

# The Pitfalls of Community Court Criminal Proceedings for Foreign Citizens in Connecticut

By Virginia Carstens



**G**ina Gutierrez<sup>1</sup> had no idea when she submitted her Application for Naturalization to the U.S. Citizenship and Immigration Services (USCIS) that after months of waiting for a naturalization interview her application would be denied and her status as a lawful permanent resident might be jeopardized, due to a shoplifting charge dismissed after a conditional guilty plea.

Potential clients who consult me to seek an immigration benefit—adjustment of status to permanent resident, or for those who are already permanent residents, naturalization—sometimes report that they have been arrested. These same individuals confidently assure me that the charge has been dismissed by the Hartford Community Court. Unfortunately, dismissal by the court after a guilty plea does not remove the record for immigration purposes.

This article explores immigration diffi-

culties triggered by the resolution of charges in Hartford Community Court.<sup>2</sup>

In 2003, Gina entered a conditional guilty plea to a Larceny 6 (shoplifting)<sup>3</sup> charge in Hartford Community Court. In exchange for two days of community service, the Community Court dismissed the shoplifting charge. Unbeknownst to Gina, this “collateral consequence” lurked in her record until her naturalization interview. The charge resurfaced to jeopardize her application for naturalization.

One of the first questions attorneys should ask clients facing criminal charges is whether or not they are U.S. citizens and, if not, the nature of their immigration status. This information is just as important as knowing whether a client is a juvenile, for instance. Foreign nationals may face a variety of barriers to future immigration benefits, as well as the loss of benefits or

removal (deportation) on the basis of a criminal court disposition.

The attorney should know the immigration consequences before advising any plea, no matter how seemingly inconsequential. The immigration laws are not logical and are sometimes counterintuitive, but in many cases careful planning in state court before a plea can mitigate future immigration consequences.

## Background: The 1996 Amendments to the Immigration and Nationality Act

In many cases, a criminal conviction will result in deportation, termed “removal” since the 1996 amendments to the Immigration and Nationality Act.<sup>4</sup> Removal

involves banishment from the United States for varying amounts of time or even permanently. Even if a legal permanent resident (a green card holder) is eligible for a waiver of removal, the waiver does not extend to naturalization, and hence the conviction may still make it impossible to become a United States citizen or preclude the person from naturalizing for a number of years.

The 1996 amendments added a definition of “conviction” that sets up non-citizen defendants for removal or denial of their naturalization applications.

The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court, or, if adjudication of guilt has been withheld, where—

- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
- (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.<sup>5</sup>

Congress added this definition of “conviction” to “address situations where a judgment of guilt or imposition of sentence is suspended, conditioned upon the alien’s future good behavior.”<sup>6</sup>

The legislative history makes clear that Congress intended to make the original finding or confession of guilt sufficient to establish a “conviction” for purposes of the immigration law, regardless of the subsequent expungement or dismissal which may occur as part of a rehabilitative statute. This type of lowest-common-denominator uniformity means that *all* rehabilitative statutes under which a plea is taken in anticipation of later dismissal after repaying the community or engaging in rehabilitation are convictions for immigration purposes.<sup>7</sup>

The Board of Immigration Appeals has broadly interpreted the definition of “conviction,” holding that “no effect is to be given in immigration proceedings to a state action which 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 statute.”<sup>8</sup>

In many cases, entering a plea seals the non-citizen’s immigration fate. In order to

### Example: Immigration consequences of a conditional plea or accelerated rehabilitation for a Connecticut Larceny 6 charge (CGS § 53a-125b)

	Conditional Guilty Plea	Accelerated Rehabilitation (pre-plea)
Naturalization Good moral Character-discretionary INA § 101(f)	Likely to result in a denial of naturalization	Not likely to result in a denial of naturalization
Removability (deportability) INA § 237(a)(2)(A)(ii) Multiple criminal convictions	Individual with a lawful admission to US is rendered deportable by a second CIMT, if the two convictions do not arise out of a single scheme of misconduct	No effect—not a conviction
Removability (inadmissibility) INA § 212 (a)(2)(i)(I)	No effect if it is a first offense, otherwise, removable	No effect—not a conviction

#### *Why a foreign citizen should seek accelerated rehabilitation rather than a conditional guilty plea.*

decrease the likelihood of removal, criminal defense attorneys should work with immigration attorneys to anticipate the immigration consequences of a plea and craft a strategy to minimize immigration ramifications.

### Immigration Warnings Required by Connecticut Law

Prior to the 1996 amendments to the INA, the Connecticut legislature promulgated a statutory immigration warning that judges must offer prior to accepting a criminal plea. Section 54-1j of the General Statutes states that a judge may not accept a plea of guilty or *nolo contendere* from any defendant, until the judge:

first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from

readmission to the United States or denial of naturalization, pursuant to the laws of the United States. Conn. Gen. Stat. § 54-1j(a).

The statute also provides a post-conviction route for the defendant to withdraw the plea. Upon the defendant’s motion, the original plea may be withdrawn if (1) the court did not “address the defendant personally and determine that the defendant fully understands the consequences of the defendant’s plea” and (2) if the defendant can show that the plea and conviction may have one of the enumerated consequences.<sup>9</sup> For instance, if a person is prevented from naturalizing due to a criminal charge, and did not receive the warning, the court may vacate the conviction upon the defendant’s motion. However, the INA as amended provides that such a vacatur is valid for immigration purposes only if the original plea was vacated for a ground of legal invalidity existing at the time of the plea and not “solely” to avoid later immigration consequences.<sup>10</sup> One possible such ground of legal invalidity is that the plea was not

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knowing and intelligent. The order vacating the conviction should state the ground of legal invalidity.

Gina withdrew her shoplifting plea with a 54-1j motion. The transcripts of her plea colloquy proved to be devoid of immigration warnings, and she demonstrated that she was denied naturalization on the basis of the plea. The Community Court judge allowed her to withdraw the plea, and the prosecutor agreed to enter a *nolle prosequi* on the original charge.

Unfortunately, Gina still has to go through the administrative appeal process on the naturalization denial. This process begins with a motion to reconsider before the agency, which usually takes a year or more. Meanwhile, she is still not a U.S. citizen. Gina could have avoided denial of her naturalization application if she had been allowed to arrange a pre-plea agreement for this extremely minor charge. In her view, “I think the law should be more specific when you are considering accepting a plea.”

In 1997, the Connecticut legislature added a three-year statute of limitations to the plea withdrawal provision of the Connecticut immigration warning statute.

In immigration matters, three years is a relatively short period of time. Permanent residents must wait nearly five years before they submit their applications to apply for U.S. citizenship or three years if married to a U.S. citizen. The statute requires applicants to demonstrate “good moral character” for a period of five years preceding the date of application, meaning that if a non-citizen attempts to naturalize after the three-year statute of limitations has run but before five years has passed, he or she may have no way to challenge the conviction. Gina accepted a conditional plea just under three years prior to her naturalization denial. If the plea had been taken just a few weeks before, she might not have been able to vacate the conviction. Courts may still set aside a plea based on the lack of warning, but it is discretionary, not mandated.

## Conditional Guilty Pleas vs. Pretrial Diversionary Programs

Connecticut criminal law provides a number of ways to minimize the blemish of

a minor first offense. Some of these are valid for immigration purposes, and others are not. The two principal pathways to a dismissal in Connecticut are (1) pretrial diversionary programs such as Accelerated Rehabilitation,<sup>11</sup> and (2) conditional guilty pleas in Hartford Community Court. The Community Court later dismisses the action after the defendant performs community service or rehabilitation.

Accelerated Rehabilitation is a pre-plea rehabilitative program. Unlike other states which require that a plea be taken and a charge later expunged, in Connecticut the court may place a person on probation for up to two years before entering any plea or legal admission of guilt. This result is possible when the defendant is charged with a crime or motor vehicle violation for the first time. If the defendant satisfactorily completes probation, the court will dismiss the charges. Since a plea has never been entered, the charge is not a conviction for immigration purposes.<sup>11</sup>

## The Hartford Community Court

In Hartford Community Court, although public defenders are available, very few defendants request representation. In the words of a former Hartford Community Court judge, “for most low-level charges, most defendants are confident that they can handle the case themselves.”<sup>13</sup> Also, the defendant may be embarrassed about the charge, or may be afraid to disclose his or her immigration status before the judge or others in the courtroom.

The Hartford Community Court is a model program lauded for its innovative, streamlined arrest-to-arraignment process emphasizing alternative sentences. Community Court handles only the most minor “nuisance” or “quality of life” cases, which generally include offenses such as public drinking, larceny, prostitution, and graffiti.<sup>14</sup> Sanctioning in the court is “contingent on the defendant accepting the community service and/or social service mandates of his plea agreement.”<sup>15</sup>

In the majority of cases handled by the Hartford Community Court, the defendant takes a conditional guilty plea, then the plea is dismissed and the record expunged in thirty days if the defendant complies with the conditions of his plea, usually two days of community service. For U.S. citizens, the

conditional guilty plea, once dismissed, imposes no legal impediments to obtaining employment or housing. It sounds like a good deal—"dismissed" is a comforting word to a defendant. It is exactly this overly optimistic outlook which gets immigrants into trouble.

The Hartford Community Court approach is designed to be effective in the most minor of cases. Ironically, the conditional guilty pleas issued there are convictions for immigration purposes, whereas a successfully completed Accelerated Rehabilitation is not. Apparently, there is a sense that it would be a waste to "use up" the one opportunity for Accelerated Rehabilitation, although it too was intended for minor crimes.<sup>16</sup>

In Hartford Community Court, non-citizens facing minor criminal charges get a mixed message. The 54-1j warnings are designed to alert them to the immigration consequences, but the judge also says that if

they take a conditional guilty plea, their records will be wiped clean if they complete the community service. However, when it comes to immigration, any plea of guilty or *nolo contendere*, combined with some punishment (even community service) constitutes a conviction for immigration purposes, regardless of whether or not the plea is later expunged for rehabilitative reasons. Many non-citizen criminal defendants completely underestimate the possibility of being removed until it is too late.

In June 2007, the New York City Bar Committee on Criminal Justice Operations issued a report critiquing the requirement of a guilty plea as part of a diversion program for charges in "problem-solving" community courts across New York, and calling for more pre-plea/deferred prosecution diversion programs, since immigrants should have meaningful access to ameliorate options for the first-time offender.<sup>17</sup> The

report made recommendations based on survey of alternatives in various states. First on the list of models was Connecticut's array of pretrial disposition programs. Connecticut already has the tools to provide alternatives to incarceration that can also operate as alternatives to deportation.<sup>18</sup>

## Criminal Law and Immigration Law at Cross Purposes

The tension arises between state criminal law and immigration law because the criminal laws of Connecticut and the federal immigration laws were drafted with different goals. Criminal sanctions envision the individual's continued residence in the community, and thus focus on restitution, rehabilitation, punishment, deterrence, and the like. The immigration laws, on the other hand, are designed to effect the removal of foreign nationals who commit crimes. The immigration laws take an intentionally broad approach to the definition of "conviction" in an effort to achieve uniformity in the immigration consequences of convictions in the various states.

Attorneys must proactively review these issues before suggesting that a non-citizen client agree to a plea, even a minor first-time offense. According to Elisa Villa, Supervisory Assistant Public Defender at GA #17, Bristol, "Since there's often a potential for dire immigration consequences for even the most trivial state criminal conviction, it's critical for non-citizens to have legal representation in all court proceedings—including immigration court."

When Gina applied for naturalization, she disclosed that she had been arrested and charged, and that the case had been dismissed. Normally, one arrest for allegedly shoplifting will not absolutely preclude a person from becoming a U.S. citizen. The applicant must disclose the arrest on the application. Good moral character for purposes of naturalization has both a statutory and a discretionary component. The statutory component incorporates the petty offense exception noted above. However, in practice, a guilty plea or minor conviction can result in a discretionary denial of naturalization based on a finding the applicant lacks good moral character.

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**All foreign citizen criminal defendants should have their cases assessed by competent immigration counsel, so that their pleas are truly knowing and voluntary.**



Immigration practitioners know from practice that in Connecticut, a CIMT conviction or guilty plea, even if it does not statutorily preclude naturalization, will almost always result in a denial on discretionary grounds. Gina described her naturalization interview in the following way: “She denied me because I pleaded guilty and I had community service so it was bad moral character, but she said if the judge had vacated it, it wouldn’t have been a problem.” In fact, the written denial of her naturalization application quoted the statutory definition of a conviction.

## Crimes Involving Moral Turpitude

The concern about a shoplifting conviction is the “crime involving moral turpitude” (CIMT) ground of inadmissibility. The statute is vague as to what constitutes moral turpitude, but it is well-settled that it includes crimes involving theft. The Immigration and Nationality Act provides an array of tools that the Department of Homeland Security (DHS) can use to exclude people. For instance, a conviction is not necessary to trigger the crime involving moral turpitude ground; moral turpitude may be sustained where someone “admits having committed, or who admits committing acts which constitute the essential elements of” such a crime.

There is a one-time “petty offense” exception for convictions for which “the maximum penalty possible for the crime of which the alien was convicted...did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of six months.”<sup>19</sup> Some people entering a conditional guilty plea have prior convictions. For example, a lawful permanent resident (LPR) with a prior CIMT may not be removable for that conviction, but once the LPR pleads guilty to shoplifting for example, he or she would be removable for two CIMTs.

Because a “conditional plea” is a conviction for immigration purposes and because any kind of theft involves moral turpitude, this essentially sets up a framework in which two shoplifting charges would render inadmissible any applicant for permanent residence. In Gina’s case, had the shoplifting charge been her second, she

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would not only have been denied naturalization, but she would have also been put in removal proceedings. Although there might be waivers available in removal proceedings in some circumstances, a pre-plea diversion program such as Accelerated Rehabilitation would avoid unnecessarily placing a client in jeopardy of removal.

## Other Grounds of Removability

Another consequence of one “conditional plea” to shoplifting, for example, is that when our hypothetical person applies to adjust his or her status to permanent residence, the applicant must disclose any convictions. People with expunged conditional pleas might deny any conviction. This could lead them into another ground of inadmissibility—seeking to procure an immigration benefit by fraud or willful misrepresentation.<sup>20</sup>

Consider the example of a person whose only brush with the law has been an arrest for one marijuana cigarette. Misdemeanor possession of less than four ounces of marijuana is a charge routinely handled in Hartford Community Court. CGS § Sec. 21a-279(c). If the defendant attends the hearing and agrees to a conditional guilty plea, he or she will have a controlled substances offense for immigration purposes. In the case of a person seeking to become a

permanent resident, the INA offers no waiver of a controlled substance offense. On the other hand, the INA does provide for a waiver for the possession of less than 30 grams. The Connecticut statute, however, states that a conviction does not provide a safe harbor. The defendant would have to prove the marijuana possession involved less than thirty grams, which is extremely difficult where there is no clear record of the drug being weighed. Unless a person could prove that the amount in question was less than thirty grams, he or she would be barred from becoming a permanent resident.<sup>21</sup>

Other types of minor pleas may trigger broad health-related grounds of inadmissibility. If the intending immigrant is determined to have or “to have had a physical or mental disorder and a history of behavior associated with the disorder, which behavior has posed a threat to the property, safety, or welfare of the alien or others and which behavior is likely to recur or to lead to other harmful behavior;”<sup>22</sup> the person is inadmissible. The DHS routinely invokes this provision used to exclude people considered alcoholics, even recovering alcoholics, if the “behavior is likely to recur.” *Id.* Thus, an intending immigrant who is convicted of “disorderly conduct” or “breach of peace” related to intoxication may be found inadmissible under health grounds.

## Help is Available

All foreign citizen criminal defendants should have their cases assessed by competent immigration counsel, so that their pleas are truly knowing and voluntary. Clients seeking the assistance of a public defender may benefit from a new program. In Connecticut, the Division of Public Defender Services (PDS) has established an immigration consequences training program for its attorneys, support staff, and special public defenders. PDS teaches defense attorneys to recognize immigration issues, comprehensively represent their non-citizen clients’ interests in criminal proceedings, and make appropriate referrals, as necessary.

Elisa Villa, Supervisory Assistant Public Defender at GA #17, Bristol, who helped establish this ongoing program, “often will communicate with criminal defense and immigration lawyers for months during pre-

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# THE PITFALLS OF COMMUNITY COURT CRIMINAL PROCEEDINGS FOR FOREIGN CITIZENS IN CONNECTICUT

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trial negotiations. This back and forth brainstorming helps ensure that all of the client's legal interests are adequately addressed and the client is fully informed.<sup>23</sup>

## Conclusion

This article only scratches the surface of a few of the many grounds of inadmissibility, focusing on the ones relevant to charges typically handled in Community Court. The Department of Homeland Security may invoke a host of statutory provisions rendering a non-citizen removable, and a discussion of the many other issues is beyond the scope of this article. Foreign citizens and their attorneys should never make the blindly optimistic assumption that a guilty plea is harmless. On the other hand, where an immigrant is charged with a serious crime, defense attorneys should not automatically succumb to the opposite conclusion that there is nothing that can be done to avoid removal.

Immigrants facing first-time and minor arrests should have access to information about the specific immigration consequences of their pleas. The key is to look at the issues head-on and address each situation with current immigration status and future immigration goals in mind. Had Gina known that her conditional guilty plea would lead to the denial of her naturalization application, she would have requested pre-plea diversion.

Immigration law is not intuitive. Non-citizen defendants deserve a full analysis of the possible grounds of removability that addresses the effect a plea will have on current status or future applications for immigration benefits. **CL**

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## Notes

1. Fictitious name used to protect the identity of a client.
2. This article does not cover all criminal grounds of removability for non-citizens,

- such as aggravated felonies, drug trafficking, etc. which would not be handled in Community Court.
3. Conn. Gen. Stat. § 53a-125b, (P.A. 82-271, S. 6.)
4. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") Pub.L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).
5. Immigration and Nationality Act § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).
6. H.R. Conf. Rep. No. 104-828, at 224 (1996).
7. With the exception, in the 9th Circuit, of certain rehabilitative statutes for drug charges. *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728, (9th Cir., 2000).
8. *Matter of Roldan*, 22 I. & N. Dec. 512 (BIA 1999).
9. Conn. Gen. Stat. § 54-1j(c), (P.A. 82-177; P.A. 97-256, S. 6; P.A. 03-81, S. 1.).
10. Vacating a conviction in this manner is effective for immigration purposes because it is for due process, not rehabilitative, reasons. *In re Adamiak*, 23 I. & N. Dec. 878, 2006 WL 307908 (B.I.A. 2006) (vacating a conviction under a state advisal statute effectively eliminates conviction for immigration purposes); See also *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), reversed on other grounds by *Pickering v. Gonzales* 454 F.3d 525, 2006 Fed.App. 0248P (6th Cir. 2006), then amended and superseded by *Pickering v. Gonzales*, 465 F.3d 263, 2006 Fed.App. 0369A (6th Cir. 2006) judgment reversed and case remanded for entry of an order terminating deportation proceedings and quashing the order of deportation.
11. Wherein no plea is taken, and the defendant must complete a rehabilitation program before the charge is dismissed. In addition to Accelerated Rehabilitation, Connecticut offers several other pretrial diversionary programs that provide for a dismissal of criminal charges upon successful completion, e.g., the Family Violence Program, the Community Service Labor Program. These programs essentially call for a suspension of the prosecution of a case pending the fulfillment of certain conditions.
12. See *Matter of Grullon*, 20 I.&N. Dec. 12 (BIA 1989) (disposition under Florida's pretrial intervention program, Fla. Stats. § 944.025, not a conviction for immigration purposes).
13. Hartford Community Court: Origins, Expectations and Implementation, A report of the Center for Court Innovation, Robert Weidner 1999, p. 12.
14. Id. at p.4
15. Id. at p.11
16. Accelerated Rehabilitation is for "a crime or crimes or a motor vehicle violation or violations for which a sentence to a term of imprisonment may be imposed, which crimes or violations are not of a serious nature." Conn. Gen. Stat. § 54-56e.
17. cite for NY report

18. The New York report cited the following: Accelerated Pretrial Rehabilitation, for certain low-level offenses (including some felonies under certain circumstances), Conn. Gen. Stat. § 54-56e; (b) Pretrial Family Violence Education Program, for certain low-level family violence offenses, including some felonies under certain circumstances), Conn. Gen. Stat. § 46b-38c(g); (c) Pretrial School Violence Prevention Program, for certain offenses committed by students under certain circumstances, Conn. Gen. Stat. § 54-56j; (d) Pretrial Alcohol Education System, for certain offenses related to the operation of a motor vehicle or vessel while under the influence of alcohol or drugs, Conn. Gen. Stat. § 54-56g; (e) Pretrial Drug Education Program, for certain drug offenses, Conn. Gen. Stat. § 54-56i.
19. INA § 212(a)(2)(A)(I) and INA § 212(a)(2)(A)(ii).
20. INA § 212(a)(6)(C).
21. An applicant for a green card has the burden to prove they are admissible. An applicant with a marijuana possession conviction would have to find proof that the amount in question was less than 30 grams, or else they would be permanently unable to adjust and be deportable. There is a "hardship waiver" for intending immigrants with certain types of convictions, but it does not waive drug offenses. INA § 212(h).
22. INA § 212(a)(1)(iii).
23. Ms. Villa encourages lawyers and their support staff to call or e-mail with any questions or issues relating to the representation of immigrants in state criminal proceedings. She can be reached at 860-589-5976, ext. 333, or via e-mail at elisa.villa@jud.ct.gov.



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