

WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter

Issue 13 / October 2021

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.

Buffalo Office

Sophie Feal
290 Main Street
Buffalo, NY 14202
716.853.9555 ext. 269
sfeal@legalaidbuffalo.org

Canandaigua Office

Brian Whitney
3010 County Complex Dr.
Canandaigua, NY 14424
585.919.2776
bwhitney@legalaidbuffalo.org

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.



FREE CLE

“Identifying and Representing Survivors of Human Trafficking”

Sponsored by the New York State Defender’s Association (NYSDA) and the WNY Regional Immigration Assistance Center (RIAC).

Thursday, October 14th, 2021

2:00 PM - 4:30 PM

Speakers:

Amy Fleischauer, Director of Survivor Support Services, International Institute of Buffalo

Alicia Tabliago, Resource Coordinator, Human Trafficking Intervention Court (HTIC), Buffalo

Andrea Sevene, Resource Coordinator, HTIC, Rochester

Mary Armistead, Staff Attorney, The Legal Project, Albany

Leigh Latimer, Supervising Attorney, Exploitation Intervention Project, Legal Aid Society, New York City

[CLICK HERE TO REGISTER](#)

WNY Regional Immigration Assistance Center

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



“UNCOOPERATIVE” CLIENTS: RESISTING ARREST, FLIGHT, CONTEMPT, AND OBSTRUCTION OFFENSES

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

Public defenders and assigned counsel often represent clients who are alleged not to have cooperated with some government order, in some judicial process, or during some government interaction. Frequently, these charges may appear with a “more serious” offense from a criminal perspective. However, criminal allegations of noncompliance or interference can have serious immigration consequences of their own for noncitizens.

One criminal immigration ground to avoid is the crime involving moral turpitude, or “CMT,” previously covered in our February 2021 newsletter. In brief, CMT convictions can trigger immigration consequences including deportation, inadmissibility, bond-ineligible detention, and naturalization bars, among others. To be a CMT, a crime must involve: “[1] reprehensible conduct and [2] a culpable mental state.” *Matter of Silva-Trevino*, 26 I&N Dec. 826, 834 (BIA 2016). “Reprehensible conduct” is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general,” and a “culpable mental state” entails a mens rea greater than negligence. *Id.* at 833–34. This definition is opaque, and some would argue even constitutionally vague under recent Supreme Court decisions. See, e.g., *Islas-Veloz v. Whitaker*, 914 F.3d 1249 (9th Cir. 2019). With no statutory definition, agency and federal court decisions dictate which offenses constitute CMTs.

Some crimes have less CMT risk than others – and an element of harm or risk of harm can make all the difference. For example, resisting arrest, NYPL § 205.30, is likely not a CMT, because unlike similar offenses found to be CMTs by the Board of Immigration Appeals (BIA), the statute does not require that an officer suffers a bodily injury or assault. See *Cano v. U.S. Attorney General*, No. 11-15918, (11th Cir. 2013); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *Matter of O-----*, 4 I&N Dec. 301 (BIA 1951). NYPL § 270.25, unlawful fleeing of a police officer, is a CMT, because of

Contempt convictions should always be avoided where there is a qualifying domestic relationship between the defendant and the complainant because they trigger deportable domestic violence grounds under INA § 237(a)(2)(E)(ii).

the physical danger posed to society. In 2011, the BIA concluded, analyzing a Wisconsin fleeing statute, that “when a person deliberately flouts lawful authority and recklessly endangers the officer, other drivers, passengers, pedestrians, or property” they commit a CMT. *Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011); see also *Mei v. Ashcroft*, 393 F.3d 737 (7th Cir. 2004)(holding an Illinois statute to be a CMT where “a person who deliberately flees at a high speed from an officer who, the fleer knows, wants him to stop, thus deliberately flouting lawful authority and endangering the officer, other drivers, passengers, and pedestrians”). NYPL § 270.30 and § 270.35, which involve high-speed flight as well as injury and death, are likewise CMTs.

Intent to defraud also makes a CMT. See *Jordan v. De George*, 341 U.S. 223 (1951). Concealment and deceit, on the other hand, require more. The Second Circuit generally holds that deceit “must be paired with an intent to wrongfully extract some benefit or to cause a detriment for the offense to constitute a [CMT].” *Mendez v. Barr*, 960 F.3d 80 (2d Cir. 2020)(citing *Ahmed v. Holder*, 324 F. App’x 82, 84 [2d Cir. 2009] and *Rodriguez v. Gonzales*, 451 F.3d 60, 64 [2d Cir. 2006]). Our circuit also finds deceit coupled with “an intent to impair the efficiency and lawful functioning of the government” sufficient. *Rodriguez v. Gonzales*, *supra* (knowingly false statement on passport is a CMT). The BIA

takes the same view. See *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006) (“impairing and obstructing a function of a department of government by defeating its efficiency or destroying the value of its lawful operations by deceit, graft, trickery, or dishonest means is a [CMT]”).

Where does this leave New York obstruction offenses? On one end of the spectrum, false personation, under § 190.23, might not be a CMT, lacking intent to impede government function, benefit, or harm. In a non-precedential decision, *Matter of Victor*, 2008 Immig. Rptr. LEXIS 5018 (BIA 2008), the BIA distinguished New York’s false personation crime, NYPL § 190.23, from a Pennsylvania statute which did constitute a CMT. Whereas Pennsylvania criminalized “misleading statements with an intention to disrupt the performance of a public servant’s official duties,” NYPL § 190.23 does not require intent to prevent an officer from performing an official function and was, therefore, not a CMT. In comparison, due to the intent to impede administrative function, New York obstructing crimes, such as obstructing governmental administration under NYPL §§ 195.05 and 195.07, likely are CMT offenses. Offenses incorporating intent to defraud or intent to deceive and extract some benefit or cause harm, such as criminal impersonation, are CMTs. See, e.g., NYPL § 190.25.

Criminal contempt charges stemming from a violation of an order of protection may also be CMTs. Arguments might be made that a contempt offense relating to an order of protection encompasses conduct too broad to be considered a CMT. See 2013 Immig. Rptr. LEXIS 10269 (AAO 2017)(finding § 215.50, sub. 3, is not a CMT)(citing *Matter of Tran*, 21 I&N Dec. 291 [BIA 1996]) (non-precedential); but see *Matter of L-R-K-G-L.*, 2017 Immig. Rptr. LEXIS 11140 (AAO 2017)(finding § 215.50 sub. 3 is a CMT) (non-precedential). However, contempt convictions should always be avoided where there is a qualifying domestic relationship between the defendant and the complainant because they trigger deportable domestic violence grounds under INA § 237(a)(2)(E) (ii), which notably only requires a judicial finding of an order of protection, and not necessarily a conviction.

Apart from CMT exposure, convictions within this cluster of offenses can trigger aggravated felonies, pursuant to 8 USC

Where is the WNYRIAC?

You can always reach us by phone or email, but if you’d like a personal consultation, you can see us at the following locations:

Buffalo

Sophie Feal is at Buffalo City Court, 4th floor Public Defender’s Office on Wednesdays, from 11:30AM - 4:00PM.

Niagara Falls

Sophie Feal is at Niagara Falls City Court, Room 233 on Thursday, 10/14, 11/18, and 12/9 from 9AM - 1PM. Dates for 2022 will be determined at a later time.

Rochester

Brian Whitney is at the Monroe County Hall of Justice, Room 235C on Tuesdays, from 11:30AM - 1PM.

He is at the Monroe County Public Defender’s Office, 3rd floor conference room on Tuesdays, from 1:30PM - 4:30PM, and on the second Friday of each month, from 1:00PM - 4:30PM.

Only available for consults with assigned counsel at this location via appointment. Please email: bwhitney@legalaidbuffalo.org

Lyons

Brian Whitney is at the Wayne County Public Defender’s Office conference room on the third Friday of each month, from 9:00 AM - 12:00 PM.

New Guide

This helpful guide is written for noncitizen clients who are serving time in DOCCS' custody and want information about ICE and the immigration removal process. Click [here](#) to access the guide (Print warning: it is 64 pages long).

§ 1101(a)(43)(S). These include the “obstruction” aggravated felonies: “[1] obstruction of justice, [2] perjury or subornation of perjury, or [3] bribery of a witness.” Aggravated felonies have the most serious immigration consequences, including detention without the possibility of bond in removal proceedings, ineligibility from virtually all relief, and a permanent bar to reentry following deportation. While not all aggravated felonies require a sentence to a term of incarceration of at least one year to be triggered, “obstruction” aggravated felonies do. Therefore, convictions after April 12, 2019 for New York misdemeanor offenses, such as obstructing government administration 2nd, hindering prosecution 3rd, and criminal contempt 2nd, cannot be “obstruction” aggravated felony offenses. First and second degree hindering prosecution and first degree criminal contempt felony convictions might not be “obstruction” aggravated felonies, but only if the sentenced term of incarceration is less than one year.

Of these three aggravated felony grounds, the first is clearly the most expansive, and will implicate the most New York offenses. The BIA extends “obstruction of justice” to state crimes involving “[1] an affirmative and intentional attempt [2] that is motivated by a specific intent [3] to interfere either in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant, or in another’s punishment resulting from a completed proceeding.” *Matter of Valenzuela Gallardo*, 27 I&N Dec. 449 (BIA 2018). New York obstruction and hindering offenses qualify.

The second “obstruction” aggravated felony, perjury, is defined by the BIA as offenses where “an offender make[s] a material false statement knowingly or willfully while under oath or affirmation [or penalty of perjury] where an oath is authorized or required by law.” *Matter of Alvarado*, 26 I&N Dec. 895, 901 (BIA 2016). This definition “incorporates false statements made orally and in writing under penalty of perjury” and does not require statement to be made in a proceeding. *Id.* at 899-900 & n.11.

Finally, “bribery of a witness,” does not appear to have any court-constructed “generic definition.” This is likely because bribery offenses, such as NYPL § 215.00, and witness tampering more generally, already satisfy the definition of “obstruction of justice” outlined above. For example, in *Higgins v. Holder*, 677 F.3d 97, 101 (2d Cir. 2012), the court held a Connecticut witness tampering conviction to be an obstruction aggravated felony, because it criminalized “inducing or attempting to induce another to withhold testimony, testify falsely, to evade or elude legal process or absent themselves from an official proceeding.” *Id.* A review of unpublished decisions shows similar aggravated felony convictions for New York witness tampering offenses. See, e.g., *Matter of Omadhan*, 2006 Immig. Rptr. LEXIS 12593 (BIA 2006)(holding § 215.10 is an aggravated felony).

This summary of immigration exposure is not exhaustive, and criminal convictions frequently trigger multiple criminal immigration grounds, with different immigration consequences specific to each individual’s particular circumstances. Discuss your noncitizen clients’ pending criminal and family proceedings with your RIAC advisor to effectively advise your client on the immigration risks of all charges and every offer by prosecution, as well as to help negotiate a favorable plea where possible.