

PDS IMMIGRANT DEFENSE QUICK REFERENCE GUIDE by Gwendolyn Washington, Esquire

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DEFENSE COUNSEL'S AFFIRMATIVE DUTY TO ADVISE OF IMMIGRATION CONSEQUENCES

Padilla v. Kentucky, 130 S.Ct. 1473 (2010) – Defense counsel has an affirmative duty to provide non-citizens with competent advice on immigration consequences resulting from a guilty plea. Defense counsel's failure to render competent advice on immigration consequences may constitute ineffective assistance of counsel pursuant to *Strickland v. Washington, 466 U.S. 668 (1984)*. See also *Goodall v. United States, 759 A.2d 1077 (D.C. 2000)*.

SPECIAL CONSIDERATIONS FOR CERTAIN CLASSES OF NON-CITIZEN CLIENTS

Non-citizens with Temporary Protected Status ("TPS") can lose their status with either two (2) misdemeanor convictions or (1) felony conviction in the U.S. See 8 CFR §244.4(a)• Undocumented persons are immediately deportable, but can also be deported for immigration offenses stemming from a criminal case as well as for their unlawful presence.• Legal Permanent Residents can be subject to removal proceedings for certain immigration offenses regardless of the length of lawful presence in the U.S., and hardship to US citizen children and/or spouse is only one factor in cancellation of removal.

JUDICIAL OBLIGATIONS TO NON-CITIZEN DEFENDANTS IN DC SUPERIOR COURT

District of Columbia law requires the court to advise non-citizen defendants of adverse immigration consequences that might result from a guilty plea such as denial of citizenship, inadmissibility into the U.S. and deportation during the plea colloquy. Failure to do so is grounds for withdrawal of the guilty plea. See D.C. Official Code §16-713 (2005); see *Valdez v. United States, 906 A.2d 284 (D.C. 2006)*; see also *In re Adamiak, 23 I&N Dec. 878 (BIA 2006)*. The statute does not require clients to reveal immigration status; such information is confidential. See D.C. Rule of Prof'l Conduct 1.6.

CONVICTIONS FOR IMMIGRATION PURPOSES

A conviction occurs pursuant to 8 U.S.C. §1101(a)(48) when:

- 1) A client enters a plea of guilty or an *Alford* plea or plea of no contest (*nolo contendere*) admitting facts sufficient to warrant a finding of guilt by a judge, or a finding of guilt after a trial by either judge or jury.
- 2) The judge imposes some form of punishment, penalty or restraint on a non-citizen's liberty as a sentence.
- 3) Finality of the conviction is not a requirement. *But see Pino v. Landon, 349 U.S. 907 (1955)*; see also *Matter of Punu, 22 I&N Dec. 224 (BIA 1998)*.

AGREEMENTS NOT CONSTITUTING CONVICTIONS

- Stet Docket Agreements
- Juvenile Adjudications (Except Title 16 clients- who are considered to be adults for immigration purposes). See *Matter of Ramirez-Rivero, 18 I&N Dec. 135 (BIA 1981)*.
- Diversion Agreements with Office of United States Attorney (Be sure that the client does not make any admissions of guilt as those admissions can be used in removal proceedings.)

AGREEMENTS CONSTITUTING CONVICTIONS

- Any guilty plea, plea of *nolo contendere* or *Alford* plea, straight probation, regardless of whether the sentence is suspended or imposed. See 8 U.S.C. §1101(a)(48)(B).
- Deferred sentencing, such as the Domestic Violence Intervention Program ("DVIP"); *Matter of Roldan, 22 I&N Dec. 512 (BIA 1999)*.
- Drug Convictions with Expungement Provisions such as §48-904.1(e) are still convictions for immigration purposes. *Ibid*; see also 8 U.S.C. §1101(a)(48)(A).

PLEA NEGOTIATIONS

- ✓ **Negotiate for a plea to a lesser-included offense that does not involve a crime of violence or other element that renders it a deportable offense.**
Example: Burglary will not be a CIMT unless the record reflects that the breaking and entering was done to commit a CIMT, i.e. theft. See *Matter of G, 1 I&N Dec. 403 (BIA 1943)*.
- ✓ **Negotiate for pleas that are binding upon the court pursuant to DC Superior Court Criminal Rule 11(e)(1)(C).** A binding plea can ensure that the court does not impose a sentence with potentially damaging immigration consequences for the client.
- ✓ **Negotiate for a sentence just below one year if the one-year sentence is the "triggering effect" for an aggravated felony.** Stack counts consecutively so that no one conviction carries a sentence of more than one year if plea negotiation involves a judge and/or AUSA who desires the client to serve more than one year in prison. When fashioning a plea agreement in which the client may serve time, be sure to advise the client that s/he will be rendered deportable if: If the client is convicted of two (2) or more CIMT, that do not arise out of a single scheme or criminal misconduct or from a single trial. See INA §237(a)(2)(A)(ii), 8 U.S.C. 1227(a)(2)(A)(ii). When fashioning a plea agreement in which the client may serve time, be sure to advise the client that s/he will be rendered inadmissible if: s/he is convicted of two (2) or more offenses, arising from a single scheme of misconduct or from a single trial, regardless if the offenses involved moral turpitude, and, if the aggregate sentence to confinement is five (5) years or more. See INA § 212(a)(2)(B); 8 U.S.C. §1182(a)(2)(B).
- ✓ **Sanitize the record during any plea colloquy.** Ask the AUSA to issue a new charging document so that the contents of the new charging document do not trigger immigration consequences. Make sure that the plea colloquy does not contain any references to offenses that would result in immigration consequences. Ask the AUSA to omit from the factual proffer all references to other charges to which the client is not pleading guilty.

SENTENCING

- ✓ **Urge the court to impose more straight probation, as probation *is not* a term of imprisonment for one year for immigration purposes.** Remember to ask for a sentence in terms of days instead of months because 12 months equals one year in immigration court.
- ✓ **If the non-citizen client has been detained pre-trial, then waive credit for time-served in order to obtain a lower jail sentence.** Advise the client to spend more time in jail instead of having a suspended sentence of over one year. In many cases, serving more time can prevent adverse consequences in immigration court. Incarceration for a period of 180 days or more at a time for a conviction(s) results in a loss of Good Moral Character for the client. See 8 U.S.C. §1101(f)(7).
- ✓ **Seek to vacate the conviction.** Look for flaws in the trial record as a basis to vacate the conviction. File an appeal if possible. Make sure that the judge's order to vacate does not state immigration consequences as the *only* reason to vacate the conviction, i.e. language in the order implying social stigma or inability to find employment is beneficial. See *Matter of Pickering, 23 I&N Dec. 621 (BIA 2003)*.
- ✓ **Seek modification of the original sentence.** File a DC Superior Court Criminal Rule 35 Motion if the triggering effect results from the length of the sentence. The immigration court will recognize the sentence reduction even if the sentence reduction is *solely* for immigration purposes. See *Matter of Cota-Vargas, 23 I&N Dec. 849 (BIA 2005)*; see also *Matter of Song, 23 I&N Dec. 173 (BIA 2001)*.
- ✓ **Probation Revocation:** Revocation of probation may result in a sentence that renders the client deportable if the court orders additional time to be served for the probation violation. To avoid a sentence that triggers removal, waive credit for time already served. **IMPORTANT:** Non-citizen clients cannot apply for naturalization while on probation or parole. See 8 C.F.R. §316.10(c).

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