

**WARNING: Immigrant Defendants with a First Minor Drug Offense:  
“Rehabilitative relief” will no longer eliminate a first conviction for simple possession for immigration purposes, *unless* the conviction occurred before 7/14/11**

In its July 14, 2011, en banc decision in *Nunez-Reyes v. Holder*, the Ninth Circuit overruled its longstanding precedent decision in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9<sup>th</sup> Cir. 2000). The *Lujan* decision held that convictions for first-time simple possession offenses (and lesser offenses such as possession of paraphernalia) would not trigger the controlled substance grounds of deportation or inadmissibility where the defendant had been granted, and completed, some type of rehabilitative relief (e.g., drug court, deferred sentences or subsequent expungement under RCW 9.94A.640 or 9.96.060). The *Lujan* exception has now been eliminated with the *Nunez-Reyes* decision. The decision will have disastrous consequences for countless noncitizen defendants and their families.

**What is the impact of Nunez-Reyes?** Noncitizens convicted of even first-time simple possession of controlled substances (and lesser drug offenses) will face deportation for these convictions, regardless of whether or not they complete treatment, comply with deferred sentence agreements and/or conditions of probation, or subsequently have their convictions expunged. These convictions will also trigger the controlled substances ground of inadmissibility, which bars noncitizens from lawfully entering or reentering the U.S. and prevents them from obtaining lawful permanent resident status (a greencard), U.S. citizenship and other types of lawful immigration status. *These consequences also attach to convictions for attempted possession.*

**Will participation in drug court save my client?** Possibly. In order to trigger the controlled substance grounds of deportation and inadmissibility there must first be a conviction under immigration law. Pre-plea drug court agreements that do not constitute convictions under 8 U.S.C. 1101(a)(48(A) remain an “immigration safe” resolution. The immigration statute’s definition of a conviction requires that the defendant either admit guilt or stipulate to “facts sufficient to warrant a finding of guilt.” Agreements, such as the King County drug court agreement, that do not require such admissions or stipulations will not be impacted by the *Nunez-Reyes* decision and still afford an alternative to noncitizens to avoid these immigration consequences. See WDA’s Immigration Project resources for a copy of this agreement.

Prior to *Nunez-Reyes*, the *Lujan* exception still afforded noncitizen defendants who entered into drug court agreements that were not “immigration safe” an avenue to avoid triggering these immigration consequences if they successfully completed drug court, even though these agreements constituted convictions for immigration purposes. This is no longer true. Non-immigration safe drug court agreements will be convictions in perpetuity and, as such, will trigger deportation and inadmissibility grounds. Please contact Ann Benson if for assistance in negotiating an “immigration safe” drug court agreement with your prosecutors.

**Defense Strategies Post Nunez-Reyes:** There are essentially four options for your client: 1. Plead guilty to solicitation to possess pursuant to RCW 9A.28.030 (Ninth Circuit precedent holding that this is not a controlled substance violation under immigration law remains good); 2. Enter an immigration-safe drug court agreement (and successfully complete it); 2. Plead guilty to attempt/possession of a controlled substance after being fully advised that it will trigger deportation and inadmissibility; 3. Go to trial. Note that noncitizens with even a colorable defense have no reason not to try their case if options 1 & 2 are not available to them. Note also that deferred sentences are *not* an immigration-safe alternative as they constitute convictions in perpetuity under immigration law, regardless of any subsequent withdrawal of the plea and dismissal of the charges.

**Prospective application only.** The one bright spot with the *Nunez-Reyes* decision is that the court only applied it only prospectively to convictions entered on or after July 14, 2011. This means that noncitizens who successfully complete drug court or deferred sentence agreements entered into prior to this date will have the benefit of the *Lujan* exception. Additionally, noncitizens with convictions prior to this date who are able to get their first-time possession (or attempted possession or paraphernalia) convictions expunged will also have the benefit of the *Lujan* exception.