Immigration Consequences

Selected Practice Pointers Relating to Juveniles

By Dan Kesselbrenner, Director of the National Immigration Project

Editors' Note: The following article was originally published in the National Immigration Project's March 2004 Newsletter and is being reprinted with their permission.

This article raises selected pointers to eliminate adverse immigration consequences from crimes a noncitizen committed before her or his eighteenth birthday.

Pointer 1: Admissions

An adjudication of delinquency is not a conviction for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000). However, a noncitizen can be inadmissible from the United States if she or he admits the essential elements of a crime involving moral turpitude or a controlled substance offense. In order for a noncitizen's statements to constitute a valid admission:

- the conduct must be for something that is a crime,
- the government must provide a plain language description of the crime, and
- the admission must be voluntary.

The Board of Immigration Appeals (BIA) has held that an adult cannot admit essential elements of controlled substance or moral turpitude offense if the conduct required mandatory delinquency treatment. *Matter of M-U-*, 2 I& N Dec. 92 (BIA 1944).

> Example: AV, a 25 year-old noncitizen admitted setting a fire in a national forest when she was 11. Under the Federal Juvenile Delinquency Act (FJDA) no one under the age of 12 can be tried as adult. Even if AV voluntarily provides the information, the statements are not an admission since she could only face delinquency charges under FJDA standards.

The several states have different standards to determine when a child can be charged as an adult. By examining the rules for when a child can be charged as an adult in a particular jurisdiction, a practitioner can determine whether her or his client's statements could be treated as an admission of a crime.

Pointer 2: Adult Court Convictions May Have Juvenile Dispositions

There is a provision in the FJDA that may create a defense for certain under-18 defendants to argue that the disposition is a delinquency adjudication even if they plead guilty to an offense as an adult. Section 5032 of Title 18 provides:

> Whenever a juvenile transferred to district court under this section is not convicted of the crime upon which the transfer was based or another crime which would have warranted transfer had the juvenile been initially charged with that crime, further proceedings concerning the juvenile shall be conducted pursuant to the provisions of this chapter.

For those practitioners assisting minor clients with pending charges in the federal criminal justice system that the Attorney General transferred from juvenile proceedings, try to get a plea that would not have warranted a

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transfer in the first instance. In so doing, the resulting plea is a juvenile disposition under 18 USC § 5032 by operation of law.

The law is less clear for analogous transfers in the state system. Nevertheless, a practitioner may still argue that a plea that would not have warranted a transfer in the first instance should not be a conviction because Congress did not intend for such a disposition to be a conviction in light of 18 USC § 5032. The First Circuit has rejected this argument. *Garcia v. INS*, 239 F.3d 409 (1st Cir. 2001).

In the Ninth Circuit there is case law that requires comparable treatment for noncitizens in federal and state criminal justice systems that would support by analogy this argument. *See*, *e.g.*, *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that a state rehabilitative disposition is not a conviction for immigration law purposes if it is a counterpart to the Federal First Offender Act (FFOA)). A practitioner within the Ninth Circuit could argue that a noncitizen defendant in state court should get the treatment she or he could have received under the FJDA just as a noncitizen defendant under *Lujan* now gets the benefit of the treatment she or he could receive under the FFOA.

> Example: KAM, a noncitizen living in California, does not face juvenile proceedings because he is facing aggravated assault charges. He pleads guilty to disorderly conduct in adult court. There is no provision under California law that a defendant under 18 be treated as a juvenile if he pleads to an offense that would not have justified transfer to adult court in the first instance. Mr. M can argue that he is entitled to the treatment he would have received had he faced federal charges, which would mean that he would be treated as a juvenile.

Practice Pointer: Motion to Strike State's Allegation of Priors in "Third Strike" Misdemeanor Cases

By Karen Boehmer, Defender Attorney

We are all familiar with the "three strike" rule that increases punishment for misdemeanors such as DUI, shoplifting, Proposition 200 drug offenses, and domestic violence. The first and second offenses remain misdemeanors, but cross that magic number of three offenses within 60 months and your client automatically enters felony land. For crimes involving domestic violence, the third misdemeanor offense within 60 months is bumped up to Aggravated Domestic Violence, a class 5 felony.

This is why it is imperative to double check the misdemeanor priors that the State alleges for purpose of sentence enhancement. If the first two misdemeanors occur out of "the same series of acts," I recommend filing a Motion to Strike Allegation of Priors, thereby asking the Court to dismiss the felony charge of Aggravated Domestic Violence. A sample motion is provided on pages 10-11.