

CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

May 2018 - Vol. 3, Issue 4

This month's issue offers some practical tips for protecting clients in a post-Padilla "ICE" age. Our non-citizen clients face enormous risks of removal and other negative immigration consequences (e.g., deportation, detention, inadmissibility, bars to lawful status) on the basis of their criminal convictions, even misdemeanors and violations. ICE, never a friendly agency, is newly empowered and aggressive in pursuing its agenda.

As you know from the landmark case of Padilla v. Kentucky, before your client pleads guilty, you have a constitutional obligation to advise him or her of the true immigration consequences of the plea, and try to negotiate the immigration-safest plea possible. This might mean advocating for a non-deportable offense or for an offense that at least preserves your client's opportunity to petition for relief from deportation, or, depending on the offense, negotiating for a sentence that eliminates deportation consequences (in some cases, a sentence of 364 days, as opposed to one year, will accomplish that). For some clients, though, taking his or her chances at trial may be preferable to the certain deportation consequences resulting from a guilty plea.

The purpose of this newsletter is not to set forth the advice you should give in any particular situation, but to offer some tips that will help ensure that you acquire the full information you need to protect your client and are better able to take steps from the outset of the case through sentencing, and even post-sentencing, to ensure that your client isn't put at further risk by the plea he or she enters.

- When you interview your client, first ask him **where he was born**, not whether he's a citizen
 - *The client might think he's a citizen when he's not, or assume he is from his many years in the country;*
 - *The client might be afraid to tell you he's not a citizen*
 - *Asking where the client was born will better ensure an accurate response.*
 - *If your client tells you he was born outside the U.S., then proceed to ask additional questions to determine your client's exact immigration status. At a minimum:*
 - When did he first come to the country and how?
 - His current immigration status and when/how it was obtained?
- Even if your client says he was born in the United States and otherwise appears "American" (e.g., no accent), continue to check any documentation you receive in the course of the case, ESPECIALLY the Presentence Report and the rap sheet.

- *If the PSR newly reveals that the client is a non-citizen, you can advise your client of the true consequences of the plea and move to withdraw the plea before sentencing. It may be possible to renegotiate the plea to an immigration-safer one.*
- If you have a non-citizen client, consult throughout the case with immigration experts
 - *Institutional providers have in-house immigration experts*
 - *Regional Immigration Assistance Centers, funded by the Office of Indigent Legal Services, provide statewide support to trial and appellate attorneys.*
 - *The Immigrant Defense Project houses the NYC Center.*
 - *Immigration counsel will help you understand the risks your client faces, how to advise your client as to these risks, and the plea you should try to obtain.*
 - *A link to ILS's list of Regional Assistance Centers can be found [here](#).*
- Don't fall into the trap of thinking that the immigration consequences in your case don't matter just because your client may be deportable for independent reasons, e.g., he has no lawful status or has prior convictions that make him deportable. It is again critically important to discuss these matters with immigration experts.
 - *Your client may be entitled to relief from deportation or to adjust his or her status **but for** your conviction.*
 - *With respect to prior convictions, it's possible that post-conviction counsel (such as our office) could develop collateral challenges to vacate even old convictions and secure immigration-safer repleads. You don't want your case becoming the only thing standing between your client and security in the United States.*
- While a sentence of probation may ordinarily be a very attractive offer as it spares your client from incarceration, it does not guarantee your non-citizen client non-detection from ICE. Just because your client doesn't enter custody doesn't mean his conviction won't put him on ICE's radar. Once again, speak to immigration counsel before advising your client about the consequences of what may seem like an otherwise "good" deal.
- Don't make a bad *Peque* warning better: courts are obligated under *People v. Peque*, to advise the defendant that if he or she is not a United States citizen, they may be deported upon a guilty plea. But courts are known to forget to give the warning, or bungle it, e.g., fail to expressly refer to the possibility of deportation. Don't point out any perceived inadequacies to the court. If your client ends up in ICE's crosshairs, and you've filed a notice of appeal (see below), the court's "bad" *Peque* warning could provide a basis for a plea withdrawal argument on appeal.
- **File a notice of appeal**, even if your non-citizen client pleaded guilty and received the minimum, and even if there is a seemingly valid appeal waiver. **A notice of appeal alone will not put your client on ICE's radar.**

- *While we appellate types regularly urge our trial brethren to file notices of appeal (recall it's just a placeholder and doesn't by itself trigger an appeal), it is **crucial** to do so if your client is a non-citizen. **The mere existence of the NOA could prevent the client's immediate deportation if picked up by ICE and may entitle your client to release from immigration detention.** Remember, to be timely, the NOA must be filed within 30 days of sentencing. A motion seeking permission to file a late notice of appeal can be made up to a year and 30 days after sentencing.*
- Unless there is specific reason to do so, do not elicit from a client at any proceeding on the record that he is a citizen, even if you have good reason to believe that is the case. If it turns out he's not, that misrepresentation will prejudice him in any efforts to obtain post-conviction relief.

General Reminders:

- When you move to dismiss at the close of the People's case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss "for failure to make out each and every element" or a "prima facie case" does not preserve a sufficiency issue for appeal.
- If you are litigating a 30.30 issue, state in your initial motion that you are entitled to a pre-trial hearing under *People v. Allard* 28 N.Y.3d 41 (2016), and CPL § 210.45(5)(c). Do a reply even if you don't think the prosecution has rebutted your showing with conclusive proof.

see past issues at:

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