WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter **Issue 21 / July 2022**

What You Need to Know for Your Noncitizen Client

If your noncitizen client is facing criminal charges or adverse findings in Family Court...

Please contact the WNY Regional Immigration Assistance Center. We provide legal support to attorneys who provide mandated representation to noncitizens in the 7th and 8th Judicial Districts of New York.

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We are funded by the New York State Office of Indigent Legal Services (ILS) to assist mandated representatives in their representation of noncitizens accused of crimes or facing findings in Family Court following the Supreme Court ruling in *Padilla v. Kentucky*, 559 U.S. 356 (2010), which requires criminal defense attorneys to specifically advise noncitizen clients as to the potential immigration consequences of a criminal conviction before taking a plea. There is no fee for our service.

Please consider also contacting us if you need assistance interviewing your client to determine their immigration status or communicating immigration consequences; or if you would like us to intercede with the DA or the judge to explain immigration consequences. We speak Spanish and French.

New Case Law

In *People v. Samaroo*,__ AD3d __ (App. Div. 2d Dep't 2022), the Second Department considered the appeal of an order denying a motion to vacate a conviction for marihuana in the fourth degree on two grounds: the alleged ineffective assistance of counsel for failure to properly advise on immigration consequences of the guilty plea, and the failure of the court to give a warning that the plea may risk deportation. The matter was remitted for a hearing on the IAC claim because the court found the alleged misadvice was not contradicted by the record of the pleadings, and a previous conviction for a removable offense did not prove the defendant was not prejudiced. The court also considered factors such as the defendant's length of time in the U.S., minor U.S. citizen children, wife's medical condition, sole provider status, etc., to find that he sufficiently alleged that a rejection of the plea would have been rational. On the other hand, the court upheld the denial of the defendant's court warning claim. Relevant facts to that claim were in the record of the plea proceedings and subject to review on direct appeal, but the defendant did not establish that his failure to take an appeal from the judgment was justifiable.

NEW CASE LAW CONT'D ON PAGE 3

Ontario County NEW YORK

LEGAL AID BUREAU of Buffalo, Inc.

Childhood Arrivals with United States Citizen Parents: The Child Citizenship Act and its Limitations

By Brian Whitney, Staff Attorney, WNYRIAC, Legal Aid Bureau of Buffalo, Inc.

Some clients who are born abroad may still be U.S. citizens. Proof of citizenship would include a naturalization certificate, U.S. passport, or a certificate of citizenship. Where possible, it is important for defense counsel to obtain this proof to ensure that their client is safe from any immigration consequences in criminal or family court proceedings.

However, not all foreign-born clients who have become citizens have proof of citizenship, particularly those who arrived in the U.S. as children. They may not even know their immigration status or whether they are indeed citizens. For these reasons, we may ask you: "were your client's parents citizens before your client turned eighteen?" This question helps us to screen for individuals who *might* have "acquired" citizenship at birth or "derived" citizenship through a naturalized parent after birth, but before the age of eighteen, or those who were adopted by U.S. citizen parents. Both inquiries touch on complex areas of immigration law through which citizenship is obtained by operation of law.

The Child Citizenship Act of 2000 ("CCA") was passed to protect foreign-born children of United States Citizens and to remedy instances in which adopted children had been subject to deportation. It also relaxed the requirements for obtaining automatic citizenship through U.S. parents. Under the CCA, otherwise eligible lawful permanent resident children, including fully and finally adopted noncitizens, can derive citizenship if certain conditions are met while they are under eighteen, and when at least one parent is a U.S. citizen, "whether by birth or naturalization." CCA § 101; INA § 320(a). Before this change, generally both parents needed to naturalize before their foreign-born child's eighteenth birthday for the child to derive citizenship, with narrow exceptions for legally separated parents, deceased parents, and children born out of wedlock, depending on the child's birthdate. The extension to inter-country adoptees was another important change, because under prior laws foreign-born children did not automatically obtain citizenship even if adopted by a U.S. citizen, and then only qualified under specific circumstances when their adoptive parents naturalized.

"Under the CCA, otherwise eligible lawful permanent resident children, including fully and finally adopted noncitizens, can derive citizenship if certain conditions are met while under eighteen and at least one parent is a U.S. citizen, 'whether by birth or naturalization.' Unfortunately, the CCA only applies to noncitizens born on or after 2/28/83; i.e., those who were under 18 years old on or after 2/27/2001."

Unfortunately, the CCA only applies to noncitizens born on or after 2/28/83; i.e., those who were under 18 years old on or after 2/27/2001. This leaves many noncitizens subject to more exacting earlier requirements, under which they may not qualify for automatic citizenship through one parent or adoption. These individuals may be mistaken or unclear about their citizenship or immigration status and, rather than obtaining citizenship automatically, must still *apply* for it. Like other lawful permanent residents, they can become permanently ineligible for naturalization or unable to prove "good moral character" based on criminal convictions. (For more information, see our March 2021 newsletter here). Like other noncitizens, they are exposed to our country's strict criminal immigration laws and can become removable, be deemed inadmissible upon return to the U.S., face immigration detention, and be ineligible for

or be denied relief applications based on interactions with the criminal justice system.

Determining the immigration status or citizenship of clients is a crucial first step towards ensuring your legal and ethical obligations to noncitizen clients are met. Ask every client where they were born, and reach out to the RIAC for assistance. Bear in mind, though, that while the RIAC can help to spot potential automatic citizenship issues, we are not funded to provide direct representation and are not positioned to make the determination about whether your client has in fact derived or acquired citizenship. Should this appear to potentially be the case, we can work with you to collect documentation and refer your client to the immigration service providers who can make such a determination and help to obtain proof in the form of a certificate of citizenship or a U.S. passport when advisable.

WNY Regional Immigration Assistance Center

A partnership between the Ontario County Public Defender's Office and the Legal Aid Bureau of Buffalo, Inc.

NEW CASE LAW (CONT'D)

On June 8, 2022, in *United States v. Castillo*, __ F.4th __ (2d Cir. 2022). the Second Circuit held that the offense of attempted second-degree gang assault, in violation of NYPL § 110.120.06, is legally impossible. The Court reasoned that Castillo's conviction conflictingly requires, as an attempted offense, "the nonsensical mens rea of intent to cause unintended serious physical injury." Due to this legal impossibility, the defendant's conviction did not match the definition of a "crime of violence" under the United States Sentencing Guidelines. Nor would it constitute a "crime of violence" under immigration law.

Legally impossible pleas are permissible bargains in New York. *See People v. Foster*, 225 N.E.2d 200 (1967). For information on logically impossible "attempted recklessness" pleas and inchoate offenses generally, see our February and September 2021 Newsletters.

In *Jang v. Garland*, __ F.4th __ (2d Cir 2022), the Second Circuit held that a provision of attempted second degree money laundering, NYPL §§ 110 and 470.15(1)(b)(ii)(A), is not a crime involving moral turpitude (CMT), because it lacked the "evil" mental state necessary for an offense to constitute a "concealment" CMT. The specific subdivision of money laundering 2nd did not require the accused to have intended to impair government function or to conceal a crime, but rather merely to know that the proceeds came from illicit activities and to know that transactions were designed to conceal or disguise "the nature, the location, the source, the ownership or the control of the proceeds of specified criminal conduct." *Id*. (citing NYPL 470.15 [1][b][ii][A]) Consistent with Second Circuit precedent, "knowledge of a crime and concealment of a crime are not categorically sufficient types of scienter to denote a [CMT] if the statute of conviction does not require a 'specific mental purpose' to conceal." *Id*. (citing *Mendez v. Barr*, 960 F.3d 80, 84-85 [2d Cir. 2020]).

This June, in *Egbert v. Boule*, __US__ (2022), the Supreme Court declined to permit a U.S. citizen to sue a Border Parole agent for damages stemming from alleged First and Fourth Amendment violations. While the decision limits the accountability of certain federal agents for civil rights abuses under *Bivens*, it does not alter your noncitizen clients' constitutional rights during interactions with immigration enforcement. The Immigrant Defense Project has published Know Your Rights flyers in sixteen languages which can be accessed *here*: https://www.immigrantdefenseproject.org/know-your-rights-with-ice/.