IMMIGRATION AND CUSTOMS ISSUES
COLLATERAL CONSEQUENCES IN TOWN AND VILLAGE COURTS

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CARLA J. HENGERER

Chief Counsel
Office of Chief Counsel Buffalo
ICE Office of the Principal Legal Advisor

Ms. Hengerer is currently the Chief Counsel of the Buffalo Office of Chief Counsel (OCC BUF). The office consists of the Chief Counsel, a Deputy Chief Counsel, ten Assistant Chief Counsels, and seven support staff. The main office is located in Buffalo, New York, with an additional office located within the Buffalo Federal Detention Facility at Batavia, New York. One Assistant Chief Counsel is embedded with Homeland Security Investigations and another is detailed to the United States Attorney's Office as a full-time Special Assistant United States Attorney.

Prior to becoming Chief Counsel, Ms. Hengerer was Deputy Chief Counsel with OCC BUF for eight years. Before that promotion, she was an Assistant Chief Counsel with OCC BUF for ten years.

Before joining OCC BUF, Ms. Hengerer was a Senior Immigration Examiner with the Immigration and Naturalization Service (INS) at Buffalo, New York. She worked within the Naturalization program and also handled complex adjudications cases. In 1993, she was detailed to INS Headquarters to draft the interim regulations necessary for the implementation of the North American Free Trade Agreement. Prior to that, she held the positions of Free Trade Examiner and Vehicle Seizure Officer. In 1991, while on detail to INS Headquarters, Ms. Hengerer drafted regulations implementing the nonimmigrant religious worker and EB-5 immigrant investor provisions of the Immigration Act of 1990.

Ms. Hengerer began her career in federal service in 1981 as a part-time Immigration Inspector at the Peace Bridge, Buffalo, N.Y. She continued working as a part-time Immigration Inspector until she began working as an Assistant Chief Counsel in 1994.

Ms. Hengerer holds a Bachelor of Arts degree in Politics and a Master of Arts degree in Politics from New York University. In 1985, she was awarded a Juris Doctor degree from the State University of New York at Buffalo School of Law. She was admitted to the New York State bar in 1987. She is a member of the Erie County Bar Association.

ALFRED D. CHAPLEAU, M.A., J.D.

Asst. Professor Criminal Justice, Behavior and Law
Chair Department of Sociology and Criminal Justice
Pre-Law Adviser
School of Mathematics and Sciences
College of Saint Rose
Rm. 203-1 Albertus Hall
432 Western Ave
Albany, New York 12203
chapleaa@strose.edu

EDUCATION:

J.D., Albany Law School of Union University, 1978
M.A., Criminal Justice, State University of New York at Albany, 2008
B.A., cum laude, Political Science, Siena College, 1975
Certificate programs, community, custody/visitation, attorney/client fee dispute resolution, divorce and victim/offender mediation

TEACHING EXPERIENCE:

8/2011– Present — College of Saint Rose
432 Western Ave
Albertus Hall Rm. 312
Albany, New York

- Chair, Department of Sociology and Criminal Justice 5/2014 - Present
- College Pre-law Adviser 8/2013 - Present
- Faculty/ Assistant Professor Criminal Justice
  Introduction to Criminal Justice CJS 230, Court Systems CJS 233, Substantive Criminal Law CJS 238, Drugs, Crime and Criminal Justice CJS 260, Criminal Justice Policy CJS 336, Constitutional Criminal Procedure CJS 339, International Criminal Law and Procedure CJS 420, National Mock Trial Team CJS 490-493, Criminal Justice Internship CJS 494.

1/2011 – Present — NYS Office of Court Administration/
Office of Justice Court Support
187 Wolf Road
Albany, New York

- Educational/Curriculum Consultant
  Assist staff in the development, design and delivery (on-line and classroom) of mandatory continuing judicial education and judicial certification courses for newly elected justices of NYS town and village courts. Member NYS Office of Court Administrations curriculum committee for town and village court training and certification.

1/2013 – Present — SUNY at Albany/Graduate and Undergraduste School of Criminal Justice
Western Ave
Albany, New York

- Faculty/ Adjunct Professor of Criminal Justice
  Theoretical Foundations of Criminal Justice RCRJ 540, Criminal Justice Process RCRJ 201.

IMMIGRATION TERMS AND ACRONYMS

DHS – Department of Homeland Security. Created in 2003, the Department brought together 22 government agencies, including the former Immigration and Naturalization Service.

ICE – Immigration and Customs Enforcement. Agency within the Department of Homeland Security. The head of ICE is an Assistant Secretary.

ERO – Enforcement and Removal Operations. Within ICE, the component that oversees the detention and removal of aliens from the United States.

HSI – Homeland Security Investigation. Within ICE, the component that initiates criminal investigations of immigration and customs law.

CBP – Customs and Border Protection. CBP has two main components: United States Border Patrol (USBP) and Office of Field Operations (OFO). USBP – they wear green uniforms and operate between US Ports of Entry. OFO – They wear blue and are at the Ports of Entry.

CIS – Citizenship and Immigration Services. CIS has three main components: Field Offices, Service Centers and Asylum Offices. Field offices primarily handle applications for naturalization and adjustment of status. They are staffed to handle in-person interviews. Service Centers handle all other applications. Asylum offices conduct asylum interviews, make recommendations, and refer cases to the Immigration Court.

OPLA/OCC – Office of the Principal Legal Advisor/Office of Chief Counsel. OPLA is counsel to ICE. It is the only legal component within DHS that litigates cases and currently has approximately 900 lawyers on staff. There are 26 OCCs throughout the United States, including OCC Buffalo.

INA – Immigration and Nationality Act. Title 8 of the United States Code.

CFR – Code of Federal Regulations. Volume 8 – Aliens and Nationality

Alien – INA § 101(a)(3). Any person not a citizen or national of the United States.

Immigrant – An alien who comes to the United States with an intention to reside permanently.

Lawfully Admitted for Permanent Residence –
INA § 101(a)(20). The status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant. Alien having such status are referred to as Lawful Permanent Residents or LPRs.

Form I-551 – Permanent Resident Card. Formerly called an Alien Registration Receipt Card. Also known as a "Green Card". The card hasn't been green for more than twenty years.

Nonimmigrant – INA § 101(a)(15). An alien who comes to the United States without intending to reside permanently. There are currently 22 categories of nonimmigrants.

Form I-94 – Document generally provided to a nonimmigrant at the time of their lawful admission into the United States. Will indicate their nonimmigrant classification and duration of authorized stay.

Refugee – INA § 101(a)(42). A person outside of their country of nationality who has a well-founded fear of persecution on account of (1) race, (2) religion, (3) nationality, (4) political opinion, or (5) membership in a particular social group.

Asylee – INA § 208(b)(1)(A). An alien who is within the United States who is determined to be a refugee within the definition at INA § 101(a)(42).

Removal Proceedings – INA § 240. Proceedings conducted by an Immigration Judge for the purpose of deciding the inadmissibility or deportability of an alien.

Notice to Appear – INA § 239. The Notice to Appear (NTA) is the document served on an alien outlining allegations and charges of removability. Once served, the NTA is served on the Immigration Court. Service on the Immigration Court formally initiates removal proceedings.

Executive Office for Immigration Review – Consists of the Immigration Courts located throughout the United States and the Board of Immigration Appeals located in Falls Church, Virginia. Current caseload: 395,000.

CIMT – Crime Involving Moral Turpitude.

- An intentional act
- An act which is base, evil, or depraved
- An act which violates the norms of society
- An act which causes harm to an individual or to property
- NOT a regulatory offense

CIMT is not defined in the INA or within 8 CFR. We rely on case law from the Board of Immigration Appeals and U.S. Circuit Courts of Appeal.

Aggravated Felony – INA § 101(a)(43)(a)-(u). If an alien is convicted of an aggravated felony, relief from removal is severely limited.

Detainer – Document served on local law enforcement, requesting that DHS be informed prior to an alien's release on a pending criminal charge, or following completion of a criminal sentence.

Mandatory Custody – INA § 236(c). Mandatory custody is triggered for some aliens placed into removal proceedings as a result of the nature of the criminal offense and time served in federal or state custody. Pre-conviction custody can trigger mandatory custody for an alien in removal proceedings.

EAD – Employment Authorization Document. This is sometimes the only evidence of lawful status in the possession of a refugee or an asylee.

Naturalization – INA § 101(a)(23). Conferring of nationality of a state on a person after birth.

Derivation of citizenship – Obtaining citizenship after birth as a result of the naturalization of parents. Under the INA, this can only happen to a child before their 18th birthday.

Accepting a Misdemeanor Plea of Guilty: One additional thing to think about.

By: Alfred D. Chapleau M.A., J.D.
Asst. Professor Criminal Justice and Law
College of Saint Rose
Adjunct Professor of Criminal Justice
School of Criminal Justice
SUNYA

I probably would not get an argument from criminal court judges in New York if I stated that the process of accepting guilty pleas has become more time consuming and complex. I need only point to legislation involving Orders of Protection, changes in surcharges and DWI pleas as evidence to make the case for the assertion. So, this article is perhaps rubbing salt in the wound by asking: Is it necessary for a trial court to do something additional before accepting a misdemeanor guilty plea from a person who it *suspects* or *knows* is not a U.S. citizen? The answer to this question appears to be yes. Before I get to why I say this, a brief review and a discussion of the Court of Appeals decision in *People v. Pegue*, 22 NY3d 168 (2013) is needed.

As judges you are acutely aware of your legal obligation to assure that guilty pleas are accepted by the court only when the judge is convinced that the plea is knowingly, intelligently and voluntarily entered into. You, as judges, do this by asking questions of the defendant to assure yourself that the plea is not involuntary or otherwise coerced in some way and by informing the defendant of the *direct* consequences of their entering a guilty plea. This process we refer to as a *plea allocution*.

In November 2013, the Court of Appeals was asked to address the question of whether, in a felony plea entered into by a non U.S. citizen, the trial court is obligated (before accepting the plea) to inform the defendant of their possible deportation as a result of their entering a guilty plea. The Court in *People v. Peque*, held that since deportation is virtually automatic in felony convictions and because deportation possesses "punitive qualities" much like a criminal sentence, the trial court *is* required to inform the defendant of the possibility of deportation or other immigration consequences.

In other words, the Court of Appeals held that possible deportation is a *direct* consequence of a felony guilty plea. What is therefore required is that the "trial court must provide a short, straightforward statement on the record notifying the defendant that, in sum and substance, if the defendant is not a United States citizen, he or she may be deported upon a plea of guilty." The Court of Appeals also suggested that as part of the allocution the trial court may want to encourage the defendant (prior to pleading) to speak with their counsel about immigration issues that might arise. This suggestion has its roots in the 2010 U.S. Supreme Court decision in *Padilla v. Kentucky*, 559 U.S. 356, where the court held that defense attorneys, in order to effectively represent their non-citizen clients, must provide advice to them about the possible immigration problems they may have by pleading guilty.

Peque does offer to the trial court suggested language to fulfill the requirement of notification to non-citizen defendants who are offering to plead guilty. That language is found in CPL 220.50(7). The section reads in pertinent part " …. If the defendant is not a citizen of the United States, the defendant's plea of guilty and the courts acceptance thereof may result in the defendant's deportation, exclusion from admission to the United States or denial of naturalization pursuant to the laws of the United States."

Now back to the question at hand and the taking of misdemeanor pleas from non-citizens in the Town and Village courts. While the decision in *Peque* only addressed felony guilty pleas, the Court's reasoning to the result was based upon both the State and Federal Constitutional guarantees to due process that ensure that a defendant's plea of guilty must be found by the trial court to be knowing, voluntary and intelligent. Since it is possible that certain misdemeanor pleas can have the same immigration consequences as felony pleas, best practice would seem to dictate that local criminal courts, when dealing with non-citizens in misdemeanor plea cases, follow *Peque* and read the language from CPL 220.50(7), as well as suggest that the defendant speak with their counsel about immigration matters before entering a plea.

While this discussion and what it suggests can be seen as adding another requirement to an already requirement-laden process, it might be better viewed as no more than the natural progression of providing one of our most treasured rights – due process under law – to all those that appear before you seeking another equally treasured right - their day in court. As our society as a whole becomes more diverse, those that appear before the court become more diverse and the concept of due process must grow, change and adjust as society does.

One final comment: A defendant may attempt to get the court's advice concerning the likelihood of deportation, etc. Worse yet, defense counsel may try to draw the court into such a discussion. As with all similar matters, best practice would strongly dictate that you politely demur the request adjourning the matter if need be so that information can be gotten, if need be, from an appropriate source.