

***EN BANC* SECOND CIRCUIT NOW REQUIRES CRIMINAL DEFENDERS TO ADVISE ABOUT THE RISKS OF BOTH DENATURALIZATION AND DEPORTATION**

The full Second Circuit recently held that a criminal defense attorney’s failure to advise his naturalized citizen client of the likelihood of denaturalization (losing US citizenship) violated the client’s right to the effective assistance of counsel. Now, defense counsel must investigate a client’s complete immigration history, including asking about the date of naturalization, and provide immigration advice about any likelihood of denaturalization as a result of conviction on the charges. “The Sixth Amendment entitles a naturalized U.S. citizen facing the risk of deportation following denaturalization to no less protection than a noncitizen facing the risk of deportation. A risk of denaturalization cannot be decoupled from a risk of deportation. A naturalized U.S. citizen considering whether to enter a guilty plea has a constitutional right to be advised by counsel that he may lose his citizenship and be banished from the country as a result.” *Farhane v. US*, Slip Op. 20-1666 (*en banc*)(2d. Cir October 31, 2024).

For most state defendants, the risk of denaturalization is low, but it may be increasing. In February 2020, the Department of Justice announced the creation of the Denaturalization Section, “dedicated to investigating and litigating revocation of naturalization.” The number of denaturalization proceedings has increased since the unit was started.

In *Farhane*, the defendant had been convicted of the federal crime of fraud in the naturalization process itself (18 USC § 1425), was denaturalized, and then ordered deported; such crimes are not prosecuted in State courts. Nevertheless, in state court criminal prosecutions, a risk of denaturalization exists where a naturalized citizen is convicted *after* naturalization of criminal activity that occurred or was ongoing *prior* to the defendant’s oath of citizenship.

Careful questioning about the date of naturalization and the earliest possible date of commission of the charged offense will identify any potential risk. Careful records in the case file, and a referral to the Long Island Regional Immigration Assistance Center in appropriate cases will help attorneys fulfill their Sixth Amendment obligations.

DENATURALIZATION

The Immigration and Nationality Act allows very few bases for lifting the citizenship of a naturalized US citizen. Only “clear, convincing, and unequivocal evidence” in a federal civil proceeding or “proof beyond a reasonable doubt” in a criminal case, that the citizen was not qualified for naturalization at the time it was mistakenly granted will permit lifting US citizenship, which then will lead to deportation. The

denaturalization process is governed by the following provisions of law:

- Illegal Procurement, Concealment, or Willful Misrepresentation, INA § 340(a): Revocation in a civil proceeding for “illegally procuring” citizenship or by “concealment of a material fact or by willful misrepresentation.”

- Denaturalization for Convictions for Naturalization Fraud, 18 U.S.C. § 1425: Naturalization may be revoked by conviction for procuring or attempting to procure the naturalization of anyone contrary to the law. (This provision was the basis for the prosecution in *Farhane*).

- Wartime Military Service (INA § 329(c)): Naturalization through wartime military service under § 329(a) may be revoked if the citizen was subsequently discharged under other than honorable conditions within a specified five-year period.

- Failure to Provide Testimony to Congress under INA § 340(a): naturalization may be revoked for refusing to testify before a congressional committee on alleged subversive activities.

DEFENSE COUNSEL *MUST* ADVISE NON-CITIZENS AND NATURALIZED CITIZENS ABOUT THE RISKS OF DEPORTATION TO FULFILL THEIR SIXTH AMENDMENT DUTIES

In *Farhane*, the Second Circuit has reaffirmed the basic holdings of *Strickland v. Washington*, 466 US 668 (1984), and *Padilla v. Kentucky*, 559 US 356 (2010). Together these cases establish that the Sixth Amendment protects the rights of a non-citizen criminal defendant to receive

effective assistance of counsel. These rules oblige defense counsel to provide information about and advice regarding negative immigration consequences that flow from a plea bargain, and how to avoid them.

HOW TO FULFILL YOUR OBLIGATION:

1. Ask all clients: “where were you born?”
2. Begin completing the RIAC intake for all clients born outside of the U.S. or its territories
3. If the client discloses they are a naturalized citizen, ask for the date of the naturalization
4. If the allegations in the current criminal case *predate* the date of naturalization, reach out to the RIAC for an immigration advisal.
5. Naturalized citizens who are not charged with crimes *predating* naturalization cannot be deported for conviction of the current charges, and should be so advised.
6. All non-citizens who have not naturalized may be referred to the RIAC for free consultation to fulfill *Padilla* obligations.

Upcoming Continuing Legal Education Training Schedule:

12/4/2024

Identifying Ineffective Assistance Claims When Representing Non-Citizens in Appeals and Post-Conviction Review

12/11

Confronting Personal Biases When Representing Non-Citizens