested for this offense, amounting to ten times the arrest rate for white people. In fact, more Black people were arrested for this offense in Manhattan than white people citywide. Across the East River, in the Mayor’s home neighborhood of Park Slope, Black and Latinx people comprise 24% of residents and 73% of those arrested for this offense.⁶

In reviewing data from 2017, a reporter found that, when white people were arrested, they were significantly more likely to have their cases dismissed by District Attorneys, and cases involving Black and Latino people were approximately twice as likely to end in a conviction compared to those involving white people.⁷ Of course, these disparities extend to arrests for allegations of marijuana sales. Of the 80 people arrested for the lowest-level marijuana sale charge (Criminal Sale of Marijuana in the 5th degree) in New York City in 2016, only 1 was white.

⁶ Harry Levine, *60,000 Jim Crow Marijuana Arrests in Mayor De Blasio’s New York* (Drug Policy Alliance & Marijuana Arrest Research Project 2017), https://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf.

⁷ Brendan Cheney, *For Non-white New Yorkers, Marijuana Arrests More Often Lead to Conviction*, POLITICO, May 9, 2017 at <https://www.politico.com/states/new-york/city-hall/story/2017/05/04/racial-disparities-in-marijuana-convictions-in-all-five-boroughs-111807>.

94% of those arrested for the more common Criminal Sale of Marijuana in the 4th Degree were Black and/or Latinx, despite research showing users typically buy drugs from their peers.⁸

It is because of this systemic and disparate treatment, that BDS supports legislation that prioritizes individuals with prior marijuana convictions in issuing licenses and offering employment within the newly regulated marijuana industry as outlined in **Resos 0738-2019, 07341-2019, and 0744-2019**. It's imperative the individuals that we represent, the residents of New York City, that have been so harmed by the prohibition and illegalization of marijuana to have a meaningful opportunity to participate in this industry, to have business ownership, to obtain licenses, and to receive gainful employment.

MARIJUANA ENFORCEMENT AND COLLATERAL CONSEQUENCES

Eviction, Housing Instability, and Marijuana Prohibition

BDS' Civil Justice Practice assists clients with a wide range of consequences stemming from justice system involvement. Many of these individuals and families, disproportionately people of color, suffer diminished housing stability and future housing options by low-level marijuana arrests or convictions.

Currently, a mere arrest for marijuana possession will lead to NYCHA beginning a termination of tenancy proceeding against the head of household. The proceeding is brought quickly after arrest and NYCHA often forces the eviction proceeding to go forward before any related criminal proceeding has concluded. For this reason, tenants often end up being coerced into agreeing to be on housing probation, and permanently banning a member of their family from even visiting their home, all on the basis of marijuana charges alone. This means that even if the criminal case is eventually dismissed and sealed, a NYCHA tenant has already put their housing at risk.

Being on probation or having to permanently exclude a family member is incredibly risky for NYCHA tenants. A violation of probation, which could include paying your rent late, or forgetting to recertify on time, subjects you to a termination of your tenancy. Permanent exclusion is even more burdensome; tenants must allow NYCHA to randomly inspect their apartments, and if one specific room is not available for inspection at that time, for example a family member is sleeping and the inspectors are denied access to that room, NYCHA records a violation and the tenant can and often will be evicted. Not to mention, even a brief surprise visit from the excluded family member results in eviction.

Termination of tenancy proceedings based on marijuana charges are the most dangerous for NYCHA's most vulnerable tenants. If a tenant suffers from either mental or physical disabilities

⁸ Source: NYS Division of Criminal Justice Services

that might make it difficult for them to appear on their hearing date, that tenant is defaulted, which means their tenancy is terminated and they will be evicted. A tenant often does not even find out about this default until it is too late to appeal or re-open the default, and NYCHA regularly denies applications to re-open a default. This means that NYCHA's most vulnerable residents are most at risk for actually losing their low-income housing based merely on marijuana possession charges.

Equally as important is the fact that applications for NYCHA housing are routinely denied based on marijuana convictions, or even simply marijuana use. A question NYCHA asks as part of the admission interview is whether or not the prospective tenant has used marijuana. If the tenant admits that they have used marijuana any one time in the last one year, their application will be rejected. A conviction for criminal possession of marijuana in the fourth or fifth degrees results in an application being banned from eligibility for 3-5 years. Even a criminal case that results in a marijuana ACD will ban the applicant for the one year period prior to sealing.

For these reasons, BDS supports **Reso 0296-2018**, calling upon NYCHA to add unlawful possession of marijuana and criminal possession of marijuana in the fourth and fifth degrees to its list of "overlooked offenses," and stop considering these offenses as grounds for termination of tenancy. However, we urge the City Council to enact legislation that prevents NYCHA from using possession of marijuana as a basis for seeking termination or probation under any circumstances.

Probation, Parole, and ATI programs

Individuals on probation or parole stand the to lose the most from a low-level marijuana arrest, because they can be sent to jail or prison. Moreover, these individuals can have their probation or parole revoked if they test positive for smoking marijuana. If the MRTA and corresponding federal, state, and local legislation makes it legal for a person to smoke marijuana, than individuals on probation or parole should be treated no differently. BDS supports **Int 1427-2019**, as it proposes to amend the New York City administrative code in order to prohibit the department of probation from drug testing probationers for marijuana use. This proposed amendment, however, includes a provision that would allow probation to test for marijuana use under certain circumstances. BDS urges the City Council to prohibit the department of probation from drug testing for marijuana under ANY circumstance. Moreover, BDS urges the City Council to call for the same prohibition for parolees.

It is important for the Council to note that many individuals involved in the criminal justice system in Brooklyn, and throughout the City, are participating in programs called ATI's, or Alternative to Incarceration programs. These programs are essential for assisting individuals with job training, education, and counseling in order to provide the best chance of avoiding incarceration, rearrest, and/or a permanent criminal record. Many of these programs consistently drug test their participants for marijuana use and a positive test result can cause a participant to be discharged from the program and potentially serve time in jail or prison. BDS urges the Council and the Courts to be consistent when responding to the new cultural

understanding of marijuana use and encourage ATI programming to stop drug testing participants for marijuana.

THE VIEW FROM KINGS COUNTY CRIMINAL COURT

Our criminal defense attorneys meet their clients on the brink of crisis, generally within 48 hours of an arrest. The most common cases they handle include allegations of turnstile jumping, possession of a crack pipe, driving on a suspended license, stealing essentials like a bar of soap, trespass (often shelter-seeking) or, despite years of pronouncements by policymakers and prosecutors to the contrary, low-level marijuana possession. The Brooklyn District Attorney's office received a lot of attention for announcing that it would decline to prosecute most low-level marijuana possession cases in 2014; in reality, the office prosecuted 83% of these cases in 2016. Finally, earlier this year, Brooklyn prosecutors began declining to prosecute the majority of low-level marijuana possession cases and dismissing those that come into court via Desk Appearance Tickets.

However, we are now seeing an increase in arrests and prosecution for the possession of so-called vape pens, or electronic smoking devices, as Criminal Possession of a Controlled Substance in the Seventh Degree (CPCS7). This charge is typically reserved for possession of non-marijuana drugs, or drug residue, and is often treated more harshly, even though vaping may create less of a public nuisance than smoking. (Under the Penal Law, concentrated marijuana products used in vape pens can be charged as either CPCS7 or Criminal Possession of Marijuana in the Fifth Degree.) The fact that a person is in possession of THC oil as opposed to the marijuana plant should not make any difference in whether a person is arrested or prosecuted. This practice makes no sense. Ironically, one of the exceptions in the Brooklyn DA's policy is to continue prosecuting marijuana where the police say a person is 'creating a genuine nuisance,' but THC oil and vaping are actually the least intrusive method of consumption." BDS represented 23 individuals arrested for possession of THC oil, charged as Criminal Possession of a Controlled Substance, between Sept. 4 and Nov. 12 of 2018.

As such, BDS supports **Reso 0745-2019**, which calls upon the State Legislature to pass, and the Governor to sign, legislation related to the reclassifying of THC and all other marijuana based products from a controlled substance to the equivalent of flower marijuana.

Additionally, BDS also supports the legalization of synthetic cannabis. While the legislature contemplates legalizing marijuana, BDS wants to encourage elected officials not to exceptionalize flower marijuana as the only socially acceptable recreational drug. Synthetic Cannabis is also being prosecuted as a controlled substance, in much the same way as THC oil is being prosecuted.

The gulf between the rhetoric of policymakers and the reality we see in court underscores the need for legislative action. Moreover, the statutory criminalization of marijuana, not just its enforcement, drives discriminatory broken windows policing. The oft-claimed "odor" of marijuana and the alleged observation of a flicked marijuana cigarette are two of the most

common pretexts officers use to justify unconstitutional stops and frisks, or turn car stops into full blown searches. Much like allegations of failure to signal, odor of marijuana is notoriously difficult to disprove in court, hence the commonality of its use as a pretext. All that said, simply ending all arrests and summonses for marijuana spare thousands of New Yorkers the trauma and burden of criminal court involvement, fines, and countless consequences.

Once in court, most low-level marijuana possession cases across New York City resolve with no criminal sentence. This is why court watchers often say “the process is the punishment.” After formally charging people, prosecutors generally do not seem to care about marijuana. However, the absence of a criminal sentence does not mean there is no additional punishment. Beyond the harm that can happen between arrest and arraignment, cases that result in an Adjournment in Contemplation of Dismissal (ACD), remain open and visible to prospective employers and landlords for six months to a year.⁹ Cases that result in non-criminal violations trigger costly court surcharges and erect legal barriers to civil lawsuits for police misconduct. Cases that result in misdemeanor convictions result in even steeper surcharges and often permanent criminal records. Children who are removed from their parents during an arrest, even for short periods of time, must deal with the known trauma of removal, and families bear the burden of mending this harm over many months and years.

Importantly, I can only speak to marijuana cases in Brooklyn; in other parts of the state, where jail populations have doubled while that of New York City jails has shrunk by half, people may be much more likely to suffer pre-trial detention on bail or Misdemeanor jail sentences.

Client Stories

[Note: All client names have been changed]

Mr. P was stopped by police as he left the NYCHA building where he lives as a tenant of record based on an outdated trespass notice issued 11 years earlier. Police found a small amount of marijuana on him and arrested him for trespass and marijuana possession. He was detained overnight. The case resolved with an ACD but Mr. P was forced to do a day of community service. Mr. R is Black and 38 years old.

Ms. R was illegally searched and found to have a small amount of marijuana. She also had an open summons warrant for having an open container of alcohol that she had failed to pay. Police arrested her and detained her overnight. Her BDS attorney was able to secure an ACD, but the case was slated to remain open for a year. Recently, Mr. R learned that the company for which she works conducts random background checks and she is at serious risk of losing her job. Now, her attorney is working to get the ACD immediately sealed, but it is unclear whether the court will grant it. Ms R. is South Asian and 22 years old.

⁹ Source: NYS Division of Criminal Justice Services

Mr. J was in the hallway of his apartment in Brooklyn, a NYCHA building, where he lives with his family. That evening the warrant squad came into the building and arrested Mr. J. Earlier in the year, Mr. J received a summons for possession of marijuana in the Bronx. Mr. J did not have the money to pay the summons so a warrant was issued for his arrest. Mr. J had to spend a night in jail and when he appeared before the judge, the District Attorney dismissed the case. Mr. J is black and 19 years old.

Mr. M was arrested by an undercover officer and charged with a felony for selling synthetic cannabis to this undercover officer. Approximately 3 months later, his charges were dismissed because a lab report confirmed that the substance he was accused of selling wasn't in fact synthetic cannabis. It is worth noting that the District Attorney's office had access to the NYPD lab report in this case 6 days after Mr. M was arrested but did not disclose the report for 3 months. Mr. M is black and 32 years old.

MARIJUANA PROHIBITION AND RESOURCE ALLOCATION

As a public defense organization, Brooklyn Defender Services is principally concerned with the direct impacts of drug laws and enforcement on the people we represent and their families and communities. That said, we recognize that the fiscal and economic impacts of drug policy also play a major role in their daily lives. For example, most of our clients or their children attend or attended public schools with inadequate funding. According to the New York State Board of Regents, schools are owed billions of dollars in funding under the Campaign for Fiscal Equity ruling, with the majority owed to schools with high populations of Black, Latino and immigrant students.¹⁰ Without the resources for a State Constitutionally-mandated "sound basic education," many of our public schools have infamously become pipelines to prisons and jails. If funds currently spent on drug enforcement were instead reinvested in school-based mental health clinics and restorative justice programs, school environments would improve and administrators and teachers would be better able to address any behavioral problems without calling 911 or issuing suspensions and expulsions. If funds currently spent on overtime for police officers who make low-level marijuana possession arrests near the end of their shifts were instead reinvested in making addiction treatment more widely available and accessible, perhaps overdoses would decline rather than increase or plateau at record-high levels.

The fact that marijuana and other drug prohibition is the status quo should not exempt it from close scrutiny. This hearing is a critical example of such scrutiny and the upcoming State budget negotiations provide ample additional opportunities for reconsideration of existing funding choices. While the City and State have together spent tens of millions of dollars every year criminalizing mostly people of color for low-level marijuana possession, the State has provided more than \$15 million dollars in *subsidies* to mostly or all white-owned craft wineries,

¹⁰ *Brennan Ctr. for Justice, Campaign for Fiscal Equity V. State of New York* (2006), <https://www.brennancenter.org/legal-work/campaign-fiscal-equity-v-state-new-york>.

breweries, distilleries and cideries in recent years.^{11,12} These resource allocations expand the disparities in health, economic success, and liberty in our society. In addition to simply legalizing and regulating adult marijuana use, the MRTA would foster significant economic growth and meaningfully shift the balance toward justice and equality.

Thank you for your time and consideration of our comments. We look forward to further discussing these and other issues that impact our clients. If you have any questions, please feel free to reach out to Jared Chausow, our Senior Policy Specialist, at 718-254-0700 ext. 382 or jchausow@bds.org.

¹¹ Robert Harding, *Regulatory Reforms, Tax Credits Help NY Craft Beverage Producers Save \$15M*, AUBURN CITIZEN, May 9, 2017 at http://auburnpub.com/blogs/eye_on_ny/regulatory-reforms-tax-credits-help-ny-craft-beverage-producers-save/article_a593fbb4-0433-11e7-b486-5b9c7090db7a.html.

¹² Marijuana Arrest Research Project, Loren Siegel & Harry G. Levine, *\$75 Million a Year: The Cost of New York City's Marijuana Possession Arrests* (Drug Policy Alliance 2011), <http://marijuana-arrests.com/docs/75-Million-A-Year.pdf>.