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Practice Advisory for Representing Noncitizens In Drug Possession Cases – November 2013¹

I. IDENTIFY IMMIGRATION STATUS, CRIMINAL HISTORY, & DEFENSE GOALS

Status Determines Consequences: Immigration *status* determines which immigration laws apply. Undocumented people, permanent residents & refugees are subject to different immigration laws.

- **Undocumented Persons (UP):** Many UPs (if never deported and never left U.S.) have paths to relief from removal, especially with a U.S. citizen (USC) spouse, parent or child. Two main types of UPs: 1) Entered illegally; never had status; 2) came legally but status expired.
 - **Defense Goal for UPs: Avoid ICE by Getting/Staying out of Jail.** Outside of King County, a UP in jail for even one day is likely to get an ICE detainer, and go into ICE custody & removal proceedings. If defendant does not have a detainer, avoiding jail (and ICE apprehension) may be highest priority. **However**, if s/he has options to obtain lawful status, this may be higher priority than release from jail.
 - **Defense Goal for UPs: Preserve Paths to Lawful Status.** Many UPs have routes to lawful status.² Drug convictions usually make them inadmissible and ineligible for lawful status.
- **Lawful Permanent Residents (LPR or green-card holders) & Refugees³:** Face permanent loss of legal status and deportation. Identify *how long* the person has had status and *when* entered the U.S.
 - **Defense Goal for LPRs & Refugees: Avoid Triggering Crime-Based Removal Grounds.** Removal proceedings will be initiated against LPRs and refugees convicted of deportable drug offenses. Outside King County, an ICE detainer means transfer to ICE custody directly upon release.
 - **Defense Goal for LPRs & Refugees: Preserve Avenues for Relief from Deportation.** If a crime-related removal ground cannot be avoided, defense counsel should focus next on preserving avenues to relief from deportation.⁴ **Get complete criminal history.** Priors impact analysis of current charges. It is *critical* to have complete history (misdemeanors, too) with sentences (suspended or not).
- **Mandatory Immigration Detention.⁵** Drug convictions can trigger mandatory detention once in deportation (removal) proceedings. There is no appointed counsel in removal cases.
- **Deportation is Permanent.** It is virtually impossible to get or regain lawful status if deported, especially after a drug conviction. Illegal re-entry after removal is the most-prosecuted federal felony.

¹ This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen defendants. When possible defenders are advised to consult directly with WDA's Immigration Project staff.

² See the WDAIP advisory "Immigration Proceedings and Relief from Removal" on the WDA website.

³ Refugees flee persecution, get status outside the US and enter lawfully. Asylees come to US first and then apply for asylum from persecution. Refugees and asylees can apply for LPR status after one year.

⁴ See e.g. Practice Advisory on Cancellation of Removal at www.defensenet.org/immigration-resources.

⁵ 8 USC §§ 1226(c)(1)(A)-(B)

II. THE “RECORD OF CONVICTION” (R/C) FOR IMMIGRATION PURPOSES

The “Record of Conviction” (R/C) for immigration purposes can play an important role in determining whether a conviction will trigger immigration consequences.⁶ It includes charge pleaded to, jury instructions, J&S, plea agreement, factual findings by court, plea colloquy, and documents stipulated to as the factual basis for the plea.⁷ Police reports and CDPCs *are not* included unless defendant stipulates to admission as factual basis for plea, which is usually bad. R/C includes plea colloquy but not statements only by prosecutor or dropped charges. Shaping the R/C, particularly crafting the plea statement can be critical to avoiding immigration consequences in some cases.

III. KEY CONCEPTS

- **GENERAL RULES:** A conviction for “violation of...any law or regulation...relating to a controlled substance (CS), *including attempt and conspiracy to possess*, will trigger grounds for deportation and inadmissibility.⁸ Thus, a CS conviction results in loss of legal status for those who have it (e.g., LPRs & refugees) and they cut off eligibility to get lawful immigration status for those who do not (undocumented persons). They also render LPRs ineligible for US citizenship.⁹ C/S convictions are NEVER safe pleas for noncitizens.
 - The **CS deportation ground**¹⁰ applies to non-citizens here after a lawful admission. This includes LPRs, refugees and persons granted asylum, as well as those who entered on tourist and student visas.¹¹ Convictions that trigger this ground will make LPRs and refugees deportable and UPs and refugees ineligible to obtain relief from removal (i.e., lawful status).
 - The **CS inadmissibility ground**¹² triggers removal for UPs who entered illegally. Also: bars UPs from obtaining future legal status, bars LPRs from citizenship; bars refugees from LPR status; bars all noncitizens from future lawful entry or re-entry into the US.
 - Length of sentence is irrelevant in simple possession (and most other drug) cases.
 - *ANY* substantial probative evidence of having engaged in or aided drug trafficking triggers permanent, unwaivable “reason to believe” *inadmissibility ground*¹³ Conviction not required; not limited to R/C.
- **EXCEPTION:** Single conviction for **possession of 30 grams or less of Marijuana** will not trigger the C/S deportation ground. It *will* trigger the C/S inadmissibility ground, but some UPs can seek a waiver if otherwise qualified. POM §69.50.4013 under 40g still a crime. Only POM of 1 oz. (28.5g) is legal, so 29g MJ is still illegal.
- **EXCEPTION:** Per 9th Cir. caselaw **Solicitation to Possess under RCW 9A.28.030** is not a C/S violation under immigration law,¹⁴ As such does not trigger C/S deportation/inadmissibility grounds w/in 9th Circuit ONLY.

⁶ *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Descamps v. US*, 133 S. Ct. 2276 (2013).

⁷ *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005)

⁸ The CS definition used is the federal one at 21 USC 802 et seq., from the Controlled Substances Act.

⁹ See 8 U.S.C. 1182(a)(2)(A)(II); 8 U.S.C. 1227(a)(2)(A)(B); 8 U.S.C. 1229b(B)(1)(C).

¹⁰ 8 USC 1127(a)(2)(B)(i).

¹¹ 8 USC § 1227(a)(2)(B). There is a separate deportation ground for a noncitizen who has been deemed a drug addict or abuser after admission to the US. This ground is rarely charged.

¹² 8 USC § 1182(a)(2)(A)(i)(II). Limited waiver exists for certain applicants for lawful status with only one POM conviction for 30 grams or less.

¹³ 8 USC § 1182(a)(2)(C). *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004); *Matter of Casillas-Topete*, 25 I&N Dec. 217 (BIA 2010). *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992). A noncitizen believed to have engaged in trafficking is *permanently* inadmissible. Relatives who knowingly benefitted from trafficking of a spouse or parent are inadmissible for 5 years after receipt of benefit.

- **EXCEPTION: Pre-7-14-11 first PCS offense:** A single possession conviction committed before 7-14-2011 & dismissed after probation pursuant to a rehabilitative statute, including §§ 9.94A.640 or 9.96.060, is not basis for deportation— but **only** within the 9th Circuit.¹⁵
- **Prescription Fraud per RCW § 69.50.403.** Even if for own use, this may be drug aggravated felony. Avoid.
- **Use of Paraphernalia per RCW 69.50.412(1).** **WARNING!** Triggers same consequences as PCS conviction. This is not a viable alternative to avoid/mitigate immigration consequences. Charges should be treated same as simple possession of C/S case.

IV. STRATEGIES TO AVOID OR MITIGATE IMMIGRATION CONSEQUENCES

If you cannot negotiate an alternative that mitigates the immigration consequences, it may be better to risk trial and/or decline to proceed via an expedited misdemeanor and proceed w/felony filing. You must ID the defendant’s immigration status to know how to help him or her.

1. **Immigration-Safe pre-plea deferred adjudication.** Immigration-safe language avoids the agreement being classified as a conviction (that triggers C/S inadmissibility or deportation grounds) under immigration law, since defendant does NOT “admit[s] sufficient facts to warrant a finding of guilt.” Must use “immigration-safe” language for pre-plea diversions. **Drug Court:** Admissions to drug abuse/addiction can trigger separate deportation and inadmissibility grounds. The deportation ground is rarely used to deport LPRs, but inadmissibility ground can interfere with ability for UPs to obtain lawful status. Even so, a drug court agreement with immigration-safe language is usually far better than a conviction IF defendant complies & charges are dismissed.
2. **Solicitation to Possess under RCW 9A.28.030.** Best strategy – avoids C/S conviction. Limited to 9th Circuit.¹⁶
3. ***In re Barr* and *State v. Zhao* allow plea to substitute (non-CS) charge that is a legal fiction** to receive benefit of plea bargain.¹⁷ An *In Re Barr* plea to a non-CS legend drug¹⁸, or other non-drug crime, could work. Consult WDAIP advisory before entering into *Barr/Zhao* plea.¹⁹
4. **Rendering Criminal Assistance under RCW 9A.76.050 (1)-(3).** RCA is not a C/S violation, so safer for LPRs, refugees and UPs. Avoid any facts re: drug-dealing in ROC. May trigger “crime of moral turpitude” (CMT) grounds. Avoids CMT deportation ground if not w/in 5 yrs of admission & no priors. If no priors, avoids CMT inadmissibility ground if sentence imposed is 180 days or less (regardless of suspended time).
5. **Possession of Marijuana** – If plea specifies possession of <30g of MJ, avoids triggering C/S deportation ground (thus, best for LPRs). If no priors, similar plea will permit otherwise qualifying UPs to be eligible for an inadmissibility waiver that will let them become LPRs. Refugees will also avoid triggering deportation ground and qualify for special refugee waiver in application for LPR status.²⁰

¹⁴ *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997). Although this decision focused on the C/S deportation ground, the reasoning should extend to the similarly worded C/S inadmissibility ground.

¹⁵ *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011).

¹⁶ **Warning to Client:** Do not relocate, travel or try to re-enter the US outside the states of the 9th circuit (Alaska, Arizona, Calif., Hawaii, Idaho, Montana, Nevada, Oregon & WA.) w/o consulting competent immigration counsel.

¹⁷ *In re Barr* 102 Wn.2d 265 (1984); *State v. Zhao* 157 Wash.2d 188 (Wash., 2006).

¹⁸ RCW 69.41.030(1); but see RCW 69.41.072 (Violation of 69.50 not to be charged under 69.41). An alternate charge of legend drug crime agreed to by prosecution and accompanied by a knowing, intelligent and voluntary plea should be accepted by most Courts; or *In re Barr* plea to a (non-CS) legend drug may work.

¹⁹ Available at: <http://www.defensenet.org/immigration-project/immigration-resources/navigating-and-crafting-pleas-for-noncitizens>. NOTE: If R/C specifies only “a CS , to wit: a drug, substance . . . included in Schedules I-V,” it might make a finding of deportability more difficult in certain cases. Not naming a specific CS is unusual in a WA drug plea, but legally sound if plea is knowing, intelligent and voluntary, and defendant fully apprised of charges. See, e.g., *State v. Kjorsvik* 117 Wash.2d 93, 103, 812 P.2d 86, 91 (Wash.,1991)

²⁰ See 8 USC 1159(c).