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## **Practice Advisory for Representing Noncitizen Defendants In Drug Possession Cases – August, 2011<sup>1</sup>**

### **IDENTIFY IMMIGRATION STATUS & CRIMINAL HISTORY**

- **Undocumented Persons (UP):** Note many UP (except those w/prior deportations) have avenues for obtaining lawful status, particularly if they have U.S. citizen spouse or parents and have never left the U.S. Two types of UP: **1).** Entered illegally and have never had status; **2).** Came lawfully with a temporary visa (e.g. student or tourist) that has since expired. Face permanent *inadmissibility*.
- **Lawful Permanent Residents (LPR or greencard holders) & Refugees<sup>2</sup>:** Face permanent loss of their lawful status and deportation. Identify how long person has had lawful status. (LPR status can be lost, but does not expire; LPR card expires every 10 years.)
- **Temporary (non-immigrant) Visa Holders (e.g. student & tourist visas):** Identify if person's status is current or expired. If current, goals are same as LPRs & refugees. If expired, goals are same as UPs.

### **KEY CONCEPTS**

- **GENERAL RULE:** Convictions for simple possession of a C/S, *including attempt and conspiracy to possess*, trigger grounds for deportation and inadmissibility and cut off eligibility for noncitizens to obtain lawful immigration status and citizenship.<sup>3</sup> They are NOT safe pleas for noncitizen defendants.
- **EXCEPTION:** (A conviction for a first, simple possession committed before July 14, 2011, only, that is dismissed after probation *pursuant to a deferred sentence or drug court* or other rehabilitative statute cannot be a basis for deportation by itself. This **only ever** works within the 9<sup>th</sup> Circuit.)
- **EXCEPTION: Solicitation to Possess under RCW 9A.28.030 does not trigger deportation in 9<sup>th</sup> Circuit ONLY.** It may make defendant inadmissible to U.S. (person can never safely leave and return).
- **Prescription Fraud per RCW § 69.50.403.** Attempted prescription fraud may be an aggravated felony under immigration law and should be avoided. Pursue strategies outlined *infra*.
- **Use of Paraphernalia per RCW 69.50.412(1).** This is a drug crime and triggers same consequences as attempt or conspiracy conviction. Not better than possession. Pursue strategies outlined *infra*.
- **Marijuana Possession.** Where a conviction is unavoidable, it is critical to *affirmatively specify the amount as 30 grams or less*. Such a first-time conviction will not trigger deportation for LPRs and refugees. UP will be able to seek a special waiver if they otherwise qualify to obtain lawful status.
- **Length of sentence (365 vs. 364) is not relevant in simple possession (or most other drug cases).**

<sup>1</sup> This advisory is intended to serve as a quick-reference guide for defenders representing noncitizen defendants. Whenever possible defenders are advised to consult specifically with WDA's Immigration Project and our more extensive drug cases practice advisory, available at [www.defensenet.org](http://www.defensenet.org).

<sup>2</sup> People who come to the US in refugee status must apply for LPR status after one year, although many take longer to do so. People granted asylum in the U.S. can also apply to be LPRs.

<sup>3</sup> See 8 U.S.C. 1182(a)(2)(A)(II); 8 U.S.C. 1227(a)(2)(A)(B); 8 U.S.C. 1229b(B)(1)(C).

- **Mandatory Immigration Detention.** Drug convictions trigger mandatory detention once person is in deportation/removal proceedings, which can last for months/years if the person fights her/his case.

### DEFENSE GOALS FOR UNDOCUMENTED PERSONS (UPs):

1. **Avoiding ICE apprehension by getting/staying out of jail.** A UP who goes to jail for even one day is likely to encounter ICE, get a detainer imposed and end up in ICE custody & removal proceedings. If defendant does not yet have ICE detainer, getting out of jail may be highest priority (see #2).
2. **Preserve avenues to obtain lawful status.** Many UPs have avenues to obtain lawful status. Most drug convictions will render them ineligible to do this. If US citizen spouse (or partner whom they could marry), resolve the case via one of the strategies outlined below to preserve avenue(s) to obtain LPR status through marriage. This may be a higher priority than immediate release from jail.

### DEFENSE GOALS FOR LAWFUL PERMANENT RESIDENTS & REFUGEES

1. **Avoid a drug conviction that triggers deportation.** (See strategies *infra*.)
2. **If not possible, preserve avenues for relief from deportation.** LPRs and refugees will get a hearing before an immigration judge who has the power to grant *discretionary* “relief from removal (deportation)” through one of several legal avenues to qualifying noncitizens. In these cases, that will generally mean LPRs with 7 years of residency by date of crime (simple possession may be waivable); and refugees or asylum grantees *who have not yet become LPRs*.
3. **Avoid conviction that triggers controlled substance inadmissibility grounds, which can result in denial of readmission, ineligibility for U.S. citizenship (and, for refugees, denial of LPR status).**

### STRATEGIES TO AVOID/MITIGATE IMMIGRATION CONSEQUENCES

**If you cannot negotiate one of these alternatives, it may be more important for a noncitizen – depending on her/his defense goals - to decline the expedited misdemeanor offer and proceed w/felony filing since the immigration consequences, in most cases, are no worse.**

1. **Solicitation to Possess under RCW 9A.28.030.** Best strategy for LPRs (avoids deportation). Okay for refugees and UPs, but 3 & 4 are better since they do not pose risk of triggering grounds of inadmissibility. Where possible, get a deferred sentence.
2. **Rendering Criminal Assistance under RCW 9A.76.050 (1)-(3) w/364 day sentence.** Not a C/S violation so safer for LPRs, refugees and UPs. Might be a CIMT. Avoid any sign of complicity in drug-dealing.
3. **Drug Court or deferred adjudication (e.g. an SOC) to any charge w/ immigration-safe language.** Might avoid being a conviction that triggers deportation (or inadmissibility grounds) under immigration law, **unless** defendant has “admitted sufficient facts to warrant a finding of guilt.” Use “*immigration-safe*” language for pre-plea diversions. Admissions to drug abuse (a separate ground of deportation/inadmissibility) make drug court less appealing, but still usually better than a drug conviction.
4. **Refrain from identification of specific illegal drug.** Amended information that says that defendant possessed only “a controlled substance, to wit: a drug, substance or immediate precursor included in Schedules I-V,” without naming the drug elsewhere in the record (plea or J&S or allocution) will prevent deportation (and possibly inadmissibility) for the conviction.