

Law Offices of Norton Tooby

# Crimes & Immigration

eNewsletter

**October, 2004**

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## Post-Conviction for Noncitizens: How Immigration and Criminal Defense Counsel Work Together - Timing Issues

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[1] INTRODUCTION: Post-Conviction for Noncitizens: How Immigration and Criminal Defense Counsel Work Together - Timing Issues.

By: Joseph Justin Rollin and Norton Tooby

Increasingly, immigration counsel and criminal defense counsel are finding it necessary to cooperate in representation of a noncitizen client. One of the more challenging aspects of assisting a noncitizen to avoid removal for a criminal conviction is the timing. On one hand, there is a question of when to approach cooperating criminal or immigration counsel. On the other hand, once a two-front criminal/immigration attack begins, it often becomes necessary for one counsel to move slowly in order to afford enough time to allow the other counsel to complete his or her work.

Part I of this article will discuss these timing issues from the perspective of a criminal defense or post-conviction counsel. Part II will discuss the same issues from the perspective of immigration counsel. Immigration counsel may get the most from this article by reading the criminal defense section of this article, and vice-versa.

[2] ONLINE RESOURCES:

BIA decisions may be viewed without charge at:  
[http://www.usdoj.gov/eoir/vll/intdec/lib\\_indecitnet.html](http://www.usdoj.gov/eoir/vll/intdec/lib_indecitnet.html)

D. Kesselbrenner & L. Rosenberg, Immigration Law and Crimes is online at [www.westlaw.com](http://www.westlaw.com).

C. Gordon, S. Mailman & S. Yale-Loehr, Immigration Law and Procedure (2002) is online at LexisNexis.

Additional Enewsletters on post conviction relief and other immigration and crimes topics may be viewed without charge at:  
[http://www.criminalandimmigrationlaw.com/Free\\_verified.php](http://www.criminalandimmigrationlaw.com/Free_verified.php)

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Three hours of audio training, plus written materials on:

1. How to determine what post-conviction relief is necessary to avoid immigration consequences
2. How to assess the chances of obtaining the necessary relief
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4. Non-immigrant related grounds to vacate guilty pleas
5. How to vacate or reduce sentences to avoid immigration consequences

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ARTICLE PART I: Timing Issues for Criminal Defense Counsel

A) Pre-Plea/Sentence: The American Bar Association and many states are putting increasing pressure on criminal defense attorneys to investigate the immigration consequences that a conviction will have upon a noncitizen client. At least 19 states and the ABA now require the court to inform a noncitizen of the immigration perils prior to entry of plea. See D. Kesselbrenner & L. Rosenberg, *Immigration Law and Crimes*, Appendix B (2004). Some states also require defense counsel to defend the client against a conviction that would have often disastrous immigration consequences for the noncitizen client.

The best way for defense counsel to meet these new standards is to contact an immigration attorney prior to entering a plea. The immigration attorney will need to know at least these basic facts:

- a) the client's immigration status (undocumented, visa holder, green card holder, etc.);
- b) how long the client has been in the United States (since entry, and/or since getting their visa or green card);
- c) the date of the offense;
- d) the wording of the charges contained in the criminal complaint;
- e) the client's criminal history.

Immigration counsel can then determine the immigration consequences of a conviction under the charges, and suggest immigration safe alternatives. Some states have non-profit organizations that make themselves available to public defenders to assist their noncitizen clients.

If immigration counsel cannot be reached prior to entry of the plea, immigration counsel may still assist in suggesting a sentence. Alternatively, immigration counsel may be able to assist in developing an argument for withdrawal of the guilty plea prior to sentencing.

B) Post-Conviction Relief: If the noncitizen has been convicted and sentenced already, he or she will need a criminal defense lawyer familiar with post-conviction relief. The timing of the post-conviction case is a complex question. On one hand, it is important that enough time has passed since the offense was committed for the client to demonstrate considerable "clean time," so s/he can establish 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 in investigating or filing the claim of legal invalidity. It is critical immediately 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.

In many jurisdictions, the most common and easiest form of post conviction relief, habeas corpus, is not available to someone once they have been released from criminal custody, probation, or parole. In federal court, there is a one-year statute of limitations for filing habeas, even if the defendant is still in custody. Immigration custody does not count. Other forms of relief, including a nonstatutory motion for vacate, or coram nobis, may not have a set filing deadline, but they often do require an explanation for any periods of delay between the date of the conviction and the date the motion is brought. Even if a nonstatutory motion or coram nobis petition can be brought, however, it may be too late to attack the conviction on certain grounds. Some jurisdictions, for example, allow a defendant to make an ineffective assistance of counsel claim in a habeas corpus petition, but not in a coram nobis petition.

Other forms of relief, such as a reduction in the length of a sentence from in California, require that the defendant file the motion while s/he is still on probation. Post conviction counsel is the best suited to determine the best timing to bring an attack after s/he has had a chance to review the documents. Nevertheless, the sooner counsel can review those documents and develop a strategy, the better.

Post-conviction counsel will likely need the files from the court and the original defense counsel, as well as any documents the client may have, and reporters transcripts of the trial or plea and sentencing hearings (these transcripts are often not part of the court file). It may take one to two months to gather and review these documents to determine the best way to approach the post-conviction attack.

Recently, some 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. On the other hand, there are some issues as to which the prosecution bears the burden of proof (e.g., where the court is required to maintain record that the immigration consequences of the conviction were explained to the defendant). As to these issues, the defense position may be strengthened by the destruction of the criminal records.

Once some sort of petition or motion for post conviction relief has been filed, it can take weeks, months, and sometimes more than a year

to obtain the post-conviction relief. Generally, this process takes about six to eight months. The amount of time varies depending upon the jurisdiction (federal cases tend to take longer), the individual court (depending on the court's docket, etc.), the parties involved (post conviction counsel may need time to convince a tough D.A. or Judge), and the type of motion filed with the court. Immigration counsel needs to keep this in mind, ask post-conviction counsel for an estimate, and consider ways to give post-conviction counsel the time s/he needs (see below). If the client does not have six to eight months within which criminal counsel can attack the conviction, it may not be worth embarking on the effort.

Once the post-conviction attack has been successful, criminal defense counsel need to obtain certified copies of the new disposition, and send those to immigration counsel as soon as possible.

#### [4] PRINT RESOURCES:

For a comprehensive discussion of post-conviction relief for noncitizens, see N. Tooby, *Post Conviction Relief for Immigrants* (2004); N. Tooby, *California Post-Conviction Relief for Immigrants* (2002). See also, N. Tooby, *Effective Post-Conviction Relief: Eliminating Criminal Convictions for Immigration Purposes*, in *II AILA Handbook on Immigration and Nationality Law - Advanced Practice* (2001-2002); N. Tooby & K. Brady, *Criminal Defense of Immigrants* Ch. 10 (3d ed. 2003); Norton Tooby, *Aggravated Felonies* Ch. 7 (2003); Dan Kesselbrenner & Lory Rosenberg, *Immigration Law and Crimes* §§ 4.2, 4.20 (2003).

#### [5] ARTICLE PART II: Timing Issues for Immigration Counsel

Noncitizen clients approach immigration counsel at many different stages, from the day the client is arrested, to the day s/he loses a pro-se appeal at the Board of Immigration Appeals (BIA). As with criminal counsel, the sooner a client contacts immigration counsel the better. Immigration (and criminal defense) attorneys may want to make it a practice to inform all their noncitizen clients that any criminal convictions or charges need to be addressed as soon as possible.

Ideally, noncitizen clients should contact immigration counsel before they enter a plea of guilty in criminal court, or before they are sentenced. At this point, immigration and criminal defense counsel can work together to find an immigration-safe disposition in criminal court, or at least one

that will allow the client later to seek relief in immigration court.

If the client was convicted, but has been able to avoid coming to the attention of the immigration authorities, it is important to determine the immigration consequences of the conviction and start post-conviction work before the client makes his/her status known to the immigration authorities. The client usually should not attempt to travel outside the United States. The client should also avoid bringing himself or herself to the attention of the immigration authorities by filing an application for naturalization or adjustment of status. Given the current change of address requirements and new computer databases, the client also may want to refrain from moving to a new location or applying for renewal of an expired green card.

The good news, however, is that as long as the client can avoid arrest by the immigration authorities, s/he has time to invest in seeking post conviction relief. Note that filing documents with the court may, in some cases, result in the immigration authorities being alerted. Counsel should be prepared in case this happens.

If the immigration authorities have come across the noncitizen while in criminal custody, immigration proceedings will likely begin as soon as the noncitizen is released (usually to immigration custody). If the client has filed an application of some kind, the immigration authorities may issue a Notice to Appear the same day the application is denied. Again it is better to start post-conviction work before immigration proceedings begin, since 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 perform 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.

Once a Notice to Appear has been filed, immigration counsel will need to work to give post-conviction counsel the time s/he need to complete a review of the criminal case and complete the post-conviction attack.

It is often helpful in obtaining a continuance in immigration court to present a letter from post-conviction counsel to the immigration judge that discusses the post-conviction work and sets a date (in the reasonably foreseeable future) that post-conviction counsel expects s/he will be able to successfully complete the attack. The sooner post-conviction counsel expects the attack will succeed, the more likely immigration counsel will be able to obtain a continuance.

Immigration counsel, as always, should not automatically concede the allegations made by the immigration authorities. Immigration counsel can hold the immigration authorities to their burden of proof, and present arguments to the Immigration Judge that the client's conviction should not cause removal. Even though an argument may ultimately be weak, presenting the argument will require the immigration authorities and judge to invest additional time to the benefit of post-conviction counsel and your client. Note that it may be beneficial to confer with post-conviction counsel in finding arguments that can be presented to the immigration judge.

Proceedings before an immigration judge may again be a matter of days, weeks, months, or years depending on the individual case. A noncitizen who is clearly an aggravated felon, and is in immigration custody, will not spend much time before an immigration judge compared to a client who has arguments that his/her offense is not an aggravated felony, who is out of custody, and/or who may have a viable claim to asylum or other form of relief. Immigration counsel is in the best position to estimate how long immigration proceedings will last.

After the Immigration Judge has made a decision, there is a 30-day period before an appeal to the BIA has to be made, and a 90-day period in which to bring a motion to reopen or motion to reconsider. Again, depending upon the issues presented, and whether the client is in immigration custody, an appeal to the BIA can take from six months to a number of years. Immigration counsel, however, may want to avoid making a frivolous appeal or motion to reopen.

Even if post-conviction counsel was not retained until immigration proceedings commenced, it may still be possible to succeed in a post-conviction attack before the BIA issues a decision. After a successful attack, immigration counsel can then make a motion to remand the case to the immigration judge to consider the new criminal disposition.

Finally, if post-conviction work cannot be completed by the time the BIA issues a decision, immigration counsel may want to consider appealing the decision of the BIA to the federal circuit court or file a habeas petition with the federal district court. Although there is a short period in which to begin an appeal or habeas petition, these proceedings again can take years to complete.

Success in attacking a conviction to allow a noncitizen to avoid removal takes a strong level of cooperation between counsel. Counsel must work together to ensure that they are able to give their client every opportunity of success in either venue. Although it may be difficult, and expensive, to launch a two-front attack, the chances of success are cumulative and the stakes are high.

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