

CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

November 2018 – Vol 3, Issue 7

*This month we want to address one clear immediately litigable issue resulting from the Court of Appeals groundbreaking decision, issued November 27, in **People v. Suazo**. In **Suazo**, the Court decided, in a 5-2 decision, that a **noncitizen defendant** who demonstrates that a charged crime carries the potential penalty of deportation is entitled to a jury trial under the Sixth Amendment. Practically speaking, this means that non-citizen defendants who are facing B misdemeanor charges and who can establish that they are potentially deportable because of the charged crime are entitled to a jury trial, notwithstanding that CPL § 340.40 requires non-jury trials in NYC of B misdemeanors. To the extent CPL § 340.40 denies jury trials to non-citizens facing potentially deportable offenses, the statute violates the Sixth Amendment.*

We expect the wide-ranging consequences of this game-changing decision to play out in NYC courtrooms over the coming months, if not years. However, we want to bring to your immediate attention an issue explicitly left open by the Court of Appeals: **“whether a citizen would likewise be entitled to a jury trial when charged with an otherwise deportable offense.”** *Suazo*, slip op. at 19.

- This open question begs for an Equal Protection challenge - namely that it violates Equal Protection to deny jury trials to citizens facing charges that would entitle non-citizens to a jury trial under the Sixth Amendment. Seize the opportunity to make this challenge!
- Here is some guidance, but you shouldn't need to say much to make/preserve the challenge:
 - If you have a citizen-client facing B misdemeanor charges (through reduction or otherwise), that would potentially lead to deportation for a non-citizen, argue that your citizen-client is entitled to a jury trial. Cite *Suazo*, the Sixth Amendment, and Equal Protection under the Federal (amend. XIV) and State (art. I, § 11) Constitutions.
 - Argue that CPL 340.40 violates Equal Protection insofar as, under *Suazo*, it now discriminates against individuals with respect to their jury trial right on the basis of citizenship or alienage, and alienage is a protected class under Supreme Court law (*City of Cleburne, Texas v. Cleburne Living Center*, 473 U.S. 432, 440 (1985)). (The burden will then fall to the People to establish a “compelling” state interest for such discrimination).

- As an Equal Protection challenge will lie only if your citizen-client is similarly situated to the hypothetical non-citizen (meaning they face B misdemeanor charge(s) with potential deportation consequences), we've attached a "cheat sheet" of B misdemeanors to this newsletter to assist you in determining whether you have a cognizable challenge.
- The list includes both straight-up Bs and attempts of As that carry, at least in some iteration, potential deportation consequences, **but it is not exhaustive, detailed, nor intended to provide immigration advice, and you should always check with immigration counsel to be sure.**
- **Of course, if your client is a non-citizen, always consult with immigration counsel concerning the immigration consequences of the charge and what might be an immigration-safer plea.**

General Reminder:

If you have a non-citizen client, consult throughout the case with immigration experts

- *Institutional providers have in-house immigration experts*
- *Regional Immigration Assistance Centers, funded by the Office of Indigent Legal Services, provide statewide support to trial and appellate attorneys.*
- *The Immigrant Defense Project houses the NYC Center.*
- *Immigration counsel will help you understand the risks your client faces, how to advise your client as to these risks, and the plea you should try to obtain.*
- *A link to ILS's list of Regional Assistance Centers can be found [here](#).*

NON-EXHAUSTIVE LIST OF B MISDEMEANORS WITH POTENTIAL IMMIGRATION CONSEQUENCES

- attempted criminal solicitation 4th degree (110/100.05)[based on underlying offense]
- conspiracy in the 6th degree (105.00)[based on underlying offense]
- attempted criminal facilitation 4th degree (110/115.00)[based on underlying offense]
- attempted assault 3rd degree [intentional] (110/120.00[1])
- attempted menacing 2nd degree (110/120.14)
- menacing 3rd degree (120.15)
- stalking 4th degree (120.45)
- attempted stalking 3rd degree (110/120.50)
- attempted criminal obstruction of breathing or blood circulation (110/121.11)
- sexual misconduct (130.20)
- attempted forcible touching (110/130.52)
- sexual abuse 3rd Degree (130.55)
- attempted sexual abuse 2nd degree (110/130.60)
- attempted unlawful imprisonment 2nd degree (110/135.05)
- attempted criminal trespass 2nd degree - sub 2 (110/140.15[2])
- attempted possession of burglar's tools (110/140.35)
- attempted criminal mischief 4th degree (110/145.00)
- attempted arson fifth degree (110/150.01)
- attempted petit larceny (110/155.25)
- attempted theft of services (110/165.15)
- attempted criminal possession of stolen property in the fifth degree (110/165.40)
- attempted trademark counterfeiting (110/165.71)
- attempted forgery 3rd degree (110/170.05)
- attempted criminal possession of a forged instrument 3rd degree (110/170.20)
- attempted tampering with public records (110/175.20)
- attempted offering a false instrument for filing (110/175.30)
- false personation (190.23)
- attempted criminal impersonation 2nd degree (110/190.25)
- attempted obstructing governmental administration 2nd degree (110/195.05)
- attempted hindering prosecution 3rd degree (110/205.55)
- attempted perjury third degree (110/210.05)
- attempted making a punishable false written statement (110/210.45)
- attempted criminal contempt 2nd degree (110/215.50)
- attempted bail jumping 3rd degree (110/215.55) [outside 2nd Circuit]
- attempted criminal possession of a controlled substance 7th degree (110/220.03 [outside 2nd Circuit])
- attempted criminally using drug paraphernalia 2nd degree (110/220.50)
- attempted criminal possession of methamphetamine manufacturing material 2nd degree (110/220.70)
- criminal possession of marijuana 5th degree (221.10)
- attempted criminal possession of marijuana 4th degree (110/221.15)
- criminal sale of marijuana 5th degree (221.35)

- attempted criminal sale of marijuana 4th degree (110/221.40)
- attempted promoting gambling 2nd degree (110/225.05)
- attempted possession of gambling records 2nd degree (110/225.15)
- prostitution (230.00)
- attempted prostitution in a school zone (110/230.03)
- attempted patronizing a person for prostitution 3rd degree (110/230.04)
- attempted promoting prostitution 4th degree (110/230.20)
- permitting prostitution (230.40)
- harassment 1st degree (240.25)
- attempted aggravated harassment 2nd degree (110/240.30)
- loitering for the purpose of engaging in a prostitution offense [is a B mis if def. has certain previous convictions)
- criminal nuisance 2nd degree (240.45)
- attempted falsely reporting an incident 3rd degree (110/240.50)
- public lewdness (245.00)
- attempted endangering the welfare of a child (110/260.10)
- attempted unlawfully dealing with a child 1st degree (110/260.20)
- attempted criminal possession of a weapon 4th degree (110/265.01)
- driving while ability impaired by the combined influence of drugs and alcohol (NYVTL 1192(4-a))