

WNY REGIONAL IMMIGRATION ASSISTANCE CENTER

RIAC Monthly Newsletter

Issue 25 / December 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.

PLEASE JOIN US FOR A FREE VIRTUAL AND LIVE CLE

(1.5 Areas of Professional Practice
and 0.5 of Ethics)

The Erie County Assigned Counsel Panel
and the WNY RIAC present:

An overview of *Padilla* obligations and the Immigration Consequences of Convictions on Noncitizens

Monday, December 12, 2022
1-3 PM

Sophie Feal, Managing Attorney of the RIAC at the Legal Aid Bureau of Buffalo, will discuss the ethical obligations required of criminal defense attorneys to advise noncitizen clients; how to identify a client's immigration status; and the range of criminal convictions that can affect such status.

Please email Michelle DePasquale at mdepasquale@assigned.org to register and obtain Zoom link or address for personal attendance.



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GUIDELINES FOR APPEALS AND PCR FOR NONCITIZENS

A criminal conviction which is on direct appeal is not final for immigration purposes, and cannot serve as the sole basis to commence removal proceedings against a non-citizen who is lawfully present in the United States. (Of course, a person who is not lawfully in the U.S. may be subject to removal on that ground alone). This standard was affirmed in the Second Circuit Court of Appeals last year in *Brathwaite v. Garland*, 3 F.4th 542 (2d Cir. 2021), a case in which the Court reversed a decision of the Board of Immigration Appeals (BIA) which had found that a New York Appellate Division's order granting a noncitizen's motion to file a late appeal pursuant to CPL § 460.30 was "legally insufficient" to establish that the conviction was not final for immigration purposes. The immigration judge, and then the Board, had accepted the Government's argument that, when the noncitizen was placed in removal proceedings, the 30-day time limit to file an appeal of the conviction had lapsed, and there was no evidence, as required by Board precedent, that the Appellate Division's grant of the late appeal motion was based on the *merits* of the appeal. The federal circuit court rejected the Board's reasoning. It opined that a motion for a late notice of appeal pursuant to CPL § 460.3 (1) may be filed within one year and thirty days of the criminal judgment, and that "such late filings are a matter of course in New York... [Therefore] courts treat appeals taken by written notice of appeal and those taken by a granted § 460.30 motion as identical."

For this reason, while perhaps not practical, advocates recommend that an appeal of a conviction, even if filed late, should be done in every noncitizen case. Given the fact that an appeal can take very long to resolve, a pending appeal may allow a noncitizen who ultimately faces removal to develop equities and show rehabilitation, which are requirements for virtually every form of immigration relief. Moreover, there is no harm that can come from filing a notice of appeal in a case. The client only benefits from it. If you are unable to reach the client to sign a poor person application, you can certify the client's indigency, or have the sentencing court make a finding of indigency before appellate counsel is assigned.

Defense attorneys should also understand that immigration authorities do not recognize several forms of post-conviction relief that vacate, expunge, or otherwise eliminate a prior state conviction when they are deemed rehabilitative forms of relief. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), and *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Thus, the underlying conviction still counts for immigration purposes. This includes expungements in the case of marijuana convictions under MRTA. Marijuana expungements are considered rehabilitative. (For more information, see <https://www.immigrantdefenseproject.org/community-faq-marijuana-legalization-and-considerations-for-immigrant-new-yorkers-english-and-spanish/>).

Therefore, it is critical that vacatur be obtained for constitutional defects in the case, such as ineffective assistance of counsel under *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010); an unknowing and involuntary plea; cruel and unusual punishment; and any comparable rights under N.Y. Const. Art 1, §§ 5,6. An expungement under MRTA does not prevent courts from having jurisdiction over a 440 motion. CPL § 160.50(5)(c). Note that immigration counsel may need a copy of the defense attorney's motion to prove the vacatur was granted on the appropriate grounds.

Indeed, defense attorneys must recognize that marijuana remains a federal controlled substance, and convictions related to marijuana can still be grounds of removal.

Before undertaking any efforts to vacate a noncitizen's conviction, it is important to speak with an immigration attorney to ascertain that the vacatur will indeed make a difference since previous convictions could still constitute grounds of removal. As well, if the client will simply again face the indictment or the accusatory, defense counsel must make certain the new plea will not have immigration consequences. Moreover, for the purposes of discretion, which is always relevant in immigration decisions, a mere arrest may prejudice the client. And finally, under the laws of inadmissibility, certain conduct such as "reason to believe" one is a drug abuser, without a conviction, can render a noncitizen inadmissible to the United States.

If the aforementioned options do not exist, one may want to explore a pardon to eliminate the immigration consequences of a criminal conviction.

IMPORTANT NEWS

According to a [recent article by Reuters](#), the Cuban government is accepting deportees from the U.S. who attempted to cross the border. While this appears to affect only those arriving at the US border, this is a policy that all Cubans with criminal convictions should be made aware of, particularly since the article points out that prior to the pandemic, "About 1,500 Cubans were removed in fiscal year 2020, which began on Oct. 1, 2019, the year regular deportation flights were paused, according to data from the U.S. Department of Homeland Security."

Happy Holidays!

ACTION REQUESTED

President Biden announced that he is pardoning those convicted of simple marijuana possession under federal law, and said the classification of the drug would undergo review. While the president's marijuana pardon action is worth celebrating, the failure to include many noncitizens is a major policy failure that should be addressed. Consider reaching out to your elected representatives about this.

The move will remove many legal barriers for thousands of people to gain jobs, housing, college admission and federal benefits, and fulfills a campaign pledge made by Biden. However, a significant percentage of the people who are impacted by marijuana convictions are those currently navigating the devastating collateral consequences associated with a federal conviction for simple possession, and the fact that noncitizens are excluded from this benefit is unjust. Immigrant communities are some of those most deeply impacted by marijuana criminalization in the US. No one should be torn apart from their family, deported, or detained by Immigration and Customs Enforcement (ICE) based on convictions for simple possession of drugs.

To learn more about the Immigrant Defense Project's ongoing fight to decriminalize marijuana, please click [here](#) for proposed legislation, training resources, and stories of people who have been directly impacted by the war on drugs.