

# RIAC2



CRIMINAL LAW

FAMILY LAW



IMMIGRATION LAW

May 2021

Volume 5, Number 5



## **In This Issue:** **SPECIFICITY OF CONVICTIONS ON THE RECORD: CLEAR OR CLOUDY? Implications of *Pereida v. Wilkinson***

### **UPCOMING EVENTS:**

May 13, 2021: 3:00 – 4:30 PM  
2021 PADILLA UPDATE:  
CRIMINAL LAW. Online via  
Webex. To register:  
[mmarcello@ocgov.net](mailto:mmarcello@ocgov.net)

June 3, 2021: 3:00 – 4:30 PM  
2021 PADILLA UPDATE:  
FAMILY LAW. Online via Webex.  
To register:  
[mmarcello@ocgov.net](mailto:mmarcello@ocgov.net)

June 24, 2021: 2:00 – 4:30 PM  
2021 PADILLA UPDATE:  
CRIMINAL & FAMILY LAW  
Online via Webex. To register:  
[mmarcello@ocgov.net](mailto:mmarcello@ocgov.net)

*The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.*

*\*RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

## **“Clean” Allocutions v. Specifics: The Implications of *Pereida v. Wilkinson***

Our RIAC advisals often contain advice on what to put on the record to avoid negative immigration consequences. The U.S. Supreme Court’s recent holding in *Pereida v. Wilkinson*, Slip Opinion No. 19–438 (March 4, 2021) has now complicated the issue. This month, we discuss the implications for noncitizens who are convicted of crimes that carry immigration consequences and what, if anything, to put on the record about those convictions.

### **What happened in *Pereida*?**

Clemente Alvarino Pereida was placed in removal proceedings for entering and remaining in the U.S., unlawfully, from Mexico. Relief from removal was available to him in the form of Cancellation of Removal (COR), but he would not be eligible for COR if he had a prior conviction for a Crime Involving Moral Turpitude (CIMT). Mr. Pereida was convicted under a criminal statute that described an offense involving fraud (he had used a false social security card to get a job), a CIMT, but the statute contained additional subdivisions describing different offenses. Nothing in the record stated which subdivision he for which he was actually convicted. Mr. Pereida argued that under the “categorical” approach, the conviction could have been for an offense in that particular statute that did not constitute a CIMT, especially since there was nothing in the record to which to point. The Supreme Court, however, agreeing with the 8<sup>th</sup> Circuit and the Board of Immigration Appeals (BIA), dismissed the “categorical” approach argument and held that because Mr. Pereida has the burden of proof to demonstrate eligibility for Cancellation Removal, if he cannot show that he was *not* convicted of a CIMT, he failed to meet his burden and is therefore ineligible for COR. Because there was nothing in the record specifying the subdivision of the offense of conviction, Mr. Pereida could not show that his conviction was not a CIMT, and he was deemed ineligible for Cancellation of Removal, making him removable from the U.S. after being here for 25 years, working and raising a family.

## Burdens of Proof in Immigration Law

Generally, in the immigration world, if your client is subject to the laws of **deportability** (i.e. they are here after a lawful admission, even if their status has expired), the **Government** has the burden of proof to show your client is deportable by “clear and convincing” evidence.

If your client is subject to the laws of **inadmissibility**, or is applying for an **immigration benefit or relief from removal**, then your **client** has the burden of proof to demonstrate eligibility for the relief or benefit. The standard of proof varies from “clear and convincing” to “preponderance of the evidence,” depending on the circumstances.

### What does *Pereida* mean for defense counsel?

If your client is otherwise deportable (e.g., overstayed a visa), and does not otherwise qualify for any kind of relief from removal, (which we discuss in our advisals), the Government has the BOP. In this situation, it is best to keep the record free and clear of any reference to the specific subdivision of conviction if it is a CIMT or other problematic conviction (e.g., CODV, CAC, Firearms offense, Aggravated Felony, etc.) In other words, a generic allocation to the general statute of conviction with no facts is more appropriate.

If your client is undocumented (i.e., entered the U.S. illegally without inspection), or your client is eligible to apply for a green card, cancellation of removal, or any other type of relief from removal, then your client has the BOP, so the specific offense, including subdivision, must be specified, assuming the crime it is NOT a disqualifying offense like a CIMT.

Example (HIGHLY simplified): Offer is Assault 3d, PL §120.00(1):

-Try to get an offer under Subdivision 2 (*Reckless Assault*).

-If that is not possible, and client is subject to deportability, then avoid any mention of subdivision and allocate to generic statute with no facts (i.e., PL 120.00).

-If offered PL §120.00(2), *Reckless Assault*, and client is subject to inadmissibility, is or will be applying for relief, green card, etc., then specify PL §120.00 **subdivision (2)** and get a Certified Disposition for the client (and make sure the certification is clear as to the subdivision!).

Bottom line: Negotiate for an immigration-safe plea if possible. The RIAC will help you with this!

You can see how important it is to know your client’s immigration status, history and family background to be able to determine the best option for your client when figuring out what, if anything to put on the record in a plea proceeding. **We REPEAT: A thorough intake is required to get a proper analysis and advisal from the RIAC.**

Our advisals cover these considerations, but only if you reach out to us as soon as possible in your representation of the client. Negotiation is critical, especially in felony cases prior to indictment.



### CONTACT US!

Tel. (315)356-5794

Fax (315)356-5795

Sharon Ames, Esq.

sames@ocgov.net

CELL: (315)272-0505

Tina Hartwell, Esq.

thartwel@ocgov.net

CELL: (315)264-9217

### Chief Defenders & Assigned Counsel Administrators:

**Contact the RIAC2 to  
schedule your next training,  
lunch hour or other session  
in your office/county.  
We will provide CLE credit!**