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LEGAL ALERT: ONE DAY TO PROTECT NEW YORKERS ACT PASSES IN NY STATE

Today, One Day to Protect New Yorkers passed in the New York State budget as Part OO (page 50) of the Public Protection and General Government Article VII legislation with important Amendments added in Part MMM (page 152). The law went into effect on April 12, 2019. This law ensures that many immigrant New Yorkers will no longer be subject to extraordinarily harsh and disproportionate consequences for misdemeanor convictions under federal immigration law. In addition, the new law offers various means for immigrants to attack the negative immigration consequences of past New York misdemeanor convictions. By reducing the maximum sentence for Class A misdemeanors by one day--from 365 to 364, this change protects thousands of New Yorkers from being torn away from their communities due to immigration detention, denial of necessary immigration relief, and deportation.

WHAT THE NEW LEGISLATION DOES

- **Maximum sentence for NY misdemeanors reduced to 364 days** – The legislation reduces the maximum sentence of imprisonment for any New York Class A or unclassified misdemeanor from one year to 364 days. *See* NYPL § 70.15(1) and (3), as amended by the Budget Bill, Part OO, § 1, and NYPL § 70.15(1-a)(a), as added by the Budget Bill, Part OO, § 2.

- **New misdemeanor maximum sentence applies retroactively** – The legislation provides that the new 364 day maximum applies not only to persons sentenced after the new law but also to persons sentenced before enactment of the legislation. *See* NYPL § 70.15(1-a)(b), as added by the Budget Bill, Part OO, § 2.

- **Past misdemeanor one year sentences reduced to 364 days by operation of law** -- The legislation provides that any sentence imposed for a past New York Class A or unclassified misdemeanor conviction that is a definite sentence of imprisonment of one year shall, by operation of law, be changed to a sentence of 364 days. In addition, the legislation provides that the defendant shall be entitled to obtain from the criminal court a certificate of conviction setting forth the reduced sentence as the court's sentence. *See* NYPL § 70.15(1-a)(c), as added by the Budget Bill, Part OO, § 2.

- **Past misdemeanor sentences of less than one year may be set aside to allow resentencing under the new law** -- The legislation provides that any sentence imposed for a past New York misdemeanor conviction that is other than a definite

sentence of imprisonment of one year may be set aside under NYCPL § 440.20, based on a showing that the judgment and sentence entered under prior law is likely to result in collateral consequences, in order to permit the court to resentence the defendant under the new law. *See* NYPL § 70.15(1-a)(d), as added by the Budget Bill, Part OO, § 2, as amended.

- **Past misdemeanor convictions may be vacated pursuant to a rebuttable presumption of unconstitutionality to permit re-pleading and resentencing under the new law** -- The legislation provides that a past New York Class A or unclassified misdemeanor conviction may be vacated under new NYCPL § 440.10(1)(j) if it satisfies the 440.10(1)(h) ground that the judgment was obtained in violation of a right of the defendant under the state or federal constitution. The legislation provides that there shall be a rebuttable presumption that a plea conviction of such an offense was not knowing, voluntary and intelligent based on ongoing collateral consequences, including potential or actual immigration consequences, and that a conviction by verdict of such an offense constituted cruel and unusual punishment based on such consequences. The legislation further provides that, upon granting of a motion under NYCPL § 440.10(1)(j), the court may either (1) with the consent of the prosecution, vacate the judgment or reduce it to one of conviction for a lesser offense; or (2) vacate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant under the new law. *See* NYCPL § 440.10(1)(j), as added by the Budget Bill, Part OO, § 3, as amended.

WHAT THE LEGISLATION MEANS FOR IMMIGRANT NEW YORKERS CURRENTLY OR IN THE FUTURE FACING MISDEMEANOR CHARGES IN NEW YORK CRIMINAL PROCEEDINGS

- **Lawfully admitted immigrants will no longer be subject to the one "crime involving moral turpitude" deportability ground, INA § 237(a)(2)(A)(i), based on a future New York misdemeanor conviction** –A lawfully admitted immigrant is deportable from the United States under INA § 237(a)(2)(A)(i) for conviction of one crime involving moral turpitude (CIMT) if the crime was committed within five years of admission to the country so long as the potential maximum prison sentence is one year or longer, regardless of the actual sentence imposed. In the past, this ground of deportation reached lawfully admitted immigrants—particularly lawful permanent residents—convicted of New York Class A or unclassified misdemeanors since the maximum prison sentence for these offenses was one year under prior state law. Under the new state legislation, conviction of these New York misdemeanors will be subject to a maximum potential sentence of 364 days (one day less than a year) and therefore will no longer trigger this consequence. This is important because a CIMT is an immigration law term of art that the Board of Immigration Appeals (BIA) has broadly interpreted to reach many low-level state misdemeanors that were so minor that the criminal court imposed little or no actual jail time. *See, e.g.*, *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016) (misdemeanor petty

larceny); *Matter of Solon*, 24 I&N Dec. 238 (BIA 2007) (misdemeanor simple assault). In fact, the federal courts have had to intervene to strike down BIA overreaching use of this deportability ground. *See Silva-Trevino v. Holder*, 742 F.3d 197, 200 n.1 (5th Cir. 2014) (collecting cases).

- **Applicants for non-LPR cancellation of removal and VAWA cancellation of removal will no longer be subject to petty offense "crime involving moral turpitude" ineligibility based on a future New York misdemeanor conviction** – INA § 240A(b) authorizes two principal groups of noncitizens to apply for cancellation of removal: undocumented immigrants with long residence in the country and family hardship, and undocumented and documented immigrants who have been battered by a documented spouse or parent. However, both forms of relief are barred if a person has been convicted of a CIMT under the INA inadmissibility and deportability grounds. And the federal government has interpreted the law to find that this relief is barred even for those whose CIMT conviction qualifies for the petty offense exception to inadmissibility -- maximum potential sentence did not exceed one year and the actual sentence did not exceed six months – if the conviction meets the deportability requirement of a CIMT for which the maximum potential sentence is one year or longer. *See Matter of Cortez-Canales*, 25 I&N 301 (BIA 2010). Thus, many New York immigrants convicted in the past of New York Class A or unclassified misdemeanors have been barred from cancellation relief, regardless of a petty offense actual sentence of six months or less, since the maximum potential sentence for these offenses was one year under prior state law. Under the new state legislation, conviction of these New York misdemeanors will be subject to a maximum potential sentence of 364 days (one day less than a year) and therefore will no longer categorically bar noncitizens with these convictions from presenting applications for discretionary relief.

- **Generally the federal government will not be able to apply the immigration "aggravated felony" provisions to New York misdemeanor convictions/sentences** – "Aggravated felony" is an immigration law term of art that has particularly harsh immigration consequences, including deportability, ineligibility for virtually any form of relief from deportation (thus, deportation is mandatory), and long sentence enhancements for illegal reentry after deportation. The Board of Immigration Appeals has unfortunately broadly interpreted the aggravated felony definition to reach even low-level misdemeanor state offenses. *See, e.g.*, *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), *overruled by Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Matter of Small*, 23 I&N Dec 448 (BIA 2002). One reason for this is that certain aggravated felony grounds reach convictions where the prison sentence imposed is one year or longer, even if the offense at issue is only a misdemeanor. Such aggravated felony grounds include those for a theft offense, a crime of violence, or an offense relating to forgery or obstruction of justice. *See* INA § 101(a)(43). Thus, in the past, immigration authorities have applied the aggravated felony label to reach some New York Class A misdemeanors whenever New York courts imposed a sentence of one year, e.g., New

York misdemeanor petty larceny (NYPL § 155.25). This has led to hugely disproportionate consequences for New York immigrants convicted of such misdemeanor state offenses and so sentenced. Under the new state legislation, conviction of these New York misdemeanors will no longer result in a sentence imposed of one year and therefore will no longer risk triggering aggravated felony consequences.

INITIAL LEGAL GUIDANCE FOR IMMIGRANTS WITH PAST NEW YORK MISDEMEANOR CONVICTIONS

- **Immigrants facing "aggravated felony" charges or mandatory detention based on a past NY misdemeanor conviction for which they received a one year sentence** – The new legislation provides that any sentence imposed for a past New York Class A or unclassified misdemeanor conviction that is a definite sentence of imprisonment of one year shall, by operation of law, be changed to a sentence of 364 days. *See* NYPL § 70.15(1-a)(c), as added by the Budget Bill, Part OO, § 2 This provision should enable immigrants with one year sentences for certain past misdemeanor convictions to avoid aggravated felony grounds such as those for a theft offense, a crime of violence, or an offense relating to forgery or obstruction of justice, which all require a sentence of one year or longer. *See* INA § 101(a)(43). This provision should also enable immigrants deportable for one CIMT conviction with a one year sentence to avoid mandatory detention under INA § 236(c)(1)(C). Note that the government may argue that such an automatic re-sentencing by operation of law should not be given effect based on the BIA decision in *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018) (pending review before the Ninth Circuit in *Velasquez-Rios v. Barr*, No. 18-72990 (9th Cir. 2019)). In *Velasquez-Rios*, the BIA was faced with the question of whether California's amendment of its criminal law to lower the maximum sentence for certain offenses from one year to 364 days, and subsequent legislation to apply this amendment retroactively, meant that a past California offense should be treated as an offense for which the maximum potential sentence was 364 days and not one year. The BIA ruled that, for purposes of determining whether the past offense was a CIMT for which the maximum potential sentence was one year or more as required under INA § 237(a)(2)(A)(i)(II), it was the potential sentence at the time of conviction that matters. *See Velasquez-Rios*, 27 I&N Dec. at 474 ("Section 237(a)(2)(A)(i)(II) . . . requires a backward-looking inquiry into the maximum possible sentence the respondent could have reached for his forgery offense at the time of his conviction"). Significantly, however, the BIA pointed out in a footnote that it was not reaching the question of the effect of California's separate amendment providing for a reduction of actual 365 day sentences to 364 days. *See Velasquez-Rios*, 27 I&N Dec. at 471 n.3 (The California law "provides for a sentence reduction from 365 days to 364 days. However, . . . this aspect of [the California law] is not before us"). And, in a case relied on by the BIA for its ruling, the Supreme Court distinguished a situation "in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and

sentenced for that offense." *McNeill v. U.S.*, 563 U.S. 816, 825 n.1 (2011). The New York legislation makes the one-day reduction available by operation of law and provides that the defendant shall be entitled to obtain from the criminal court a certificate of conviction setting forth the reduced sentence as the court's sentence. *See* NYPL § 70.15(1-a)(c), as added by the Budget Bill, Part OO, § 2. Such a resentencing should be credited by immigration authorities under *Matter of Song*, 23 I&N Dec. 621 (BIA 2003) ("The respondent has presented evidence that, although he was convicted of a theft offense, the "term of imprisonment" for that conviction has been revised to less than 1 year (360 days). Therefore, the offense no longer falls within the definition of an "aggravated felony" in section 101(a)(43)(G) of the Act . . ."). In addition, should it become necessary for any reason (e.g., immigration authorities do not credit the sentence reduced and certified by the criminal court under this provision), the New York legislation provides that a resentence under this provision does not prevent a defendant from seeking vacatur and resentencing under NYCPL § 440.10(1)(j). *See* NYPL § 70.15(1-a)(e), as added by the Budget Bill, Part OO, § 2, as amended. Nor would a defendant be precluded from seeking resentencing only under NYCPL § 440.20.

- **Immigrants facing one "crime involving moral turpitude" ineligibility for lawful admission or for citizenship based on a past NY misdemeanor conviction with a sentence of more than 6 months** – The immigration law provides that an individual is inadmissible for lawful admission if convicted of one crime involving moral turpitude unless the offense is one for which the maximum sentence did not exceed one year (such as a New York misdemeanor) and the actual sentence did not exceed six months. *See* INA § 212(a)(2)(A)(i)(I) and (ii). In addition, the immigration law provides that one is ineligible for naturalization as a U.S. citizen if convicted of one such crime not subject to the exception. The new legislation provides that any sentence imposed for a past New York misdemeanor conviction that is other than a definite sentence of imprisonment of one year may be set aside under NYCPL Section 440.20, based on a showing that the judgment and sentence entered under prior law is likely to result in collateral consequences, in order to permit the court to resentence the defendant under the new law. *See* NYPL § 70.15(1-a)(d), as added by the Budget Bill, Part OO, § 2, as amended. It thus permits immigrants who in the past received a sentence of longer than six months for a New York misdemeanor to seek a new sentence of six months or less to avoid the collateral consequences of ineligibility for lawful admission to the United States or U.S. citizenship. Such a resentencing should be credited by immigration authorities under *Matter of Song*, 23 I&N Dec. 621 (BIA 2003) and *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (held that a trial court's decision to reduce a sentence nunc pro tunc is valid for purposes of the immigration law without regard to the trial court's reasons for effecting the reduction).

- **Immigrants facing "significant misdemeanor" ineligibility for DACA based on one past NY misdemeanor conviction with a sentence of more than 90 days** – The Deferred Action for Childhood Arrivals (DACA) administrative guidelines

provide that an individual is ineligible for DACA if convicted of a "significant misdemeanor," defined in part as including any misdemeanor for which the person received a sentence of time in custody of more than 90 days. The new New York legislative authority described above -- for seeking resentencing based on a showing that the judgment and sentence entered under prior law is likely to result in collateral consequences -- should also be applicable to someone who in the past received a sentence of longer than 90 days for a New York misdemeanor and who needs to seek a new sentence of 90 days or less to avoid the collateral consequence of ineligibility for DACA. Such a resentencing should also be credited by immigration authorities under *Matter of Song*, 23 I&N Dec. 621 (BIA 2003) and *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005).

- **Immigrants facing one "crime involving moral turpitude" deportability based on a past NY misdemeanor conviction with a one year potential sentence OR immigrants facing related ineligibility for cancellation of removal based on such a past NY misdemeanor conviction (OR immigrants facing other negative immigration consequences based on a past NY misdemeanor conviction)** – The new legislation provides that the new 364 day maximum sentence applies not only to persons sentenced after the new law but also to persons sentenced before enactment of the legislation. *See* NYPL § 70.15(1-a)(b), as added by the Budget Bill, Part OO, § 2. However, the recent BIA precedent decision in *Matter of Velasquez-Rios*, 27 I&N Dec. 470 (BIA 2018), may present a hurdle for immigrants seeking to have the new legislation applied to their past New York misdemeanor convictions. In *Velasquez-Rios*, the BIA was faced with the question of whether California's amendment of its criminal law to lower the maximum sentence for certain offenses from one year to 364 days and its legislation to apply this amendment retroactively meant that a past California offense should be treated as an offense for which the maximum potential sentence was 364 days and not one year. The BIA ruled that, for purposes of determining whether the past offense was a CIMT for which the maximum potential sentence was one year or more as required under INA § 237(a)(2)(A)(i)(II), it was the potential sentence at the time of conviction that controls. *See Matter of Velasquez-Rios*, 27 I&N Dec. at 474 ("Section 237(a)(2)(A)(i)(II) . . . requires a backward-looking inquiry into the maximum possible sentence the respondent could have reached for his forgery offense at the time of his conviction") (pending review before the Ninth Circuit in *Velasquez-Rios v. Barr*, No. 18-72990 (9th Cir. 2019)). Significantly, however, in a case relied on by the BIA to support its ruling, the Supreme Court distinguished a situation "in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *McNeill v. U.S.*, 563 U.S. 816, 825 n.1 (2011). To overcome the potential *Velasquez-Rios* hurdle and provide relief for negative immigration consequences based on past misdemeanor convictions, the new legislation provides that a past New York Class A or unclassified misdemeanor conviction may be vacated under a new NYCPL § 440.10(1)(j) ground if it satisfies the 440.10(1)(h) ground that the judgment was obtained in violation of a right of the defendant under the state or

federal constitution, in order to permit the court to resentence the defendant under the new law. *See* NYCPL § 440.10(1)(j), as added by the Budget Bill, Part OO, § 3. And, to support this, the new (j) ground provides that there shall be a rebuttable presumption that a plea conviction of such an offense was not knowing or voluntary based on ongoing collateral consequences, including potential or actual immigration consequences, and that a conviction by verdict of such an offense constituted cruel and unusual punishment based on such consequences. in order to permit the court to resentence the defendant under the new law. *See* NYCPL § 440.10(1)(j), as added by the Budget Bill, Part OO, § 3, as amended. However, a NYCPL § 440.10 petitioner could also raise any other constitutional claim under the (h) ground, such as ineffective assistance of counsel for failure to negotiate a disposition and sentence that avoided immigration consequences. The legislation further provides that, upon granting of a motion under NYCPL § 440.10(1)(j), the court may either (1) with the consent of the prosecution, vacate the judgment or reduce it to one of conviction for a lesser offense; or (2) vacate the judgment and order a new trial wherein the defendant enters a plea to the same offense in order to permit the court to resentence the defendant under the new law. in order to permit the court to resentence the defendant under the new law. *See* NYCPL § 440.10(9), as added by the Budget Bill, Part OO, § 4. Such a vacatur and resentencing should be credited by immigration authorities under *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) (held that a conviction that has been vacated pursuant to Article 440 of the New York Criminal Procedure Law based on legal or constitutional defect does not constitute a conviction for immigration purposes within the meaning of INA § 101(a)(48)(A)) and *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (held that a trial court's decision to reduce a sentence nunc pro tunc is valid for purposes of INA § 101(a)(48)(B) without regard to the trial court's reasons for effecting the reduction).