



MINNESOTA JUDICIAL TRAINING UPDATE



IMMIGRATION

FIVE (5) IMMIGRATION FACTS EVERY JUDGE AND ATTORNEY SHOULD KNOW and ONE SUGGESTED BEST PRACTICE

1. A PLEA OF GUILTY TO ANY PROVISION OF THE DOMESTIC ASSAULT STATUTE IMPLICATES THE “DOMESTIC VIOLENCE” GROUND FOR DEPORTATION – INCLUDING THE “INTENT TO CAUSE FEAR” SUBDIVISION.

Pleading guilty to domestic assault “intent to cause fear” is no longer a “safe” plea for non-citizens. In the past, most criminal defense attorneys and prosecutors operated under the assumption that a conviction of domestic assault “intent to cause fear” in violation of MS 609.2242 subd. 1(1) was a “safe” plea for noncitizen defendants. It was considered a “safe” plea because everyone involved in the criminal and immigration realms seemed to agree it was not a crime of violence under 18 U.S.C. 16(a) which would make a defendant removable under Sections 237(a)(2)(E)(i) of the Immigration and Nationality Act (INA).

This is no longer the case due to an Eighth Circuit sentencing case, *U.S. v. Salido-Rosas*, 633 F.3d 1254 (8th Cir. 2011). Beginning in 2013, based on the *Salido-Rosas* case, the Department of Homeland Security (DHS) began arguing that any domestic assault conviction, whether under the fear or the harm portion of the statute, is a removable offense. In addition, some immigration judges have ruled that a fighting/brawling disorderly conduct conviction (but not a noisy/boisterous disorderly) that arose out of a domestic charge is also a deportable crime of domestic violence under *U.S. v. Frausto-Vasquez*, 435 Fed. Appx. 575 (8th Cir. 2011).

2. IMMIGRATION LAW DEFINES A “CONVICTION” BROADLY TO INCLUDE OFFENSES THAT ARE NOT CONVICTIONS IN STATE COURT.

Under the definition found at 8 U.S.C. § 1101(a)(48)(A), a conviction for immigration purposes includes a (a) stay of adjudication, (b) a plea under Minnesota Statute § 152.18, (c) an *Alford* plea, (d) a nolo contendere plea (or similar type of plea), (e) a continuance for dismissal if an admission of facts or guilty plea is on the record.

3. VIOLATION OF AN OFP OR NO CONTACT ORDER (DANCO, ETC) CONSTITUTES A GROUND FOR DEPORTATION

This applies to judicial findings issued in civil or criminal court including juvenile delinquency proceedings and probation violation hearings. This deportation ground, found at 8 U.S.C. § 1227(a)(2)(E)(ii), is very broad and covers any type of violation, except violation of a provision such as requiring attendance at and payment for a counseling program or requiring the payment of costs for supervision during parenting time. *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011).

4. THE LENGTH OF A DEFENDANT'S SENTENCE AND/OR ANY AMBIGUITY IN THE SENTENCING ORDER CAN CREATE DEPORTATION ISSUES

In immigration court, whether a state conviction counts as an aggravated felony for deportation purposes often depends on the length of sentence imposed by the court. For example, many crimes count as aggravated felonies for deportation purposes when a sentence of "one year" (365 days) or longer is imposed. For example, if a felony is sentenced as a gross misdemeanor with 365 days imposed, the immigration court will consider that an aggravated felony even though it is not a felony conviction for state court purposes. *Matter of Small*, 23 I. & N. Dec. 448, 450 (BIA 2002).

In addition, although often intended by the court as an act of judicial leniency, imposing the maximum sentence and then suspending all or part of that sentence can have serious consequences in immigration court. Under federal immigration law (8 U.S.C. § 1101(a)(48)(B)) when classifying cases for deportation purposes immigration courts look to the actual length of the imposed sentence. How much of the imposed sentence is stayed or executed is of no consequence. *Matter of S-S-*, 21 I. & N. Dec. 900 (BIA 1997).

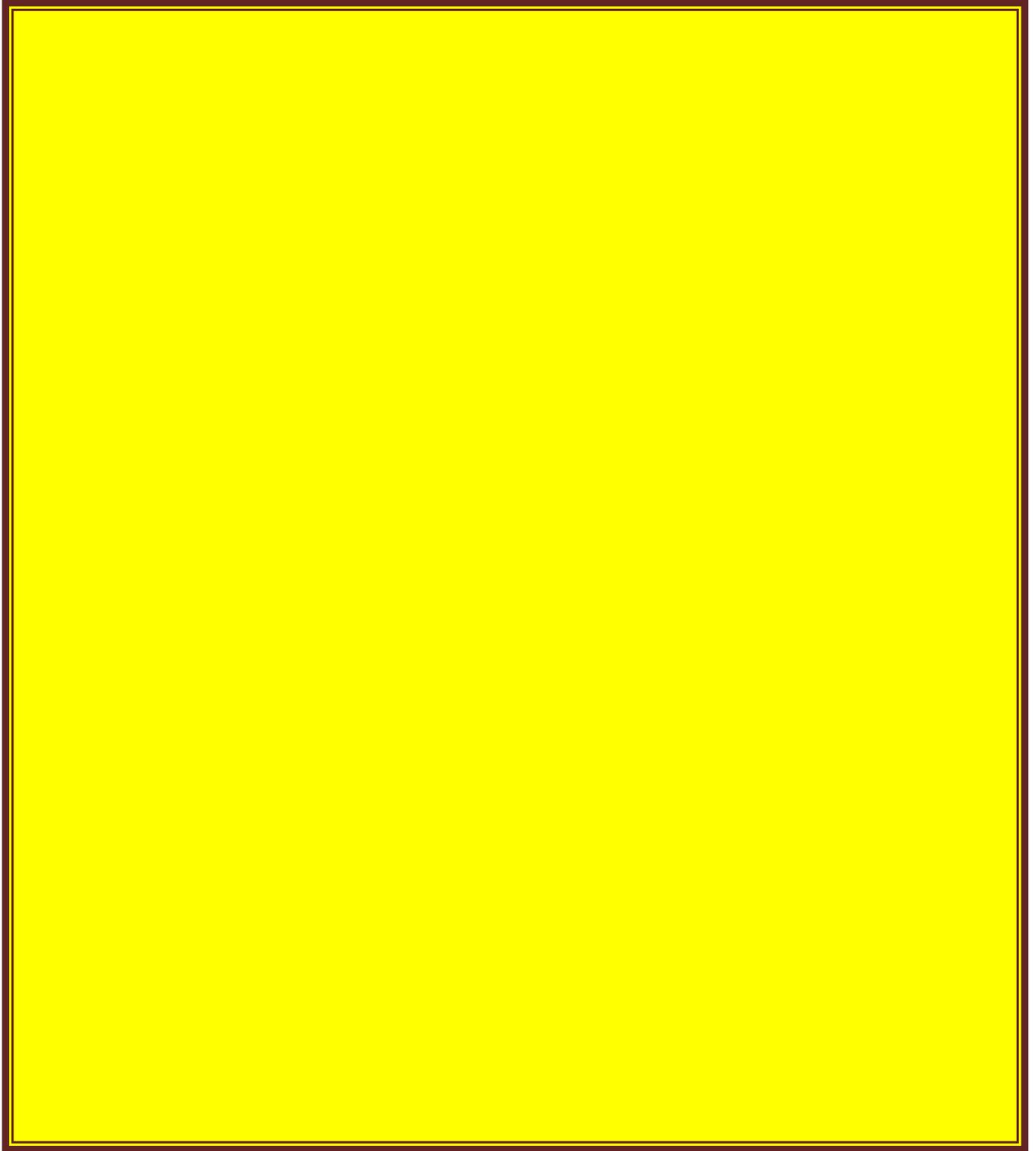
Also, if there is any confusion in MNCIS (or the written sentencing order) on whether the court stayed imposition of sentence or imposed the sentence, that ambiguity has been weighed against the non-citizen and treated as an imposed sentence.

5. IMMIGRATION CONSEQUENCES CAN ATTACH TO CRIMES THAT DO NOT QUALIFY AS AGGRAVATED FELONIES OR THAT INVOLVE MORAL TURPITUDE

(a) **TEMPORARY PROTECTED STATUS (TPS)** is unavailable to someone convicted of any felony or any two misdemeanors (regardless of how old they are). The Department of Homeland Security can designate a foreign state for TPS when conditions in the country (civil war or natural disaster) prevent people from returning safely or when the country is unable to handle the return of its nationals adequately. TPS allows people from those countries to live and work legally in the U.S. for the duration of the designation. Currently designated countries include El Salvador, Haiti, Honduras, Nicaragua, Somalia, Sudan, South Sudan, and Syria. <http://www.uscis.gov>.

(b) **DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA)** is unavailable to someone convicted of any felony; or three (3) or more misdemeanors (regardless of how old they are); or any "significant misdemeanor" (which is defined as one that involves domestic violence; sexual abuse or exploitation; burglary; unlawful possession or use of a firearm; drug distribution or trafficking; or DWI; or if not listed, whenever the sentence to be served "in custody" is 90 days in jail or more). DACA is a prosecutorial discretion program that grants a 2 year reprieve from deportation and work authorization to certain people who came to the U.S as children, who are enrolled in school, have graduated from high school, or have received a GED. <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

(c) **DWI'S HAVE SPECIAL CONSEQUENCES:** In addition to disqualifying a non-citizen from the DACA program noted above, the Board of Immigration Appeals has also upheld determinations that multiple DWI's support a discretionary decision to hold a noncitizen without bond. This is true even though federal courts have issued many decisions finding that simple DWIs are not crimes involving moral turpitude or crimes of violence; In addition, depending on circumstances, a simple DWI could fall under the "particularly serious crime" bar to "withholding of removal." Withholding of removal is a humanitarian form of relief from deportation for those individuals who can prove it would be "more likely than not" that they would suffer persecution or torture if forced to return to their home country. Anyone convicted of a "particularly serious crime" is barred from eligibility. 8 USC 1231(b)(3)(B)(ii).



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