IMMIGRATION AND SENTENCING: OIL AND WATER OR HAND IN GLOVE?

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I. WHY ARE IMMIGRATION CONSEQUENCES A FACTOR AT SENTENCING?

A. A Sentencing Judge has wide latitude in using his or her discretion. authority to In order to effectively comply with the broad mandate of sentencing, a judge must

MD Case Law

A judge has broad discretion to accomplish the objectives of sentencing: punishment, deterrence and rehabilitation. *Logan v. State*, 289 Md. 460 (1981).

"... [T]o aid the sentencing judge in fairly and intelligently exercising the discretion vested in him, the procedural policy of the State encourages him to consider information concerning the convicted person's reputation, past offenses, health, habits, mental and moral propensities, social background and any other matters that a judge ought to have before him in determining the sentence that should be imposed." (footnote omitted) (emphasis added). Bartholomey v. State, 267 Md. 175(1972).

"The only restrictions placed on the judge at sentencing are that the sentence not constitute cruel and unusual punishment or violate constitutional requirements; the judge not be motivated by ill-will, prejudice or other impermissible considerations; and that sentence be within the statutory limitation." *Reid v. State*, 302 Md. 811 820 (1985)

ABA

ABA Standards for Criminal Justice § 18-5.1(b)(2d ed. 1982 Supp.) recommend a PSI if incarceration for over 1 year is possible, if the defendant is under 21, or if the defendant is a first offender.

B. In order to comply effectively with the broad mandate of sentencing, a judge may (or should?) consider varied factors related to both the crime and the defendant.

MD Case Law

A judge can consider the facts and circumstances of a crime, as well as a defendant's reputation, past crimes, health, habits, mental and moral propensities, social background, lack of remorse, and other relevant matters. *Jennings v. State*, 339 Md. 675 (1995).

USSC Case Law (re: federal sentencing)

In *U.S. v. Booker*, 125 S.Ct. 738 (2005), the Supreme Court held that the federal sentencing guidelines are advisory only, and that the other factors set forth in 18 U.S.C. § 3553(a) must also be considered in fashioning an appropriate sentence. These factors include:

- (A) the nature and circumstances of the offense,
- (B) the history and characteristics of the defendant,
- (C) the need for the sentence imposed to reflect the seriousness of the offense,
- (D) to promote respect for law and to provide just punishment for the offense,
- (E) to afford adequate deterrence to criminal conduct,
- (F) to protect the public from further crimes of the defendant;
- (G) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner,
- (H) the need to avoid unwarranted sentencing disparities, and
- (I) to provide restitution to the victims.

In *Booker* the Court also reaffirmed a judge's sentencing power: "We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range." *Id.* at 750.

MD Trial Judges' Benchbook

- § 1-2302 (d) 1. Have you determined whether the defendant holds a license for occupational, professional or employment purposes, and if so, whether the licensing authority must be notified of the conviction?
- C. A Defense Attorney's obligations include assessing collateral consequences as part of accepting or rejecting a plea offer. Thus, defense counsel should raise immigration issues at every step of proceedings to accomplish the defendant's goals.

<u>ABA</u>

ABA Standards for Criminal Justice - Pleas of Guilty § 14-3.2 (3d ed. 1999) states that defense counsel "should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed." § 14-3.2 (b).

"To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." § 14-3.2 (f).

DC Criminal Practice Manual (Public Defender Service):

"[S]entencing is a critical stage of a criminal trial; to a criminal defendant, perhaps the most important." *United States v. Hamid*, 531 A.2d 628, 643 (D.C. 1987). It "is the time at which for many defendants the most important service of the entire proceeding can be performed." ¹

Effective legal representation at sentencing is critical to meeting society's urgent interest in reaching determinations that accurately and fairly build upon the past and honestly attempt to create hope for the future. . .

"The first essential element of effective assistance of counsel is counsel able and willing to advocate fearlessly and effectively..."

United States v. Hurt, 543 F.2d 162, 167-68 (D.C. Cir. 1976).

Critical decisions such as whether to accept a plea offer depend heavily on potential exposure. Thus, advising clients throughout the case requires a thorough understanding of the potential sentence for each offense, including the statutory limits and all relevant enhancement, mandatory minimum, and credit provisions.