RIAC2

CRIMINAL LAW FAMILY LAW

IMMIGRATION LAW

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Noncitizen Defendants Entitled to a Jury Trial if Charged with a Deportable Offense

UPCOMING EVENTS

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The Regional Immigration Assistance Center provides legal support for attorneys who represent indigent noncitizen clients in criminal and family court. Founded in the wake of Padilla v. Kentucky, there are six centers located in New York State. Region 2 covers sixteen counties in the central part of the state.

**RIAC2 is administered by the Criminal Division of the Oneida County Public Defender.*

NY COURT OF APPEALS: NONCITIZEN DEFENDANTS FACING CHARGES THAT WILL RESULT IN DEPORTATION IF CONVICTED ARE ENTITLED TO A JURY TRIAL

We interrupt our "anatomy of an advisal" series to bring you a recent decision from the NYS Court of Appeals. On November 27, 2018, the Court issued a groundbreaking decision in *People v. Suazo*, 2018 Slip Op 08056, holding that a noncitizen defendant who demonstrates that a charged crime carries the potential penalty of deportation is entitled to a jury trial under the Sixth Amendment.

Saylor Suazo had been charged with a number of class A Misdemeanors, and a violation (Assault 3d, Endangering the Welfare of a Child, Criminal Obstruction of Breathing, Unlawful Imprisonment 2d, Menacing 2d and Harassment). The prosecutor moved to amend all of the charges to "attempt" charges making them class B Misdemeanors with a maximum possible sentence of 90 days. Consequently, the offenses precluded a jury trial in NYC under CPL 340.40.

Counsel for the defendant opposed a reduction of the charges, but the Court refused to entertain defendant's argument in opposition to the reduction, and commenced the bench trial. Defense counsel then made a written motion requesting a jury trial, arguing that the consequences of conviction, i.e. deportation, were serious enough to warrant a jury trial under the Sixth Amendment. The People argued that deportation was a collateral consequence arising under federal law that does not constitute a "criminal penalty" under the Sixth Amendment.

The Court denied the motion, and the bench trial proceeded. Defendant was convicted of all charges, making him deportable from the United States. The Appellate Division affirmed, holding that deportation is a collateral consequence of the convictions, and as such, does not trigger the Sixth Amendment guarantee of a jury trial.

Chief Defenders & Assigned Counsel Administrators:

Contact the RIAC2 to schedule a training, lunch hour or other session in your office/county. We will provide CLE credit!

In reversing the Appellate Division, the Court of Appeals held that other penalties, besides the maximum sentence imposed by statute, may be examined to determine whether a charge is serious enough to fall within the Sixth Amendment right to a jury trial. The Court, citing *Padilla v. Kentucky* and *People v. Peque*, reiterated the now familiar concept that deportation is a severe consequence that flows from many, if not most criminal convictions, and this is regardless of whether deportation is a federal civil matter or, as courts have previously held, "collateral". The Court held that the seriousness of deportation clearly places these offenses within the scope of the Sixth Amendment right to a trial by jury.

What are the implications for defense counsel outside NYC, where the defendant IS entitled to a jury trial for a class B misdemeanor? What about violations? Suppose your client is charged with UPM and the client already has a conviction for UPM. As we all know, a noncitizen is deportable if convicted of any controlled substance offense (CSO), and any marijuana charge is a CSO. The only exception is for a SINGLE conviction of 30 grams or less for personal use of marijuana. So, if your client has a prior UPM conviction, he or she will be deportable if convicted of a second UPM charge. As in *Suazo*, by statute, your client is not entitled to a jury trial (see CPL 340.40(1)), but will face deportation if convicted. Though the Court of Appeals ruled only on the New York City exception for B misdemeanors, is there logic and reasoning from the holding that allows defense counsel to argue that *Suazo* should apply in the UPM context, i.e. where the charge is a violation?

Using the *Suazo* reasoning, could a motion for a jury trial (if warranted) for a violation be made in the following situations:

1. DWAI - where the noncitizen faces visa revocation?
2. UPM - in any circumstance because of the lack of verifiable information relating to whether the client has a prior UPM?
3. Harassment 2d - involving a "domestic" relationship, child or violation of an Order of Protection?

Further analysis and discussion will determine whether other violations fall into this category. The Court of Appeals noted that whether the defendant is entitled to a jury trial would be an issue that the local criminal court would have to determine based on the defendant's circumstances and an explanation of the immigration consequences involved, utilizing the resources before it to resolve the issue (e.g. RIAC advisal).

When making a motion for a jury trial, the Court stated "it is the defendant's burden to overcome the presumption that the crime charged is "petty" and establish a Sixth Amendment right to a jury trial." *Suazo (supra)*. Even the lowest level of offense can mean deportation for a defendant in certain circumstances, highlighting the duty of defense counsel to thoroughly investigate the client's immigration status and criminal history and to contact the RIAC at the earliest possible moment in the case.