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## **Washington Defender Association's Immigration Project**

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### **Reset: Misdemeanor Sentencing – Passage of SSB 5168**

**April 26, 2011**

With the passage of SSB 5168, Washington State altered the landscape of misdemeanor sentencing by reducing the maximum possible sentence for gross misdemeanor offenses from 365 days to 364 days. This change was in response to practices in many courts of limited jurisdiction of imposing boilerplate sentences to the statutory 365 day maximum in virtually all cases.

While this 1-day alteration in the statutory maximum will not necessarily change the erroneous practices of judges, it will dramatically alter the consequences for noncitizen defendants by ensuring that no misdemeanor conviction can any longer be classified as an “aggravated felony” under immigration law (a classification that results in virtually automatic deportation). Remember that under immigration law, in most instances it’s the amount of time imposed by the court, regardless of time suspended that counts.

365 day sentences did not render all gross misdemeanor offenses as deportable aggravated felonies. The primary offenses that are classified as such with a 365 day sentence are: assault 4, theft 3<sup>rd</sup>, PSP 3<sup>rd</sup> (and attempted forgery). It is critical to obtain <365 day sentences for these convictions to avoid this outcome. Where court’s insist on imposing 365 day sentences for these convictions, defense counsel must strongly advocate for and assist their client to file RALJ appeals of the 365 sentence.

### **Key Points for Defenders About SSB 5168:**

- **WDA’s Immigration Project Resources:** In addition to individual case consultations, defenders can find critical resources to support the issues below at the Immigration Project Resources section of WDA’s website: <http://www.defensenet.org/immigration-project/immigration-resources/challenging-365-day-sentences>.
- **Effective Date:** The law will not go into effect until 90 days after the end of the legislative session. In light of current events, this means that the earliest the law is likely to go into effect is mid-August 2011.
- **Application to Municipal Code Offenses:** Municipal Code violations will no also be limited to a maximum of 364 days. RCW 35.21.163 states: Except as limited by the maximum penalty authorized by law, no city, code city, or town, may establish a penalty for

an act that constitutes a crime under state law that is different from the penalty prescribed for that crime by state statute. Additionally, the courts have held: “Thus, we hold that application of the statutory scheme of the Seattle Municipal Code violates equal protection in that it punishes attempted vehicle prowling to a greater extent than our State Legislature has decreed it should be punished. We do not hold that SMC 12A.62.060-070 is void but rather that it may be enforced only to the extent it is within statutory limitations.” *City of Seattle v. Hogan*, 53 Wash.App. 387, 392, 766 P.2d 1134, 1137 (1989).

- **Advocating for A Proportional Sentence and/or <365 days NOW:** Defense counsel must advocate for a sentence of <365 days in the offenses list above now. Routine imposition of the statutory max is contrary to Washington law. Defenders should be seeking proportional sentences, which in virtually all cases should be far below the statutory maximum. Additionally, the legislative intent language of SSB 5168 strengthens the argument against imposition of statutory maximums where it will result in the defendant’s automatic deportation. A copy of SSB 5168 is posted on the WDA website Immigration Resources section.
- **Padilla v. KY: Supreme Court Sanctions Factoring Immigration Consequences Into Sentencing Determinations:** In its landmark decision in *Padilla v. KY*, the U.S. Supreme Court specifically recognized that immigration consequences are an appropriate factor to be included in sentencing determinations. See 10-14-10 Immigration Project memo on the WDA website.
- **180 Days or Less Magic Sentence To Ensure No Immigration Consequences:** Classification as an aggravated felony due to imposition of 365 days is not the only immigration consequence of misdemeanor sentences. For many noncitizens, to avoid deportation for the offense and qualify for immigration benefits, such as lawful status and citizenship, they will need to have a sentence of 180 days or less (regardless of time suspended) imposed. See 10-14-10 memo. Again, defense counsel should be advocating for a proportional sentence, which, in most cases, should arguably be no more than 180 days.