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Washington Defender Association's Immigration Project

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Negotiating 180-day Sentences for Gross Misdemeanors[1]

Getting a sentence of 180 days or less (including time suspended) may be critical to prevent your noncitizen client from facing bars to lawful status, U.S. citizenship, and/or bars to re-entering the country after traveling abroad. The following are two key scenarios where this can make a difference for your client:

THE 180-DAY "PETTY OFFENSE EXCEPTION"

- Immigration law contains **"grounds of inadmissibility"** that, if triggered will bar noncitizens from lawful admission (or re-entry) into the U.S., preclude them from getting legal status (e.g. a green card), and render them ineligible for U.S. citizenship. One of these grounds is triggered when a noncitizen is convicted of a **"crime involving moral turpitude" (CIMT)**.[2]
- However, there is a "petty offense exception" for a *single* CIMT offense if: **1**. The maximum possible sentence for the crime was not more than one year (all WA misdemeanors); and, **2.** The *actual sentence imposed (including time suspended)*[3] is not more than six months (180 days).
- Since all Washington gross misdemeanors will meet the first requirement, *noncitizens convicted of a single CIMT will fit this exception if the total sentence, including time suspended, is 180 days or less.*

THE GROUND OF INADMISSIBILITY FOR A FIVE-YEAR LIFETIME SENTENCE TOTAL

A non-citizen who has more than one conviction of any kind, and has a lifetime aggregate of sentences to confinement (*including suspended time*) that add up to five years or more, is inadmissible.[4] If this ground is triggered it will be a *per se* bar to eligibility for 10-year cancellation of removal, and can affect legal residents as well.

HOW DOES THIS MATTER TO MY CLIENT'S CASE?

- A conviction for a CIMT offense with a sentence of 364/364 will trigger the CIMT inadmissibility ground.
  - If your client is a **lawful permanent resident** (LPR = green card holder), she will be barred from obtaining U.S. citizenship and, if she departs the U.S., will be barred from re-entering and risks losing her LPR status.
  - If your client is in **refugee or asylee** status, his application for LPR[5] status can be denied. If he departs the U.S., he can be barred from lawfully re-entering and risks losing his refugee/asylee status.
  - If your client is an **undocumented person** she will be barred from getting lawful status through legal avenues such as marriage to a U.S. citizen.
- Assuming your client has no prior CIMT convictions, a sentence of 180 days or less will avoid these consequences.[6]
- If your client *actually serves* 180 days, this will trigger a specific bar to obtaining lawful status or U.S. citizenship.[7]
- If suspended sentences total 5 years, your client may be removable (deportable) and ineligible for a key type of relief.

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[1] 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 on individual cases.
[2] See 8 U.S.C. 1182(a)(2)(A)(ii)(II).
[3] See id.; 8 U.S.C. 1101(a)(48)(B).
[4] See 8 U.S.C. 1182(a)(2)(B).
[5] Persons granted refugee status are entitled to apply for LPR status one year after admission to the U.S.
[6] A single CIMT conviction for a WA gross misdemeanor will not trigger the corresponding CIMT deportation grounds; however multiple CIMTs will trigger the CIMT deportation ground. *See* 8 U.S.C. 1227(a)(2)(A)(i)-(ii).
[7] See 8 U.S.C. 1101(f)(7).

WHAT DEFENDERS NEED TO DO

- **Always Advocate for 180 Day Sentences in All GM Cases:** The "easiest" way to address this issue is to advocate that courts impose 180 day or less sentences in every case. This avoids singling clients out as noncitizens.
- **Conduct an Individualized Assessment of When 180 Day Sentence Is Critical to Your Client:**
  - **Identify whether offense at issue is a CIMT.** Only convictions classified as CIMTs (e.g., patronizing a prostitute or communicating with a minor for immoral purposes) will trigger the CIMT inadmissibility ground. If facing a first conviction for a CIMT offense, a *180 day sentence is critical for all noncitizen clients.*
  - **Two or more CIMTs will trigger the CIMT inadmissibility ground regardless of the sentences imposed.** Whether client has prior CIMT convictions will determine how critical it is to get 180 days in the present case.
  - **See how close client is to inadmissibility for a 5-year (1825 days) sentence total** by adding up prior sentences.
- **File an Appeal of the Sentence Where the Court Refuses to Impose 180 Days.** See WDAIP resources for help.

KEY ARGUMENTS FOR OBTAINING A 180-DAY SENTENCE

- **WA Law Requires Individualized and Proportional Sentencing.** RCW 9A.020.021(2) permits a prosecutor to request, and a court to impose, a period of time between 0 and 364 days for a gross misdemeanor offense. Washington case law mandates that judges exercise *individualized* discretion in sentencing in any case, including in imposing the maximum.[8] To do so, the law also makes clear that a court should have access to a wide range of information about the defendant and must consider all relevant factors during sentencing.[9] The old practice of routinely imposing 364 day sentences in most gross misdemeanor cases (regardless of time suspended) compromises the requirement for individualized determination. It jettisons a meaningful effort to fix a punishment proportionate to the crime. The practice may allow for more expeditious and seemingly "uniform" sentencing, but it does not comport with the law.

  Additionally, imposition of this maximum period is a significant burden on a defendant, even if such period of time is never served. It should be the exception, not the rule. While the majority of misdemeanor defendants never come close to serving the maximum period of time imposed by the court, having a 364 day sentence hanging over them is a significant burden which is not warranted in all, or even most, cases.

- **Immigration Consequences Are Not Collateral and Should Be Considered in Sentencing.** In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the U.S. Supreme Court held that immigration consequences are a severe penalty, not a collateral consequence, that must be considered in the resolution of criminal proceedings. The Court *highlighted that providing "informed consideration" of immigration consequences in the resolution of the criminal proceedings is in the State's interest and specifically sanctioned crafting a sentence to avoid deportation as an acceptable means of ensuring that justice is served.*[10] In *State v. Sandoval*, 171 Wn.2d 163 (2011), the Washington Supreme Court also recognized the severity of immigration consequences and held that effective assistance of counsel requires an affirmative duty to address immigration consequences. In light of *Padilla* and *Sandoval*, the potential immigration consequences to a noncitizen defendant are critically relevant factors for consideration by the court.

- **Sentencing That Factors Immigration Consequences Does Not Violate Equal Protection or the Supremacy Clause.** In *State v. Osman*, 157 Wn.2d 474 (2006), the Washington Supreme Court explicitly held that taking a non-citizen's immigration status into account at sentencing was both necessary and appropriate and does not violate equal protection. Failure to consider immigration consequences in fashioning a defendant's sentence is not a violation of equal protection but rather, an abuse of discretion. Equal protection in misdemeanor sentencing requires that the trial judge endeavor to fashion a just punishment in light of the totality of circumstances of any particular case.

  The U.S. Supreme Court has made clear that where state law does not actually conflict with federal immigration law and where it is an area of law not traditionally occupied by federal law, it does not violate the Constitution and will be respected.[11] Sentencing a defendant for a violation of a state criminal statute is unquestionably within the purview of state law. In *State v. Quintero-Morelos*, 133 Wn.App. 591, 600 (2006), the Court of Appeals affirmed that a Washington court does not violate the Supremacy Clause of either constitution when it considers immigration consequences at sentencing.

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[8] *See, e.g., State v. Harris*, 10 Wn. App. 509, 513, 518 P.2d 237 (1974) (sentencing judge has an "obligation to make the punishment fit the man rather than the crime").

[9] *See, e.g., State v. Russell*, 31 Wn. App. 646, 648, 644 P.2d 704 (1982) (sentencing judge must possess the fullest information possible concerning the defendant's past life and personal characteristics.).

[10] *Padilla*, 130 S.Ct. at 1486.

[11] *De Canas v. Bica*, 424 U.S. 351 (1976).