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4.2 Effect of North Carolina Dispositions

A. Deferred Prosecution

In North Carolina, a “deferred prosecution” occurs when the State agrees to cease prosecution on the defendant’s successful completion of certain conditions. The court does not enter judgment against the defendant, and the deferred prosecution is generally not considered a conviction under state law. If the person fails to live up to the conditions, the State then reinstutes the prosecution and seeks a conviction.

Types of Deferred Prosecution. There are two basic forms of deferred prosecution, formal and informal. Formal deferred prosecution is governed by G.S. 15A-1341(a1) and generally requires a written agreement and approval of the court. Formal deferrals may vary county by county. When a person is placed on formal deferred prosecution, the conditions of the deferral may be made a part of probation. Prosecutors also informally “defer” prosecution by dismissing the case on the defendant’s promise to abide by certain conditions.

In both instances, the defendant ordinarily does not enter a plea but may be asked to sign a statement admitting the charged conduct.

Immigration Consequences. Whether a deferral constitutes a conviction for immigration purposes depends on the structure of the deferred prosecution. The key factors are whether the defendant made an *admission* of having committed the essential elements of an offense and the *court imposed conditions* as part of the deferred prosecution.

In a formal deferral, if the defendant is required to admit the essential elements of the offense and the court imposes conditions that the defendant must fulfill, the disposition will almost certainly be treated as a conviction for immigration purposes, even if the charges are later dismissed on successful completion of the conditions. In this instance, though the defendant does not enter a guilty plea and only admits the essential elements of the offense, that is sufficient to trigger a conviction under immigration law.

If, however, the court imposes conditions *without* an admission to the factual allegations, the deferral *should* not be considered a conviction for immigration purposes. Counsel

should be wary of box # 9 of [AOC-CR-626](#) (Dec. 2016) (deferred prosecution), which states that “the admission of responsibility given by me and any stipulation of facts shall be used against me and admitted into evidence without objection in the State’s prosecution against me for this offense. . . .” If checked, the document would suggest that the defendant had made an admission when, in fact, he or she may not have. In appropriate cases, therefore, strike the language or leave the box unchecked.

The Fourth Circuit recently stated that a “deferred prosecution agreement is not by itself a sufficient ‘admission of facts,’ given that it seems to merely describe the anticipated admission of responsibility and stipulation to take place. . . .” *Boggala v. Sessions*, 866 F.3d 563, 568 n.3 (4th Cir. 2017). In *Boggala*, the Court found that the deferred prosecution agreement at issue was a conviction under immigration law because the defendant stipulated to sufficient facts as part of the deferral, in that instance during the hearing at which the court accepted the deferral. *Id.* (finding that petitioner was informed in writing of the facts to be used against him and then later stipulated to those facts underlying each element of the crime). Thus, a deferral agreement, unaccompanied by a written or oral admission or stipulation of sufficient facts, should not rise to a conviction under immigration law.

There is still some risk to a defendant with a formal deferral even if he or she makes no admission. If ICE learns of the deferral, it might institute removal proceedings on the assumption that an admission of guilt is often made in formal deferrals, but a defendant armed with this law should ultimately prevail before an immigration judge.

An informal deferral by the prosecutor should not constitute a conviction for immigration purposes because ordinarily the defendant does not make an admission as a condition of such an arrangement. Further, there are no court-ordered restraints in an informal deferral—the second requirement—as the court is generally not involved in such an arrangement.

B. Drug Treatment Court Disposition

In North Carolina, there are both post-plea and pre-plea drug treatment courts. The practices vary from county to county. In a post-plea drug court, a defendant is required to plead guilty before the court will order the defendant to participate in a drug treatment program. Even if the court does not enter a judgment of conviction, such a disposition will almost certainly constitute a conviction for immigration purposes. This is true even if the State eventually dismisses the criminal charges because the combination of admission of guilt and restraint on the defendant’s liberty would be considered a conviction for immigration purposes. *See Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).

Drug treatment courts that require a guilty plea up front raise difficult issues for a noncitizen client. On the one hand, diversion to a drug treatment program may provide a way of getting all drug charges dismissed in the end. Moreover, if the individual suffers from drug addiction, the treatment program may assist the person to overcome the

addiction. On the other hand, the drug treatment court proceeding is almost certain to constitute a conviction for immigration purposes.

In a pre-plea drug court, a client typically must make an admission of guilt as part of a deferred prosecution agreement; thus, the first requirement is met. If the court then imposes treatment or other restraints, the disposition will probably qualify as a conviction for immigration purposes. *See supra* § 4.2A, Deferred Prosecution. In some counties, the court does not order the treatment or other restraints but simply approves the deferred prosecution agreement. If the court does not order drug treatment or other restraints on the defendant, it is possible that such a disposition would not constitute a conviction for immigration purposes. It is not clear how an immigration court would treat such a procedure.

C. 90-96 and 15A-1341 Deferrals

A deferral under G.S. 90-96, called a conditional discharge or discharge and dismissal in North Carolina, is available for a narrow class of drug offenses. If the defendant pleads guilty or is found guilty, a court may defer further proceedings and place the defendant on probation without entering judgment. *See* G.S. 90-96(a). If the defendant fulfills the conditions of probation, the proceedings are dismissed and the defendant does not have a conviction under state law. However, the deferral will almost certainly constitute a conviction for immigration purposes because the statute requires that the defendant plead or be found guilty and that the court impose conditions.

North Carolina recently created a similar conditional discharge procedure for Class H and I felonies and misdemeanors other than impaired driving offenses. *See* G.S. 15A-1341(a4); *see also* G.S. 15A-1341(a3) (conditional discharge for prostitution offenses).

For the above reasons, these dispositions would probably constitute convictions for immigration purposes.

D. Prayer for Judgment Continued

A prayer for judgment continued (PJC) granted by a North Carolina court will almost always be treated as a conviction for immigration purposes.

A PJC occurs when the court accepts the defendant's guilty plea or finds the defendant guilty after trial but withholds judgment in the case. A PJC is considered a conviction under state law for many purposes, whether or not the court imposes any conditions or costs.

For immigration purposes, if a PJC is granted and the court imposes conditions amounting to punishment, such as performance of community service or payment of a fine, then the definition of conviction has been met. A PJC in which court costs alone have been imposed is a conviction as well. Even though North Carolina law does not treat court costs as punishment (*State v. Popp*, 197 N.C. App. 226 (2009)), the immigration

courts do. *See Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008) (imposition of court costs in the criminal sentencing context constitutes a form of punishment for immigration purposes). It is unclear whether a PJC without the imposition of costs or other conditions would be treated as a conviction for immigration purposes.

E. Expungement

A North Carolina conviction that has been expunged will continue to constitute a conviction for immigration purposes. The Board of Immigration Appeals considered the issue of an Idaho expungement in *Matter of Roldan-Santoya* and held that no effect would be given in immigration proceedings to any state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative procedure. 22 I&N Dec. 512 (1999).

F. Juvenile Delinquency Adjudication

Adjudication of Delinquency Not a Conviction. A juvenile delinquency adjudication is not a conviction for immigration purposes. *See Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2001); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). Thus, regardless of the nature of the offense, a juvenile delinquency adjudication should not trigger any adverse immigration consequences based on conviction of a crime.

Under the North Carolina Juvenile Code, jurisdiction of a juvenile may be transferred to superior court for prosecution as an adult for some felonies. A conviction of a juvenile resulting from a transfer to superior court likely constitutes a conviction for immigration purposes. *See, e.g., Singh v. U.S. Att’y Gen.*, 561 F.3d 1275, 1278–79 (11th Cir. 2009) (finding that a 15-year old tried as an adult under state law was convicted for immigration purposes).

Practice Note: Because it is settled law that a juvenile delinquency adjudication is not a conviction for immigration purposes, and a conviction in superior court has other adverse consequences for a juvenile (such as a criminal record for state law purposes), defense counsel should ordinarily resist transfer of a juvenile case to superior court.

Other Potential Consequences of Adjudication. Counsel representing juveniles should be aware that a finding of juvenile delinquency could still have adverse consequences for a noncitizen. First, it could be considered an adverse factor if the juvenile applies for any discretionary benefit under the immigration laws, such as adjustment of status to a lawful permanent resident. *See Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006) (upholding BIA and immigration judge’s consideration of noncitizen’s New York youthful offender adjudication when evaluating his application for adjustment of status).

Second, certain grounds of inadmissibility and deportability do not require a conviction; mere “bad acts” or status can trigger the penalty. Examples include engaging in prostitution, being a drug addict or abuser, using false documents, smuggling aliens, or

the government having “reason to believe” the person has ever been a drug trafficker. Thus, a juvenile delinquency adjudication involving one of these offenses could support a finding of inadmissibility, in particular an adjudication involving drug trafficking. *See Matter of Favela*, 16 I&N 753 Dec. (BIA 1979) (holding that individuals who pled guilty to drug trafficking in juvenile proceedings are inadmissible as drug traffickers even though there is no conviction). Adjudications involving these offenses can also be used to deny an application for Special Immigrant Juvenile Status (SIJS), which helps certain undocumented children in the state juvenile/foster care system obtain lawful immigration status. An adjudication involving drug trafficking will bar SIJS relief.

Additionally, defense counsel should be aware that immigration officers sometimes question clients in North Carolina juvenile detention centers. Admissions to immigration officers by juvenile clients could lead to removal proceedings. *See supra* § 2.3D, Advise Your Clients of Their Rights.

G. Conviction Vacated via Post-Conviction Relief

The BIA has ruled that when a state court vacates a judgment of conviction based on a procedural or legal defect, the state court order must be given full faith and credit, and the conviction is eliminated for immigration purposes. *See Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2001). For example, if a conviction is vacated for ineffective assistance of counsel through a motion for appropriate relief, there is no longer a conviction for immigration purposes.

The conviction is not eliminated for immigration purposes, however, if it was vacated for reasons “solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings.” *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), *rev’d on other grounds*, 465 F.3d 263 (6th Cir. 2006); *cf. Yanez-Popp v. I.N.S.*, 998 F.2d 231, 235 (4th Cir. 1993) (“[U]nless a conviction is vacated on its merits, a revoked state conviction is still a ‘conviction’ for federal immigration purposes.”).

For a further discussion of the impact of post-conviction relief, see *infra* Chapter 8, State Post-Conviction Relief.