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PRACTICE ADVISORY

Activation of the Early Release from DOC for Deportation Statute

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The Prior Conditional Release Statute: In 1993, the legislature amended the SRA by adding RCW 9.94A.685 – Conditional Release for Deportation of Alien Offenders. The purpose of the statute was to save state resources, by allowing noncitizen defendants convicted of nonviolent offenses to be released for deportation in lieu of serving their time in state DOC custody. In practice the statute was rarely actually successfully invoked and, since passage, only a handful of noncitizen offenders have ever been released pursuant to it. The recent passage of ESHB 1547 will change all that.

Under the 1993 version of the statute, in order for a noncitizen defendant to be ordered “conditionally released for deportation”, s/he needed to have a final order of removal, the prosecutor needed to request conditional release, and the sentencing court then needed to enter an order sanctioning it. All this had to happen before DOC could then exercise its authority to actually release the person into the custody of immigration officials for deportation. (Note, until recently, ICE officials actually refused to take the handful of individuals into custody who managed to run this gauntlet). It was an impossible array of stars to align. In recent years, however, downward spiraling budgets combined with expanding federal resources devoted to increasing deportations created the perfect storm to change the status quo.

The Newly Amended Conditional Release Statute: The newly amended version of RCW 9.94A.685, which took effect April 29, 2011, permits early release for deportation under the following circumstances:

- Defendant is in the custody of the State Department of Corrections (DOC);
- Defendant is a noncitizen is subject to a final order of removal (deportation);
- Defendant's conviction is a nonviolent offense (not listed under RCW 9.943A.030).

DOC now has sole authority to make decisions regarding early release under the statute and has already begun processing qualifying inmates for release. Upon release, the remaining portion of the offenders sentence will be tolled and, upon release to Immigration & Customs Enforcement (ICE) officials an arrest warrant will be issued and remain in effect indefinitely.

WDA (along with the Northwest Immigrant Rights Project (NWIRP) and the ACLU-WA) lobbied successfully to get the legislature to include several basic due process protections for defendants in the bill (notice at sentencing, requirements by DOC to work with NWIRP to provide information and notice of rights in removal proceedings). However, prior to signing the bill, the governor vetoed out these due process provisions.

Note that the early release statute only applies to inmates in the custody of state DOC. It does not apply to a defendant serving time in a county or municipal jail facility. For many noncitizen offenders who face certain deportation upon release, this will likely come as welcome news. For those for whom deportation will mean permanent separation from family, it may further add to their already unfortunate plights.

Advice to Clients: In the context of *Padilla/Sandoval* obligations defense counsel is already assisting the client in determining the substantive risk of deportation of a conviction. Where clients are considering entering into pleas that will qualify them for conditional release upon arrival to DOC, counsel must inform them of this expected result.

Actual implementation: ICE currently has numerous agents stationed at the DOC intake facility at Shelton, WA. Upon arrival, noncitizen inmates are identified by DOC. Their classification status is suspended for up to 6 months in order to allow ICE and the immigration courts to pursue (and enter) removal/deportation orders. Under the new procedures, once a final order of removal is entered for otherwise qualifying offenders, DOC will proceed with conditional release.

For additional details on the legislation amending RCW 9.94A.685 please go to:

<http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1547>