

Garden State CLE Presents:

DWI and Its
Immigration Consequences



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Lesson Plan

Introduction Historic Overview

It is only in recent years that the New Jersey judiciary has recognized immigration issues as a significant collateral consequence of a conviction.

The initial review of this issue occurred in State vs. Heitzman, 107 N.J. 603, 604(1987) where the Court adopted the Appellate Division's ruling in the case to the effect that:

“[a] defendant need be informed only of the penal consequences of his plea and not the collateral consequences, such as loss of public or private employment, effect on immigration status, voting rights, possible auto license suspension, possible dishonorable discharge from the military, or anything else.”

Of particular significance was that the lone dissent in this case was written by the Chief Justice. To the Chief Justice, his advocacy for advising defendants about collateral consequences of a conviction, especially, removal from the United States was a matter of fundamental fairness.

The Chief's view was subsequently adopted by the Court in State vs. Bellamy, 178 N.J. 127, 138-39(2003) to the effect:

“[i]t matters little if the consequences are called indirect or collateral when in fact their impact is devastating. Whether a court should be required to advise defendant of certain consequences of a guilty plea should not depend on ill-defined and irrelevant characterizations of those consequences”[.]

As a result of the foregoing, the judiciary began allowing post-conviction relief to defendants who had entered guilty pleas without knowledge of the associated immigration consequences. By way of

example, in State vs. Nunez-Valdez, 200 N.J. 129, 131(2009), the New Jersey Supreme Court held that defense counsel, in failing to inform the defendant that under federal law his conviction would mandate deportation, did not provide effective assistance to the defendant.

Note that this decision correctly anticipated the United States Supreme Court ruling the following year in Padilla vs. Kentucky, 559 U.S. 356(2010), where the United States Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a non-citizen defendant regarding the immigration consequences of a guilty plea. Failure to do so can constitute ineffective assistance of counsel.

In 2011, the New Jersey Supreme Court addressed this constitutional requirement in Superior Court criminal cases with Directive 05-11 and in municipal court by way of Directive 09-11, the latter of which mandated that municipal court judges (1) inform defendants that a guilty plea or a finding of guilt as to certain offenses may result in negative immigration consequences and (2) inform defendants that they have a right to seek advice from an (immigration) attorney regarding those potential consequences. More specifically:

A municipal court judge shall inform defendants of possible immigration consequences and of their right to seek counsel on these matters at three stages of the court process: (A) as part of the court's opening statement for each court session; (B) at defendant's first appearance; and (C) as part of the guilty plea colloquy.

Based upon the existing case law, the failure of a judge to do so may result in the granting of post-conviction relief under Rule 7:10-2.

See Directive 09-11 – Informing Municipal Court Defendants of the Immigration Consequences of Guilty Pleas.

See also State vs. Gaitan, 209 N.J. 339(2012) (PCR challenging the accuracy of immigration consequences question on Superior Court plea form).

Part I

The Hand You Are Dealt

a) First steps - The starting point is to accurately ascertain your client's immigration status, the precise charges he currently faces and if he has any prior convictions for DWI or refusal in any jurisdiction.

Once you have obtained these data, the key to successful advocacy for your client will be to determine what reasonably obtainable outcome will best meet his immigration, driving, work and family needs.

b) USC - Immigration considerations will not be a factor in cases involving United States Citizens (USC). These include:

1) "Bruce Springsteen": People born in the U.S.A. This is also referred to as "acquisition citizenship" or birthright citizenship.

2) Citizenship can also be obtained by way of the lawful naturalization process.

3) Proof - Citizenship can be proved by birth certificate, U.S. passport or passport card.

4) Birthright citizenship for those people born in the USA to parents who are unlawfully in the country on or after February 19, 2025, being challenged based upon the President's Executive Order 14160.

5) Derivative citizenship – Lawful resident child automatically becomes a USC when his parent with whom he resides obtains citizenship through naturalization process. See Child Citizenship Act of 2000. [See 8 U.S.C.A. 1432-1433.]

c) Non-citizens - The defendants with whom we are concerned are not citizens of the United States, meaning that that they were neither born here nor have been naturalized nor acquired derivative citizenship.

These defendants have been charged with violations of N.J.S.A. 39:4-50(a) (DWI), N.J.S.A. 39:4-50.4a (Refusal) and any number of companion disorderly persons' offenses.

d) Unlawful status - The defendant's presence in the United States may be unlawful. Unlawful in this sense includes entered without inspection (EWI), expired visa, missed hearing date, under order of removal, paroled in previous administration, entered by way of fraud and several others.

e) Lawful status may involve the following categories of people:

1) LPR - Green card (lawful permanent resident status) through family, employment, diversity visa lottery, etc.) The Green Card may be for either 2 or 10 years.

2) Refugee or Asylum Status - Individuals fleeing persecution in their home country may be eligible for refugee or asylum status, which can lead to a green card. This status is based upon a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group, or political opinion.

3) TPS - Certain humanitarian programs, such as Temporary Protected Status (TPS), may allow individuals to remain in the United States legally. (Also discuss parole status.)

4) DACA – Deferred Action for Childhood Arrivals

5) Tourist Visas - People can enter the U.S. for tourism purposes on a non-immigrant visa.

6) Student Visas- Foreign students can come to the U.S. to study at a U.S. educational institution. (F Visa or on OPT (1 year))

7) Work Visas - Certain types of work visas allow foreign workers to come to the U.S. to work in specific fields. (H1B, H2B, E, L.)

8) Temporary Visas - There are other non-immigrant visas for various purposes, such as attending conferences, visiting family, or engaging in religious activities. E.g. exchange visitor (J Visa) or Athletes/Performers (O. P. Visas).

Part II

The Entry and Removal Process

a) Certain criminal convictions render the immigrant inadmissible for entry into the USA. For DWI, the status as a “Habitual Drunkard” qualifies as an inadmissible provision.

b) Certain crimes also support an automatic justification for removal. In addition, crimes that call into question the moral character of the immigrant can also support an order for removal.

c) Deportation is triggered by an “Order of Removal” – Reentry after removal is a federal criminal offense.

d) Bail may be granted pending proceedings, except that certain arrests and convictions render the immigrant ineligible for bail. The most recent example of this is included in the Laken Riley Act.

Part III

Impact of a Drunk-Driving Ticket on Those With LAWFUL Status

a) LPR First offender - For a lawful permanent resident, a single DWI conviction is not fatal and usually will not result in a removal action. However:

A DWI from another state can support a removal action as a criminal offense if it had aggravating factors. By way of example, a DWI ticket with knowledge of a revoked license under N.J.S.A. 39:3-40(f)(2). This leaves open the possibility that a DWI coupled with N.J.S.A. 39:3-40 wherein the immigrant knew about the suspension status might support a removal.

b) LPR Second and subsequent offenses – Two DWI convictions by an LPR establishes a presumption of bad character for the relevant period.

For citizenship applications, multiple convictions may also support a rebuttable presumption that the applicant lacks good moral character (GMC) which is generally required for the preceding five years. See In re Castillo-Perez, 27 I&N Dec. 664(A.G.2019). Without significant rehabilitation proofs, the applicant will not be eligible for citizenship.

Finally, an LPR who leaves the United States following a second DWI conviction may be subject to an investigation related to “alcohol issues” when attempting to return.

c) Non-immigrant visa holder – This status is generally defined as someone who is permitted to enter the United States for a temporary period, for a specific purpose (like tourism, business, study, or temporary work), and with the intention of returning to his home country.

d) A DWI arrest in the previous 5 years (pre-conviction) can support automatic visa revocation. The revocation is triggered upon travel outside the United States. As long as the immigrant remains within the US, there is no penalty. The I-94 entry paper controls legal status while in the US, not the visa. Upon travel abroad, he must participate in an interview at the US Embassy related to the DWI. A finding of fraud will be fatal to visa eligibility.

e) A finding of alcoholism by a doctor will be fatal to a visa renewal. If there is no danger, the examining doctor will recommend visa re-issuance.

f) A non-immigrant applying for LPR status must disclose DWI arrests and convictions to the embassy or face inadmissibility based upon fraud, misrepresentation or alcoholism.

g) DACA – A DWI conviction will result in a denial of the subject’s next DACA renewal. As a result, reckless is a much better outcome than DWI for the DACA defendant.

h) A pure refusal can be asserted as evidence of lack of GMC, alcoholism and disrespect for the rule of law. A plea to the DWI may be a better option for someone who is lawfully in the USA.

Part IV

Impact of a Drunk-Driving Ticket on Those **With UNLAWFUL Status**

a) Unlawfully in the United States – Immigration and Customs Enforcement (ICE) aggressively monitors court calendars to detect defendants who are not lawfully in the United States. Of late, there are numerous instances of such defendants being apprehended in the parking lots of municipal courts and in the hallways of the Superior Court.

Part V

Drunk-Driving Arrests and Convictions

a) Companion disorderly persons' offenses - As a general rule, any plea agreement in municipal court for a person who is LAWFULLY present in the USA should include a dismissal of any companion disorderly persons' offenses.

b) DWI First offense - DWI by itself is NOT a deportable offense *per se*, but for an alien who is NOT LAWFULLY in the United States, ICE can detain him based upon his unlawful status.

If the alien has been detained by ICE prior to the DWI disposition, obtaining an immigration bond will be highly unlikely due to the presumed issues of flight and danger to the community. The DWI case may never be concluded in municipal court. [See State vs. Reyes-Rodriguez, 480 N.J.Super 526(App.Div.2025) holding that a Superior Court criminal defendant who has been removed from the United States may waive his right to personally appear and try his case virtually.]

An unlawful immigrant who has been detained based upon a DWI conviction also has a negligible chance at the issuance of a bond for the same reasons, with the additional strike of lack of GMC.

c) Second and subsequent DWI convictions – These convictions constitute a virtual absolute bar to demonstrating GMC. No bond will be available based upon danger to the community.

d) DWI and refusal – Which is better?

For advocacy purposes, one DWI and an unrelated refusal (different date) are better than two DWI convictions.

Reckless driving – This option is better than DWI, even with a license suspension.