TEACHING, INTERPRETING AND CHANGING LAW SINCE 1979

WARNING: Immigrant Defendants with a First Minor Drug Offense: "Rehabilitative relief" will no longer eliminate a first conviction for simple possession for immigration purposes, *unless* the conviction occurred before 7/14/11[1]

Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011) (*en banc*)

ONE-PAGE SUMMARY

Holding: A first conviction received after July 14, 2011 for a minor drug offense ***can no longer be eliminated*** for immigration purposes by withdrawal of plea pursuant to "rehabilitative relief" such DEJ, Prop 36, or P.C. § 1203.4. *Lujan-Armendariz,* 222 F.3d 728 (9th Cir. 2000) will not apply.

However, a first conviction from before July 14, 2011 ***still can receive*** the *Lujan* benefit, if it was for simple possession or possession of paraphernalia (but *not* under the influence), and if the person did not violate probation or have a prior pre-plea diversion. The probation/diversion bar should not apply if the person was under 21 when he or she committed the original offense; see Part II.

Immigration Consequences: A first conviction for a minor drug offense will make a noncitizen inadmissible and deportable. A permanent resident can be deported, and an undocumented person can be denied application for lawful status and deported. All will be mandatorily detained.

Strategy for Clients in Custody: If there is no immigration detainer ("hold") on the person, try to get him or her out of criminal custody immediately. If there is a detainer, do *not* get him or her out of criminal custody without advice, because the person may simply be sent to immigration custody.

Defense Strategies Now: ***Informally defer the plea.*** Ask the prosecution to agree to defer the plea hearing so that the defendant can voluntarily meet specified goals, e.g. attend drug counseling, perform community service, and then make an alternate plea or no plea after goals are completed.

- ***Plead to a non-drug offense.*** Loitering, trespass, disturbing the peace, driving under the influence of alcohol, etc. often have no immigration consequences. See Part I below, and see *California Quick Reference Chart* at www.ilrc.org/crimes for other options.
- ***Plead to possession of an unspecified controlled substance.*** Sanitize the record of a plea to H&S §§ 11350 or 11377 so that the plea is to possession of "a controlled substance," not, e.g., "heroin." This only works for straight possession, and not for §§ 11364, 11365, or 11550.
- ***For immigrants, conviction of H&S §§ 11364, 11365, or 11550 is at least as bad as possession***.
- ***Plead to possessing 30 grams of marijuana or the equivalent of hashish, being under the influence of these drugs, or possessing paraphernalia to use only these drugs.*** A first such conviction does not cause deportability, and in some cases there is a waiver of inadmissibility.
- ***It is possible that DEJ with no fine or unconditionally suspended fine is not a conviction.***
- ***To correct a post-July 14th plea,*** quickly withdraw it pursuant to P.C. § 1018 or other vehicle.

DISCUSSION AND DETAILED INSTRUCTIONS

A first conviction received on or after[2] July 14, 2011 for simple possession, possession of paraphernalia, or another minor drug offense can no longer be eliminated for immigration purposes by withdrawal of plea pursuant to "rehabilitative relief" such DEJ, Prop 36, or Calif. P.C. § 1203.4. Qualifying convictions from before July 14, 2011 still can be eliminated by rehabilitative relief, i.e. still come within *Lujan-Armendariz*. See *Nunez-Reyes v. Holder,* 646 F.3d 684 (9th Cir. July 14, 2011) (*en banc*), partially prospectively overruling *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

Part I of this Discussion addresses strategies for pleading to new drug charges. Part II discusses how to evaluate and/or treat drug convictions from before July 14, 2011.

I. How to Represent Immigrant Defendants Currently Facing a First Minor Drug Charge

A. Accurately Warn the Immigrant Defendant About the Immigration Consequences

A first minor drug conviction will make a noncitizen inadmissible and deportable.[3] The few defenses and exceptions are described below. For many immigrants, this first minor offense will have the same devastating immigration effect as a conviction for drug trafficking, robbery or rape.

> **Example:** On July 15, 2011, Simone pleads guilty to possession of a small amount of cocaine. Now she is inadmissible and deportable for a drug conviction. Even if the plea is later withdrawn pursuant to DEJ, Prop 36, or P.C. § 1203.4, the conviction will remain for immigration purposes.
>
> If Simone is a lawful permanent resident (a/k/a "green card" holder or LPR) she can be put in removal proceedings. She will be held in mandatory immigration detention throughout her removal case and any appeals. Depending on her individual circumstances, she *might* be eligible to apply to the immigration judge for a discretionary waiver (pardon) of the deportation. If she can't apply, or if she applies but the judge denies the waiver, she will be deported and can never return, regardless of dependent family or other considerations.
>
> If instead Simone is undocumented but wants to apply to get lawful status, in most cases the conviction will make her ineligible. For example, she will never be able to get lawful status based on a family visa petition, even if she has a U.S. citizen spouse and children.[4]

Possessing paraphernalia, being under the influence, being in a place where drugs are used, or other minor offenses relating to controlled substances have the same severe consequences. In fact, possession has some advantages over the other offenses; see discussion of the "unspecified controlled substance" defense below.

B. Defense Strategies. (See further discussion in *California Quick Reference Chart and Notes*, including *Note: Controlled Substances*, at www.ilrc.org/criminal.php.)

Clients in Custody. If there is no immigration detainer ("hold") on the person, get him or her out of criminal custody immediately. If there is an immigration detainer, do *not* get him or her out of criminal custody without advice, because the person may simply be sent to immigration custody.

Note that an immigrant with lawful status who is not yet deportable for a conviction – i.e., who doesn't have a prior deportable conviction and has not yet pled to the drug charge – should not have a detainer. You should be able to work with jail or immigration authorities to get it lifted.

Alternate Pleas. Given the life-destroying immigration consequences that may flow from this first minor offense, defense counsel may be able to persuade the prosecution to accept an immigration-neutral disposition.[5] The following are suggestions for safer alternatives.

Informally defer the plea. With the client out of custody, ask the prosecution to defer the plea hearing so that the defendant can meet set goals such as community service, drug counseling, etc. In exchange, ask the prosecution to agree to an alternate plea or no plea when the defendant is successful.

Plead to a non-drug offense. Offenses such as loitering, trespass, disturbing the peace, or driving under the influence of alcohol are safer pleas. It is all right to accept drug counseling (with no admission of abuse/addiction) as a condition of probation.

Plead to possession of an unspecified controlled substance. The California definition of controlled substance includes some substances that do not appear on the federal drug schedules, and the federal schedules control for immigration purposes. For Calif. H&S Code §§ 11350 or 11377, if the record of conviction does not specify the controlled substance, the government can't prove it is a deportable or inadmissible drug conviction.[6] Counsel must sanitize the record to refer only to "a controlled substance" rather than, e.g. "heroin." This may require amending the complaint or adding a new Count; creating a sanitized factual basis for the plea; and wording the plea in this manner. See *Note: Record of Conviction* at www.ilrc.org/criminal.php. This defense works for possession, but *not* for possession of paraphernalia,[7] and assume not under the influence or presence where drugs are used.

There is no immigration advantage to pleading to H&S §§ 11364, 11365, 11550, which have the same effect as possession, plus the above defense of sanitizing the record will not work.

Plead to simple possession of 30 grams of marijuana or the equivalent of hashish, or being under the influence of these drugs, or possession of paraphernalia to use only these drugs. While H&S Code § 11357(b) is best, (a) where the plea specifically is to 29 grams or less may also be effective. The conviction will not make a noncitizen deportable.[8] It *will* make the person inadmissible, although some people will be eligible to apply for a discretionary "section 212(h)" waiver of inadmissibility.[9]

It is possible that DEJ with no fine or unconditionally suspended fine is not a conviction. The Ninth Circuit held this in one case,[10] although this may conflict with other rulings. This should be used only if no other option is available and if the client is warned that it is not guaranteed.

If the defendant did plead to first minor drug offense on or after July 14, 2011, quickly withdraw the plea under P.C. § 1018, or any other basis of legal invalidity. See next section.

C. What to Do if a Noncitizen Pled Guilty to a First Minor Drug Charge After July 13, 2011

For any immigration error, if the mistake in pleading is discovered early a (relatively) easy way to correct it is by acting quickly to substitute a different plea under Calif. P.C. § 1018. Pursuant to P.C. § 1018, a court may allow a defendant to withdraw his or her guilty plea "for good cause shown" ***before judgment is entered or within six months[11] after the defendant is placed on probation.*** In California, a "judgment of conviction" is not deemed to have been entered where imposition of sentence is suspended and probation is granted (even though a conviction may exist for purposes of finality and appeal).[12] The § 1018 motion and judgment should state that the basis for the plea change was legal error, which could be that that counsel inadvertently misadvised the defendant about immigration consequences of the plea, before learning of this relatively new change in the law.[13] While there is a strong argument that convictions from the day of July 14, 2011 get *Lujan* relief (see Part II, *infra*), counsel also should attempt to vacate these pleas and re-plead.

If § 1018 relief is not available, the conviction will have to be vacated pursuant to an extraordinary writ such as a petition for a writ of *error coram nobis* or *habeas corpus*. ***As long as the defendant is in custody or on probation or parole for the offense,*** he or she can file a petition for writ of *habeas corpus* based on defense counsel's inadvertent misadvice or failure to advise.[14] If the record of conviction does not show that the judicial warning required by Calif. P.C. § 1016.5 was given, the person can apply in criminal court to vacate the conviction. For further information on all of these forms of post-conviction relief, see Tooby, *California Post-Conviction Relief for Immigrants* (www.nortontooby.com) or see Chapter 11 of Brady, Tooby, Mehr & Junck, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org, 2011).

II. Convictions From Before July 14, 2011

The good news from *Nunez-Reyes* is that it eliminates *Lujan-Armendariz* only prospectively, for convictions after July 14, 2011. (Note that because the opinion, quoted below, does not spell out that convictions *on* July 14, as opposed to before or after, get the *Lujan* benefit, criminal defense counsel should conservatively try to vacate July 14th pleas, while immigration counsel should assert that they qualify for *Lujan.*) In *Nunez-Reyes* the court stated:

> "For those aliens convicted before the publication date of this decision [July 14], Lujan-Armendariz applies. For those aliens convicted after the publication date of this decision, Lujan-Armendariz is overruled."

Nunez-Reyes, 646 F.3d at 694.

Thus the date of conviction will control whether rehabilitative relief will eliminate a first minor drug conviction for immigration purposes, in Ninth Circuit states.

> **Example:** Bella pled guilty to a first offense of simple possession of cocaine in January 2011. If she successfully completes requirements, she can withdraw the plea in July 2012. *Lujan-Armendariz* will apply, because the conviction occurred before July 14, 2011. Therefore withdrawing the plea will get rid of the conviction for immigration purposes. For example, Bella will be able to immigrate through a family visa petition.

> **Example:** In contrast, if Frank pleads guilty to a first offense of possession of cocaine on July 20, 2011, *Lujan-Armendariz* will not apply. A withdrawal of plea or expungement will have no effect. Frank is inadmissible and deportable under the controlled substance ground. (See Part I.C, *supra*, regarding P.C. § 1018 and other options for Frank)

Review: What types of convictions qualify under Lujan-Armendariz?

Lujan-Armendariz held that a ***first*** conviction for simple possession that is eliminated under state rehabilitative provisions also is eliminated for immigration purposes. This also works if the first conviction is for an offense less serious than simple possession that does not have a federal analogue, such as possessing paraphernalia.[15] However, *Nunez-Reyes* held that being ***under the influence of a drug*** is not such a "less serious" offense. Immigration advocates will argue that conviction for giving away a small amount of marijuana for free qualifies for *Lujan-Armendariz* treatment.[16]

The *Lujan-Armendariz* benefit is not available if the criminal court found that the defendant ***violated probation*** before ultimately getting the rehabilitative relief. [17] Despite the fact that it is not a prior conviction, having a ***prior pre-plea diversion*** is also a bar.[18] However ***these penalties should not apply if the defendant was under the age of 21*** when he or she committed the offense for which there was a probation violation, or the offense that was the subject of a pre-plea diversion.[19]

Is the person at risk of deportation in the period before the plea is withdrawn? The Ninth Circuit held that s/he is, in a case involving a *discretionary* expungement statute with no connection to the controlled substance statutes. The result might be different with automatic withdrawal of plea under DEJ, Prop 36, or § 1203.4.[20]

Lujan-Armendariz only has effect in immigration proceedings arising in Ninth Circuit states. If a client is transferred to the Fifth Circuit for his removal hearing, for example, a pre-July 14, 2011 conviction will be treated as a deportable and inadmissible conviction there, even if it was eliminated by rehabilitative relief and would come within *Lujan-Armendariz* in proceedings in the Ninth Circuit.

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[1] This advisory was written by Kathy Brady with contributions from Angie Junck, Norton Tooby and Su Yon Yi. For information on ILRC publications, seminars, or case consultations, go to www.ilrc.org.

[2] *Nunez-Reyes* was published on July 14, 2011. Immigration counsel will argue that it bars *Lujan-Armendariz* relief to convictions starting on July 15, not July 14, but criminal defense counsel should act conservatively and try to vacate July 14th pleas. See Part C, *infra.*

[3] See 8 USC §§ 1227(a)(2)(B), 1182(a)(2)(A)(i)(II) (deportability and inadmissibility grounds based on conviction of an offense relating to a controlled substance).

[4] The conviction is a bar to relief such as family or employment immigration, Temporary Protected Status, non-LPR cancellation, and VAWA protection for abused family members. It is a bar to LPR cancellation if the conviction occurs within seven years after admission in any status. The conviction is not otherwise a bar to LPR cancellation, and is not an absolute bar to asylum, or a T or U visa. For discussion of these and other forms of Relief see *Note: Overview* in the *California Chart and Notes* at www.ilrc.org/crimes, or Chapter 11, Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit* (www.ilrc.org, 2011).

[5] Recently the Supreme Court stated that prosecutors should consider immigration factors in negotiating a plea, which "can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1486 (2010).

[6] *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007) (Calif. H&S Code § 11379); *Esquivel-Garcia v. Holder*, 594 F.3d 1025 (2010) (H&S Code § 11350); see also *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965) (prior California law).

[7] *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009); *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009).
[8] See 8 USC § 1227(a)(2)(B) (deportation ground and automatic exception for simple possession of 30 grams or less marijuana). For a discussion of the waivability of under the influence, hashish, and paraphernalia, as well the § 212(h) waiver of inadmissibility, see Brady, "Defense Update on § 212(h)" at www.ilrc.org/crimes. Because § 11357(b) is an infraction, advocates will argue that it is not a "conviction." See "Practice Advisory: § 11357(b)" at same site.
[9] See 8 USC § 1182(h) (section 212(h) waiver of inadmissibility) and "Defense Update on § 212(h)," *supra*.
[10] *Retuta v. Holder,* 591 F.3d 1181 (9th Cir. 2010).
[11] *People v. Miranda* (2004) 123 Cal.App.4th 1124, 20 Cal.Rptr.3d 610. It may be possible to argue successfully that such a motion can be filed after the six-month limit on the same grounds used to file late notices of appeal.
[12] *People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796, 114 Cal.Rptr. 596. Thanks to Norton Tooby for this discussion.
[13] Without legal error, immigration authorities might not accept the substitution. Regarding error, see, *e.g., Padilla v. Kentucky, supra,* and *In re Resendiz* (2001) 25 Cal.4th 230. While these cases discuss requirements for a writ of *habeas corpus* rather than § 1018, they establish that failure to competently advise on immigration consequences is legal error.
[14] See *Padilla* and *Resendiz, supra*, and see *People v. Villa* (2009) 45 Cal. 4th 1063 (criminal custody, not immigration custody, is required for writ of habeas corpus).
[15] *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000), *Ramirez-Altamirano v. Mukasey,* 554 F.3d 786 (9th Cir. 2009) (Calif. H&S C § 11364(a).
[16] See 21 USC § 841(b)(4) and discussion in *Defending Immigrants in the Ninth Circuit*, § 3.6 (www.ilrc.org, 2011)
[17] See, e.g., *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009) (expungement under P.C. § 1203.4 has no immigration effect where criminal court found two probation violations before ultimately granting the expungement).
[18] *Melendez v. Gonzales*, 503 F.3d 1019, 1026-27 (9th Cir. 2007).
[19] The reasons are as follows. Eligibility for *Lujan-Armendariz* relief is based on an Equal Protection requirement (which *Nunez-Reyes* withdrew from, but only prospectively) that a noncitizen in state proceedings should receive the same benefit that would have been available had the case been held in federal court. In federal proceedings, the FFOA at 18 USC § 3607(a) provides that an expungement of a first simple possession plea eliminates the *conviction* for all legal purposes. Section 3607(a) also provides that a violation of probation will bar this relief. Section 3607(a) has been the subject of all opinions interpreting *Lujan-Armendariz*. Another FFOA section, § 3607(c), provides more generous relief to persons who committed the offense while under age 21. Arguably this has at least two effects. First, unlike § 3607(a), § 3607(c) contains no bar to relief based upon a probation violation. Therefore, *Estrada* should not be held to preclude the *Lujan* benefit based on a probation violation, as long as the person was under age 21 at the time of committing the drug offense at issue. Second, § 3607(c) does not merely eliminate the conviction, it relieves the person of any penalties whatsoever based on official notice of the event, providing "The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings." Therefore, if the person was under 21 when he or she was involved in an incident that resulted in a pre-plea diversion, arguably that diversion – as a relief analogous to § 3607(c) -- cannot serve as a bar to obtaining *Lujan* benefit for a later conviction. For example, if A completes a pre-plea diversion at age 20, pleads guilty to a charge of simple possession at age 30 (and before July 15, 2011), completes probation with no violation, and withdraws the plea, the conviction should be eliminated under *Lujan-Armendariz*. (A must avoid a probation violation pursuant to *Estrada,* because he committed the offense at issue while over the age of 21.) In contrast, if the event that led to the pre-plea diversion had occurred after the person became 21, the diversion would be a bar under *Melendez*. Note that *Melendez* cited another Ninth Circuit case, *Paredes-Urresterazu,* for the proposition that a disposition analogous to § 3607(a), while not a conviction, still may have some adverse immigration effect (in *Paredes-Urresterazu* it was to serve as a negative factor in discretion). *See Melendez,* 503 F.3d at 1026, citing *Paredes-Urresterazu v. United States INS*, 36 F.3d 801, 810-11 (9th Cir. 1994). However, *Paredes-Urresterazu* itself emphasizes that § 3607(a) and (c) must be treated differently, and opined that no penalty – not even a negative discretionary finding -- would be justified based upon a disposition analogous to § 3607(c). Counsel arguing this should see the discussion at *id.* at 812-813.
[20] *Chavez-Perez v. Ashcroft*, 386 F.3d 1284 (9th Cir. 2004) See discussion of California statutes in *Defending Immigrants in the Ninth Circuit*, § 3.6(H).