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PRACTICE ADVISORY¹ AVOIDING OR WITHDRAWING A “CONVICTION” FOR IMMIGRATION PURPOSES²

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April 28, 2016

The definition of a “conviction” in immigration law differs in important respects from, and is significantly broader than, the definition of a conviction for purposes of Virginia criminal law.³ In light of these differences as well as established case law on plea withdrawal and deferred dispositions, this practice advisory covers three options Virginia criminal defense attorneys can consider in order to avoid or mitigate negative immigration consequences for their noncitizen clients.

(1) Deferred Dispositions:

For first-time offenders, certain deferred dispositions available under the Virginia Code will not be considered a “conviction” for immigration purposes, and therefore will not trigger any of the immigration consequences that result from criminal convictions. In *Crespo v. Holder*, the Fourth Circuit held that a deferred disposition under Virginia Code §18.2-251 is not a conviction for immigration purposes **if the defendant pleads not guilty and makes no admission of facts sufficient for a finding of guilt.** 631 F.3d 130 (4th Cir. 2011). The same reasoning applies not only to deferred dispositions for drug offenses under §18.2-251, but also to deferred dispositions for certain first-time domestic violence offenses under §18.2-57.3 and misdemeanor property offenses under §19.2-303.2, which are all worded identically.

Thus, it is usually extremely beneficial for non-citizen clients to seek a deferred disposition under any of these statutes, provided the defendant **pleads not guilty and makes no admission of facts sufficient for a finding of guilt.** So long as those two conditions are met, the prosecutor can make any proffer he or she wants without objection or stipulation by the defendant, and the judge can find facts sufficient without a proffer or stipulation by the defendant.

¹ This practice advisory does not constitute legal advice. It is intended for the use of legal professionals and is not meant to serve as a substitute for a lawyer’s obligation to conduct independent analysis and provide legal advice tailored to the facts and circumstances of a client’s case.

² This practice advisory is intended to be read in conjunction with our primer series, which provides fuller explanations of the definitions of “conviction,” “sentence,” “crime involving moral turpitude,” and “aggravated felony” in immigration law.

³ See CAIR Coalition Conviction Primer (August 28, 2015), <http://www.caircoalition.org/wp-content/uploads/2015/09/20150904-Primer-Conviction.pdf>.



The work of the Virginia Justice program is financially assisted by a generous grant from the Virginia Law Foundation. The Virginia Law Foundation promotes through philanthropy the rule of law, access to justice and law-related education.

In some instances, judges may express concern that a client could be deported before he or she can complete the terms of the deferred disposition. It may be helpful in those circumstances to remind judges that for most noncitizens, a properly structured⁴ deferred disposition makes it less likely that they will be subject to deportation and therefore significantly increases the likelihood that they will be able to complete the terms of their deferred disposition.

It may be more difficult to structure first offender dispositions according to the requirements laid out in *Crespo* and described above (with a not guilty plea and no admission to facts sufficient) in circuit court than it is in General District Court. For this reason, we include in the Appendix a sample plea form successfully obtained in a Virginia circuit court that illustrates a plea properly structured under *Crespo* with the goal of avoiding a “conviction” for immigration purposes.⁵

(2) Withdrawal of a guilty plea:

In some cases, withdrawal of a guilty plea may be a useful remedy for a noncitizen whose guilty plea has resulted in negative immigration consequences, provided that: (1) the withdrawal is granted because of a legal defect – usually ineffective assistance of counsel – in the underlying proceedings; and (2) there is a likelihood of obtaining a more immigration-friendly outcome should the plea withdrawal be granted.

Section 19.2-296 of the Virginia Code allows the withdrawal of “a plea of guilty or nolo contendere . . . before sentence is imposed or imposition of a sentence is suspended.” This applies both to the time period between a finding of guilt and the sentencing hearing and to the deferred disposition period under any of the provisions discussed in Section (1) above.

Generally, the standard for plea withdrawal is quite permissive. The Virginia Supreme Court has held that withdrawal of a plea should be granted “where it is in the least evident that the ends of justice will be subserved by permitting not guilty to be pleaded in its place.” *Parris v. Commonwealth*, 189 Va. 321, 325 (1949). The Court has interpreted this to mean that a plea withdrawal should be accepted anytime the original plea was made “inadvisedly”; “under an honest mistake of material fact”; or “through a misunderstanding as to its effect.” *Id.* Under this permissive standard, plea withdrawal should also be granted where ineffective assistance of counsel is found due to a failure to advise about immigration consequences.⁶

This can be useful in the deferred disposition context, for example, because it can allow a noncitizen to withdraw a guilty plea and any former proffers of facts sufficient that resulted in a “conviction” for immigration purposes and to replace them with a plea of not guilty.

⁴ “Properly structured” is used here to mean a deferred disposition with no guilty plea and no proffer, stipulation, or admission of facts sufficient for a finding of guilt.

⁵ See Appendix I, Sample *Crespo* Deferred Disposition Plea Form.

⁶ See *Zemene v. Clarke*, 289 Va. 303 (2015); see also CAIR Coalition *Zemene v. Clarke* Practice Advisory (March 6, 2015), <http://www.caircoalition.org/wp-content/uploads/2015/11/20150306-Zemene-v.-Clarke-Practice-Advisory-Final.pdf>.

Of critical importance, however, is that under Board of Immigration Appeals precedent, a plea withdrawal is **not sufficient to eliminate the conviction for immigration purposes unless it is withdrawn on the basis of a “procedural or substantive” legal defect in the underlying proceedings.** See *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Thus, it is extremely important in withdrawing a plea to specifically request that the judge find a legal defect in the underlying criminal proceedings. For this purpose, a finding of ineffective assistance of counsel under *Padilla* and *Zemene* would suffice.⁷

In order to ensure the finding will be recorded for future use by a noncitizen in defending against immigration proceedings, it may be advisable to ask the judge to write on the order that the withdrawal was granted because of a legal defect in the underlying plea, for example because of ineffective assistance of counsel.

Questions about this Practice Advisory? Contact Sirine Shebaya at sirine@caircoalition.org.

⁷ See *id.*

Appendix I: Sample *Crespo* Deferred
Disposition Plea Form

VIRGINIA:

**IN THE
CIRCUIT COURT FOR THE CITY OF ALEXANDRIA**

COMMONWEALTH OF VIRGINIA

— v. —

CF []

Plea

[]

[] [], 2015

Defendant.

FELONY MEMORANDUM AND AGREEMENT

- (1) My name is []. My date of birth is [].
- (2) I am represented by counsel whose name is [].

Understanding of the Charges

- (3) I have received a copy of the indictment before being called upon to plead. I have read the indictment and discussed it with my attorney. I understand the charge against me. I have told my attorney everything I know about the case against me. My attorney has explained to me the elements of **possession of a Schedule I/II controlled substance in violation of Virginia Code §18.2-250**. My attorney has explained to me what the Commonwealth must prove to convict me. I have discussed with my attorney whether to plead guilty or not guilty. After that discussion, I have decided for myself that I should plead not guilty and allow the Commonwealth to proffer the facts alleged. We also have discussed any possible defenses I might have to the offense to which I am pleading.

Waiver of Rights

- (4) I understand that by pleading not guilty but allowing the Commonwealth to proffer the facts alleged, I waive all objections to the admissibility of evidence and to the legality of my arrest and any search and seizure of property.
- (5) I understand that I may, if I so choose, plead Not Guilty and proceed to trial on any charge against me, and that if I choose to do so, the Constitution guarantees that I would have:
- (a) The right to a speedy and public trial by jury, with a lawyer to help me at all stages of the proceedings, and the unanimous agreement of a jury that I am guilty beyond a reasonable doubt before I can be convicted;
 - (b) The right to see, hear, and be confronted with all witnesses against me, and the right to cross-examine those witnesses;
 - (c) The right to use the process of the Court to compel the production of any evidence and the attendance of witnesses on my behalf;

- (d) The right to require the Commonwealth to prove every material allegation against me beyond a reasonable doubt, and to prove my guilt beyond a reasonable doubt;
- (e) The right to seek appellate review of the decision of this Court in the event I am convicted;
- (f) The right to remain silent and to not take the stand or give testimony against myself, and I understand that no inference could be drawn from my failure to testify.

I understand that I am waiving these trial rights today.

Possible Penalties

- (6) I understand that if the Court finds that there are sufficient facts to find me guilty, I subject myself to the same possible penalties as if I had been convicted of the same offense after a trial by jury or by the Court sitting without a jury. I understand these possible penalties are: **for Possession of Schedule I or II Controlled Substances: a term of imprisonment of not less than one year nor more than ten years or confinement in jail for a period of up to twelve months and a fine of not more than \$2,500 dollars, either or both.**
- (7) No one connected with the State, such as the police or the Commonwealth's Attorney, or any other official, in any manner has threatened me or forced me to enter this plea.

The Plea Agreement

- (8) My attorney and I have made the following agreement with the Attorney for the Commonwealth:

I will plead not guilty. The Commonwealth will recite the facts to the Court. If and when the Court finds that that there are sufficient facts for the Court to find me guilty of the charge in the indictment, the Commonwealth and my attorney will ask that pursuant to 18.2-251, the Court withhold a finding of guilt.

On Count I, possession of a Schedule I or II controlled substance, my case will be continued for one year pursuant to Virginia Code 18.2-251. Between now and the date of my review, I will remain of uniform good behavior and comply with the mandates of adult supervised probation, to include any substance abuse screening and treatment my probation officer deems appropriate. I will also complete one hundred hours of community service and pay my court costs. Finally, I understand that my privilege to operate a motor vehicle in the Commonwealth will be suspended for six months.

I understand that if I am fully compliant with all aspects of my probation, the case against me will be dismissed on my review date. I understand that if I fail to complete the terms of my probation as outlined above, the court will enter a finding of guilt against me in this matter.

This is the entire agreement, and no one has made me any other commitments or promises of leniency.

The Consequences of the Plea

- (9) I understand that in imposing punishment the Court is not bound by any agreement between the Commonwealth's Attorney and me, and that the Court need not follow any recommendation of the Commonwealth's Attorney. I have discussed my citizenship, immigration, and legal status with my attorney. I understand that, if I am not a United States citizen, my plea of not guilty with facts sufficient to find me guilty may make me eligible for deportation from the United States, and otherwise carries a risk of adverse immigration consequences. I wish to enter this plea despite any such adverse immigration consequences. I acknowledge that by entering this plea, I waive any right to withdraw my plea or challenge at any time my conviction or sentence because of any present or future adverse immigration consequences. I also understand that immigration and the status of aliens are subjects of the Federal Government's power, and that this Court has no jurisdiction over matters of immigration, legal status, or deportation.
- (10) I am entirely satisfied with the services of my attorney who has represented me in this matter.
- (11) I understand that by entering this plea I waive any right to appeal the decision of this Court.
- (12) I understand all the questions asked of me and do not have any further questions.
- (13) I therefore freely and voluntarily plead not guilty to **Felony Possession of a Schedule I or II controlled substance** in Criminal Case CF [].

Signed by me in the presence of my attorney this ____ day of [], 2015.

[]
Defendant

The above accords with our understanding of the facts of this case.

*I certify that I have complied
with the requirements of Va.
Code §19.2-11.01(A)(4)(d).*

[], Esq.
Attorney for the Defendant

[]
Assistant Commonwealth's Attorney