

*Fox Rothschild Podcast*

**The Presumption of Innocence Podcast Series: Episode 27**

**Blazing Trails: Cannabis Law in the Garden State**

*Featuring Matt Adams and Fruqan Mouzon of Fox Rothschild LLP*

**Adams:** Hi everyone, and welcome to "The Presumption of Innocence," a podcast that's brought to you by the White-Collar Criminal Defense and Regulatory Compliance practice at Fox Rothschild. I'm your host today, Matt Adams, one of the co-chairs of the practice, and I have the great privilege of being joined by Fruqan Mouzon, one of my partners in our Cannabis Law practice.

Fruqan is a seasoned attorney with more than two decades of public and private sector experience. And of particular note in his role in government, Fruqan played a pivotal role in helping to write the 2021 state law in New Jersey that, for the first time, legalized recreational use of cannabis in the Garden State. And so there probably couldn't be a better person to talk about an emerging cannabis market and some of the pitfalls that might be experienced as something that was historically illegal becomes legal.

And I think we've seen this at times in our history, but it's seldom, Fruqan, right?

**Mouzon:** Yeah.

**Adams:** Where we see something that was criminally unlawful ... slowly the tides turn and it becomes legal. My thought goes to Prohibition and that is really where it ends. It's not frequent that we see this, is it?

**Mouzon:** No. Maybe once in a lifetime, right?

**Adams:** So, we're seeing some states all over the country legalizing marijuana. In a previous episode of "The Presumption of Innocence," episode 11, some other of our colleagues and I really took a deep dive into the intersection of state law legalizing cannabis used for recreational purposes and anti-money laundering provisions.

Today, I wanna do more of a case study. I wanna take a look at what's going on in one of the most recent states to legalize cannabis for recreational purposes, New Jersey, and talk about the sundry of potential criminal law issues that start to pop up as you take this once prohibited substance and turn it into a mainstream business.

So, let's start with your experience in helping to craft and shape the 2021 law that went into effect in New Jersey legalizing adult-use recreational cannabis. Talk to us a little bit about your role and how that whole process played out.

**Mouzon:** Well, interestingly, people always ask me, "How'd you get involved with the cannabis industry?"

And the answer is: I didn't choose to get involved with the cannabis industry. It was forced on me. So, I was the general counsel for the State Senate Majority Office. So, I worked for the State Senate Democrats. In that role, big job, not enough money. We're trying to seat judges. We're trying to make sure all the laws are constitutional, trying to keep all the senators happy.

And then Senator Scutari, who's now the Senate president, he comes in my office and we're talking about a hundred different things. And he says, "You know what I think we should do? I think we should legalize marijuana in New Jersey."

And I'm like, "Bro, come on. In New Jersey, the only place in the country you can't buy a firecracker or pump your own gas? You think these people are gonna allow us to legalize marijuana?"

But he believed in it. It took some years to get to the point where people were starting to build the momentum into supporting this thing. There was a trip out to Colorado. People saw what actual dispensaries look like, what growth facilities actually look like. And then it came to the point where we want to legalize, tax and regulate. That was it. That was the point. It was like a 60-page piece of legislation. Everybody starts getting their hand in it at that point.

Someone comes into the meeting — I'll mention the late, great Ron Rice. The late, great Ron Rice comes in. He says, "You know, I'm not gonna vote for it." It's a big surprise, right? "Why not Senator?" He says, "Because only rich white people from out of state are gonna come to New Jersey. They're gonna take the money and they're gonna leave."

So, I thought you know, what are we gonna do about that? So, step-by-step, we started trying to deal with that. How do we make sure everybody isn't a multibillionaire? So then, the idea of micro licenses came up for smaller operators, and then the idea of having certain classes of licenses just for locally owned.

Then there was talk about having more diversity and more women-owned businesses. And it kind of went on and on like that until the 60 pages became 250 pages. And we still weren't able to pass it in the legislature, by the way.

**Adams:** For purposes of our audience — I know what happened — but why don't you tell our audience how it actually came to be? Because it, the first go around, it failed, right?

**Mouzon:** It failed multiple times. Because think about it, the bill got so big that it got to the point where there were certain things you would add that would get your votes and lose your votes at the same time.

I'll give you an example. So, one of the senators that represents an urban district where a lot of people live in public housing ... She's concerned that her constituents won't be able to participate in consumption because you're not allowed in public housing or in places that have more than four occupants. So, she wants to have consumption lounges, for example. So yeah, now we get her vote and then we lose two suburban senators who don't want consumption lounges.

Then we had a big fight about which things are gonna be expunged from someone's criminal record. You think about it, we're making something legal that has been illegal for 80 years. So, there are people that have sentences on their record, convictions, for having done the same thing that we're gonna pat people on the back and let them make millions of dollars doing. So, that was a big concern.

So, who are you gonna let expunge their record? So immediately, anyone with a possession can expunge your record. That's not an argument. But then what about people that were distributing? No one wanted to allow an expungement for someone that had been distributing thousands and thousands of pounds. So, you looked at the criminal statute, and fourth degree was under an ounce and then third degree was one ounce to five pounds. And that became a sticking point, because some people thought five pounds was too much. Some people thought five pounds was too little. So, then we got stuck right there. And I think that was probably the biggest reason why we couldn't pass it, the legislature.

**Adams:** And then ultimately it came to a ballot referendum.

**Mouzon:** Yeah, because some of the senators that wanted to vote for it but weren't sure about their constituencies wanting it, they said, "All right, I'll vote for it if the people vote for it." So, then it went to the ballot in order to give cover to the politicians that needed it. And it passed overwhelming, two to one.

**Adams:** Yeah, some, something like 70% of the electorate voted in favor of that referendum, right?

**Mouzon:** That's right. Then it went back to the legislature to pass the bill that we had been working on all that time anyway.

**Adams:** So, at the end of the day, all it really took was some political cover for the folks who would ultimately pass the bill by having their constituents back them up.

**Mouzon:** Exactly right. Because you may have a constituent that ... There are a lot of churches and the pastors have a lot of power within the constituency, and they don't want it. Like religious institutions, typically, you know, they're not, not in favor of this sort of thing. So, the senator couldn't vote for it without the support of, you know, the people having already given their thumb of approval on it.

**Adams:** So, I won't say that New Jersey is the latest state to legalize adult-use recreational marijuana because it's not. We've seen states come after it, including New York, but New Jersey is in a bit of a rollout phase of its recreational program. So, it's not a mature program like we might see in Colorado or some of the places that were early on the train.

New Jersey is sort of coming into this somewhat late in the game, isn't it?

**Mouzon:** I wouldn't say late. I think the last time I checked, there were less than two dozen states that have legalized. So we're, you know, in the first 15 or 16 legalized. So, not early by any stretch because California and Colorado, a decade ahead. But certainly not late.

**Adams:** But my point is this: We have the benefit of learning from some of those other states' experiences, right?

**Mouzon:** That is correct.

**Adams:** And I would imagine that some of those experiences made their way into the ultimate bill that you helped, correct?

**Mouzon:** A hundred percent. We went out to Colorado and Senator Scutari asked the regulators there, you know, what is the one thing that you wish you had done differently? And the answer was, we allow home grow. So, we allowed people to have a certain amount that they can grow in their home without a license. What happened by allowing that, people were growing more than they were supposed to. They were putting it on the market. Then all of a sudden you had marijuana on the market that you couldn't tax, you couldn't regulate, you don't know where it came from. It creates a big disaster. So, the state of New Jersey doesn't allow homegrown, and that's been a lot of pushback.

**Adams:** And so, it's still a crime in New Jersey to grow marijuana in your home?

**Mouzon:** That is correct.

**Adams:** It's interesting how that plays out. And now, the bill was passed in 2021 after the ballot referendum. And so we're working our way into the second full year of rollout. What are some of the biggest challenges that are presented as we take this previously criminal activity in some instances, like very serious criminal activity when you talk about large quantities and ...

**Mouzon:** Sure.

**Adams:** Trafficking and money laundering.

**Mouzon:** Sure.

**Adams:** We take this previously criminal activity and we try to mainstream it to make it legal. What are some of the biggest challenges that are being faced in New Jersey right now?

**Mouzon:** The law allows each municipality to decide whether they're gonna allow cannabis or not. And the result of that is most of the towns have said no. So, now you have a billion-dollar industry that has to fit itself within a number of municipalities that — it may be a third of the municipalities are going to have a hundred percent of all the cannabis businesses, which creates a problem in trying to find the right location.

I think New York came after us and learned from that. So, in New York, the municipalities don't have a carte blanche veto power over who comes there. They actually have to explain: If you don't want it, why don't you want it? And then the state can overrule that and force them to have it anyway.

**Adams:** So, let me get this straight, as I understand the technical specifics of this. The voters passed a ballot referendum to amend the New Jersey constitution, isn't that correct?

**Mouzon:** That is exactly what happened.

**Adams:** But the local municipalities can prevent that, for lack of a better phrase, constitutional right from coming to fruition in the confines of their community? How is that going to continue to not face some type of legal challenge?

**Mouzon:** It creates a huge problem and not so much for the consumer, right? Because they can't make it illegal in any town for you to consume. They can't make it illegal in any town for you to have your product delivered to you. Who it hurts is the local entrepreneur.

So, as I mentioned earlier, the state has pretty much set aside a certain number of licenses. A big number too, like a third of the licenses are supposed to go to local entrepreneurs. Meaning, you're supposed to open up your cannabis business in the town where you live, or a town that borders your town. So, anyone that lives in a town that opted out and is surrounded by other towns that opted out, that person can't get into the cannabis business. And that's a big problem for them.

**Adams:** Do you see that being challenged?

**Mouzon:** I hope so. I hope so. Someone certainly should. Someone certainly should. But it was a political decision. A lot of the senators were either mayors or very close to mayors. And the mayors, the League of Municipalities, wanted each town to have that power. And it has created a huge problem. Probably, I would say the biggest problem.

**Adams:** What else are you seeing, by way of problems?

**Mouzon:** The banking issue. So, it still remains federally illegal. So big banks won't take your money. So, you can't go to the Bank of America, you can't go to Wells Fargo, and put the money in the bank. And you certainly don't want to have million dollars under your mattress. So, you're forced to go to smaller banks, state-owned banks, credit unions, and they're taking advantage of it. \$1,500, \$3,000 a month fee just to hold your money, that sort of thing.

**Adams:** Is what you're seeing in New Jersey generally a cash-only situation, or is there opportunities to use credit cards or debit cards?

**Mouzon:** People are getting more creative, especially when it comes to businesses to businesses. So, a grower selling to a dispensary: They're not dealing in cash, they're just doing a bank transfer, a wire transfer. But in terms of dealing with the customers, if you go to a dispensary right now, there's ATMs everywhere. They're still dealing in cash. So then, that whole industry with the cash transfer, that becomes a whole other thing. Because now you need Brinks trucks. You need someone to pick up the money, bring it to the bank, that sort of thing.

**Adams:** You touched on this before, but what about all those millions of people whose lives were irreparably altered for having, in many instances, just low-level marijuana convictions? I mean, certainly, yes, we had people who were convicted of trafficking in large quantities and things of that variety. But your run-of-the-mill marijuana convictions, how is that rollout happening in practice?

Now, I know just from being a criminal law practitioner in New Jersey that before the bill ultimately passed, after the ballot measure, there was an attorney general guideline that was issued, basically dialing back the enforcement. Not a full-scale change of the law, but essentially directing prosecutors not to dedicate their resources at prosecuting marijuana cases, almost as a prelude for what was coming. To say, don't waste your time, because we're about to legalize this substance. What problems are those that may have been convicted previously encountering under the rollout in New Jersey?

**Mouzon:** Well, the state has tried in a number of ways to help. The one thing they're trying to do, as you mentioned, first of all, before the bill even was passed, the Attorney General said, let's stop arresting people for marijuana possession. So, there was that reprieve. And then after the bill passed, then they started having automatic expungements for people with low-level marijuana convictions for possession and distribution, I believe up to an ounce.

**Adams:** So, they drew the line somewhere, is what you're saying.

**Mouzon:** You had to draw the line somewhere. And that was a huge fight. I think it would've gotten passed if that conversation hadn't happened with one of their senators coming in and saying, "What about intent to distribute?"

They were like, "No, we're not trying to expunge that." And then she explained that you can have the same amount of marijuana and just have one prosecutor decide to charge you with distribution and another one to charge you with just possession. So, it wouldn't be fair for that decision made by that person to affect so many lives. So, they decided that they're gonna allow expungements for possession and distribution, I think up to third degree.

**Adams:** It's interesting that you raised that because it really brings up an equitable concern. Because historically there has been at least vast prosecutorial discretion ...

**Mouzon:** Right.

**Adams:** ... if you are a socioeconomically advantaged young adult in the suburbs of New Jersey, it was far easier to get away with a simple possession conviction than it may have been if you were in the middle of one of the urban centers. And that has broad-ranging racial and socioeconomic consequences, doesn't it?

**Mouzon:** The ACLU came out with a study and showed that you're three times more likely, if you're African American, to get arrested for marijuana than if you're white. And that really moved the needle in terms of getting support. And I think a lot of the people that voted in favor of it becoming legal, that was the reason.

So that's why there's a little bit of a disconnect in the towns, because some people voted for it to be legal because they didn't want to continue to see kids arrested for doing this minor thing. But at the same time, they weren't trying to sign up to be drug dealers themselves. "We don't want to be drug dealers. We just don't want people arrested."

So I think that has a lot to do with why there's a disconnect with towns voting predominantly for legalization, but yet opting out of having businesses in their area.

**Adams:** Have you ever seen anything like this during your time in the public sector that drew so much political opinion and scrutiny? I'm going back to the analogy about the legislative process is that you don't want to see how the sausage is made, and it sure sounds like there was a lot of sausage-making here.

**Mouzon:** Oh, absolutely. In my career, that was probably the biggest thing. The gay marriage ... earlier in my career, I used to work with Governor Corzine back in 2007, 2008, and they were trying to legalize gay marriage. That was a big deal as well, like a real sea-change in social commentary on what people thought.

But I think this was even more because it touched on so many different things. Some people — and because of the money that it was gonna generate — some people, libertarians, just want more freedom. And then the social justice aspect that we just touched on is, predominantly people of socially disadvantaged backgrounds that were getting arrested for marijuana.

And I think part of the reason was the cops aren't going into people's basements trying to arrest them. They're not going into the dorms. What they're doing is driving around the street and they see people on the corner, and then that's when they arrested them, too. So, if you're in an urban environment, you're much more likely for them to even notice you.

**Adams:** Let's look at this from a different angle: As far as we sit here today, adult-use recreational marijuana is still illegal federally. It is still a Schedule One narcotic as we sit here today. And I can be, in New Jersey, arrested for possession or distribution of marijuana by the feds.

**Mouzon:** Yes.

**Adams:** So how does this actually get managed in practice? Certainly, federal agents aren't making traffic stops, generally speaking. So, we're not encountering marijuana arrests there. I would imagine that, notwithstanding the new law, there is still a black market for marijuana, which I'm sure the feds are active in investigating and prosecuting. But how does this delicate balance play out in an emerging market like New Jersey?

I can imagine in Colorado or one of the early states, they've pretty much figured it out. But in New Jersey where we're still in this area... and I have some police officer friends of mine who, when the law first passed, they were still sort of uncertain. And even police officers themselves ... It's taken a lot of guidance from the Attorney General to understand whether, in their off-duty capacity, now police officers could imbibe in cannabis the same way that they would potentially alcohol, socially. And it's taken a lot of different rulemaking and regulation, a process which is really in its infancy as we've highlighted.

So, how is it happening in New Jersey that this balancing act, this tightrope is being walked between the federal laws prohibiting possession, distribution and the state laws, which now allow it?

**Mouzon:** I mean, I think we're just ... growing pains trying to figure it out. You're still not allowed to sell marijuana without a license, right? So, if you read the law, we started using the word cannabis and a little bit of inside baseball: That was done so that you could make it legal in some ways, but still remain illegal in other ways. So, there's still marijuana on the books, and it's still illegal. So you can't sell it without a license. You can't have over a certain amount. You can't drive and smoke at the same time sort of thing. And we're just trying to figure it out.

The problem I would say, Matt, really is trying to balance that with the social undertones. So, even though it's not legal to sell without a license, the state — and in New York it's even more prevalent — is in no hurry to arrest some Black kid without a license that's selling a hundred pounds of marijuana because it just would look bad, politically. So, they've been pretty much letting you get away with it.

**Adams:** Do you think that, as the process matures, we're destined to see some refinement to that bill you worked on that was ultimately passed in 2021?

**Mouzon:** I think there are some things that need to be fixed.

**Adams:** Where would you start?

**Mouzon:** This local control ... I would start there. I think that there's a real problem with towns having so much control over, not only if it's allowed, but who gets the license.

So, the town, number one, gets to decide if they allow it. Number two, gets to decide how many they will allow, what types of licenses. And then thirdly, the state is requiring each individual licensed applicant to get a resolution from the town council, endorsing them specifically. So, the towns get to pick who wins and who doesn't, which means if you are politically connected you've got a much better chance of getting the marijuana license.

**Adams:** Let's take it from a different angle: Traveling across state lines. Where I am sitting right now, I can be in the state of New York in, eh, no traffic, 20 minutes. I can be in the state of Pennsylvania, no traffic, 25, 30 minutes. How do you deal with it?

Now, mind you, New York I think, has now come on board with legalized cannabis, but to my knowledge, Pennsylvania has not.

**Mouzon:** I've had a client that had that trouble. He went to some kind of trade show. He had some marijuana with him. I don't know what they were doing at the trade show, but he's coming back to New Jersey and he gets pulled over and he has some marijuana in his bag and it's not legal in Pennsylvania. Got arrested.

**Adams:** It's not like you can tell the police officer who pulls you over or stops you, searches you in Pennsylvania, "Oh that's okay. I live in New Jersey. I'm allowed to have this," because you're possessing it in Pennsylvania.

**Mouzon:** When in Rome, right?

**Adams:** Exactly.

**Mouzon:** I don't think that's different than a lot of laws, right? So, if some guy has a gun, carrying concealed, and he gets pulled over and they see it, he can't be like "Well, I'm from Texas, so you gotta let me go."

**Adams:** Or Arizona ... Have Constitutional carry in Arizona. You try to make that defense in New Jersey, and you get laughed out of a courtroom.

**Mouzon:** Exactly right. Exactly right. I think that's where we are.

**Adams:** So, the state line issue still exists, and folks that are going to avail themselves of this new right to possess and consume — and in some instances, with a proper license, sell — cannabis in New Jersey, have really got to be concerned about how the law may differ a few miles down the road.

**Mouzon:** That's right.

**Adams:** Now, I've been reading a lot lately about illegal cannabis operations, and they're popping up in a lot of places. In particular, I've been reading about this for about a year in New Jersey, which means that they must have been ready to pounce on this the minute that the law passed and was ultimately signed to the law. Because I've seen blatant illegal operations, as far as I am concerned, in communities where no licenses have been granted, so you know that they are not licensed operations yet. And I'm talking convenience stores with a rack of marijuana paraphernalia and pre-roll joints sitting on a shelf in a store. And they seem to be trying to avail themselves of a gray area.

And I can tell you, I've advised some of these operations and I see no gray area that would allow you to, in your convenience store, have a marijuana aisle no different than you have an aisle of protein bars or potato chips. And so, what specifically about the law you helped to write prevents that? Because technically they can possess it, but they can't distribute it without a license. Some of these folks are trying to be very creative in saying, "Hey, we'll give you a quarter pound of weed for free if you buy our overpriced bong," for example. I've literally seen a sign on a busy road that said, we carry cannabis products for free if you buy whatever.

**Mouzon:** Well, a couple things. First of all, you're allowed to possess up to six ounces. You're not allowed to possess a day's worth of marijuana to be able to sell from the bodega, which I would imagine is much more than six ounces.

Also, the laws about distribution did not change. It's still illegal to sell marijuana without a license. And I have clients that, you know, they'll contact me and they'll say, "What's the difference if I have a license or not? If you should be allowed to sell it, whatever." I'm like, "Yeah, some people have a license to operate on your brain, but does that mean I can't get arrested if I decide, you know, to give you a lobotomy?" Get outta here. You gotta have a license to do it.

I think the problem isn't that the law is gray. It's that the politicians and the government doesn't really have a stomach for enforcing it at this point.

**Adams:** So, it's an exercise in prosecutorial discretion.

**Mouzon:** That's right.

**Adams:** Do we need refinement then about how to deal with some of these operations — that I have no problem calling illegal because they're unlicensed -- but that think they're operating in some gray area before we actually get this off the ground in a legitimate and reasonable way that provides the benefits that it was intended to?

**Mouzon:** I think at some level, you gotta start arresting the perpetrators, right?

You gotta arrest the moonshiners and the bootleggers, right? Because one of the reasons why we wanted to legalize marijuana is because you can control the content of it, right? You have to have a label ... Has to be tested in the lab. It can't have fentanyl in it or cocaine in it, or whatever. That's one of the reasons why, you know, we wanted to do legally versus illegally.

So, to just have stores popping up, buying marijuana from God knows where that has God knows what in it, I think we gonna have to crack down on it at some point. But I think politicians haven't had the nerve to deal with it yet.

**Adams:** This is a fascinating conversation, Fruqan, one that we could probably have all day, but that's all the time that we have for now.

I want you to make one prediction for me before we go today. How long until we see the federal legalization of marijuana, if ever?

**Mouzon:** Oh, I think it'll be difficult. Maybe never. Because the Democrats and the Republicans aren't agreeing on it.

**Adams:** They don't agree on anything.

**Mouzon:** They don't agree on anything, so that's gonna make it hard. And even from a more selfish standpoint, like a state like New Jersey would be hurt if it became federally legal, in the sense that we would be getting competition from everywhere. Big companies like, who knows, Amazon and CVS might start selling marijuana, and it'll push all the mom-and-pops right out of business.

So, in some ways, it's better to not be federally legal.

**Adams:** Well, that was an interesting perspective. I don't know if you answered my question other than to say you didn't know.

**Mouzon:** The answer is probably never. Until there is a House that's not 51% Republican and 49% ... I don't see it.

**Adams:** That is all the time that we have for today on "The Presumption of Innocence." I want to thank my guest, Fruqan Mouzon of our cannabis practice, and until next time, we'll see you soon.

**Mouzon:** Thanks for having me.