

WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter

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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.

ILS HIGHLIGHTS WNYRIAC NEWSLETTER

We are pleased to share that the WNYRIAC has been recognized by ILS for its monthly newsletter this year. Anyone can access our newsletters online, which provide critical insights on a range of relevant topics, including guidelines for appeals and post-conviction relief for noncitizen clients, strategies for utilizing mitigation reports for more favorable dispositions, advice on working effectively with interpreters, as well as valuable information on obtaining details about clients who are in ICE custody. We encourage mandated representatives to take advantage of this resource to stay current on developments that affect their noncitizen clients and their practice. Click here to get access to the newsletters: <https://www.ils.ny.gov/node/204/riac-general-information>

We also invite you to explore the recently released 2023 RIAC Report, which provides additional information on the RIAC's work and impact. Click on this link to access the report: <https://www.ils.ny.gov/sites/ils.ny.gov/files/RIAC%20Report%20March%202023.pdf>



WNY Regional Immigration Assistance Center

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

Treatment Courts may have Potential Risks for Noncitizens

By Sophie Feal, Managing Attorney, WNYRIAC, Legal Aid Bureau of Buffalo

While treatment courts may be an attractive option from a criminal defense perspective since a client can obtain a more favorable plea with successful completion of a behavioral health program, defense attorneys should be aware that participation in treatment court has some important limitations for the noncitizen.

Treatment courts, including the Judicial Diversion Program (see, CPL 216.00), generally require that a plea be entered prior to participation. **Once there is a plea of guilty, and the court imposes the treatment, which under U.S. immigration law constitutes a “restraint on liberty,” the noncitizen defendant has a conviction under immigration law, even if the treatment court later allows withdrawal of the plea and dismissal of the charges, or withdrawal of the plea and reduction to lesser, non-deportable, offense.** This is so because under immigration law, the definition of conviction is: a formal judgment of guilt entered by a court, or where an adjudication of guilt has been withheld, a judge or jury has found guilt, or a plea of guilt or nolo contendere has been entered, or sufficient facts to warrant a finding of guilt have been submitted, and a judge

The Board of Immigration Appeals has held that entry into a pretrial intervention program qualified as a conviction for immigration purposes where the individual admitted sufficient facts to warrant a finding of guilt at the time of his entry into the agreement, and the judge authorized the agreement ordering the individual to participate in the pretrial intervention program.

has ordered some form of punishment, penalty or restraint on liberty. Immigration and Nationality Act (INA) 101(a)(48)(A); 8 U.S.C. 1101(a)(48)(A). For example, in *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017), the Board of Immigration Appeals held that entry into a pretrial intervention program under Texas law qualified as a conviction for immigration purposes where the individual admitted sufficient facts to warrant a finding of guilt at the time of his entry into the agreement, and the judge authorized the agreement ordering the individual to participate in the pretrial intervention program, under which he was required to complete

community supervision and community service, and comply with a no-contact order.

Under immigration law, a conviction still exists if an expungement or a vacatur is done under a rehabilitative statute, or solely for the purpose of ameliorating immigration consequences, as opposed to one done on account of a constitutional defect in the underlying conviction). **This means that a vacated plea after successful treatment is still valid for immigration purposes.** As such, it is important for defense counsel to negotiate participation without a plea up front if at all possible. In some instances, this may require the agreement of the Assistant District Attorney assigned to the case.

Pursuant to CLP 216.05(4)(b), a court may grant participation in diversion programs without prior entry of a guilty plea when courts find the existence of “exceptional circumstances.” Such circumstances arise when, regardless of the ultimate disposition, an entry of a plea of guilty is likely to result in severe collateral consequences. In *People v. Kollie*, 38 Misc. 3d 865 (County Ct, 2013), the Westchester County Court held that deportation is a severe collateral consequence. The court also considered ineligibility for relief from deportation, such as cancellation of removal or humanitarian asylum, and cited the Supreme Court’s recognition of deportation as a particularly severe penalty for a criminal conviction in *Padilla v. Kentucky*, 559 US 356 [2010].

However, in subsequent cases, including *People v. Gabrilov*, 178 A.D.3d 727 (2d Dept. 2019), a decision by the Second Judicial Department, the courts have declined to adopt a *per se* formulation of exceptional circumstances. Instead, courts consider the severity of deportation, a rationale initially adopted in *People v. Brignolle*, 41 Misc.3d 949, 951–952 (Sup Ct, New York County 2013). To assess the severity of collateral consequences, these courts have considered factors such as age, length of residence in the United States, ties to the place of birth, prior criminal record, offenses since arrest, employment history, patterns of noncompliance, family ties, and whether drugs are possessed for personal use or sale. See, *People v. Radonich*, 49 Misc.3d. 1212(A) (N.Y. Sup. Ct., New York County 2015), *People v. Mills*, 52 Misc.3d 1209(A) (N.Y. Sup. Ct., New York County 2016), *People v. Rafaniello*, 51 Misc.3d 1218(A) (N.Y. Sup. Ct., New York County 2016). Consequently, the analysis is on a case-by-case basis. Holding otherwise, reasoned the court, would create a “two-tier” system of justice between citizens and noncitizens, and “deportation consequences are not always severe.” *People v. Brignolle*, 41 Misc.3d 949, 951.

There is a bill pending before the NYS Legislature called the “Treatment Not Jail Act” (S.2881 B Ramos; A.8524 A Forrest) that would amend CPL §216 to not only make treatment court available to more people in the criminal justice system, but would also require courts to allow treatment without an upfront plea, which is a critical measure for a noncitizen defendant. There are also several other benefits raised by those who practice in mental health law. As such, we urge you to support passage of this legislation.

Finally, proceeding in any treatment court assumes that the participant wants to engage in court-ordered treatment and is able to do so. This may require a participant to have health insurance, either private insurance or Medicaid. The undocumented will most likely have no access to health insurance. They are ineligible for Medicaid, ineligible for benefits under the Affordable Care Act, and due to their undocumented status, rarely obtain employment that includes private health insurance. Therefore, they may not meet the required threshold for participation in such treatment courts. If a client is not covered by insurance, court counselors may help participants engage in treatment programs with income-based payment requirements. In such cases, defense counsel will have to work with the courts and counselors to overcome the financial barriers to participation faced by non-citizen clients.

NEW CASE LAW

On February 21, the Second Circuit issued a decision in *United States v. Gibson*, 60 F.4th 720 (2d Cir. 2023) clarifying that it’s prior decision in the case, issued on December 6, 2022, in fact held that New York’s definition of “narcotic” is overbroad as of January 23, 2015 when naloxegol, an opiate derivative, was removed from the federal schedules. The government tried to argue that the finding was dictum, but the circuit rejected that argument and made clear that was a precedential holding. So, **convictions under certain New York drug statutes should no longer be found to be controlled substance offenses or drug trafficking aggravated felonies for any conviction dated after the descheduling of naloxegol on January 23, 2015.** This means the type of drug, beyond merely a “narcotic” cannot be specified in the plea allocution. This is a huge win for noncitizens! Nonetheless, **CONTACT THE RIAC TO BE CERTAIN OF THE APPROPRIATE PLEA.**

FINGERPRINTING

According to the Immigrant Defense Project (IDP) and the New York Civil Liberties Union (NYCLU), any fingerprint request made to DCJS for the purpose of generating a RAP sheet may trigger a call to ICE. This includes, for example, fingerprints taken in connection with Family Court proceedings, applications to become a foster care parent (including kinship care), new arrests, personal record reviews, and job or professional license applications.

Read more here: <https://www.immigrantdefenseproject.org/wp-content/uploads/DCJS-advisory-7-27-17-6-PM-updated1.pdf>