

# WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter

Issue 17 / February 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.

### Dear Colleagues:

We do not have an article for you on crim-imm law this month, but please see page 3 for an index of our previous newsletter topics. If you'd like to request any of the newsletter issues, please feel free to email [abrown@legalaidbuffalo.org](mailto:abrown@legalaidbuffalo.org). Furthermore, you will find important crim-imm news and updates on pages 2-3.

We do hope that you'll consider joining us for a free virtual CLE co-hosted by NYSDA on March 30th from 2-4PM, where we will present on representing youth in criminal matters and family proceedings to obtain Special Immigrant Juvenile Status. More information will be posted about the CLE in next month's newsletter.

For those of you who were unable to join us at our virtual CLE with the Erie County ACP on January 28th, "The Consequences of Criminal Law Convictions and Family Law Findings on Noncitizens," we plan to have a basic summary for you next month. In the meantime, please contact us every time you have a client who was born abroad.

Thank you!



### WNY Regional Immigration Assistance Center

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



## IMPORTANT NEWS AND UPDATES

### A POSSIBLE SOLUTION FOR VTL §1192(4) CHARGES

At the RIAC, we are concerned when defenders call us about VTL § 1192(4) charges since they are potentially removable controlled substances offenses. While an alcohol-related plea is not perfectly safe, it may have less potential consequences than a DWAI-drugs plea, so we often suggest that defense attorneys attempt to obtain an alcohol-related plea, though we also recognize that this can be difficult. Perhaps the case, *People v. Tagiev (Shamil)*, 70 Misc. 3d 47 (App. Term 2d Dep't 2020), might be helpful. There, the court allowed an 1192(3) plea for an 1192(4) charge. While the defendant contended that the court lacked jurisdiction to accept a plea to VTL § 1192(3) because, notwithstanding that the two foregoing charges were of equal grade, the sentence for driving while intoxicated (common law) requires the court to impose a harsher sentence than any that could have been imposed upon the charges set forth in the accusatory instrument. The court, however, found that "there is no constitutional impediment to such a plea and there is no statutory impediment because, when a defendant is charged with operating a motor vehicle while under the influence of drugs, the plea to driving while intoxicated (common law) in satisfaction thereof is statutorily authorized pursuant to Vehicle and Traffic Law § 1192(10)(a)(i)."

In addition, held the court, with respect to defendant's contention that, since he stood accused of being impaired by drugs, he could not have factually allocuted to driving while intoxicated, which proscribes only impairment by alcohol, "we note that a factual basis for a plea is not a constitutional requirement (see *People v. Darling*, 125 AD3d 1279 [2015]; *People v. Winbush*, 199 AD2d 447 [1993]) and, consequently, a defendant can plead guilty to a crime 'for which there is no factual basis and even plead guilty to a hypothetical crime' (*Keizer*, 100 NY2d at 118, n 2). Accordingly, a plea of guilty will be sustained even in the complete absence of a factual recitation of the underlying circumstances of the offense where the defendant otherwise understands the nature of the charges and enters the plea voluntarily, as was demonstrated by the record herein (see *People v. Goldstein*, 12 NY3d 295, 301 [2009]; *People v. Nixon*, 21 NY2d 338, 350 [1967]; *Winbush*, 199 AD2d at 448; *People v. Ali*, 66 Misc 3d 139[A], 2020 NY Slip Op 50095[U] [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2020])."

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### UPDATE FROM NYSDA

*This is an important update from NYSDA for Family Law Practitioners given that a violation of a protection order is a ground of removability even if there is no conviction.*

"Failure to Provide Respondents in Juvenile Delinquency Proceedings with CPL Discovery, an 'Equal Protection' Violation:

[T]he First Department unanimously reversed a Bronx Family Court decision in *Matter of Jayson C.* (2021 NY Slip Op 06794), finding that the court denied equal protection of the laws to a respondent in a juvenile delinquency proceeding by not providing them with the same CPL discovery rights provided to an adult in criminal court. The court wrote that "[a] respondent in a juvenile delinquency proceeding has the same right to cross-examine witnesses as a criminal defendant [citation omitted] and there is no reason to allow more limited access to impeachment materials in a juvenile suppression or fact-finding hearing than in a criminal suppression hearing or trial. The need for impeachment evidence is equally crucial in both delinquency and criminal proceedings. A similarly situated defendant in a criminal proceeding would be entitled to access to the impeachment materials requested by appellant."

This case is pivotal in the ongoing discussion of whether family court litigants are entitled to the same substantive and procedural protections as criminal defendants, particularly where such litigants are faced with much of the same loss of liberty for the same or similar allegations. This case gives even more credence to those, including NYSDA, who argue that under *Matter of Crawford v. Ally*, litigants faced with having a temporary order of protection issued against them in family court have the same procedural/substantive protections as those faced with the same loss of liberty in analogous proceedings in criminal court."

## IMPORTANT NEWS AND UPDATES (CONT'D)

### IMMIGRATION COURTS POSTPONE CERTAIN CASES

“On January 10, 2022, in response to the recent increase in both active cases and community transmission of COVID-19, the Executive Office for Immigration Review (EOIR), which maintains Immigration Courts nationwide, postponed certain hearings.

#### Postponed/Rescheduled

Non-detained cases without a lawyer or other representative of record

#### Proceeding as Scheduled

Detained cases, including bond requests and custody redeterminations

Non-detained cases with a lawyer or other representative of record or non-detained cases without a lawyer or other representative of record who wish to proceed

Cases of individuals outside the U.S. who are enrolled in the Migrant Protection Protocols

Non-detained individuals without a lawyer or other representative of record should not appear for any hearing scheduled through January 31, 2022. While EOIR will mail notice to all parties affected by this postponement, some parties will not receive the mailed notice of postponement or rescheduling in advance of hearings scheduled before January 15, 2022.

In order to continue operations, including the hearings that impact liberty interests of those respondents detained by the Department of Homeland Security (DHS), EOIR's highest priority cases will generally not be rescheduled [...].

Certain categories of cases will not be postponed. For individuals who are detained by DHS, cases will proceed as scheduled and be held by phone or online. Further, individuals who are not detained by DHS and have a lawyer or other representative of record, cases will be held by phone or online. For those individuals outside of the United States who are awaiting a hearing as enrollees in DHS's Migrant Protection Protocols (MPP), cases will proceed as scheduled and will be held in person. For those individuals whose cases will proceed, the Notice of Hearing remains the best information regarding date and time of the hearing.”

## THE WNYRIAC'S NEWSLETTER INDEX

While we are taking a break from article writing this month, please know that we can provide you with any back issues of our articles. Here is a list of the subject matter we have:

- ◆ “The Repatriation of Noncitizens Ordered Removed” - October 2020
- ◆ “Crimes of Domestic Violence Lead to Deportation” - November 2020
- ◆ “Treatment Courts may have Potential Risks for Noncitizens” - December 2020
- ◆ “Preserving the Best Defense for a Permanent Resident in Removal Proceedings” - January 2021
- ◆ “Requisite Mental States for Crimes Involving Moral Turpitude: Where does that leave Recklessness?” - February 2021
- ◆ “How does my Client become a U.S. Citizen? The Requirement of Good Moral Character” - March 2021
- ◆ “The Peculiar Status of Firearms Convictions” - April 2021
- ◆ “The Basics of the Deportation Process – Part 1: Arrest and Detention” - May 2021
- ◆ “The Basics of the Deportation Process – Part 2: The Hearings and Relief” - June 2021
- ◆ “Temporary Protected Status and Deferred Enforced Departure” - July 2021
- ◆ “Sex Offenses Encompass Several Grounds of Removal” - August 2021
- ◆ “My Client Didn't Complete the Offense: Inchoate Crimes - Is an 'Attempt' a Safe Plea?” - September 2021
- ◆ “‘Uncooperative’ Clients: Resisting Arrest, Flight, Contempt, and Obstruction Offenses” - October 2021
- ◆ “When are there Immigration Consequences to a Crime without a Conviction?” - November 2021
- ◆ “Identifying and Representing Human Trafficking Survivors” - December 2021
- ◆ “Steering Clear of Immigration Consequences: Advisals at the Intersection of VTL and Immigration Law” - January 2021