IN OREGON, FOR IMMIGRANT DEFENDANTS, THE TIME FOR POST-CONVICTION RELIEF IS NOW!

The time to proceed with a PCR (Post Conviction Relief Petition) is now in Oregon because the Vega-Gonzalez v. State case has opened the door to substantive and procedural justice. This door, under current appellate law, may close in two years from the date of the immigrant-defendant's conviction. However, a Multnomah County Circuit Judge, Linda L. Bergman, has allowed a petitioner to file a PCR twenty months after the two year statute of limitations (SOL) expired. In her decision she writes:

> Petitioner argues that the case falls under the exception of ORS 138.510(2) in that the petitioner could not have raised this issue in a timely petition.
>
> When Petitioner appeared, he was a legal permanent resident (he was born in Vietnam). The plea petition advised him that "my plea may result in deportation from the USA, or denial of naturalization or exclusion from future admission to the United States." The court taking the plea did not discuss any immigration consequences. The "may" language has been held insufficient in the recent opinion, Gonzalez v. State of Oregon, 191 Or App 587 (January 28, 2004). Clearly the immigration consequences of guilty pleas is largely an unknown to most lawyers and judges in state courts. It's an area of retroactive laws and evolving definitions. The fact that Mr. Huynh didn't discover the negative consequences of his plea until the Office of Homeland Security began proceedings against him should come as no surprise. The facts are sufficient to allow a filing beyond the statute of limitations.

If the Oregon appellate courts follow this ruling then one can anticipate the two year statute of limitations will run from the January 28, 2004 date of the Vega-Gonzales v. State opinion. CF. State of Washington v. Littlefair 112 Wash. App 749, 51 P.3d 116 (2002) which held one year state of limitations to bring a collateral attack, including a motion to withdraw a guilty plea, was equitably tolled from date of plea until the defendant first discovered deportation was a possible consequence, and defendant was

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entitled to withdraw plea based on violation of his statutory right to be informed of possible deportation consequences of the plea.

CF. Hills v. Lockart 474 U.S. 52, 59, 106 S.Ct 366, 370, 88 L.Ed.2nd 303 (1985) held that where a defendant would not have entered into a plea agreement, but would have insisted on going to trial had he received effective assistance of counsel; the plea must be set aside and the conviction vacated.

The PCR remedy under current Oregon law allows the defendant to proceed with a PCR case within two years from the date of the final judgment. Benitez-Chacon v. State of Oregon, 178 Or. App. 352 (2001). Benitez-Chacon had also been granted PCR by the Circuit Trial Court, but under the circumstances of her case (Vega-Gonzalez had not yet been decided) the Court of Appeals did not allow her to file her PCR claim after the two year SOL from the date of her conviction had expired.

On January 28, 2004, the Oregon Court of Appeals decided Vega-Gonzalez v. State of Oregon, 191 Or. App. 587 (2004). In that case, the immigrant-defendant pled to drug charges and had been advised that his guilty plea might cause deportation. He had learned afterwards that "deportation was not really a possibility, but it was a certainty for him if the INS began deportation proceedings against him as a result of his guilty plea" at 590. The Oregon Court of Appeals states at p. 593:

> Given the dramatic changes in immigration deportation law since *Lyons*, the state's argument falls short. Indeed, stating that a person "may" be subject to deportation implies that there is some chance, potentially a good chance, that the person will not be deported. That is an incomplete and therefore inaccurate statement if made to an alien considering whether to plead guilty to an aggravated felony.
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> Because the current immigration scheme all but requires that aliens convicted of aggravated felonies be deported, we conclude that petitioner's trial counsel was obligated to tell petitioner that he was pleading to an

> aggravated felony and that, unless the United States Attorney General or his designee chose not to pursue deportation proceedings against petitioner, he would be deported as a result of his guilty plea. Counsel's failure to give petitioner that information before petitioner pleaded guilty constituted a failure to provide petitioner with constitutionally adequate legal assistance under Article I, section 12, of the Oregon Constitution.

The Court found that the immigrant defendant would not have entered into the plea agreement if he had known of the immigration consequences of his conviction and affirmed the reversal of defendant's conviction. The trial court had held that the representation of the defendant was inadequate. During the oral argument before the Court of Appeals, Judge Armstrong stated in colloquy with the attorney representing the State of Oregon, who argued that the advice to the alien that he "could be deported" was effective assistance of counsel, was adequate advice, that :

> But when you say 'could be correct,' it was correct in that he could be- but there are all sorts of issues of representation and misrepresentation that arise where what you say is true, up to a point. I mean, 'the house could have termites-' [when] you know it has termites- but when you say it 'could' have termites, well that's an absolutely true statement; but, it's also untrue in that you know it has termites.

The State of Oregon is likely to request an en banc review of this case before the Oregon Court of Appeals and/or request a hearing before the Oregon Supreme Court. The court(s) may or may not allow this request. If the court issues a further written decision on this case it will be available at the State of Oregon Judiciary website, www.publications.ojd.state.or.us.

If you or someone you know has been deported based upon inaccurate immigration advice, such as the advice described in the Vega-Gonzalez v. State case, it is strongly recommended that you consider filing for post-conviction relief immediately. The Vega-Gonzalez case is available in its entirety at the State of Oregon Courts website.

If an immigrant-defendant has already been deported from the United States, it is extremely likely that the immigrant-defendant can be returned to the United States and his legal permanent status reinstated because his deportation is based upon an unconstitutionally obtained conviction. Weidersperg v. INS, 896 F.2d 117 (9th Cir. 1990) so held by the Ninth Circuit. The Ninth Circuit is comprised of California, Oregon, Washington, Arizona, Montana, Idaho, Nevada, Alaska, Hawaii, Guam and the North Mariana Islands. I am unaware how other circuits treat this particular problem.

The result of a PCR (post-conviction relief) win is that the conviction is vacated and the prosecution begins anew. At that point, the immigrant defendant can choose to go to jury trial and/or attempt to negotiate a non-deportable offense or to negotiate to a plea to a charge that allows a deportation hearing before an Immigration Judge at which the potential exists for the immigrant defendant to remain in the United States despite a deportable, but not an aggravated felony conviction. Plea bargaining needs to be guided by knowledge of the immigration consequences of convictions and plea agreements must be conducted with knowledge of those consequences at the time the plea agreement is entered into by the immigrant defendant.

The Oregon Courts may consider fixing its arguably obsolete plea petition as this type of litigation continues. This plea petition still mistakenly tells immigrant-defendants that they may be deported, even though many of these immigrant-defendants must be deported if they suffer an aggravated felony conviction. Potentially no deportation would occur if the immigrant defendant is eligible for CAT relief (Convention Against Torture), and/or withholding of removal. Most of my clients, are Mexican Nationals, most of whom have no asylum based, CAT, or withholding claims to make.

In "Guilty Pleas By Non-Citizens in Illinois: Immigration Consequences Reconsidered", (DePaul Law Review, Fall 2003) Attila Bogdan writes that the Illinois legislature had adopted Public Law at 93-0373 requiring the Illinois State Court Judges to advise all defendants that if they are not U.S. citizens their convictions upon a plea of guilty, guilty but mentally ill, or nolo contendere to a misdemeanor or a felony may result in severe immigration consequences for the non-citizen defendant. The effective date of this advisal statute was January 1, 2004.

As of the time this law review article was written, twenty-one states in the United States (including Illinois) require that the trial judge advise defendants that immigration consequences may result from accepting a plea agreement as follows:

> California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Maryland, Massachusetts, Minnesota, Montana, Maine, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, Texas, Washington and Wisconsin. See e.g. Cal. Penal Code § 1016.5,; Conn. Gen. Stat. 54-1j (2001); D.C. Code Ann. § 16-713; Florida R.C.P. 3.172(c)(8)(viii), In re Amendments to Florida Rules, 532 So. 2d 992 (Fla. 1988); Ga. Code Ann. §17-7-93 (1997); Haw. Rev. Stat. §802E-2; MD. Rule 4-242 (2001); Mass. Gen. L. ch. 278 § 29D; Minn. Rule Crim. Pro. 15.01 (2000); Mont. Code Ann. §46-12-1210 (1997); New Mexico RA Rule 5-303(E)(5) and form 9-406; N.Y. Crim. Proc. Law § 200.50(7); N.C. Gen. Stat. §15A-1022(7); Ohio Rev. Code. Ann. §2943.031; R.I. Gen. Laws §12-12-22 (2000); Tex. Code. Crim. Proc. Ann., art. 26.13(a)(4); Wash. Rev. Code §10.40.200 (1990); Wis. Stat. §971.08(1)(c);

This is not necessarily an exhaustive list of states with a "could be" or "may be" deported "obsolete" advisal.

These states and their attorney's (i.e. the Assistant Attorney General in these states) would argue that the judge has no duty to advise the immigrant defendant accurately of the "collateral consequences of this conviction", i.e. that this is the defense counsel's obligation, not the judges. But see Effective Assistance of Counsel and the Consequences of Guilty Pleas by Chin, Holmes, 87 Cornell L. Rev. 697 (2002) arguing

persuasively that the immigration consequences are direct, not collateral, consequences of a criminal conviction. If mandatory deportation forever is a direct consequence of the criminal conviction, then it is appropriate for the judge to advise of direct consequences of that conviction. CF. U.S. v. Littlejohn, 224 F.3d 960, 966-67 (9th Cir. 2000) where the court held that denial of social welfare benefits as a result of conviction was a direct consequence because it was "automatic." Such advice by the court is necessary to ensure that a guilty plea is knowing, voluntary and intelligent. North Carolina v. Alford 400 US 25, 37 (1970); Boykin v. Alabama 395 US 238 (1969); Brady v. US 397 US 742, 755 (1970).

The appellate court in its In Re Resendiz opinion 71 Cal.App.4th 145, 83 Cal.RPTR.2d 721, 99 Cal. Daily Op. Serv.2555 ((Cal.App.Dist.4 04/06/1999) stated:

> Although we do not resolve this case on the obsolete use of the subjunctive and conditional tenses in the written and oral admonishments petitioner received in the Superior Court, there seems little doubt that future cases will be so affected if the changes in federal law are not reflected in the warnings give in the trial courts. (See., e.g., Decker v. Department of Motor Vehicles (1972) 6 Cal. 3d 903 {Particularly FN2 at p. 906}. We also suggest, in light of the change in federal law, that the legislature reconsider the following language from the Penal Code Section 1016.5, Subdivision (A): "If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

The Second Circuit has recognized in dicta that "because deportation is now virtually certain for aliens convicted of aggravated felonies, the court was required under Fed.R.Crim.P. §11©(1) to inform the defendant of those deportation consequences before accepting" a plea. U.S. v. Cuoto, 311 F.3d 179,181 (2nd 2002). The court stated that this was a persuasive argument, but did not rule on it directly, and reversed the conviction,

holding that counsel was ineffective in affirmatively misrepresenting to the defendant the deportation consequences of a guilty plea. The Second Circuit in Couto discusses the inadequacy of the Amador-Leal (see United States v. Amador-Leal 276 F3d 511 (9th Cir. 2002) in which the Ninth Circuit held that deportation is a "collateral" consequence of a conviction in spite of immigration laws that make it virtually certain that an aggravated felon will be removed) holding, which failed to take into account the 1996 and 1997 Amendments to the INA, which made eternal deportation a virtually certain consequence for an alien convicted of an aggravated felony. Couto recognizes that the automatic nature of the deportation consequence is direct, and hardly describable as collateral. Couto at 188-190.

Also see Crawford v. Washington, decided March 8, 2004 WL 413301 (U.S. Supreme Court), opens the door to potentially avoid deportation by increasing the incentive for bringing a post-conviction case. If the immigrant-defendant succeeds on a State post-conviction case; the State will probably have a more difficult time prosecuting many criminal cases because of the strengthening of the confrontation clause rule by the Crawford decision.

Also in US v. Wang, decided December 29, 2003, WL 23095954 (9th Cir.(Cal.)) the Ninth Circuit held, in an unpublished opinion, that failure of defense counsel to inform defendant, a legal permanent resident, of immediate immigration consequences of her guilty plea to submitting false documents to United States Customs Service was ineffective assistance of counsel warranting habeas corpus relief . Therefore, if there is otherwise jurisdiction for such a filing, the Ninth Circuit is another court system within

which PCR cases can be brought successfully under the law in place at this time, which is codified at 18 U.S.C. §2254, 2255.

The US Supreme Court in INS v. St. Cyr, 533 US 289, 121 S. Ct. 2271 150 L. Ed 2d 347, 375-376 (2001), stated that immigration consequences are an important factor for a criminal defendant to be aware of at the time of entering plea agreements:

> There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. See *Magana-Pizano v. INS*, 200 F.3d 603, 612 (CA9 1999) ("That an alien charged with a crime...would factor the immigration consequences of a conviction in deciding to plead or proceed to trial is well-documented."): see also 3 Bender, Criminal Defense Techniques §§60A.01, 60A.02[2] (1999) (Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.)

The Supreme Court of the State of Oregon has long recognized the duty of defense counsel to be aware of immigration procedures, defenses to deportation, and recognized the duty of defense counsel to avoid potential deportation in the Lyons case by obtaining a judicial recommendation against deportation[1] (if available) in the course of plea negotiations if at all possible. Lyons v. Pearce, 250 Or at 564, 565 states:

> A deported alien may be required to sever family ties, become impoverished and return to a society in which he no longer can function and may, indeed, face life-threatening conditions. It portends drastic consequences in many cases. It is in all cases "a life sentence of banishment," Jordan v. DeGeorge, 341 US 223, 232, 71 S Ct 703, 95 L Ed 886 (1951) (Jackson, J., dissenting). This necessarily places a great responsibility on those attorneys who represent persons who may be subject to deportation. Given the potentially drastic consequences, the "factors considered important" of which defense counsel, by statute, "shall advise the defendant certainly encompasses the possibility of deportation..."

[1] Judicial recommendations against deportations were eliminated from the INA on November 27, 1990. Kurzban's Immigration Law Sourcebook, 6th edition, pp.130, published by the American Immigration Law foundation, copyright-1998.

A plea of guilty is voluntary only if it is entered by one fully aware of the direct consequences of his plea, Torrey v. Estelle, 842 F.2d 234, 235 (9th Cir. 1988).

U.S. v. Singh, decided February 24, 2004 WL 3833310 (U.S. District Court, District of Columbia), where the AUSA (Assistant United States Attorney) misunderstood the immigration consequences of an aggravated felony conviction. The AUSA misled the defendant into believing that there was a mere possibility of deportation, where there was an absolute certainty of deportation after the legal permanent resident pled guilty to fraud. The conviction was set aside.

> [W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. Santobello v. New York, 404 U.S. 257, 262 (1971). A plea agreement is a contract; the government is held to the literal terms of the agreement. See Johnson, 187 F. 3d at 1134 (citing United States v. Baker, 25 F. 3d 1452, 1458 (9th Cir. 1994)).

CF. U.S. v. Johnson 187 F. 3d 1129 (9th Cir. 1999), which held that a plea agreement was violated and defendant was remanded for re-sentencing in front of a different judge where after a prosecutor promised to recommend the low end of the guideline range at sentencing, the prosecutor presented other bad act evidence unrelated to the conviction for which the defendant was being sentenced. Afterwards, the district court sentenced the defendant to the high end of the guideline range. The Johnson court said that the purpose of introducing the evidence to the District Court was to influence the District Court to sentence Johnson more harshly; thereby breaching the government's agreement to recommend the low end of the sentencing range. The harmless error rule does not apply to the law of contractual plea agreement U.S. v. Myers 32 F.3d 411, 413 (9th Cir. 1994).

Also, through the "*coram nobis*" vehicle, an immigrant-defendant in the federal criminal justice system may be able to bring an action to vacate an unlawfully obtained federal criminal conviction under unusual and specific circumstances.

The four conditions required to qualify for *coram nobis* relief are set out in United States v. McClelland, 941 F.2d 999, 1002 (9th Cir. 1991). These four factors are discussed herein:

I) A more usual remedy is not available

II) Valid reasons exist for not attacking conviction earlier

III) Adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III

IV) The error is of the most fundamental character

In United States v. McClelland, 941 F.2d 999, 1002 (9th Cir. 1991), the Ninth Circuit held that a fundamental error had occurred because the government had been able to convict the defendant without proving that the defendant was guilty beyond a reasonable doubt of an essential element of the crime charged, see footnote 3 in McClelland, also see In Re Winship, 397 U.S. 358, 364, 25 Led 2.d 368, 90 SCt 1068 (1970), which held that the due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged, Accord Henessey v. Goldsmith, 929 F.2d 511, 514 (9th Cir. 1991).

Conclusion

Justice wishes to welcome you to the banquet, but there will be no feast if you do not do what you can to struggle to victory, i.e. file that Post-Conviction Relief Petition

immediately if you were misadvised about the immigration consequences of your conviction and want to win back your right to jury trial and effective assistance of counsel.

I discussed the potential for this result in an ILW article dated 12/18/2000 entitled "Post Conviction Relief in the Defense of Immigrants: Immigration Law from a Criminal Defense Lawyer's Perspective: Is Post Conviction Relief Impossible or Is It a No Brainer." This article is available at www.ILW.com (the Immigration Portal) at the advanced search page (search under "Conry") and/or at Mr. Conry's website, www.defendlife.net. Mr. Conry may open an additional, to some extent a mirror website, at the domain name www.wrongfullydeported.com.

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Caveat: Transmission of this information is not intended to create any attorney-client relationship. It is general information only, and one's specific circumstances' as an immigrant defendant require direct consultation with an immigration attorney to fully evaluate their immigration status and options, and it is obvious that the law in this area is still evolving.