Post-Conviction Relief in the Defense of I..migrants

BY BRIAN CONRY

Immigration Law from a Criminal Defense Lawyer's Perspective: Is Post-Conviction Relief Impossible—Or a No Brainer?

Persons facing deportation or enhanced sentences in criminal cases may be able to win post-conviction relief if their defense counsel fails to advise them fully of the immigration consequences of criminal convictions. Unfortunately, immigration attorneys and defense attorneys can be close-minded and uncreative about the possibility of post-conviction relief for their clients in deportation proceedings. "Suspending judgment" in a quick gut-reaction evaluation of the client's circumstance, followed by misadvising the client that his or her situation is "impossible," is in my opinion legal malpractice. Cf. *Krummacher v. Gierloff*, 290 Or 871 (1981). The "impossible" response is most likely to be given to an immigrant who has been convicted of an aggravated felony, a delivery of a controlled substance offense, or who was convicted more than two years before the attorney first met the client. I believe that this may not be an "impossible" situation at all but rather the doors may be wide open for post-conviction relief for this immigrant. I hope this article will make you more aware of how post-conviction relief may get your clients out of deportation proceedings and reduce enhanced sentences that are based on unconstitutionally obtained prior convictions.

Research into post-conviction relief discloses that under *Long v. Oregon*, 130 Or App 1999 (1994), an attorney who has begun to advise a client on an area of law may not advise the client inaccurately of the consequences of a conviction. In *Long*, an attorney began to advise a client on the potential of expungement if the client were to plea to a sex-related charge. The attorney told the client that expungement was available. In fact, expungement was not available and the conviction was reversed.

For many years immigrants have been misadvised because the plea petitions used throughout the state of Oregon routinely contain grossly inaccurate information about immigration consequences. Criminal defense attorneys have often relied solely on the plea petition language to give immigration advice to immigrant clients. For example, m... ny immigrants have been told only that naturalization denials *may* occur, when in fact, under the Immigration and Nationality Act, they *must* occur. After receiving the erroneous information that was included in the plea petitions, many immigrants have subsequently applied for naturalization. Their applications are denied and they are deported. The tragedy in this is that such results are inevitable under the Immigration and Nationality Act but the judge, the DDA and the defense attorney were all ignora..t of the law.

Since approximately 1990 a denial of naturalization has been a direct consequence of a plea to drug trafficking. *Lyons v. Pearce*, 298 Or 554, 694 P2d 969 (1985), essentially held that a criminal defense attorney needs to be aware of immigration consequences and properly advise his client of the relevant immigration factors when representing an immigrant at time of plea. Failure to do so in that case led to post-conviction relief. *Also see Magana-Pizano v. INS 200*, F3d 603, 612 (9th Cir 1999) (ethical duty of criminal defense attorney to advise defendant of the immigration consequences of a conviction).

In *Littlejohn*, 9/11/2000, 9th Circuit case number 99-50417, the court held a judge must advise the defendant of direct consequences of his plea. In my 18 years as a criminal defense attorney I have yet to hear a judge advise a defendant of the direct consequence of denial of naturalization based upon a drug trafficking offense. In these cases, the defendant's pleas are unknowing and therefore involuntary.

BIA (Board of Immigration Appeals) precedent discloses that in the late 1980s and early 1990s it was, as a practical matter, almost impossible to get the BIA to grant discretionary relief from deportation for "drug traffickers." See *Elramly v. INS*, 49 F3d 535 9th Cir. (1995), *Edwards*, 20 I&N Dec. 191, and BIA case *Burbano*, Interim Decision #3229, decided September 13, 1994. The correct advice to a client in those years would have been that, following a plea to drug trafficking, he or she would almost certainly lose at any deportation hearing. The advice given too often was, "Listen, take your 30 days credit for time served, get out of jail or take a level 4 or 6 DCS and avoid prison."

When we have clients who are facing enhanced sentences and whose conviction was based on an unknowing, involuntary plea, it should be possible to routinely pursue and win post-conviction relief from the client's prior convictions. In my opinion, this is a no-brainer!

I believe the two-year statute of limitations does not apply to filing for post-conviction relief, as the statute should be tolled until the immigrant has notice of the real threat of deportation. *See Peart, Prieto, Ross v. Ross v. Florida* No. SC 92692 (Fla. 4/13/00, amended 4/26/00 (case available under *Prieto* in a Versuslaw search). *See Stevens v. Bispham*,

Continued on next page.

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316 Or 221 (1993), tolling a professional malpractice case filed against the criminal defense attorney until the post-conviction proceedings were complete. Tolling until the harm is discovered is the rule in the personal injury area.

OCDLA has recently added to its website some pleadings that led to a grant of post-conviction relief for one of my clients in this area. The client had been convicted of drug trafficking several years prior to the deportation proceeding. The client had applied for naturalization. She had been advised by a "notario" (someone she described as a "notary") that she could be naturalized without a problem. The client advised the INS that she had a drug trafficking conviction in filling out her N-400 application for naturalization. She went to the INS in downtown Portland for the interview scheduled by the INS after she passed her naturalization exam, and there she was arrested. She was placed into custody and was able to bail out. When I met her, her deportation had already been ordered by the immigration judge. The client told me that she had been advised by other attorneys that post-conviction of her case would be "impossible." When I spoke with post-conviction attorneys about her situation, I was advised that her situation was "impossible." She decided to proceed all the same in what I calculated at the time to be an "uphill battle." In order to do this, we appealed the immigration judge's decision to deport her to the Board of Immigration Appeals. While that appeal has been pending, the drug-trafficking conviction has been set aside. The state has filed an appeal. These pleadings are a good place to start to file a PCR for your client. There is a need for criminal defense attorneys to learn immigration law and for immigration attorneys to learn post-conviction relief. We could help each other in our separate practices more completely, by knowing more and more about each other's "separate areas." In fact, these areas are not separate anymore.

BIA precedents are available on the web at *www.usdoj.gov/eoir/efoia/bia/biaindx*. They are also available at the INS website at *www.ins.usdoj.gov*. The INS recently expanded the website to include a "virtual law" library, which carries BIA opinions from way back. The BIA opinions are easy to follow because there are far fewer than we are accustomed to follow in the court opinions in the State of Oregon and the Ninth Circuit. Ninth Circuit caselaw is easily followed and includes many immigration opinions. See *www.defendlife.net* for additional links and information concerning immigrant defense.

From time to time, I may upload to OCDLA's website, *www.ocdla.org*, or to *www.defendlife.net* additional information regarding the defense of immigrants. Also, see Norton Tooby's website at *www.ilw.com/tooby* for great information on the immigration/criminal law area. Among other things, Tooby has posted a list of the crimes of moral turpitude that goes on and on and on.

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