Evaluating the Chances of Obtaining Post-Conviction Relief

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A major article addressing various practical factors to consider in determining the chances of success in reopening a conviction or sentence in a criminal case, for the purpose of ameliorating adverse immigration consequences.

Table of Contents

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§ 1.1

I. Introduction and Overview

As less relief is available to immigrants with criminal records in immigration court, post-conviction work in criminal court takes on a greater level of importance. Initially, it is important to evaluate the chances of success in obtaining post-conviction relief. Chapter One deals with this topic. Two of the most important issues lawyers face when assisting clients with problematic criminal convictions and sentences are determining (1) when the prospect of vacating the conviction is hopeless versus when there is sufficient chance of success to justify the effort and expense of consulting with an expert, and (2) how to find a competent post-conviction expert in your area.[1] Chapter Two offers information on how to vacate criminal convictions: the post-conviction procedures, criminal defense tactics and strategies for vacating noncitizens' criminal convictions and sentences, to protect them against adverse immigration consequences.[2]

Chapter Three outlines the substantive grounds on which convictions and sentences may be vacated in such a way as to eliminate or ameliorate their adverse immigration effects. This chapter will concentrate on the statistically most important area of vacating convictions resting on guilty and no contest pleas, but will also briefly cover some grounds for vacating jury verdicts, and the increasingly important area of grounds to set aside a criminal sentence (while leaving the conviction intact). The errors discussed in Chapter Three are primarily drawn from federal law and the law of California; the law of other states should be consulted to see if similarities exist.

Potential grounds for invalidity of criminal convictions is a subject as broad as all of criminal law. The vast majority of criminal defenders practice in the trial courts, attempting to avoid convictions and sentences in the first place, and they may be relatively unfamiliar with grounds of invalidity of criminal convictions and sentences that can be used on appeal and in post-conviction litigation in an effort to set them aside. The substantive and procedural law governing post-conviction relief in various jurisdictions is the subject of numerous articles.[3]

The intent of this book is to provide counsel with some idea of what post-conviction counsel can accomplish in criminal courts, and of the general nature of some of the more common grounds for invalidity of criminal convictions. Sometimes counsel may be placed in the position of attempting to vacate a criminal conviction directly; on other occasions, counsel will work together with specialists on this project. In either event, some familiarity with potential grounds of invalidity may prove useful. Finally, immigration counsel may wish to provide this information to cooperating criminal counsel as suggestions for possible grounds of invalidity that may be sought in an individual case.

Many immigration and criminal counsel assume that it is difficult or impossible to vacate criminal convictions or sentences. On the contrary, because of the mass-production manner in which busy urban courts operate, because of the scarcity of resources of public defenders' offices that handle over 80% of the criminal caseload, and because of the special handicaps that innocent immigrants face when encountering the criminal justice system, most criminal convictions exhibit mistakes of greater or lesser moment in substance or procedure. If the equities are strong, minor errors may be sufficient to reopen the case. While much depends on the individual case - and other factors - success in eliminating the adverse immigration consequences can be achieved well over half the time.

§ 1.2

II. Basics of Post-Conviction Relief

Vacating criminal convictions removes them completely, as if they never existed. Congress is unlikely to be able to change this result, although the vacated convictions, or the conduct underlying them, can still have some immigration consequences.

This chapter concentrates on evaluating the chances of vacating the conviction completely, rather than obtaining lesser forms of post-conviction relief such as expungements, deferred adjudication, and the like, which are far less likely to have enduring immigration benefits.

Vacating a criminal conviction does not remove the immigration consequences (if any) of the underlying conduct.[4] This relief does, however, completely eliminate criminal convictions themselves and the adverse immigration consequences that flow from them,[5] so long as the order is based on a ground of legal invalidity of the conviction,[6] rather than on a state rehabilitative statute.[7]

§ 1.3

III. Checklist for Immigration Counsel

A. Timing: Start Immediately

Generally speaking, the passage of time damages the chances of obtaining post-conviction relief. It is therefore important to begin immediately to evaluate the case in order to determine the chances of successfully vacating the conviction and obtaining a new resolution so as to avoid or minimize the adverse immigration consequences.

§ 1.4

B. Investigation

Start immediately to gather records from the criminal case lest they be lost or destroyed by the time we later decide we need them. Obtain:

1. Complete copy of court file;
2. Complete copy of defense counsel's file;
3. Relevant court reporter's transcripts - especially of the guilty plea - but also of the sentencing hearing, diversion proceedings, motion proceedings, or trial;
4. Client's state and federal criminal history reports as well as a report from the relevant Department of Motor Vehicles;

5. Hold off on interviewing original defense counsel until after talking to post-conviction counsel.[8]

The out-of-pocket expenses of conducting this investigation usually amount to several hundred dollars, where the criminal case was resolved by a plea of guilty or no contest.[9]

§ 1.5

C. Contact With Post-Conviction Counsel

Contact criminal counsel experienced in post-conviction work as soon as possible. Give him or her a rough sketch of the case, including:

1. Immigration situation;
2. Criminal history;
3. Exactly what changes must be made in criminal conviction(s) and sentence(s) in order to avoid or minimize adverse immigration consequences;
4. How much time post-conviction counsel has to attempt these changes;
5. What do you need from him or her in the meantime? For example, the immigration court date may arrive before the conviction has been vacated. It is a good idea for post-conviction counsel to write the immigration lawyer a letter, giving a status report on the project of vacating the conviction, a prognosis of how long it will take to obtain the order setting the conviction aside, and your estimate of the chances of success. The immigration lawyer can use this letter in immigration court in an effort to obtain a continuance.
6. The criminal lawyer needs to know that the immigration courts need certified copies of the order vacating the conviction. (Apparently, they feel counsel are capable of forging a file-endorsed copy of the order, but incapable of forging a certified copy.)

§ 1.6

D. Obtaining Information From Post-Conviction Counsel

Find out:

1. The deadlines (if any) of the various forms of post-conviction relief for which the client may qualify[10];
2. How long it will take to try the various post-conviction methods;
3. The chances of obtaining the necessary relief:

a. Reopening the criminal conviction; or
b. Reopening the criminal sentence; and
c. Successfully defending the reprosecution of the case, so as to obtain an outcome that will not trigger the adverse immigration consequences;

4. The chances that the client will receive additional time in custody if convicted of more serious charges or given a lengthier sentence the second time around;
5. The cost of attempting the various forms of post-conviction relief;
6. The damage to the chances of success from delaying the effort in criminal court until after immigration-court solutions are first tried.

A detailed investigation and report from experienced post-conviction counsel can cost several thousand dollars, or even more, if the records of the case are extensive or the issues numerous and complex, or, for example, if there are several separate felony cases that must be examined.

§ 1.7

E. Talk to the Client

It is important to talk to the client throughout this process. After obtaining the information, talk to the client about the entire situation, reviewing the chances of a solution in immigration court, the time and cost required, the chances of a solution in criminal court, the time and cost required there, and the chances of receiving a worse result in terms of additional custody if the criminal defense does not go well the second time. Establish a strategy, timeline, and budget.

§ 1.8

IV. A Triage Guide to Post-Conviction Cases

We need to give our clients an accurate idea of the costs and chances of successfully obtaining post-conviction relief. We need to avoid false hope. Sometimes the greatest service we can offer is to tell the client it is hopeless and save the expenses and agonies of a doomed effort to vacate a criminal conviction. Sometimes, the fruits of victory are

so important to the client that he or she is willing to spend a great deal of time and money in an effort to clear away a prior criminal conviction, even if there is only a small chance of success.

An accountant friend of mine put it this way. Suppose the client can earn an average of $30,000 per year here in the United States and only $3,000 per year in Mexico. If the client has 37 years remaining in his or her working life, the difference is $1,000,000. That ignores compounding the income, increasing earnings over that average level, as well as the intangible benefits of avoiding destruction of the family, severing relationships with friends, family, and all that the client loves about living in the United States. We are talking about a benefit worth over $1 million; some clients feel it is worth a try even if there is only a five percent chance of remaining here.

On the other hand, if the effort is doomed, the cost of attempting to vacate the conviction represents real wealth in the native land; it may be enough to purchase a business and to survive for several years at least, even if the client has no income at all in the new country.

The following factors can generally be used in assessing the chances of obtaining post-conviction relief at an early point. They can be used to assess whether the chances are great enough to justify the time and expense of obtaining a detailed analysis of the criminal records by a criminal law expert.

For ease of reference, the factors are briefly listed in checklist form in Appendix A. Each factor is discussed in more detail in the sections that follow.

The listed factors are not exclusive. They have been selected because of their importance and because it is often possible for counsel to determine whether they exist even before an extensive review of the case has been conducted.

The issues are often not black-and-white: Cases can range anywhere on a spectrum for each factor. Obviously, if a case is at the favorable end of the spectrum for each factor, it is a very promising case indeed. Conversely, even one negative factor can be sufficient to mark a case as hopeless. For example, if the client has ten different deportable convictions each entered in a different plea proceeding, the case is probably hopeless regardless of other factors.

Nonetheless, after examining each factor and noting its presence, absence, and degree, it is useful to place this information on one page (see Appendix A) to take an overall look at the case.

The following discussion is intended to give an understanding of the meaning and importance of each factor in the overall chances of obtaining a criminal court order vacating the troublesome conviction(s) or sentence(s).

§ 1.9

A. The Current Status of the Client

The current status of the client is extremely important. Generally speaking, the extent to which the client has turned his or her life around, established a track record of living a law-abiding life, and enjoys strong family and community support will determine how likely it is that the criminal court and prosecutor can be motivated to find some way to alter the criminal conviction(s) and sentence(s) to enable the client to remain in the United States.

§ 1.10

1. The Client Is Clean and Sober

If the client is a drug addict or alcoholic who is not clean and sober, the case is hopeless. If the client has been in recovery for less than a year, the case is difficult, for many relapses occur during this time, and courts and prosecutors will rightly regard short-term recovery as somewhat tentative. If the client has one or more years of recovery, this factor can be portrayed as a favorable equity: The client has turned a difficult life around. If the client is not an addict or alcoholic, that fact is also a favorable equity (since so many defendants are).

An astonishing proportion of criminal offenses is related to drug addiction or alcoholism. If the client is a currently practicing addict or alcoholic, it does not matter what wonders criminal counsel works in criminal court, or immigration counsel in immigration court. It is only a matter of time before the client's fresh misconduct will throw it all away.

Before investing our time - and the client's money - in a difficult effort to erase criminal convictions or sentences, it is prudent to screen the client for current addiction and alcoholism and to reject any case in which it is present unless the client first enters recovery, either through a residential or outpatient chemical dependency treatment program, or through an intensive twelve-step recovery program.

Aside from the danger that the client will suffer a new arrest for a new deportable offense on top of the criminal problems already triggering adverse immigration consequences, a track record of successful recovery will form an important part of the picture we need to paint for the court and the prosecutor in order to motivate them to assist us in avoiding immigration damage to the client's life.

When an active addict consulted me, I discovered the currency of the addiction, and spent the balance of our time emphasizing the indispensability of recovery to his chances of remaining in the country and drove him and his father down to the best local chemical dependency recovery in-patient program for evaluation. The urgency of the immigration

threat, in fact, can improve the chances of successful intervention and motivation of the client to enter chemical dependency recovery, perhaps saving his or her life.

§ 1.11

2. The Client Has Strong Equities

Strong equities are very useful in motivating criminal court and prosecutor to give the client a break. This factor is nearly indispensable to successful post-conviction work.

If this factor is not present, the case can be won only if it presents extreme errors in the process that led to the conviction, plus enough evidence of innocence or technical problems in the prosecution case in effect to force an immigration-harmless result through negotiation or litigation.

Favorable "equities" are often of importance equal to or greater than legal argument in obtaining post-conviction relief. You may use them to persuade judges, prosecutors, the client's former defense lawyers, and others to support the client's efforts to remain in the United States.

Common equities include:

- The client has lived in the U.S. for many years.
- The client has or at least tried to obtain lawful immigration status here.
- The client will be able to obtain or keep lawful status if post-conviction relief is granted.
- The client has numerous close relatives who live in the U.S. now and have lived here lawfully for many years.
- Many of them are U.S. citizens or permanent residents, or are in the process of becoming so.
- The client's spouse and children are U.S. citizens or permanent residents, and it would be a hardship to divide the family and deprive the children of their parent, or, alternatively, to force innocent family members into exile.
- The client has long held a job here, and the family might be thrown onto welfare without the client's economic support.
- The client has many close friends here, and is an important and respected member of the community, active in church and community activities, etc.
- The client has already served the criminal sentence, and paid the appropriate debt to society.
- The client has suffered the full punishment that would be visited on any U.S. citizen who committed the same offense. Additional punishment, such as permanent banishment from friends and family, would be unfair.
- The client has been rehabilitated since the offense, and has had a good record on probation, in custody, or on parole.

- The victim of the crime (or the police officer, probation officer, etc.) is not in favor of removal of the client.
- The client will face political or racial persecution, danger, abuse, poverty, or unhealthy conditions if removed to the home country.
- The client's behavior was partly due to trauma caused by events that occurred in the home country, such as war, death or assassination of relatives, natural catastrophe, or poverty approaching starvation.[11]
- The client has taken himself or herself in hand, is obtaining counseling, etc.

These are common examples. Many other equities can be suggested to an imaginative mind, such as artistic, religious or philanthropic contributions, ownership of property or other ties to the community, and the like.

The equities should be recorded in a declaration from the client, documented by as much supporting information as possible, and repeated as litigation and negotiation themes.

IMPORTANT PRACTICE TIP: In describing the client's past life, do not make admissions concerning drug trafficking, addiction, or abuse, habitual drunkenness, or prostitution. The INS could use such a declaration - even without a conviction for such behavior - as a basis for deportation or exclusion.

§ 1.12

3. The Client Has Served the Time and Is Now Out of Custody

It is a fact of life in criminal court that a client who is out of custody has twice the chance of acquittal or dismissal of the charges, has a far greater chance of being seen as a human being by court and prosecutor, and has a far greater chance of remaining out of custody in the future through a sort of momentum or inertia. Such a client is far more likely to be believed as a witness and to be successful in obtaining post-conviction relief.

It is therefore urgent to get the client out of custody if at all possible. It is, in fact, possible to obtain a client's release far more often than is commonly believed. The client can then dress up and come to court with child in arms, accompanied by wife and family, to make a good impression. The client can meet with counsel, actively assist in investigation of the case, and participate fully in the persuasion and litigation. While post-conviction negotiation or litigation is not utterly hopeless if the client is in custody, the chances of success are at least doubled if the client is free.

Even if the client is in custody - so long as he or she is in this country - it is possible, though more difficult, to consult with the client, obtain declarations from the client, and obtain court orders to bring the client to court during post-conviction litigation.

§ 1.13

4. The Client Has No Outstanding or Potential Arrest Warrants

If the client has outstanding warrants, they must be cleared before the client's liberty can be obtained during the post-conviction case. Outstanding warrants also present the client in a terrible light to court and prosecutor when you are seeking a favorable exercise of discretion. The client's surrender must be negotiated; the client must be defended on the criminal case, the probation or parole violation matter, and the client must serve any new sentence s/he receives before being released. Those cases must be handled in such a way as not to incur new immigration disabilities, and then the post-conviction work on the original problem conviction or sentence must be done. This problem makes the whole case much more difficult; how much more difficult depends on the circumstances.

§ 1.14

5. The Client Has No Current Aggravated Re-entry Exposure

If the client has suffered an aggravated felony conviction and has then been deported and returned illegally, it is extremely difficult to attempt to clear criminal convictions or sentences. The client is subject to arrest on view for violating 8 U.S.C. § 1326(b)(2), a federal criminal offense carrying a maximum of 20 years in custody. Federal prosecutors are currently granting plea bargains requiring service of several years in prison in these cases, depending on the jurisdiction and on the extent of the client's prior criminal and deportation history.

If the client signs a declaration, it must include the date and city in which it was signed, and thus, if signed in the United States, on its face provides proof of the § 1326(b)(2) violation. In the alternative, the client could leave the country and sign the notarized declaration abroad, but then will not be present in the United States to lend life and substance to the post-conviction litigation in court here.

It is theoretically possible for the Attorney General to grant an alien parole into the United States to attend court appearances during post-conviction litigation, but I have not heard of it actually being done.[12]

Therefore, the client in this situation can usually offer, at best, declarations from afar to assist in the post-conviction work. Although it is possible that the state authorities will not realize that the client is subject to immigration arrest for illegal re-entry, it is not a safe bet. A couple of years ago, I filed state habeas corpus for an undocumented client who suffered from lung cancer and was undergoing extensive treatment here. After a couple of court hearings, the prosecutor told me that next time she would call INS agents as witnesses concerning the immigration consequences the client suffered. After

intensive consultation, the client decided to drop the habeas petition rather than run the risk of being arrested when he next appeared in court.

§ 1.15

6. The Client Is Lawfully Present in the United States

If the client is undocumented, many of the same problems are presented, as indicated above, although the client does not face the risk of a federal prison sentence if s/he is identified and arrested.

§ 1.16

B. The Criminal Situation

The criminal situation affects several important areas. First, if the crime is minor but the immigration consequences are serious, that creates a favorable equity for the client. Second, the smaller the changes in the criminal history that are needed, the greater the chances of obtaining them. Third, the greater the errors in the criminal case, the greater the chances of altering the conviction and sentence.

It will be necessary to consult a criminal law expert in order to get a definitive reading on these factors in any individual case, but many of them can become apparent after interviewing the client and reviewing the client's criminal history report.

§ 1.17

1. A Small Criminal Case Has Large Immigration Effects

This factor is very important. At one extreme, few judges or prosecutors would feel that it was just to deport a Legal Permanent Resident (LPR) of 30 years away from his or her U.S.-citizen spouse and U.S.-citizen children on the basis of a speeding ticket alone.

If the conviction is minor, such as a misdemeanor with no jail time, it is frequently possible to convince a judge or prosecutor to vacate and dismiss it upon credible proof of the disastrous immigration effects, even if there were no errors in the conviction and it occurred a long time ago. (In order for the INS to honor the order, however, it is necessary that the order reflect that the conviction was vacated on grounds of some legal invalidity,[13] and not on humanitarian grounds or on the basis of a state rehabilitative statute.[14]

I had a case a few years ago in which the client was convicted of being under the influence of a controlled substance, to wit, "*". The prosecutor's typist had neglected to fill in a blank on the complaint form, and the defendant had pleaded guilty "as charged in

Count I." While we mounted a technical assault against the conviction, we were able in fact to go into chambers and chuckle the conviction out of existence.

Many minor cases are summarily disposed of without regard to the technical requirements, waivers of fundamental rights, or documentation necessary to sustain the constitutionality of a criminal conviction. This is particularly true of those offenses, such as being under the influence, that fill the docks on Monday mornings so that judges make blanket offers of time served in return for mass guilty pleas. These convictions, also, can frequently be vacated and dismissed on proof of serious adverse immigration consequences; they are usually vulnerable to attack if resistance is encountered.

Prosecutors often will not care to defend misdemeanor convictions with any vigor. Defense attorneys who have good relationships with court or prosecutor can frequently call in a favor and get these vacated and dismissed. There are some exceptions: Driving under the influence, petty theft, or domestic violence convictions may be more stoutly defended because they can be alleged as prior convictions in the future to enhance sentences. Moreover, misdemeanor convictions resulting from plea bargains in felony cases, or that carry more severe sentences in their own right, may also be more vigorously defended. Nonetheless, courts may not care very much about even these more serious misdemeanors and may be willing, if you can force them open, to dismiss rather than relitigate these old cases.

The more serious the case, the more the prosecution may care to defend the conviction. For more serious misdemeanors and minor felonies, it is often necessary to offer the prosecution an equivalent immigration harmless conviction and reinstate the original sentence in order to persuade them to alter the troublesome conviction.

For felony convictions for which the client received a state prison sentence, it is common for prosecutors strongly to resist efforts to reopen the convictions and to insist on equivalent convictions and sentences the second time around, although they are often willing, once a case has been forced open, to be somewhat flexible and willing to avoid immigration consequences in negotiating a new bargain.

For these and for more serious cases, prosecutors may feel strongly enough to reprosecute the case and attempt to convict the client again of a deportable offense, or even to convict the client of more serious offenses or inflict a more serious sentence on the client. Thus, it is always important to screen cases to determine whether there is any realistic possibility the client would receive a longer prison sentence the second time around.[15]

For felonies carrying more than a few years in prison, it is unlikely that the court or prosecutor would be willing to cut the client any slack unless you can convince them the client was innocent of the original offenses.

§ 1.18

2. The Client Has One or Few Damaging Convictions. If More Than One, They Flowed From One Guilty Plea Proceeding

The best situation, of course, is one in which the client needs to attack only one conviction. It is frequently possible to obtain post-conviction relief even if the client has several convictions provided they were all received during one plea proceeding, since there is then only one plea bargain that must be set aside.

It is much worse if the client suffered multiple convictions in different cases or courts with pleas entered on different occasions, since more than one plea-bargain must be set aside. If the chances of vacating one plea are 1/10, the chances of vacating two independent pleas are 1/10 x 1/10 = 1/100, and the chances of vacating three are 1/1000.

It is somewhat easier if there is an easier "fix" for one or more of the convictions. For example, if one of the convictions is insignificant and can be vacated and dismissed for that reason alone (despite the client's other record), and the immigration consequences of another of the convictions can be eliminated by an easier form of post-conviction relief, such as diversion or expungement, and there remains only one conviction against which a full-scale assault must be mounted. That might be only slightly more difficult than if only one conviction must be set aside.

§ 1.19

3. Number and Diversity of Original Charges

It is best if the client was originally charged with only one count and entered a plea to one count. The case is then seen as more minor than if there were additional counts.

It is not so bad if there were several counts - especially if they charged different types of criminal offenses - so long as they were all committed on the same occasion. This is because each different type of charge is related to a different spectrum of lesser, similar, or equivalent offenses, some of which may be immigration-harmless. Therefore, the more different types of charges there are, the greater the probability of finding a charge that is closely related to one of them that has no adverse immigration consequences to which to plead.

If the client was charged with many counts, however, it becomes extremely difficult to set aside the plea even if only one plea was entered to one count. The court will look back at the original charges, see that the client was charged with ten different sales on ten different days, and feel (often rightly) that whatever error occurred in the proceedings would ultimately have made no difference, since it is highly unlikely the client would

have beaten all ten counts of sales at trial, and would therefore have wound up with the same sentence and immigration disability in any event. Put another way, the court will feel the client's plea to one count was not involuntary, and the client got such a good deal that s/he would inevitably have accepted it anyway, even if the error(s) had not been made. Under these circumstances, (a) it is extremely unlikely we could force open the conviction, (b) the risks of receiving additional convictions and a longer sentence become significant, and (c) the prosecutor is unlikely to be willing to grant any lenience.

§ 1.20

4. The Evidence of Guilt Is Weak, or the Client Has a Plausible Claim of (Partial) Innocence

If the client has any plausible claim of innocence, or if the prosecution evidence is weak, that forms a very powerful factor increasing the likelihood of obtaining post-conviction relief. For example, if the client possessed a small quantity of drugs, yet was convicted of possession for sale, the case may have been perfectly triable on the defense that s/he possessed the drugs for personal use. In one such case, the client had been charged with attempted murder and pleaded to assault with a firearm, yet had in truth merely shot the gun in the air. He was in fact innocent of both charges. Any plausible claim of innocence is worth a great deal, as it lends substance to the client's claim that if s/he had been correctly informed about the immigration consequences of the plea, s/he would have chosen to take the case to trial and would have had some chance of winning at trial.

Even if the claim of innocence is only partial, it still bears significance. In plea bargaining, the partial innocence may well have been worth enough to motivate the prosecutor to alter the charge to an immigration-harmless offense with the same sentence.

§ 1.21

5. The Client Was Charged Jointly With One or More Codefendants

If the client was arrested with one or more others (even if they were not charged in the same charging paper or court), or if there are one or more codefendants, the chances of obtaining post-conviction relief are increased significantly.

For starters, there are others around who may in fact have been culpable. For example, if drugs are found under the front seat of a car with a driver and one passenger, whose drugs were they? It is perfectly possible that one is guilty, the other innocent.

Secondly, many more legal errors are possible if there are codefendants. The proceedings become much more complicated. For instance, it was possible to vacate a

1980 felony marijuana-cultivation conviction because one lawyer represented both husband and wife in the same criminal case, thus triggering an active conflict of interest.[16] Similarly, where two or more defendants are offered a "package deal" in which both must accept their individual offers or neither can, the potential for one defendant to coerce another to plead guilty may be great. The trial court taking the plea therefore has an obligation to determine whether this was a package deal, and, if it is, to inquire thoroughly into the possibility of coercion.[17] It was possible to vacate a plea upon proof that a codefendant (who had since been deported) threatened the innocent defendant, thereby forcing him to take responsibility for possession for sale of the codefendant's drugs.

There are interesting questions relating to the admissibility of the statements of one defendant against another.[18] This also leads to questions of the propriety of trying two defendants jointly. And, where a court takes a plea from several defendants at the same time, the chances mount that the court will violate some procedural requirement.

§ 1.22

6. A Relatively Minor Change in Conviction or Sentence Will Solve the Immigration Problem

The chances of post-conviction relief are far greater when a relatively minor change in the conviction or sentence will eliminate the adverse immigration consequences. The classic case is People v. Soriano,[19] in which the client received a sentence of 365 days in custody, triggering immigration disaster. If the client had received 364 days, all would have been well. The California Court of Appeal held that defense counsel was ineffective for failing to investigate the immigration consequences or inform the client of them. In fact, however, if the client had received a sentence of one day less, this would have removed the immigration damage. One day less would not have been much to ask; it might easily have been granted.

Virtually the identical situation will, very likely, be arising many times in the future, now that the definition of so many common aggravated felonies requires a sentence of one year or more to be imposed.[20] There will be hundreds of situations in which defendants will receive probationary sentences on condition of serving 365 days in county jail that will become aggravated felonies solely because defense counsel failed to obtain a sentence of 364 days instead.

Another common pattern is to vacate a conviction of possession for sale of drugs (after the time has been served) and negotiate a plea to felony accessory after the fact to sale of drugs. This situation offers the prosecution a felony conviction for which the client can be sent to state prison on a probation violation, and yet the accessory conviction is not considered a drug conviction nor an aggravated felony conviction (so long as the

defendant does not receive a sentence imposed of one year or more).[21]

Finally, if the client was originally charged with three different offenses of similar magnitude, and defense counsel negotiated a plea to a deportable offense, it is frequently possible to vacate that plea, enter a plea to a different count that does not trigger deportability, and reinstate the same sentence with credit for time served.

§ 1.23

7. There Is Small Risk the Client Will Receive Additional Time in Custody if the Case Is Reopened and the Client Is Reconvicted

The client may hesitate to attempt to set aside a plea if the risk of reprosecution and reconviction carries the possibility of receiving more imprisonment the second time around. It may be necessary to consult criminal counsel in order to determine the magnitude of this risk, but it is a significant factor in many clients' minds.

In the most common situation, a defendant challenges the validity of the guilty plea and is successful. The client thereby sets aside both the conviction as well as any consideration he or she received as a result of the plea, and all original charges are reinstated.[22] The client may be convicted on retrial of greater charges and may potentially be sentenced to a greater term of imprisonment.[23]

Generally, the client must be given full credit against any new sentence for the time s/he has actually already served in the matter.[24]

As a practical matter, because of the law requiring credit for time served, and because the case may be an old one, if the client has developed a good record in custody and otherwise since the original conviction, it is often extremely unlikely that the court would resentence the client to a greater punishment after reconviction unless the court were required to do so by mandatory sentencing laws. Counsel should, however, carefully investigate and discuss the possibility with the client so the client is fully aware of this risk when deciding whether to go forward with an attack on the validity of the conviction.

CAVEAT: In this age of mandatory sentences, in some cases if the client is convicted after trial of greater offenses or enhancements, the law may require the court to impose greater punishment.

The client must make the ultimate decision whether the risk of harsher punishment upon reconviction, after initially obtaining post-conviction relief, outweighs the immigration benefits sought.

§ 1.24

8. The Jurisdiction Where the Conviction Occurred Is Relatively Sympathetic

Rural jurisdictions are often much more personal than urban mass-production courts. The judge may see the defendant every week at a country cafe and know what is going on with him, or play golf every weekend with defense counsel. These circumstances can work very much to the client's benefit, or detriment, depending on the relationships. These jurisdictions may also be intensely racist, so much so that it may not be wise to let the court or prosecutor know the immigration situation if they are not already aware of it.

Conversely, the anonymity of urban courts can enable requests for post-conviction relief to slip through in a low-visibility way that would never be possible in the country. Some jurisdictions will be far more favorable to immigrants and criminal defendants in general than others.

§ 1.25

9. Incomplete Initial Defense Investigation

It may be possible to determine from the client whether the original defense counsel conducted a thorough investigation, talked at length with the defendant to find out precisely what happened, visited the scene, interviewed eyewitnesses, and the like.

If not, that may be a ground to vacate the plea. If the investigation would have turned up evidence of innocence or evidence that would have resulted in a smaller sentence or the granting of a motion, the ineffectiveness of counsel may be ruled prejudicial, and the conviction or sentence may be set aside.

As the Supreme Court held in Strickland v. Washington, 466 U.S. 668, 691 (1984), counsel must, at a minimum, conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent his client.[25]

§ 1.26

10. Technical Problems with Prosecution Case

Another way to describe this factor is whether grounds exist to force the conviction open.[26] A detailed look at this factor would require consultation with a criminal law expert, but perhaps some technical problems would be revealed through consultation with the client, for example:

- An informant was a material witness on guilt or innocence;
- The police committed an illegal search or seizure;
- There was a lengthy delay between offense and arrest.

The nature of, and authority relating to, some of the most common grounds for reopening criminal convictions is described in Chapter 3, below. Some of the grounds are stronger than others. If the grounds to reopen the case are very powerful, the conviction may be blown open even against heavy prosecutorial opposition. On the other hand, if the equities are strong, and other factors listed in this Chapter are present, many convictions can be reopened even if the technical grounds of invalidity are not powerful.

It is essential, however, to vacate the conviction on some ground of legal invalidity in order to ensure that the INS will honor the order vacating the conviction. Well-settled federal law establishes that if a conviction is vacated as unlawful under habeas corpus or coram nobis, it is void and cannot be used to establish an alien's deportability or excludability.[27] If the conviction is vacated on purely humanitarian grounds, or solely to avoid the immigration consequences, the INS will not accept the court order as eliminating the conviction for immigration purposes.[28] Similarly, if the order removing the conviction is entered under a "state rehabilitative statute," the INS will not accept it as eliminating the conviction for immigration purposes.[29]

§ 1.27

C. The Timing of the Case

The timing of the post-conviction case is a complex factor. On the one hand, it is important for enough time to have passed since the offense was committed that the client can demonstrate considerable "clean time," i.e., that s/he has turned his or her life around.

On the other hand, it is important not to miss filing deadlines for post-conviction relief and not to allow so much time to elapse that the government can obtain an order dismissing the petition for lack of due diligence.

§ 1.28

1. Post-Conviction Deadlines Have Not Passed

It is critical to determine whether a deadline has passed restricting filing of the appropriate petition for post-conviction relief and to make sure the appropriate petition is filed on time.

§ 1.29

a. Federal Time Limits

Attacking Federal Convictions. In federal court, there are no absolute deadlines or statutes of limitations preventing filing of coram nobis attacking federal convictions. The time limitation is a general one:

> A motion for relief made pursuant to these rules may be dismissed if it appears that the government has been prejudiced in its ability to respond to the motion by delay in its filing unless the movant shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the government occurred.[30]

AEDPA[31] created a new one-year statute of limitations for filing a federal 2255 motion or habeas petition in federal court attacking a federal conviction after the latest of the following events:

a. the date the judgment became final at the conclusion of direct review;

b. the date on which the constitutional right asserted was initially recognized by the Supreme Court; or

c. the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.[32]

For a federal conviction, the one-year period does not begin to run until the judgment of conviction has become final. Normally, that would be when the period within which a notice of appeal can be filed has expired, if no appeal was taken: 10 days after the entry of the judgment of conviction.[33] Therefore, the petition for post-conviction relief must be filed within one year and 10 days after the entry of the judgment if no appeal is taken from the conviction.

If an appeal is taken from the conviction, the one-year statute of limitations begins to run when the decision of the court of appeals is final, i.e., when the period within which review in the United States Supreme Court can be sought has expired (90 days after the date of decision) or the issuance of the opinion or order of the United States Supreme Court if review in that court is conducted. Under these circumstances, the petition for post-conviction relief must be filed within one year and 90 days after the decision of the court of appeals affirming the conviction.

Attacking State Convictions. After state post-conviction attacks have been exhausted, it is possible to attack a state conviction in federal court (a) if the client is still in some form of "custody," and (b) if the one-year statute of limitations has not run.

AEDPA created a new one-year statute of limitations for filing a habeas petition in federal court attacking a state conviction after the latest of the same events given above for federal habeas.[34]

The time during which a properly filed application for State post-conviction or other collateral review . . . is pending shall not be counted toward any period of limitation under this subsection.[35]

For a state-court conviction, the one-year period does not begin to run until the decision of the highest state court is final, i.e., until the period when review in the United States Supreme Court can be sought has expired (90 days after the date of decision) or the issuance of the opinion or order of the United States Supreme Court if review in that court is conducted. Therefore, if the state supreme court denies review on January 1, 1999, the period within which certiorari can be sought expires 90 days thereafter, on April 1, 1999, and the one-year statute of limitations for filing a petition for federal post-conviction relief expires on April 1, 2000.

§ 1.30

b. State Time Limits

State time limits on filing applications for post-conviction relief vary from state to state. It would be well to request a post-conviction attorney in your state to summarize the time limits relating to the various forms of state post-conviction relief.[36] Many states have enacted statutes of limitations requiring that applications for post-conviction relief be filed within one or two years following finality of the conviction. They may also have laches requirements that post-conviction relief be pursued with due diligence.

§ 1.31

2. The Client Has Six Months or More Before Irrevocable Immigration Damage Occurs

It can take from one to two months to gather and review the documents from the court file, the reporter's transcripts, and original defense counsel's file in order for criminal counsel to do an in-depth study of the validity of a conviction.

If grounds and a procedure for attacking the conviction are found, generally speaking, it requires about six months after an application for post-conviction relief has been filed to obtain an order vacating the conviction. This estimate, of course, varies considerably depending on the nature of the case, the procedures in the jurisdiction, the extent of

litigation involved, and the like.

If the client does not have six to eight months within which criminal counsel can attack the conviction, it may not be worthwhile embarking on the effort. There may be alternative means available, such as a nonstatutory motion to vacate a conviction, that can offer the possibility of a ruling in half the time, or even less, but generally speaking, the availability of six to eight months is an important factor, strengthening the probability of success in obtaining post-conviction relief.

§ 1.32

3. There Is Still Time To Reopen the Immigration Case if Criminal Convictions Are Eliminated

Post-conviction relief may mean little to a client if it comes too late to avert the adverse immigration consequences. Thus, it is important for there to be sufficient time remaining in immigration proceedings for immigration counsel to be able to take the criminal-court order vacating the conviction and turn it to use in immigration court.

In some cases, deportation or denial of immigration benefits based upon the conviction can be reversed upon a motion to reopen in immigration court once the conviction has been vacated.[37] Where the legal basis of a finding of deportability has been nullified, a new deportation hearing may be warranted.[38] A deportation proceeding may also be reopened - even after a criminal conviction has initially become final - if a criminal court accepts a late appeal of the criminal conviction and the conviction becomes non-final.[39]

PRACTICE POINTER: The new rules limiting motions to reopen must be consulted in this connection.[40]

A motion to reopen deportation proceedings in immigration court must be filed within 90 days after the deportation order becomes administratively final. An order of the immigration judge becomes final when the time for taking an appeal to the BIA has expired 30 days after entry of the order. An order of the BIA dismissing the noncitizen's appeal is considered final when entered, and the noncitizen has 90 days from then within which to file a motion to reopen with the BIA in Falls Church, Virginia. If the motion comes too late, it will be denied unless the INS joins in the motion.

It may be possible to file the motion timely (i.e., within 90 days of the BIA decision), and obtain the order in criminal court vacating the conviction thereafter, so long as the certified copy is provided to the BIA before the BIA has acted on the motion, although the order vacating the conviction should be submitted with the motion to reopen if at all possible.

§ 1.33

4. The Records Necessary To Establish Error in the Criminal Case Still Exist

Successful post-conviction work requires documentation of errors in the procedures used to obtain the conviction. More and more, criminal courts are destroying their records after a certain period of time, and criminal lawyers are following suit. It is therefore urgent to begin immediately the process of gathering the records from the criminal court, court reporters, and original defense counsel. Only if these records exist does the client have a reasonable probability of demonstrating the existence of an error so serious as to warrant reopening the conviction.

If insufficient records exist, the prospects of vacating the conviction may be hopeless. In one 1980 case in which the court file had largely been destroyed, it was necessary to reconstruct the court file from records in defense counsel's file, appellate counsel's file, the appellate record, and some documents remaining in the original court file, and to file the reconstructed court file along with the motion to vacate the conviction.

§ 1.34

V. Some Suggestions on Finding Post-Conviction Counsel in Your Area

Post-conviction work is very complicated, a specialty of its own. Many criminal defense attorneys may never handle post-conviction writs, or only very rarely. When seeking post-conviction counsel, it is necessary to inquire specifically into potential counsel's experience in this area.

Post-conviction cases involve simultaneous litigation of a number of different versions of a case:

1. the original criminal case the way it was in fact litigated;

2. the original criminal case the way it should have been litigated;

3. the new post-conviction case you are filing in an effort to vacate the conviction;

4. the even newer reprosecution if the old case is reopened; and sometimes even

5. post-conviction relief from the effects of the new resolution of the criminal case.

It is important to balance expertise in this specialty against the advantages of local counsel, who:

- knows the personalities in the courthouse on a daily basis and enjoys their respect;
- knows local practice; and
- has offices only minutes from the courthouse (as opposed to hours).

On the other hand, an expert:

- knows the arsenal of various forms of post-conviction relief available;
- can make one up to fit the case when necessary; and
- either knows or is willing to learn the necessary immigration law.

Possible sources of experienced post-conviction counsel include:

1. Members of the National Association of Criminal Defense Lawyers, a national organization analogous to the American Immigration Lawyers Association. Unfortunately, the NACDL does not make its membership directory available to nonmembers. It is therefore advisable to get to know a member who can consult his or her directory and offer referrals. The NACDL also provides a hotline panel of legal experts who can be consulted on topics such as effective assistance of counsel, immigration, motions to set aside verdict/2255, and withdrawal of guilty pleas. The NACDL may refer you to a member in your area. Call NACDL at (202) 872-8688.

2. The local death penalty resource center, which will have staff attorneys with a great deal of experience in post-conviction litigation of capital cases. They may be able to suggest ex-staff attorneys now in private practice who know local post-conviction litigation in depth. The techniques appropriate in a capital case can be used - in full form or scaled-down versions - in immigration-related cases that, after all, involve the threat of a life sentence to exile.

3. The local National Lawyers Guild Office can offer referrals.

4. Lawyers' directories may also be consulted. Martindale-Hubbell is on Lexis and can be searched online.

5. Look for names that come up repeatedly when you consult public defenders, reputable criminal defense lawyers, judges, local bar associations, and local criminal defense lawyer associations.

Don't assume someone is good. Check them out. Obtain several references and interview them.

Conduct an interview, as if hiring an employee. Consider asking the following questions:

1. Putting yourself aside for a moment, could you give me the names of three attorneys in this area who specialize in post-conviction relief in criminal cases?

2. How many post-conviction attacks have you filed in the last year? Motions to withdraw guilty pleas? Habeas corpus? Coram Nobis? Federal attacks: 2255 motions?

3. What books do you have in your library concerning post-conviction relief? (Look for Liebman & Hertz, Federal Habeas Corpus Practice and Procedure (2 volumes), Larry W. Yackle, Postconviction Remedies; Ira P. Robbins, Habeas Corpus Checklists - annually published. A call to your local law library reference librarian (or one at a local law school) can help you form a list of comparable publications related to state post-conviction relief.)

4. Ask what immigration-related post-conviction work they have done and who the immigration lawyers were on those cases. You can then call them as references to check the lawyer out.

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[1] This chapter was originally published, in somewhat different form, as N. Tooby, "Evaluating the Chances of Obtaining Post-Conviction Relief: What Immigration Lawyers Need to Know," in Practice Under IIRAIRA One Year Later: Regulations, Case Law and Agency Interpretations (AILA, R. Patrick Murphy, ed. December, 1997).
[2] Chapter Two was originally published as N. Tooby, "Vacating Criminal Convictions," in II 1997-1998 AILA Immigration and Nationality Law Handbook - Advanced Practice 339 (1997).

[3] For example, see J. Liebman & R. Hertz, Federal Habeas Corpus Practice and Procedure (3d ed. 1998); L. Yackle, Postconviction Remedies (1981 & 1999 Cum. Supp.); I. Robbins, Habeas Corpus Checklists (1996); N. Tooby, Post-Conviction Relief, in K. Brady, N. Tooby, et al., California Criminal Law and Immigration (Immigrant Legal Resource Center 1999) (California law); D. Kesselbrenner & L. Rosenberg, Immigration Law and Crimes (1999), Chap. 4.

[4] See Chapter Two, infra; K. Brady et al., California Criminal Law and Immigration, Chapter 3 and §§ 4.2, 6.2 (1999).
[5] See Chapter Two, infra.
[6] Beltran -Leon v. INS, 134 F3d. 1379 (9th Cir. 1998).
[7] Matter of Roldan, Int. Dec. 3377 (BIA 1999).
[8] See Chapter Two, infra.
[9] See Chapter Two, infra, for details of conducting the investigation.
[10] See Appendix B, infra, for a sample memorandum listing the California post-conviction deadlines. It would be wise to commission post-conviction counsel to prepare an analogous memorandum for your state.

[11] In fact, defendants from developing countries, and certainly countries of long civil war such as in Central America and Southeast Asia, often have endured terrible events through no fault of their own that in turn led to emotional problems and criminal acts. Often such people made valiant attempts to save relatives in the home country, and showed great determination just to make it to the United States. If the client is willing to discuss such events with you, it might prove helpful to provide a short description to the judge while emphasizing that the client has regained

the will to persevere and wants to take advantage of American life. Regarding extreme poverty, simple questions such as "When did you own your first pair of shoes?" or "What did you eat for breakfast, lunch and dinner?" paint a picture of life in rural areas or refugee camps.
It may well be that post-traumatic stress disorder, resulting from traumatic experiences in the country of origin, provides an explanation, defense, excuse, or mitigation to the criminal offense, and that psychiatric or psychological evaluation would yield valuable information and documentation.

[12] See INA § 212(d)(3), 8 U.S.C. § 1182(d)(3).
[13] See Beltran-Leon v. INS, 134 F3d. 1379 (9th Cir. 1998).
[14] Matter of Roldan, Int. Dec. 3377 (BIA 1999) (en banc).
[15] See Factor 7, § 1.23, infra.
[16] See Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718 (1980); Glasser v. United States, 315 U.S. 61, 62 (1942). See § 3.15, infra.
[17] In re Ibarra (1983) 34 Cal.3d 277, 193 Cal.Rptr. 538 (package deal coercive unless affirmative showing of voluntariness on the record at the plea); see United States v. Martinez-Molina, 64 F.3d 719 (9th Cir. 1995); United States v. Caro, 997 F.3d 657 (9th Cir. 1993). See § 3.27, infra.
[18] See Lee v. Illinois, 476 U.S. 530, 106 S.Ct. 2056 (1986) (codefendant's confession inadmissible against defendant as hearsay and by force of Sixth Amendment Confrontation Clause); Bruton v. United States, 391 U.S. 123 (1968) (defendant has right to exclude codefendant's confession from joint trial if it mentions and explicitly incriminates the defendant, but does not bar admission of codefendant's confession that does not mention defendant).
[19] (1987) 194 Cal.App.3d 1470. See K. Brady, supra, note *, § 8.26.
[20] 8 U.S.C. §§ 1101(a)(43)(F) (crime of violence), (G) (theft, receiving stolen property, burglary), (P) (passport fraud), (R) (commercial bribery, counterfeiting, forgery, trafficking in vehicles with altered ID numbers), (S) (obstruction of justice, perjury, subornation of perjury, bribery of a witness).
[21] Matter of Batista-Hernandez, Int. Dec. 3321 (BIA 1997).
[22] See United States v. Barron, 127 F.3d 890 (9th Cir., 1997).

[23] Alabama v. Smith, 490 U.S. 794, 104 L.Ed.2d 865 (1989) (presumption of vindictiveness does not apply when greater sentence is imposed after trial than was imposed after prior guilty plea). If the original sentence was a legally "unauthorized" one (either too great or too small), and the client attacks the conviction, the improper sentence may be set aside at any time the error is brought to the notice of the court, and there is no bar to imposition of a greater proper sentence. People v. Serrato, 9 Cal.3d 753, 764 (1973); United States v. Edmonson, 792 F.2d 1492, 1496 (9th Cir. 1986).

[24] E.g., California Penal Code § 2900.5.
[25] See also Hendricks v. Vasquez (9th Cir. 1099, 1109) (vacating conviction); United States v. Burrows (9th Cir. 1989) 872 F.2d 915, 918 (reversing conviction for failure to investigate a mental defense); Evans v. Lewis (9th Cir. 1988) 855 F.2d 631, 637 (holding a failure to investigate "cannot be construed as a trial tactic" where counsel did not even bother to view relevant documents that were available). See § 3.7, infra.
[26] See Chapter Three, infra.
[27] United States v. ex rel. Freislinger on Behalf of Kappel v. Smith, 41 F.2d 707 (7th Cir. 1930); Sawkow v. INS, 314 F.2d 34 (3d Cir. 1963); Matter of Sirhan, 13 I&N 592 (BIA 1970).
[28] See Beltran-Leon v. INS, 134 F.3d 1379 (9th Cir. 1998). Counsel must "identify [a] new defense or legal defect[] in the criminal proceedings" (in contrast to the situation in Beltran). (Ibid.) The petitioner must "request[] that the conviction be set aside solely in order to prevent deportation . . . ." (Ibid. [emphasis supplied].) And the normal order granting the petition for a writ of habeas corpus or coram nobis, or the motion to vacate, will therefore be effective to "remove the legal basis of [the] conviction for purposes of application of federal [immigration] law." (Ibid.)
[29] Matter of Roldan, Int. Dec. 3377 (BIA 1999) (en banc).
[30] Rules Governing Section 2255 Proceedings for the United States District Courts, Rule 9.
[31] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (hereinafter AEDPA).
[32] 28 U.S.C. § 2255, as amended by AEDPA § 105(1).
[33] Federal Rule of Appellate Procedure 4(b)(1)(A)(i).
[34] 28 U.S.C. § 2244(d)(1), as amended by AEDPA § 101.
[35] 28 U.S.C. § 2244(d)(2), as amended by AEDPA § 101.

[36] An example of such a memorandum describing California time limits governing post-conviction relief is Appendix B to this book. A survey of the post-conviction remedies available in the different states is contained in L. Yackle, Postconviction Remedies, § 13, p. 65 (1981 and 1999 Cumulative Supplement) and D. Wilkes, State Postconviction Remedies and Relief (1996 and 1999 Supplement).
[37] See Weidersperg v. INS, 896 F.2d 1179 (9th Cir. 1990); Estrada Rosales v. INS, 645 F.2d 819 (9th Cir. 1981); Mendez v. INS, 563 F.2d 956 (9th Cir. 1977). See also Matter of Malone, 11 I&N 730 (BIA 1966).
[38] Bridges v. Wixon, 326 U.S. 135, 156, 65 S.Ct. 1443, 1453, 89 L.Ed. 2103 (1945); Kovac v. INS, 407 F.2d 102, 107 (9th Cir. 1969); Estrada-Rosales v. INS, 645 F.2d 819, 821 (9th Cir. 1981).
[39] See Matter of P-V, Int. Dec. 3232 (BIA 1994).
[40] 8 CFR §§ 3.2(c)(2), 3.23(b)(4)(i); see Douglas S. Weigle & Benjamin Landey, "Motions to Reopen and Reconsider," in II 1997-1998 AILA Immigration and Nationality Law Handbook - Advanced Practice 268 (1997).