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Practice Advisory[1] on Representing Noncitizen Defendants Charged with Firearms Possession by a Noncitizen under RCW § 9.41.171,[2] Alien's license to carry firearms ("alien in possession of a firearm") August, 2011

SUMMARY PRACTICE POINTS:

- **A conviction under RCW § 9.41.171 is a deportable firearms offense.**
- **There is no case yet saying whether or not it is a firearms aggravated felony.**
- **(A conviction under the pre-July 26, 2009 law was not an aggravated felony)**
- **It is vital to determine the defendant's immigration status and goals.**
- **Weapons charges that do not require a firearm as an element can be a safer alternative, if the fact that the weapon was a firearm is kept out of the record.**

I. Identify Immigration Status, Criminal History & Defense Goals

A. Identifying Immigration Status and Criminal History

- **Immigration Status Determines Consequences:** A person's immigration status determines to which immigration laws she will be subject, e.g., undocumented persons are subject to different grounds than lawful permanent residents.
- **Undocumented Persons (UP):** Note many UP (except those with prior deportations) have avenues for obtaining lawful status, particularly if they have a U.S. citizen spouse, parents or children 21 or over, and have never left the U.S. Two types of UP: 1) Entered illegally and have never had status; or, 2) Came lawfully with a temporary visa (e.g. student or tourist) that has since expired (overstayer)
- **Lawful Permanent Residents (LPR or Greencard Holders) & Refugees[3]:** Face permanent loss of lawful status and deportation. (It is now legal for LPRs to possess a firearm in Washington.) An expired LPR 'green-card' does NOT = lack of LPR status, which does not expire. Identify *how long* person has had lawful status.

[1] For individual case assistance defense counsel should contact WDA's Immigration Project staff: Jonathan Moore at *jonathan@defensenet.org* or 206-623-4321 or Ann Benson at *abenson@defensenet.org* or 360-385-2538.Where possible please use the online case-assistance form and link: *www.defensenet.org/immigration-project/case-assistance*

[2] A class C felony. See RCW §§ 9.41.010(9) and (12) for the definitions employed in § 9.41.171 of "lawful permanent resident "and "nonimmigrant alien."

[3] People who come to the US in refugee status must apply for LPR status after one year, although many take longer to do so. People granted asylum (asylees) in the U.S. can also apply to be LPRs.

- **Temporary (non-immigrant) Visa Holders (e.g. student & tourist visas):** Identify if person's status is current or expired. If current, goals = LPRs & refugees. If expired, goals = UPs.
- **Obtain Complete Criminal History.** Prior criminal convictions impact the immigration consequences analysis of current charges. *It is critical to have a complete criminal history* (including misdemeanors and sentences imposed, regardless of time suspended).
- **Mandatory Immigration Detention.** Many convictions can trigger detention once person is in deportation proceedings, which can last for months/years if the person fights deportation.
- **Deportation is Permanent.** It is virtually impossible to obtain/regain lawful status if deported. Illegal re-entry after deportation is the most-prosecuted federal felony and carries sentence enhancements if defendant has prior convictions.

B. Determine Defense Goals For Your Client

1. Defense Goals for Undocumented Persons (UPs)

- **Getting/staying out of custody.** A UP who goes to jail for even one day is likely to encounter ICE, get an immigration detainer imposed and end up in ICE custody & removal proceedings. If no detainer has yet been imposed, getting out of jail ASAP may be highest priority.
- **Preserve avenues to obtain lawful status.** Many UPs already have avenues to obtain lawful status, especially if LPR/USC spouse. Criminal convictions could render them ineligible to do this. Preserving avenue(s) to obtain LPR status may be highest priority. A conviction under RCW 9.41.171 should not directly render a noncitizen *inadmissible* so it is important to find out if they have a visa petition, etc. pending. However a firearms conviction, even if it is not an AF, will bar a key type of relief for long-term undocumented workers with legal immediate relatives in the US, called "10-year cancellation of removal."

2. General Defense Goals for Non-Citizens Here Legally, Such As LPRs & Refugees

- **Avoid a conviction that triggers deportation.** Even where you do, advise clients not to leave the U.S. or apply for LPR status or US citizenship without first consulting an immigration attorney.
- **If #1 is not possible, preserve avenues for relief from deportation.** LPRs and refugees will get a hearing before an immigration judge who has the power to grant *discretionary* "relief from removal (deportation)" through one of several legal avenues to qualifying noncitizens. Generally speaking, that means LPRs with 7 years of residency and refugees/asylees who've not yet become LPRs. Aggravated felonies bar most relief.

II. Alternatives to Firearms Possession by a Noncitizen

A. Firearms Possession by a Noncitizen is always a deportable offense for a non-citizen present in the USA *after a legal admission*, such as LPRs and refugees. It can also bar discretionary relief from removal for certain long term noncitizens. ICE[4] might also charge it as a firearms aggravated felony, a separate and more serious ground, so the first strategy is to look for an alternative.

A deferred adjudication (e.g., SOC or dispositional continuance) with "immigration–safe" language should avoid being a conviction that triggers deportation, or inadmissibility grounds, as long as defendant has NOT pled guilty or "admitted facts sufficient to warrant a finding of guilt" (i.e. immigration safe).[5]

[4] Immigration and Customs Enforcement (ICE) of Department of Homeland Security (DHS)

[5] If a stipulated order of continuance or other deferred adjudication is available, see Deferred Adjudications memo at immigration resources section of WDA's website: www.defensenet.org.

B. Preferable Alternatives

The following offenses would be preferable alternatives as they are neither deportable firearms offenses nor crimes involving moral turpitude and are either not crimes of violence or can be crafted to not be one. Even for non-firearms alternatives the fact that firearm was used must be kept entirely out of the judicially reviewable record of conviction.

By judicially noticeable record of conviction (ROC) we mean: the Information actually pleaded to or convicted of, verdict and jury instructions; as well as Judgment & Sentence, plea statement, written plea agreement, factual findings by the court, admissions to court at a plea colloquy, or any documents stipulated to as providing a factual basis for the plea.

Police reports and probable cause certificates by themselves are not part of the record of conviction, unless they are stipulated to or incorporated as providing a factual basis for the plea. *Alford* pleas, because they incorporate the police report into the ROC, are bad. A carefully composed plea statement and clean ROC is always the goal.

Note: Unlawful Possession of a Firearm RCW 9.41.040 is not a safe alternative, since it is an equally deportable firearms conviction. If it is UPFA 1 or a UPFA 2 based on a prior felony conviction, it's also an aggravated felony, "described in" the federal felon-in-possession law. So it's usually worse.

• **RCW 9.41.270 Weapons apparently capable of producing bodily harm** — Unlawful carrying or handling will not be a firearms conviction and is a safer plea if: 1) a firearm is not specified as the weapon and 2) "warrants alarm" only is pleaded to and not "intent to intimidate." (Intent to intimidate is more likely to draw a charge of being a "crime involving moral turpitude" (CIMT) or crime of violence.

• **RCW 9A.84.030 - Disorderly Conduct**

• **RCW 9A.36.031 Assault in the Third Degree under a criminal negligence prong**.

§9A.36.031 **(f)** is categorically not a firearms offense under prior immigration case-law nor a crime involving moral turpitude; however under the most recent 9th Circuit case-law it is possible that if a conviction is found to necessarily rest on the fact of a firearm being used, it could be a deportable firearms conviction *even though it lacks the use of a weapon as an element*. So the advice is essentially the same as for § (d), *infra*: keep the fact of a firearm out of the record of conviction.

§9A.36.031 **(d)** is a weapons or other instrument prong, so it will be a deportable firearms offense if the weapon or instrument is identified as a firearm anywhere in the judicially reviewable record of conviction (ROC). If the ROC only specifies a "weapon," it will not be a deportable firearms conviction.[6]

If the ROC specifies a victim under 18, then either subsection is potentially deportable as a crime of child abuse (COCA), and can bar relief for certain long-term UPS.

• **RCW 9A.36.021 Assault in the Fourth Degree – Non-DV.** Simple assault does not normally trigger the "crime involving moral turpitude" grounds of deportation or inadmissibility. Whenever possible plead to only unconsented touching, which will not be a crime of violence as defined in 18 USC 16(a).[7]

[6] For more on the judicially reviewable record of conviction, see page 4, § II , of *www.defensenet.org/immigration-project/immigration-resources/Immigration%20-%20Crafting%20Pleas%20for%20Noncitizens.pdf*

[7] Please review the WDAIP practice advisory for Assault 4 DV on the WDA website, if crafting a plea this offense.

• **RCW 9A.76.170 – Bail Jumping (on a misdemeanor *only*)** –If defendant has FTA'd at some point, bail jumping under 9A.76.170(d) only, is an acceptable alternative. But an FTA where the underlying charge is a felony will constitute an AF under immigration law at 8 USC § 1101(a)(43)(T) and is not an acceptable alternative under almost any circumstance.

• **Bail Forfeiture** – Bail forfeiture as a disposition, without a guilty plea or stipulation to facts, is a good alternative. It is not a conviction for immigration purposes. Thus, regardless of the charged offense it will not trigger grounds of deportation, inadmissibility, or any provision of the AF definition. (It is critical that there are no admissions of guilt or facts, by the defendant to the court.)[8]

• **RCW 9A.46.020 (non-DV) Harassment** plea to §§ (1) (a) (ii), (iii), or (iv), but not to threat "to cause bodily injury," if at all possible.[9]

III. Who is barred from legal firearm possession by RCW § 9.41.171:

A. Any non-citizen other than a lawful permanent resident (LPR) and certain "non-immigrant aliens" are barred. In addition to the undocumented, the following people are also subject to the law:

- any other non-citizen who is *not* a "nonimmigrant alien" (because only "nonimmigrant aliens" can theoretically get an alien firearms license, or legally possess a firearm with a hunting license)[10];

- a legally present nonimmigrant alien who does not have an alien firearms license and also does not have a valid hunting license or an "invitation to participate in a trade show or sport shooting event" while possessing a firearm only for hunting or sporting purposes.[11]

B. The definition of "non-immigrant alien" used is a term of art taken from the Immigration and Naturalization Act (INA) and covers only certain categories of legal non-citizens.[12]

1. Non-citizens who *could* possess a firearm with either an alien firearm license or a hunting license per § 9.41.175 include those with a currently valid:

tourist visa (B1-B2); student visa (F); an "H1-B" temporary worker; J-visa exchange student; K fiancé visa; a trafficking victim's T-visa, or a crime victim's U-visa, and numerous others.

2. Non-citizens who are legally in the US but who are neither LPRs nor "nonimmigrant aliens," cannot even *theoretically* possess a firearm in Washington. This group includes:

asylees; refugee-visa holders; parolees; persons granted withholding or deferral of removal; people with Temporary Protected Status (TPS); "Habitual Residents" of the US under Compacts with Palau, Micronesia, and Marshall Islands, and various others.

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[8] Authority for bail forfeiture under CrLJ 3.2(m), will be revoked on July 1st, 2012

[9] See short advisory or harassment at *www.defensenet.org/immigration-project/immigration-resources/crimes-against-persons/Q-D%20Misd%20Harrassment%20Advisory%2010-09.pdf*

[10] RCW § 9.41.175; see e.g., § 9.41.175 (4) requiring "visa showing the applicant is in the country legally."

[11] See RCW 9.41.175 for exact language of the hunting or sporting exception.

[12] RCW 9.41.010(12) "'Nonimmigrant alien' means a person defined as such in 8 U.S.C. Sec. 1101(a)(15)."

3. Undocumented non-citizens, whether present without admission or visa over-stayers, are subject to this law. **It is vital not to admit that the defendant is actually unlawfully present** when pleading, as opposed to admitting only to not being a citizen, LPR or non-immigrant alien (the latter being the only ones who can possess a firearm *with* a hunting or alien firearms license).

IV. Possible Immigration Consequences of a Conviction under This Statute

A. A Conviction for Firearms Possession by a Noncitizen, RCW § 9.41.171 is a Deportable Firearms Offense.

The firearms ground of deportation is a basis for deportation of any non-citizen here after a legal admission or entry to the United States, including lawful permanent residents and refugees.[13] However, lawful permanent residents (LPRs) are no longer *per se* prohibited from gun ownership by the Washington law.

1. This firearms ground of deportation applies to any conviction under a law that has as an element possessing, carrying or using a firearm.
2. However, even where an offense lacks the element of a firearm or a weapon, if a conviction were found to "necessarily rest on the fact" of use of a firearm, it could be a deportable firearms conviction. Thus, the fact that firearm was used must be kept entirely out of the judicially reviewable record of conviction.
3. This ground applies regardless of the sentence imposed, or how long the person has been here.
4. It applies to both those here in legal status and those who came in legally but overstayed.
5. A deportable conviction can also bar certain undocumented non-citizens-- who have been here for 10 years and can show exceptional hardships to certain close relatives-- from getting legal status;[14]

B. A Conviction for Firearms Possession by a Noncitizen, RCW § 9.41.171 Does Not Directly Trigger Inadmissibility.

The grounds of inadmissibility apply in the following circumstances: **1.)** Persons seeking admission at a U.S. border (port of entry); **2**.) Persons applying for lawful status (e.g. LPR status or a tourist visa); **3**.) Can bar "good moral character" for those LPRs applying for U.S. citizenship; **4.)** Undocumented people seeking discretionary relief from removal before an immigration judge. A conviction for an offense involving only possession of a firearm does not trigger the grounds of inadmissibility. Even though it does not trigger an inadmissibility ground, a person already here after lawful admission can be deported for such a conviction.

C. A Conviction for Firearms Possession by a Noncitizen, RCW § 9.41.171 is Not a Crime Involving Moral Turpitude (CIMT)

A firearms conviction is not going to be deemed a crime involving moral turpitude (CIMT) where the only element of conduct is possession of a firearm.[15] Mere possession of a firearm is not *per se* illegal or depraved, nor does it require "evil intent." It is essentially regulatory.

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[13] 8 USC 1227(a)(2)(C)

[14] "10 year" Cancellation of Removal at 8 USC 1229a(b)(1)(iv); See *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649, 652 (9th Cir 2004) and *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010) (offenses described in 8 USC 1227(a)(2) bar a noncitizen who is present without admission from 10-year Cancellation of Removal)

[15] *Matter of Hernandez-Casillas*, 20 I&N Dec. 262, 278(BIA 1990); *Matter of Granados*, 16 I.&N Dec. 726, 1979 (BIA 1979)

D. A Conviction under RCW § 9.41.171 Risks Being Classified as a Firearms Aggravated Felony under Immigration Law.[16]

1. Convictions that fall within the purview of 8 U.S.C. 1101(a)(43) will be classified under immigration law as "aggravated felonies" (AF). The AF firearm ground at 8 U.S.C. 1101(a)(43)(E)(ii) is distinct from the regular firearms deportation ground at 8 U.S.C. 1227(a)(2)(C), and has more severe consequences. An AF conviction makes any non-citizen deportable, and has the following consequences:

- it subjects non-permanent residents to summary removal without a hearing;
- it makes any non-citizen legally here deportable[17] and bars the immigration judge from granting a discretionary waiver, no matter how long here;
- a non-citizen who has been removed (deported) for an AF is permanently inadmissible;
- it permanently bars the good moral character needed to become a US citizen;
- it subjects a non-citizen to significantly heightened criminal penalties if s/he returns illegally after removal.

2. The relevant AF ground at 8 U.S.C. 1101(a)(43)(E)(ii) cover convictions for an offense "described in" 18 USC 922(g)(5).[18] This statute makes it illegal to "possess in or affecting commerce, any firearm" if you are a non-citizen "illegally or unlawfully in the United States."[19]

3. There are very strong arguments that RCW 9.41.171 Firearms Possession by a Non-citizen is not an Aggravated Felony. *If no safer alternative is possible*, the goal is to craft a plea that preserves such arguments.

- Because the Washington law criminalizes possession by numerous classes of non-citizens who are neither undocumented nor unlicensed legal non-immigrants, such as refugees, it is not an exact match with 18 USC 922(g)(5). It lacks the element of being illegally or unlawfully in the United States.[20]

- However ICE may try to argue that the fact that the record of conviction (ROC) shows that the defendant's actual status was unlawful is enough to make it an aggravated felony. Do not specify that the defendant is guilty specifically because she is undocumented.

- If an immigration judge (IJ) agrees with ICE she may decide to look at the ROC. If the ROC establishes that the person is in fact unlawfully present, it could result in the conviction being later deemed an AF. Such a hearing may happen in any part of the US, without legal counsel and while the person is detained.

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[16] A conviction under the pre-7-26-2009 version of the law, RCW 9.41.170 "Alien's license to carry Firearms" is a *deportable firearms offense*, but not a firearms *aggravated felony*. *US v. Sandoval-Barajas* 206 F.3d 853 (9th Cir.2000).

[17] RCW § 9.41.171 no longer criminalizes gun ownership by lawful permanent residents, nor is it an automatic bar to a non-citizen becoming an LPR in the future.

[18] 8 USC 1101(a)(43)(E)(ii)

[19] The federal interstate commerce element has been held merely jurisdictional and does not prevent state statutes from being "described in" 18 USC 922(g). See *U.S. v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001). *See also U.S. v. Mendoza-Reyes*, 331 F.3d 1119 (9th Cir. 2003) (RCW 9.41.040(1)(a) conviction for possession of a firearm after conviction for a "serious crime" is a complete fit with aggravated felony definition, where all offenses included in serious crime definition have a potential sentence of more than a year; federal commerce element discounted)

[20] In *U.S. v. Aguila-Montes De Oca* --- F.3d ----, 2011 WL 3506442 (9th Cir.2011) en banc, the court held that an aggravated felony could be found, even where the state crime lacks a corresponding element, if the conviction "necessarily rested" on facts that establish the aggravated felony. A factually undocumented defendant could conceivably be such a "fact."

E. Defense counsel should seek an alternative, broader non-firearms weapons possession offense whenever possible. If there is no good choice, plead 9.41.171 defensively, as suggested below.

III. Advice for Counsel

A. A permanent resident with an expired card is still an LPR and not subject to the law.

- Since lawful permanent resident (LPR) status is an absolute defense to RCW 9.41.171, any defendant who thinks she may have "had a green-card" should be checked out closely**.**
- **Permanent resident status does not expire or time-out,** although it can be abandoned by living outside the US. The card that is proof of LPR status[21] does expire every 10 years, and LPRs must file for a replacement. At that time a criminal records check will be run and a deportable conviction can trigger proceedings, as it could at any time.
- Some immigrants may mistakenly think they are no longer legal residents because they have not replaced the card. An LPR with a merely expired card is not subject to this law.[22]

B. Check for unknown claim to be a US citizen (USC)

It is possible for a person who acquired US citizenship at birth outside the US to not know that. Since alienage, or lack of US citizenship, is an element of the state crime, **if a person has US citizen parents or grandparents,** they may have a claim to US citizenship. So ask. WDAIP can help if you get a yes.

C. Despite the above legal analysis, until there is published case-law, counsel should assume that DHS will say that the ROC can be used to decide if the conviction is for an AF.

1. In the case of an undocumented defendant, if a plea to a safer alternative is impossible, it is especially important to plead as suggested, and *not admit that the person is present without admission (PWA) or an overstay*.[23] The following would be ideal clean plea language:

> **"I am not a citizen of the United States or a lawful permanent resident and I have not obtained a valid alien firearm license pursuant to RCW 9.41.173, and I do not meet the requirements of RCW 9.41.175"**

[21] Technically a 'green-card' is form I-551.

[22] We leave the separate issue of the burden of proof of alienage or of LPR status in a criminal proceeding to the wisdom of defense counsel. Counsel should consider whether an admission to the element of alienage, prior to getting a *Miranda* warning, is suppressible in a criminal proceeding, and whether the defendant may have an unexplored claim to be a US citizen that could supply reasonable doubt.

[23] This is also the goal if your client is an actual "non-immigrant alien" with a visa, but does not have the hunting license/ sporting event defense. The reason is that 18 USC § 922(g)(5) *also* contains a separate exception for those with non-immigrant visas "admitted to the United States for lawful hunting or sporting purposes or [who are] in possession of a hunting license or permit lawfully issued in the United States." 18 USC §§ 922(g)(5)(B), (y)(2)(A). The non-immigrant provisions at RCW §§ 9.41.175 and 18 USC §§ 922(g)(5)(B), (y)(2) on possession of a firearm without a state alien firearms license or without an approved waiver from the Attorney General are broadly similar. Therefore, by admitting that the defendant is in a non-immigrant visa status, the aggravated felony analysis could shift to a comparison of the state and federal hunting license exception provisions, which are similar. For more on this see the extended version of this advisory.

2. The above is defensive plea language to try to thwart a possible aggravated felony firearms charge. However the entire judicially reviewable ROC must be clean of the "fact" of the defendant's specific status, if undocumented. By judicially noticeable ROC we mean the information actually pleaded to or of which the defendant is convicted, or verdict and jury instructions; or judgment and sentence, plea statement, written plea agreement, factual findings by the court, admissions to court at a plea colloquy, or any documents stipulated to as providing a factual basis for the plea. Police reports and PC certificates by themselves are not part of the record of conviction, unless they are stipulated to or incorporated as providing a factual basis for the plea.

E. Remember that a "Firearms Possession by a Noncitizen" conviction will render a person who is here after legal admission deportable. Such persons include: anyone here with a tourist visa (B1-B2); student visa (F); an "H1-B" temporary worker; J-visa exchange student; K fiancé visa; a trafficking victim's T-visa, or a crime victim's U-visa, asylees; refugee-visa holders; parolees; persons granted withholding or deferral of removal; people with Temporary Protected Status (TPS); "Habitual Residents" of the US under Compacts with Palau, Micronesia, and Marshall Islands, and various others.