LIRIAC Newsletter

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This has been an exciting year for New York State legislation. We have seen numerous instances where legislation and the judiciary have made big changes to laws that impact noncitizens. At the LIRIAC we seek to inform you of such changes so that you can implement them into your practice. Please visit our website at http://www.longislandriac.com/.

HOW NEW CHANGES IN CRIMINAL LAW IMPACT YOUR NONCITIZEN CLIENTS

One Day to Protect NYers and Bail Reform

ONE DAY TO PROTECT NYERS

The One Day to Protect NYers legislation went into effect in April and impacts all New York unclassified and A misdemeanors. The law sets forth that the maximum sentence for these misdemeanors in New York is 364 days, rather than 1 year. While only a minute change in the criminal context, for immigration purposes this change is very significant for certain noncitizens facing charges that are considered crimes involving moral turpitude "CIMTs" or aggravated felonies.

First, this new law makes a considerable difference for recent lawful permanent residents "LPRs." This is because there is a ground of deportability for one CIMT conviction with a minimum potential sentence of at least one year committed within 5 years after admission. *See,* INA §237(a)(2)(A)(i). Before this new legislation, any A misdemeanor CIMT would trigger deportability for any LPR holding that status for less than 5 years. Accordingly, defenders were restricted to nonremovable offenses (of which there are few) or B misdemeanor CIMTs. The new law substantially broadens the scope of CIMTs that a recent LPR can take. Note that any two or more CIMTs will trigger deportability.

This law has also impacted noncitizens filing for INA §240A(b) cancellation of removal for non-LPRs or under the Violence Against Women Act, "VAWA." Undocumented noncitizens with a long residence in the U.S. and family hardship, and those who have been battered by a documented spouse or parent may be eligible for these forms of relief. An applicant must demonstrate 10 years (or 3 for those seeking VAWA cancellation) of good moral character "GMC" immediately preceding submission of the application. One CIMT conviction in the statutory period will bar GMC unless it is: (i) the only CIMT conviction, (ii) the sentence imposed was no more than 6 months

MARIJUANA DECRIMINALIZATION

In July 2019 the marijuana decriminalization statutes went into effect changing the penalties for PL §§221.05 and 221.10. The bill expands the criminal activity that is punishable by a violation instead of a misdemeanor and eliminates the possibility of jail time for multiple marijuana possession violations. Unfortunately, the decriminalization did not eliminate the negative immigration consequences of marijuana possession convictions. Marijuana possession convictions are still considered controlled substance offenses "CSOs" that can result in inadmissibility (ineligibility for a green card or re-entry after international travel), as well as deportability, and mandatory detention. Even violations are considered CSO convictions by immigration courts and United States Immigration and Citizenship Services. Please note that the consequences of a conviction for a marijuana violation under the new law vary widely depending on the individual's immigration status and history. Always contact the LIRIAC to advise accurately.

incarceration, and (iii) the offense carries a maximum sentence of *less than* 1 year. As you can see, A misdemeanor CIMTs falling in the statutory GMC period were a bar to this form of relief before the legislation, whereas today noncitizens may be able to apply for this form of relief even if they have an A misdemeanor CIMT.

Lastly, the legislation removes the risk that certain misdemeanor convictions could be considered aggravated felonies. There are several types of aggravated felonies that require a year or more incarceration in order to be determined as such. For example, theft, crimes of violence and obstruction of justice aggravated felonies each require a sentence of one year incarceration or more in order to be aggravated felonies. *See,* INA §101(a)(43). While at first blush it may be counterintuitive that misdemeanors can be deemed aggravated felonies, the Board of Immigration Appeals has broadly defined the term aggravated felony to cover various state misdemeanor convictions. *See, Matter of Crammond,* 23 I&N Dec. (BIA 2001). Since the new legislation, A misdemeanor convictions can no longer be aggravated felonies under certain grounds requiring one year incarceration because the maximum sentence is 364 days.

BAIL REFORM

As you all surely know, earlier this year NY State passed sweeping bail reform essentially eliminating monetary bail and pretrial detention for close to all misdemeanor and nonviolent felony cases. The bill goes into effect in January of 2020. This law will have a critical effect on noncitizens in Long Island.

The new law generally requires nonmonetary conditions, or to release the defendant on their own recognizance "ROR," for all misdemeanors offenses with the exception of domestic violence, criminal contempt or sex-related offenses, or where the defendant has a felony conviction within the preceding 5 years. In such cases bail may be set, however the judge must take into consideration the individual's financial situation, or ability to pay bail, as well as the hardship it will entail.

The same is true for all nonviolent felonies, with the exception of select felonies including witness tampering, sex offenses, felony criminal contempt and terrorism related offenses. Furthermore, judges are permitted to impose electronic monitoring in lieu of bail as an additional incentive to return for court dates.

Finally, with regard to violent felonies, judges may set bail where they deem nonmonetary conditions insufficient, excepting certain burglary and robbery offenses.

Because of financial constraints, payment of bail has always posed a burdensome issue for 18B clients, many of whom are noncitizens. The imminent bail reform has imperative implications for removable noncitizens in arraignment. Noncitizens can be removable for myriad reasons, including falling out of status or entering the U.S. without inspection. Imposition of bail that a removable defendant cannot afford will generally result in eventual Immigration and Customs Enforcement "ICE" detention. Previously, prisoners were held by the Nassau and Suffolk jails up to 48 hours pursuant to ICE detainers for ICE to arrest them, which the 2nd Department explicitly found unlawful in *People ex rel. Wells v. Demarco,* 168 A.D.3d 31 (2018). Currently, the jails notify ICE to immediately arrest a targeted prisoner upon release (on bail or otherwise), rather than allowing them to reenter the community. Therefore, not being RORed from the courthouse leads to removable noncitizens being detained by ICE upon release from jail.

The Office of Court Administration prohibits ICE from making courthouse arrests without a judicial warrant. Thus, a considerable number of targeted noncitizens will no longer be arrested by ICE after contact with the jail because they will RORed directly from the courthouse.

Two DWI convictions within the good moral character "GMC" period now create a rebuttable presumption that a noncitizen cannot demonstrate GMC. Recently, the Attorney General decided *Matter of Castillo-Perez,* 27 I&N Dec. 664 (A.G. 2019), finding that INA §101(f) defining GMC could likely not be established where the applicant had two or more DWI convictions, regardless of the level. While the case involved an application for non-LPR cancellation, GMC is required for various other immigration applications including naturalization, VAWA cancellation, and voluntary departure, so this case may have implications beyond cancellation of removal for non-LPRs. Be sure to advise accordingly.