

Law Offices of Norton Tooby

Crimes & Immigration

eNewsletter

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Getting a Second Opinion

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[1] Introduction. In the medical field, second opinions are well-established as a way for a patient to obtain a fresh perspective on the situation. There is no reason that immigration and criminal counsel should not be open to the same opportunity, especially for complex questions on the overlap between immigration and criminal law. The law is always changing, and other circuits may have accepted an argument that can then be raised in your own circuit. Our own consultation practice has long emphasized two areas:

(1) pre-plea consultations seeking a safe haven plea bargain in a criminal case that will not trigger deportation or other adverse immigration consequences, and

(2) post-conviction consultations concerning (a) what changes in the criminal conviction or sentence will avert immigration damage, and (b) the post-conviction vehicles and grounds by which these changes may be achieved, and the chances of success in obtaining the necessary post-conviction relief. See N. Tooby, *Post-Conviction Relief for Immigrants* (National Edition, 2004).

Recently, however, we have been conducting more and more consultations with immigration counsel or immigrant clients themselves concerning arguments that can be raised in immigration court that a given criminal conviction does not trigger immigration damage, either because it does not fall within a ground of deportation, or because it does not disqualify the client from relief in immigration court. Many arguments against

deportability - often available no where else -- have been gathered in the 1000-page practice manual, N. Tooby & J. Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Convictions* (2005), which contains hundreds of arguments for immigration counsel to use in immigration court against deportability under all 51 different grounds of deportation. Criminal counsel are becoming increasingly sophisticated and are increasingly using these techniques to obtain safe-haven dispositions in criminal court. It is very important not to miss them when they are present.

[2] **Determining What Actually Happened in Criminal Court.** It is very important not to leap to the conclusion that a client is deportable without a careful examination of the record of conviction in a criminal case. Sometimes, criminal law expertise can be of assistance. In another case, the client had been convicted of loitering near an adult school, under California Penal Code § 647b, which does not constitute a crime of moral turpitude. The criminal clerk, however, had written down in the court minutes that the client had been convicted under Penal Code § 647(b), soliciting a lewd act. As an experienced criminal defense attorney, I wrote an expert declaration explaining the clerk's mistake which was ultimately accepted by the Immigration Judge. If the court had not accepted this declaration, it would still have been possible to file a motion to correct the clerical error and transform the apparent CMT conviction to the non-deportable actual offense of conviction to remove this ground. See N. Tooby, *Criminal Defense of Immigrants* (2003).

[3] **Drug-Trafficking.** For example, the fiancée of a Lawful Permanent Resident in mandatory detention in Eloy, Arizona consulted us concerning whether there was anything that could be done to prevent his deportation for two separate convictions of sale of heroin. Despite the initial impression that this might be a hopeless case, we obtained and examined the record of conviction in each case. To our surprise, the prosecution in each case had charged him with "sale or transportation or offering to transport" heroin, in the words of the divisible statute. Because the immigration court can consider only the minimum elements that would satisfy the conviction, he was properly considered convicted only of "offer to transport" a controlled substance. Offering to transport is considered equivalent to "solicitation," a non-substantive offense that, unlike attempt and conspiracy, is not listed in the aggravated felony definition. See INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U). Therefore, in the Ninth Circuit, neither of his convictions constituted either a drug-trafficking aggravated felony or even a controlled substances offense. Therefore he was not deportable at all for these convictions. *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001). We wrote an opinion letter to the client, his fiancée took it to him, he gave it to the immigration judge with the certified copies of the non-deportable charges to which he had pleaded guilty. Proceedings were terminated, and he was released from mandatory detention.

[4] **Crimes of Moral Turpitude.** In another case, a client consulted us after having been ordered deported by an Immigration Judge who concluded that his conviction of criminal copyright infringement constituted a crime of moral turpitude. Because the deportation order had just been issued, we were able to draft an expert declaration concluding the conviction was not, in fact, a CMT, citing *Dowling v. United States*, 473 U.S. 207, 216-

219 (1985) ("It follows that interference with copyright does not easily equate with theft, conversion, or fraud."). Immigration counsel filed a motion to reopen before the IJ, who reopened and terminated proceedings because he now believed the conviction was not a CMT. See N. Tooby & J. Rollin, *Crimes of Moral Turpitude* (2d ed. 2005).

[5] Aggravated Felonies. A client who was unrepresented by counsel consulted us from custody after having been ordered deported as an aggravated felon on account of her conviction of violating California Penal Code § 368(d) - theft from an elder with a two-year prison sentence. We consulted with her pro bono, investigated the record of conviction, and concluded that the conviction was not indeed an aggravated felony theft offense. The record of conviction did not show she was convicted of the aggravated felony portion of the divisible statute, as opposed to the non-aggravated felony portion of the statute that can be violated by mere "theft of services," which the Ninth Circuit has held is not included within the definition of an aggravated felony theft offense. *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc). The client filed a pro se notice of appeal, and volunteer immigration counsel obtained a remand and termination of proceedings based on this argument. See N. Tooby & J. Rollin, *Aggravated Felonies* (3d ed. 2006).

[6] Illegal Deportation as an Element in Illegal Reentry Cases. If a client is charged in United States District Court with illegal reentry after deportation after an aggravated felony conviction, it is sometimes possible to establish that the deportation order was unlawful. This requires an analysis of the criminal history, and its immigration consequences, and an examination of the deportation hearing looking for fundamental errors. In one case, the client had been ordered deported at a time when felony driving under the influence, with a one-year sentence imposed, was considered to be an aggravated felony. This also occurred prior to *INS v. St. Cyr*, 533 U.S. 289 (2001), which held that INA § 212(c) relief remained available for qualifying aggravated felons who entered their pleas of guilty prior to April 24, 1996. An expert declaration established that (a) a felony DUI with a one-year sentence was not indeed an aggravated felony, and (b) the client had in fact been eligible for 212(c) relief at the time of the deportation hearing, although the judge had not informed him of that fact because the hearing occurred prior to *St. Cyr*. The prosecution thereupon dismissed the illegal reentry charges in their entirety.

[7] Consultation Practice. Our office is happy to offer consultations on these subjects on short notice. If the necessary criminal and immigration documents are provided, we can usually offer a consultation within a few days that includes review of the necessary documents and an hour and a half consultation in person or by telephone. Very detailed and specific analysis is offered, and simultaneous consultation notes are recorded which can be emailed anywhere immediately after the consultation is over. Intake forms describing the necessary information and documents are available for downloading under "Services" on our website, www.CriminalAndImmigrationLaw.com. More extensive written case evaluations are also available, as are post-conviction relief services anywhere in the United States.