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MEMORANDUM

DIRECTIVE # 09-11

To: Assignment Judges
Presiding Judges-Municipal Courts
Municipal Court Judges

From: Glenn A. Grant

Subj: Informing Municipal Court Defendants of the Immigration
Consequences of Guilty Pleas

Date: December 28, 2011

This Directive promulgates procedures to be followed in the municipal courts to inform defendants that a guilty plea to or conviction of certain municipal court offenses may negatively affect their immigration status, including possibly resulting in deportation. The Supreme Court approved these procedures on the recommendation of the Conference of Presiding Judges-Municipal Courts.

In State v. Nunez-Valdez, 200 N.J. 129, 131 (2009), the New Jersey Supreme Court held that defense counsel, in failing to inform the defendant that under federal law his conviction would mandate deportation, did not provide effective assistance to the defendant. Similarly, in Padilla v. Kentucky, ____ U.S. ____, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284, 299 (2010), the United States Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea.

In 2011, the New Jersey Supreme Court addressed this constitutional requirement in Superior Court criminal cases; see Directive #05-11 ("Criminal Plea Form – Question Regarding the Immigration Consequences of a Guilty Plea"). Consistent with Nunez-Valdez, Padilla, and Directive #05-11, this Directive addresses the same concerns in municipal court cases by requiring municipal court judges (1) to inform defendants that a guilty plea or a finding of guilt as to certain offenses may result in negative immigration consequences and (2) to inform defendants that they have a right to seek advice from an attorney regarding those potential consequences.

A municipal court judge shall inform defendants of possible immigration consequences and of their right to seek counsel on these matters at three stages of the court process: (A) as part of the court's opening statement for each court session; (B) at defendant's first appearance; and (C) as part of the guilty plea colloquy.

A. Opening Statement

The municipal court judge shall include the following language in the opening statement for each municipal court session:

If you are not a United States citizen and if you plead guilty to or are convicted of certain offenses heard in the municipal court, including some motor vehicle offenses, it may result in your being deported from the United States, or it may prevent you from being re-admitted to the United States if you leave voluntarily, or it may prevent you from ever becoming a naturalized American citizen. You have a right to seek advice from an attorney about the effect a guilty plea will have on your immigration status.

This language will be incorporated into each of the three model opening statements that the Supreme Court adopted in 2008 – one model opening statement for sessions handling criminal matters only, one for sessions handling motor vehicle offenses only, and one for combined sessions.

B. First Appearance

At the first appearance proceeding, any defendant charged with the following offenses shall be advised of the immigration consequences of a guilty plea:

- (1) all disorderly or petty disorderly persons offenses;
- (2) driving while intoxicated (N.J.S.A. 39:4-50; N.J.S.A. 39:4-50.14; N.J.S.A. 39:3-10.13; N.J.S.A. 12:7-46);
- (3) operating motor vehicle while in possession of a CDS (N.J.S.A. 39:4-49.1).

The municipal court judge shall engage in the following colloquy with defendants charged with the above-listed offenses at first appearance proceeding:

If you are not a United States citizen and if you plead guilty to or are convicted of certain offenses heard in the municipal court, including some motor vehicle offenses, it may result in your being deported from the United States, or it may

prevent you from being re-admitted to the United States if you leave voluntarily, or it may prevent you from ever becoming a naturalized American citizen. Do you understand?

You have a right to seek advice from a private attorney about the effect a guilty plea or conviction will have on your immigration status. If you qualify for a court-appointed attorney, you can speak to the public defender about the immigration consequences of your plea. Do you understand?

The municipal court judge shall engage in this colloquy during the first appearance for all defendants charged with any of the above-listed offenses, regardless of the defendant's name, appearance, or English proficiency. This requirement is not intended to in any way limit the judge's discretion to engage in this same colloquy with other defendants who have been charged with offenses other than those listed above.

C. Guilty Plea

Before accepting a guilty plea to any of the above-listed offenses, the municipal court judge shall engage in the following colloquy with the defendant:

(1) Are you a citizen of the United States?

(If defendant answers "No" to question 1, defendant must answer questions 2 through 6.)

(2) Do you understand that if you are not a citizen of the United States, this guilty plea may result in your removal from the United States and/or may stop you from being able to legally enter or re-enter the United States?

(3) Do you understand that you have the right to seek individualized advice from an attorney about the effect your guilty plea may have on your immigration status?

(4) Have you discussed with an attorney the potential immigration consequences of your plea?

(If defendant answers "No" to question 4, defendant should next answer question 5. If defendant answers "Yes" to question 4, defendant should next answer question 6.)

(5) Would you like the opportunity to do so?

(6) Having been advised of the possible immigration consequences and of your right to seek individualized advice on your immigration consequences, do you still wish to plead guilty?

If during the plea colloquy an indigent defendant seeks the opportunity to discuss with an attorney the potential immigration consequences of the plea and the offense charged would result in a consequence of magnitude, the court should adjourn the proceedings and appoint the municipal public defender to represent defendant. The municipal court judge is under no obligation to appoint additional separate counsel for an indigent defendant to advise defendant on the immigration consequences of a plea.

Additionally, if during the plea colloquy an indigent defendant who is not charged with an offense that would result in a consequence of magnitude seeks the opportunity to discuss with an attorney the possible immigration consequences of the plea, the court should adjourn the matter to give the defendant the opportunity to do so.

Similarly, if during the plea colloquy a non-indigent defendant seeks the opportunity to discuss with an attorney the possible immigration consequences of the plea, whether or not there are possible consequences of magnitude, the court should adjourn the matter to give the defendant the opportunity to do so.

Finally, at no point in the proceedings should the municipal court judge attempt to advise defendants on an individualized basis as to what the actual immigration consequences of a particular plea might be. Both Padilla, 130 S. Ct. at 1486, and Nunez-Valdez, 200 N.J. at 131, made it clear that such individualized advice is the responsibility of counsel, not the judge. As stated previously, the judge's responsibility is limited to informing defendants that a plea or a guilty finding may result in negative immigration consequences and that defendants in that situation have the right to seek advice from an attorney regarding the potential consequences.

Any questions or comments regarding this Directive may be directed to Debra Jenkins, Assistant Director for Municipal Court Services, at 609-984-8241.

G.A.G.

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