

# **STOPPING IMMIGRATION CONSEQUENCES OR MAKING SURE THE ICEMAN COMETH NOT**

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## **I. GATHERING THE INFORMATION**

- A. Start at the interview**  
Place of Birth - Accra? Akron?  
Questionnaire
- B. Need complete history**  
First time in U.S.; list every other entry.  
Possible options for status?  
Remedies for client - need resume, relatives' statuses, asylum discussion, etc.
- C. Adoptees** - Persons who were adopted, even as babies, but never got citizenship **can be and are being deported**. If client is unsure about status, but looks, sounds, acts American, get PROOF.
- D. Record** - What jurisdiction?
  - In some states, 3 shoplifting offenses = an Aggravated Felony.
  - Failure to pay child support: Charged as felony in Kentucky, could be an Agg Fel if viewed like certain white collar offenses and sentence is  $\geq$  one year; would be a Moral Turpitude crime also.

## **II. MYTHS OF IMMIGRATION CONSEQUENCES**

- A.** Any sentence under one year is o.k. for immigration purposes.
- B.** As long as probation is under one year, my client's ok.
- C.** As long as the executed sentence is under one year, it won't count.
- D.** If the client is a lawful permanent resident, i.e., has a "green card," there's no problem.
- E.** If it's a non-violent offense, my client's ok.
- F.** If it's a misdemeanor, my client's ok.
- G.** If it's a minor offense, my client's ok.

H. A PBJ won't be a conviction for immigration purposes.

**NOTE: The only results that are NOT convictions in MD are (1) Stet - later dismissed; (2) diversion program with no plea entered; (3) juvenile cases; (4) dismissal; (5) nolle prosequi; (6) results equivalent to Federal First Offender Act.**

### III. WHAT CAN BE DONE BY DEFENSE COUNSEL

#### A. AFTER CHARGES, BEFORE TRIAL OR PLEA

1. Begin working on the immigration issues immediately!  
Need complete client history w/family immigration history, too.
2. Consider count or charge client is offered as plea. E.g., Theft, Poss'n, DWI, Assault 2, Sex Offense 4, Protective Order Violation and DV cases.
3. Is statute divisible?
4. Consider sentence.
5. Consider prior convictions, i.e., will this deal/conviction earn client his **second** Crime of Moral Turpitude (CMT)? Will it matter?
6. Play with combination of time to be served (or community service, restitution, etc.) and the count being offered.
7. Be prepared to suggest that client may have to serve more time to avoid deportation.
8. Encourage creativity: client can serve time without getting credit in order to satisfy prosecutor and judge, yet stay under a one-year sentence.
9. Get stipulation re: factual proffer so that facts are clear and clean.
10. What immigration consequence are you trying to avoid?  
·Deportation/removal? ·Naturalization problems?  
·Employment-based visa status? ·Diplomatic status?
11. S, V visas possible? VAWA Petition possible?

#### B. EXPUNGEMENT ISSUES

1. Need certified dispositions (get 3-5 certified copies) once case is over.

### C. AFTER CONVICTION

1. Post-conviction under statute in MD, DC, VA.
2. Beyond the ABA guidelines, the U.S. Supreme Court has also weighed in on the obligations of defense counsel regarding immigration advice in criminal cases. In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court was addressing the hardship of a retroactive provision that took away some forms of relief for aliens convicted of crimes:

“Plea agreements involve a *quid pro quo* between a criminal defendant and the government. In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous “tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources.” There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. See *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9<sup>th</sup> Cir. 1999) (“That an alien charged with a crime ... would factor the immigration consequences of conviction in deciding whether to plead or proceed to trial is well-documented.”); see also 3 Bender, Criminal Defense Techniques §§60A.01, 60A.02[2] (1999) (“Preserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence”).

*Id.* at 322, n.48. (footnotes and some citations omitted). As further support, the Supreme Court referred to the various state statutes in place that required that trial judges advise defendants that immigration consequences may result from accepting a plea agreement.

3. If time has run for post-conviction, turn to *Coram Nobis* Petition.
4. Or, if an option, use Motion to Reconsider that was never ruled on or could be re-opened.
5. Or, consider reviewing sentence imposed at a Violation of Probation hearing. Sometimes that proceeding can be re-opened for a new sentencing even when initial proceeding cannot be.

6. Use *Audita Querela* only as very last resort. (Hard to make into a constitutionally-based invalidation of a plea or conviction.)
7. In any event, be prepared to bargain.
8. Special problems with old records:
  - A. Get from court, prosecutor, original criminal defense attorney, Parole and Probation department, chemist laboratory, police department.
  - B. Try community service program, drug/alcohol treatment program, counselors.
  - C. Use affidavits from client, friends, family, former defense attorney, arresting officers, even victims.
  - D. Expungement issues.
9. Special note on *Matter of Pickering*, 12 I. & N. Dec. 621 (BIA 2003) issues: **Make sure vacating plea or conviction is done on constitutional or “legal defect” basis. That must be clear in the court’s order.**
10. **Distinguish:** *Holmes v. State*, COA filed 9/21/07. Def filed *Pet for Writ of Error Coram Nobis* because an old conviction was subjecting him to “career offender” status in the federal system. COA held that Def had waived his right to file for *Coram Nobis* relief because he had failed to raise the allegation of error in an application for leave to appeal his original conviction and provided no reasons why he had not done so. **If a challenged issue is not raised when it might have been, a Def faces a rebuttable presumption that he has waived the right to challenge his conviction in a subsequent *coram nobis* proceeding.** The COA ruled that Holmes had presented no evidence rebutting the presumption.

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