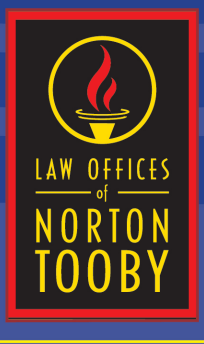
Tooby's Guide to Criminal Immigration Law

by

Norton Tooby

How Criminal and Immigration Counsel Can Work Together to Protect Immigration Status in Criminal Cases



Tooby's Guide To Criminal Immigration Law

By Norton Tooby

- Short and sweet: only 230 pages
- Simple and easy to understand
- Step-by-step checklists throughout the criminal process
- Summarizes the 2000-page CRIMINAL DEFENSE OF IMMIGRANTS
- Useful in any jurisdiction
- Well organized to save hours of research

Praise for Mr. Tooby's Work:

"Essential."
— Dan Kesselbrenner, Director, National Lawyer's Guild, National Immigration Project, Boston, Massachusetts

"The definitive resource."
— Ann Benson, Directing Attorney, Washington Defenders Immigration Project, Seattle, Washington

"Intelligent strategies and practical tips."
— Kathy Brady, Immigrant Legal Resource Center, San Francisco, California

About the Author

Norton Tooby practices law in Oakland, California, consulting with criminal and immigration counsel to find safe pleas in criminal cases and obtain post-conviction relief nationwide, to avoid adverse immigration consequences.

- Listed in Best Lawyers in America
- Graduate of Harvard University and Stanford Law School
- President of the *Stanford Law Review*, 1969-1970
- Vacated death penalty conviction and set client at liberty
- Author of best-selling practice manuals on criminal and immigration law

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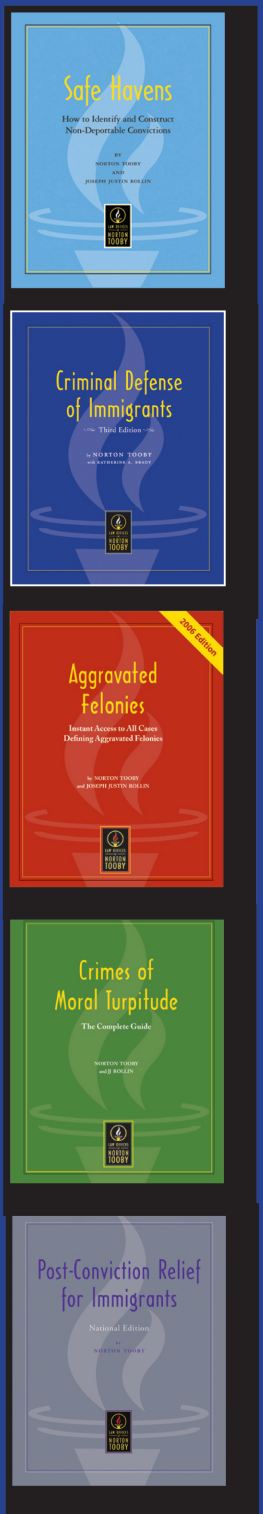
Tooby's Manuals



Read This First

The information in this book is as up-to-date and accurate as we can make it. But it's important to realize that the law changes frequently, as do procedures. It is up to you to be sure that all information you use – including the information in this book – is accurate. Here are some suggestions to help you:

First, make sure you've got the most recent edition of this book. To learn whether a later edition is available, go to our bookstore at www.NortonTooby.com or call our office at 510-601-1300.

Next, even if you have a current edition, you need to be sure it's fully up to date. The law can change overnight. At www.NortonTooby.com, we post notices of major legal and practical changes that affect the latest edition of each book, keyed to the specific section number (e.g., § 5.19). To check for updates, find your book in the Premium Member area and then click the book's title. Check back regularly.

Finally, while we believe accurate and current legal information should help you answer many of your legal questions, this text is not a substitute for reading the cases and authorities yourself to verify they apply to the facts of your case. It is also important to see whether and how the law has changed since the text or update was written. If you are doing your own research, you will need personalized advice from a knowledgeable lawyer. If you want the help of a trained professional, consult an attorney licensed to practice in your state or before the immigration courts. For suggestions on finding competent counsel, see § 3.1 in the text.

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About the
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  - TOOBY'S GUIDE TO CRIMINAL IMMIGRATION LAW: HOW CRIMINAL AND IMMIGRATION COUNSEL CAN WORK TOGETHER IN CRIMINAL CASES TO PROTECT IMMIGRATION STATUS (2008) by N. Tooby
  - TOOBY'S CRIMES OF MORAL TURPITUDE (2008) by N. Tooby, J. Rollin & J. Foster
  - CRIMINAL DEFENSE OF IMMIGRANTS (2007) by N. Tooby & J. Rollin
  - AGGRAVATED FELONIES (2006) by N. Tooby & J. Rollin
  - SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005) by N. Tooby & J. Rollin
  - POST-CONVICTION RELIEF FOR IMMIGRANTS (2004) by N. Tooby
- California Publications:
  - CALIFORNIA POST-CONVICTION RELIEF FOR IMMIGRANTS (2008) by N. Tooby
  - CALIFORNIA EXPUNGEMENT MANUAL (2002) by N. Tooby

Website: www.NortonTooby.com

This website contains America's largest knowledge base of legal information concerning (a) immigration consequences of criminal cases, (b) criminal defense of immigrants, and (c) post-conviction relief for immigrants. The Free Area of the website contains articles, sample chapters from practice manuals, free newsletter archives, and many other resources for criminal and immigration counsel, and individuals facing immigration problems caused by criminal cases. The Premium Area contains monthly updates for all of Tooby's National Practice Manuals, keyed to the section number of each manual, charts of all cases defining aggravated felonies and crimes of moral turpitude, and a database containing summaries of all cases in these fields since 2001. The text of all practice manuals is being added to the website, so you will be able to search, cut and paste the pertinent text for use in memoranda and pleadings.

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Tooby's Guide

To

Criminal Immigration Law

by

Norton Tooby

How Criminal and Immigration Counsel Can Work Together to Protect Immigration Status in Criminal Cases

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Dedicated to Dan Kesselbrenner

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Preface

Criminal cases often trigger harsh immigration consequences, far out of proportion to the offenses. Defense counsel have a responsibility to attempt to protect their noncitizen clients against this form of damage. This Guide is dedicated to that enterprise. It is shameful to inflict life-shattering penalties on people convicted of minor criminal offenses, especially when they are not informed of them in advance. It is a disgrace to our system of justice to tolerate unconstitutional convictions. Yet these failures occur far too often. The best way of avoiding them is to ensure defense counsel is armed with good information on the relationship between criminal and immigration law, and on the immigration damage caused by various dispositions of criminal cases. This book seeks to fill that gap.

TOOBY'S GUIDE seeks to summarize, in clear and concise terms, what criminal and immigration counsel need to do together in the defense of the criminal case, to protect the client's immigration status. We have also sought to explain the immigration world to criminal counsel in understandable terms. Because the law in this area is changing rapidly, and because of the difficulty of being aware of all new developments in two evolving areas of law, counsel should view this book as a starting point for research, rather than its conclusion. It is a summary of the main points covered in N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS (4th ed. 2007), the 2000-page comprehensive practice guide, and contains many cross-references for more information.

Many have contributed important ideas to this Guide. Please view the results with a critical intelligence, since the information is complex and other eyes may see what we have not. Please let us know of any additions and improvements, as you encounter them, so we may make the results available for the benefit of all.

The research cut-off date for this edition is April 1, 2008. We keep this book current on a monthly basis by posting case law updates on www.NortonTooby.com, organized by section number (e.g., § 5.21) for ease of reference.

May 1, 2008.

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Acknowledgments

I am very grateful to Dan Kesselbrenner, Director of the National Immigration Project of the National Lawyers Guild, Boston, Massachusetts, and Katherine A. Brady, Senior Staff Attorney, Immigrant Legal Resource Center, San Francisco, California, for their encouragement and support. They and their respective offices have been pioneers in developing legal protections for immigrants involved in criminal cases. In particular, Kathy deserves my gratitude for first inviting me to become involved in writing materials to assist immigrants with criminal issues to avoid deportation. Dan first invited me to write on this particular subject, and has generously contributed his time and expertise to my education. I owe both of them a great deal of gratitude for everything they have contributed to our various partnerships.

Joseph Justin Rollin's contributions greatly increase the accuracy and scope of this work, as coauthor of CRIMINAL DEFENSE OF IMMIGRANTS (and other practice manuals), and he has done a fine job of editing this work. Much of what is valuable here exists because of him.

Kerrin Staskawicz has done excellent editorial work on this book. Her enthusiasm, dedication, and fine attention to detail have made this work far more useful than it would otherwise have been. Andrew Phillips contributed to the Subject Matter Index, and assisted in the publication of this Guide. Karen Elliot, Dennis Fitzgerald, Angie Mendoza, and Lucia Rodriguez have also made important contributions to this book. This book would not have been possible without their assistance.

I am very grateful to Alex Reisman for reading the text, and making valuable suggestions, most of which I adopted.

Finally, my greatest thanks, as well as all my love, go to my wife, Peggy Phillips, whose unswerving loyalty and support made this book possible.

May 1, 2008.

Norton Tooby

Chapter 1: Introduction

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§ 1.1 Mission

TOOBY'S GUIDE has one central goal: assisting counsel to protect the immigration status of foreign national defendants facing criminal charges.

(A) *For Criminal Counsel.* TOOBY'S GUIDE is primarily designed to help criminal defense counsel. While it focuses on preserving clients' immigration status, counsel can also use the techniques described here to defend against the purely criminal consequences of a criminal case. For example, if a client is not fluent in English, precisely identifying the client's exact dialect is important to enable counsel to discuss with the client not only the immigration consequences of the case, but also the facts of the case as they relate to guilt or innocence. The same is true of learning about the client's culture, immigration situation, detention status, and many other topics discussed in this Guide.

If criminal counsel consult effectively with competent immigration counsel, they do not need to learn all the complexities of immigration law, or keep up to date with it. Competent immigration counsel will do so. They do need to consult directly with immigration counsel on every case to make sure the strategy is right.

(B) *For Immigration Counsel.* Immigration counsel will also find this work useful. They will be consulted by criminal counsel, who will ask questions. Immigration lawyers will find the answers to many of those questions in this book, as well as pointers on where to find more information.

(C) *For Both Specialties.* Both criminal and immigration counsel will find this Guide a simplified outline of the overlap between criminal and immigration law. Both criminal and immigration counsel will find useful the client questionnaire, seeking to record the essential information necessary to develop a

diagnosis and treatment plan for noncitizens facing criminal charges, Appendix A, *infra*, as well as all the other checklists provided here.

The essential knowledge base of criminal immigration law includes information on three areas of law:

(1) Immigration consequences of criminal acts and convictions;

(2) Post-conviction relief for immigrants; and

(3) Criminal defense of immigrants.

This Guide will provide an outline of these topics, with references to the main body of practice materials published by the Law Offices of Norton Tooby: a highly-organized, up-to-date collection of five other practice manuals.[1] This extensive knowledge base is being posted on the author's web site,[2] and has been updated monthly since June, 2001. Counsel will be able to search this massive collection of information electronically, and copy pertinent portions for use in developing a strategy as well as in drafting pleadings and memoranda.

§ 1.2 The Problem

Nearly 40 million U.S. residents were born abroad. About 12 million of them have no legal status. These residents commit crimes less than half as often as the average U.S.-born citizen. Their crimes are also somewhat less serious, on average, than the crimes of U.S.-born adult men, who are incarcerated at a rate more than 2 1/2 times greater than that of foreign-born men.[3]

Nonetheless, the federal government has greatly escalated the rate at which immigrants are deported. In 2001, the government removed 71,597 noncitizens on

[1] N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS (2007) (1878 pages); N. TOOBY & J. ROLLIN, AGGRAVATED FELONIES (2006) (968 pages); N. TOOBY & J. ROLLIN, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005) (998 pages); N. TOOBY & J. ROLLIN, CRIMES OF MORAL TURPITUDE (2008) (forthcoming) (approximately 800 pages); and N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS (2004) (613 pages).

[2] www.NortonTooby.com.

[3] Kristin Butcher and Anne Piehl, *Crime, Corrections, and California: What Does Immigration Have to Do with It?*, 9 CALIFORNIA COUNTS: POPULATION TRENDS AND PROFILES, No. 3 (Feb. 2008).

criminal grounds, an increase of more than 36 times the number of removals in 1986.[4] In 2005, the number of immigrants deported for criminal convictions grew to nearly 90,000 a year.[5] Removals have continued to increase, resulting in a major industry, with expanded enforcement agencies, bureaucracies, special immigration court systems, and concentration camps holding many thousands in mandatory immigration detention without possibility of bond.[6]

During the criminal process, court and counsel inform the criminal defendant of the direct penal consequences of the case. They are far less successful in informing defendants of the indirect, but often inexorable, collateral immigration disaster that may be triggered by a conviction. Criminal defense counsel are, however, becoming increasingly aware of the need to protect their clients against immigration consequences.

Unless they are informed by detailed knowledge of the exact immigration consequences of the case, and how to avoid them, counsel's efforts are often insufficient to provide protection. Many noncitizen defendants will be blindsided by later immigration detention and deportation that could have been avoided. It is not enough to identify the problem; the best interests of the client require the criminal lawyer to attempt to prevent it. Close consultation between criminal and immigration counsel is necessary to prevent unnecessary immigration disasters from blighting the lives of the clients. Counsel must precisely analyze the exact immigration threat, create an antidote tailored to the specific problem, and attempt to obtain that disposition of the criminal case.

§ 1.3 Basic Procedure

The basic approach to protecting clients' immigration status is quite simple:

1. Obtain exact information on the client's immigration situation. See Chapter 2, Investigation.

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[4] U.S. Bureau of Citizen and Immigration Services "Enforcement, Fiscal Year 2001," 2001 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE. Available from http://www.immigration.gov/graphics/shared/aboutus/statistics/ENF2001.pdf, p. 7.

[5] *See* DHS, Immigration Enforcement Actions: 2005, http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf (last visited May 25, 2007).

[6] See D. KANSTROOM, DEPORTATION NATION (Harvard Univ. Press 2007).

2. Consult an immigration expert to determine realistic criminal goals that can minimize immigration consequences. See Chapter 3, Consultation.

3. Determine with the client how important the immigration goals are, as opposed to traditional criminal defense goals. See § 3.4.

4. Formulate a strategy that balances the adverse immigration consequences, with the other consequences of the criminal case, in light of the desires of the client. See § 3.5.

5. Use standard criminal defense techniques to try to achieve the client's goals. See Chapters 4, Criminal Procedure, and 5, Post-Conviction Procedure.

Continue to consult with an immigration attorney since additional immigration questions frequently arise during the course of the case. See Chapter 3.

Finally, counsel must inform the client of the immigration consequences of the final disposition and arm the client with information on how to confront the immigration authorities. See Chapters 6 and 7.

This same approach is applicable no matter what procedural stage the criminal case has reached. It applies to the beginning of a normal criminal case. See § 4.1. It applies during plea bargaining. See § 4.2. It applies during litigation of a criminal case. See § 4.3. It applies during sentencing. See § 4.4. It applies during probation violation proceedings. See § 4.5. It applies during juvenile proceedings. See § 4.6. It applies during appeal and other post-conviction proceedings. See Chapter 5.

§ 1.4 Significance of State Law

Immigration laws governing the deportation process are federal in nature, passed by Congress. Most aspects of immigration law are uniform national federal rules. See CRIMINAL DEFENSE OF IMMIGRANTS § 16.35. The immigration authorities are in general not governed by the idiosyncrasies of the laws of the 50 states. Differences between state law and federal immigration law can lead to serious problems. For example, if a state court withholds a judgment of conviction, so that no conviction exists under state law, defense counsel may assure a noncitizen defendant that no conviction exists. This may be true under state law, but it is false under federal immigration law.[7] Federal law may also

[7] *Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998).

clash with state law concerning the circumstances in which a conviction is later erased. Many states have state rehabilitative statutes that allow a defendant to withdraw a plea and have the charge dismissed as a reward for successful completion of probation. Under state law, the defendant no longer has a conviction. Under federal immigration law, however, the conviction still exists, and may trigger deportation.[8] Defense counsel must become aware of the federal immigration law on these subjects, and not mislead the client by incorrect advice based on inapplicable state laws.

State law does become important, however, when analyzing whether a state conviction triggers a ground of removal. The law of the state in which the conviction was prosecuted must be considered in determining (a) the elements of the offense, (b) whether the offense is considered a felony or a misdemeanor, (c) the sentence imposed, and (d) the maximum possible sentence. See CRIMINAL DEFENSE OF IMMIGRANTS § 16.35.

[8] *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003).

Chapter 2: Investigation

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§ 2.1 Goals

The most important initial source of information is the client. The following list of topics can be considered a general checklist for a client interview of a foreign national defendant. See also Appendix A: Intake Information Form. The information obtained from the client, of course, must be corroborated and verified when possible by official and other sources of information.

(A) *Identifying United States Citizens.* Criminal counsel, of course, will conduct the normal criminal defense investigation of a pending criminal case. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.26. If the client is not a U.S. citizen, however, the potential consequences of conviction include not only the direct penal consequences, but also the often far more important immigration consequences. In addition, an immigration hold can sabotage many rehabilitative programs imposed as part of a criminal sentence. See § 4.4(D). In doing triage, and devoting appropriate resources to the case, defense counsel may allocate much more time and energy to the investigation of a case with threatening immigration consequences than one without. Counsel should also conduct investigation very promptly for an immigrant, since it is important to obtain the client's release from criminal custody if possible before an immigration hold is lodged. See § 4.1.

Counsel must ask *each* client whether s/he is a U.S. citizen or national.[1] A client with a name like Peter Jackson who speaks perfect colloquial American English and appears Caucasian may turn out to be a citizen of Canada who has lived here since he was two years old and who is a Lawful Permanent Resident, rather than a citizen, of the United States. There is absolutely no way to learn of

[1] See CRIMINAL DEFENSE OF IMMIGRANTS § 3.18.

the great immigration jeopardy he faces without obtaining a reliable answer to the question whether he is a United States citizen.

Common documentation of U.S. citizenship includes a birth certificate establishing that the client was born in the United States (or a listed possession); a United States passport, a U.S. Certificate of Citizenship, INS Form N-560 or N-561; a U.S. Certificate of Naturalization, INS Form N-550 or N-570, or a U.S. Citizen Identification Card, INS Form I-179. For suggestions concerning proof of citizenship, see CRIMINAL DEFENSE OF IMMIGRANTS § 15.4(B).

(1) *Obtaining Reliable Citizenship Information*. Some clients will conceal noncitizen status in the mistaken belief that – as noncitizens – they would not qualify for public defender services or would suffer other adverse consequences if they revealed their true immigration status to defense counsel. Other clients may honestly believe they are U.S. citizens, since all their brothers and sisters automatically became citizens when both parents naturalized, but the client was the only one who did not because s/he was married, or over 18, or not a lawful permanent resident at the time of the parents' naturalization. Still other clients may erroneously believe they were born in the United States, and are therefore U.S. citizens, since they immigrated as infants and never learned where they were born.

Many noncitizens assume if you ask whether they are a citizen, you are really asking whether they are in the United States legally, and answer "yes" since they have a green card. In many communities, "citizen" and "green card holder" are seen as equivalent. Counsel must, therefore, not accept a client's statement s/he is a citizen without careful verification.

You can ask where they were born. The arrest report will often indicate the suspect's "place of birth." If they were born in another country, they can become a U.S. citizen only upon completing the full naturalization process, involving application, interview, approval, and the taking of the oath of U.S. citizenship with hundreds (or thousands) of others.[2] Make sure this actually happened before you accept a client's quick "yes" answer to a citizenship question.

Some clients may be U.S. citizens and be unaware of it.[3] Does the client have a parent or grandparent, living or dead, who may have been born in the U.S. or who may have acquired U.S. citizenship? Did one or both of their parents

[2] See CRIMINAL DEFENSE OF IMMIGRANTS § 3.16.
[3] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 3.14-3.17.

naturalize when they were still under 18 years old? Were they adopted? If the answer to any of these questions is "yes," refer the person to competent immigration counsel for analysis of citizenship. These situations are surprisingly common. Hundreds of thousands of Latino United States citizens were wrongfully deported to Mexico during the last century, who as U.S. citizens gave birth to U.S. citizen children in Mexico.

(2) *Non-Deportable Persons*. In general, a person cannot be removed from the United States[4] if s/he was:

(1) Born in the United States, Puerto Rico, the U.S. Virgin Islands, or Guam;
(2) Born outside the United States, but "acquired" U.S. citizenship automatically at birth to U.S. citizen parents;
(3) Born outside the United States, but naturalized as a U.S. citizen by filing his or her own application as an adult;[5]
(4) Born outside the United States, but obtained "derivative" U.S. citizenship during childhood through naturalization of parent(s) as United States citizens before the client reached the age of 16, 18, or 21, depending on the law in effect at the time of naturalization;[6]
(5) Born in American Samoa, or Swains Island as a U.S. "national";[7] or
(6) Born in Canada as a Native American.[8]

Certain persons can be *de*naturalized. If so, they are returned to the status they held before naturalization, and then removal proceedings can be commenced as with any other noncitizen if a ground of removal can be established. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.20.

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[4] See, e.g., *Mireles v. Gonzales*, 433 F.3d 965 (7th Cir. Jan. 10, 2006) (petition for review of removal order denied over claims that defendant agency failed to establish that respondent is not a citizen of the United States). See also *Perez v. United States*, No. 1:05-CV-1294(LEK) (D.N.Y. 2006) ("[B]ecause Petitioner has established that he is a United States citizen, it is a constitutional violation to convict him for reentering the United States. As a result, the Court finds that Petitioner's conviction and, in turn, his sentence should be vacated pursuant to 28 U.S.C. § 2255.")

[5] See INA §§ 310 *et seq*., 8 U.S.C. §§ 1410, *et seq*. This summary was drawn from M. Vargas, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN NEW YORK STATE, Chapter 2, p. 2-2 (NY State Defender's Association, Criminal Defense Immigration Project, 2d ed., 2000).

[6] See INA §§ 320-321, 8 U.S.C. §§ 1430-1431.

[7] See INA §§ 301(a) & (b), 302, 304-307, 8 U.S.C. §§ 1401 (a) & (b), 1402, 1404-1407 (citizen by birth in the United States, Puerto Rico, U.S. Virgin Islands, or Guam); and INA § 308, 8 U.S.C. § 1408 (noncitizen national by birth in American Samoa and Swains Island).

[8] INA § 276, 8 U.S.C. § 1326.

(B) *Investigation Goals*. Where the client is not a U.S. citizen or national, counsel's basic investigation goals include:

(1) Determining the exact immigration status of noncitizen clients. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.21. If the client is not a U.S. citizen, the client may possess any of a considerable number of different immigration statuses. See § 2.3. A criminal case can then trigger dozens of damaging immigration consequences, against which counsel must if possible provide protection. See § 3.3.

(2) Obtaining information on the client's equities. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.23. "Equities" are favorable facts about the client or offense that can be used to persuade judges, prosecutors, former defense lawyers, and others to support the client's efforts to remain in the United States. Favorable equities are often as important as, or more important than, legal argument in avoiding adverse immigration consequences. Common equities include:

- The client has lived in the U.S. for many years.
- The client has obtained (or is in the process of obtaining) lawful immigration status here.
- The client will be able to obtain or keep lawful status if the criminal case can be successfully resolved.
- The client has numerous close relatives who live in the U.S. now and have lived here lawfully for many years.
- Many of these relatives 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 to force innocent family members into exile with the person deported.
- 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 normal criminal sentence that U.S. citizens would serve (without suffering adverse immigration consequences in addition) is a sufficient debt to society for the client to pay for the particular criminal offense.

- 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 deportation of the client.

- If deported, the noncitizen's spouse may no longer be able to collect child support.

- The client will face persecution on account of race, political opinion, religion, or sexual orientation, or will face danger, abuse, poverty, or unhealthy conditions if deported 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.

- The client has taken him- or herself in hand, turned his or her life around, is obtaining counseling, etc. It may be helpful to suggest counseling or twelve-step programs to the client.

These are only common examples. Many other equities include artistic, religious or philanthropic contributions, ownership of property or other ties to the community, and the like.

IMPORTANT PRACTICE TIP: In describing the client's past life, do not make admissions concerning drug trafficking, addiction, or abuse, or of engaging in the business of prostitution. The government could use such statements as a basis for deportation or exclusion, independent of any conviction. See § 3.7(A); CRIMINAL DEFENSE OF IMMIGRANTS § 8.40.[9]

[9] A number of grounds of deportation and inadmissibility are based on conduct, rather than a

(3) Obtaining information on the client's criminal history. Certain information about criminal history can be obtained only from the client. Some of this information is necessary in order to document the client's criminal history. First, counsel must verify the jurisdiction (i.e., the geographical location of the court) in which each prior criminal conviction occurred. Counsel should also learn whether each conviction occurred in state or federal court. If it occurred in state court, the attorney must ascertain the state and county (or other local governmental subdivision) in which each conviction occurred. This information is necessary in order to determine which "rap sheets" (federal, state [which state(s)] and/or local criminal history records) must be obtained in order to verify the existence of the conviction(s). See CRIMINAL DEFENSE OF IMMIGRANTS §§ 3.26, *et seq.*

Information concerning the client's exact criminal history may be complex or highly technical, and the client's memory may not be complete or accurate, especially if the client has used alcohol or drugs extensively over many years. Therefore, counsel must verify the details of each significant plea, conviction, and sentence with official sources of information. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.34.

Counsel must initially determine which prior convictions cause immigration consequences. For those that do, counsel must investigate their legal validity. See § 2.5; CRIMINAL DEFENSE OF IMMIGRANTS § 3.28.

(4) Determining the client's need for an interpreter: both the client's first language and the specific dialect (if any). Counsel should also discover whether the client is *literate* and in what language(s). See § 2.4(A); CRIMINAL DEFENSE OF IMMIGRANTS § 3.8 and Chapter 4.

(5) Determining the client's cultural background. This will help counsel understand (a) how to communicate better with the client, see CRIMINAL DEFENSE OF IMMIGRANTS §§ 3.10, 3.29; (b) the significance of the client's actions during the commission of the offense, (c) and during encounters with law enforcement and the courts on previous occasions. See § 2.4(B).

(6) Determining the relative importance of immigration versus criminal defense goals to the client. See § 3.4; CRIMINAL DEFENSE OF IMMIGRANTS § 3.24(E).

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conviction. See CRIMINAL DEFENSE OF IMMIGRANTS, Chapters 17 and 18.

(7) Advising the client how to respond to questions from authorities regarding immigration status: i.e., to say nothing. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.22.

§ 2.2 Sources of Information

Sources of information counsel may consider include:

(A) *Client Interview*. For topics to cover with the client, see § 2.1(B) and Appendix A: Intake Information Form; CRIMINAL DEFENSE OF IMMIGRANTS §§ 3.5, *et seq*.

(B) *Interpreter*. Court interpreters, as well as private ones, can be important sources of information concerning the client's language, dialect, fluency, literacy, customs, mental state, attitude toward counsel, attitude toward the case, goals, and the like.

(C) *Client's Family and Friends*. Counsel should seek information on the client's exact dialect and cultural background from the client's family and friends as well. See §§ 2.2(A) and 2.4. Counsel should be alert, however, to possible biases on the part of family members or others whose relationship with the defendant may be too bad, or too good, for them to be sources of accurate or unbiased information.

(D) *Immigration Records*. These records can sometimes be obtained from the client's current or former immigration counsel:

(1) *Status of Removal Proceedings*. If the client is currently in removal proceedings, counsel can quickly discover the venue, status of the case, and pending immigration court dates by calling the immigration court at (800) 898-7180, and giving the client's "A" Number (the client's eight or nine-digit immigration file number).

(2) *Client's Immigration File*. The easiest way to obtain the client's file is from current or former immigration counsel. Counsel can also submit a Freedom of Information Act request. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 3.32-3.33. In 2007, the DHS created a special FOIA processing track for noncitizens in removal proceedings, with the goal of expediting the processing of FOIA

requests.[10] Properly submitted "Track III" FOIA requests are currently being processed in three to six weeks. The FOIA request should yield all immigration records, correspondence, applications submitted by the client, decisions on applications, etc. Sometimes the government will refuse to divulge portions of the file; this refusal can be appealed.

(E) *Criminal History Reports*. Counsel must verify the jurisdiction (i.e., the geographical location of the court) in which each significant criminal conviction occurred. For federal convictions, counsel must determine the state and district. If the conviction occurred in state court, the attorney must ascertain the state and county (or other local governmental subdivision) in which the conviction occurred. This information is necessary to determine which "rap sheets" (federal, state, and/or local criminal history records) must be obtained in order to verify the existence of the conviction(s), and to determine which court in which city has the court file containing the documents that may be used to identify the nature of and to challenge the conviction.[11]

(F) *Criminal Court Records*. The immigration courts are governed by a specific list of official documents in determining the elements of the count of each conviction, for purposes of determining its exact immigration consequences. For each significant criminal conviction, counsel should obtain certified copies of the necessary documents from the criminal court in which the conviction occurred. See § 2.5. Note that official (or unofficial) destruction of the official court file does not eliminate the conviction for immigration purposes. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.41. If a conviction was appealed, it is also wise to obtain the record on appeal, especially the appellate opinion, and determine exactly what occurred in the trial court on remand.

(G) *Former Criminal Counsel*. If the client has a significant prior conviction, current counsel should attempt to obtain a complete copy of former counsel's case file, including all work product, notes, and investigation reports. See § 5.9(A); CRIMINAL DEFENSE OF IMMIGRANTS §§ 3.47, *et seq*.; N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS § 3.26 (2004). After reviewing the file, and discussing the case with the client, counsel can interview former counsel as a witness concerning how the prior conviction came about and its legal validity. See § 5.9(B); CRIMINAL DEFENSE OF IMMIGRANTS §§ 3.52, *et seq*.

(H) *Cultural Experts*. An expert on the client's culture can explain the significance and meaning of words used by the defendant, especially where those

[10] Special FOIA Processing Track for Individuals Appearing Before an Immigration Judge, 72 FED. REG. 9017 (Feb. 28, 2007).
[11] For information on obtaining official records, see CRIMINAL DEFENSE OF IMMIGRANTS § 3.34.

words may be used to establish intent or another element of the crime. The expert can place the defendant's words and actions "within the appropriate cultural context."[12] See § 2.4(B). The expert can also provide background to explain unusual actions by witnesses, either to attack or support their credibility or to explain the specific actions of the defendant. Counsel can use cultural experts to assist in presenting a traditional theory of defense, such as self-defense, supported by cultural factors.[13] One of the most important uses of cultural expert evidence is to provide mitigating evidence at sentence. See § 4.4(F)(4); CRIMINAL DEFENSE OF IMMIGRANTS §§ 3.58-3.60.

To begin learning about the client's culture, counsel can consult some of the better travel guides to the client's home country, which will contain briefings on its culture, taboos, courtesies, and the like.

(I) *Consular Officials*. Consular officials from the client's homeland can often be of great assistance to the foreign national, and to defense counsel, in such matters as arranging foreign investigation, letters rogatory, and other assistance from foreign courts and governments. See § 2.2(J). They can also provide other assistance, so counsel is wise to establish and maintain good relations with the consulate. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.58.

(J) *Foreign Investigations*. Defense counsel may need to investigate and obtain evidence from abroad to present in defense of their clients.[14] This can pose special difficulties. The consulate of the defendant's home country will often be willing and able both to assist in the conduct of a foreign investigation and in obtaining foreign evidence for use here. See § 2.2(I); CRIMINAL DEFENSE OF IMMIGRANTS § 3.63.

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[12] Connell, *Using Cultural Experts*, in CULTURAL ISSUES IN CRIMINAL DEFENSE 8-1, 8-2 (J. Connell & R. Valladares, eds., 2003), citing *United States v. Chong Won Tai*, 994 F.2d 1204, 1210 (7th Cir. 1993) (discussing testimony that statements in Korean were not actually threatening, but merely sounded threatening because of cultural differences); *Liu's Enterprises Corp. v. Li*, , 419 S.E.2d 511, 513 (Ga. App. 1992) (affirming, in civil case, admission of testimony of meaning and effect of Chinese obscenities on the hearer).

[13] *Ibid.* at 8-3.

[14] See generally M. ABBELL, OBTAINING EVIDENCE ABROAD IN CRIMINAL CASES (2003); Chapter 12, *Getting Witnesses and Evidence from Abroad*, in R. MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW 347 (2d ed. 2006). See also DOS Circulars "Service Provisions of the Foreign Sovereign Immunities Act," "Operation of the Hague Service Convention," "Operation of the Inter-American Convention on Service," and "Preparation of Letters Rogatory" at the State Department website, http://travel.state.gov/law/info/judicial/judicial_702.html.

§ 2.3 Immigration Status Checklist

Counsel must identify the client's exact immigration situation. The first question is whether the client has a passport or any documents or letters from the DHS. If so, make photocopies. Counsel may need to ask an immigration attorney to help interpret the documents.

Often, a person does not know exactly what his or her immigration status is. S/he may have applied for some relief and wrongly believe that s/he now has a green card. If a person has a green card, s/he may use shorthand and describe him- or herself as a "citizen." The immigration document itself is the best starting point for unraveling the story. It also will give the client's "A number" (an eight-digit number beginning with the letter A), which is the key to finding his or her immigration record by making an FOIA request or other inquiries. See § 2.2(D)(1).[15]

Answering the questions in the Intake Questionnaire, see Appendix A, is necessary to determine a person's current or potential immigration status. The immigration lawyer will need to know this information in order to diagnose the client's situation.

It is useful to group noncitizens into the following categories:

(A) *Lawful Permanent Residents*, or green card holders, have been lawfully admitted to the United States to live and work here permanently.

The chief immigration concern of a lawful permanent resident is usually to avoid deportation. An LPR who has resided in the United States in that status for three or five years may apply for naturalization and become a United States citizen.[16] This person may also wish to preserve eligibility to naturalize by avoiding any disqualifying conviction or other crime-related disability. They may also be concerned about crime-related grounds of inadmissibility, which can prevent them from returning to the United States after travelling abroad. An LPR who travels outside the country for a period less than 180 days is generally not subject to the rules of admissibility upon returning, but one exception to this rule occurs when s/he has committed an offense that triggers inadmissibility.[17] See §§ 6.2, 7.3.

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[15] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 3.31-3.33.
[16] See CRIMINAL DEFENSE OF IMMIGRANTS § 24.13.
[17] See INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C); CRIMINAL DEFENSE OF IMMIGRANTS §

If an LPR is unable to avoid a conviction that triggers deportation, inadmissibility, or disqualification from naturalization, s/he may still be able to qualify in immigration court for some sort of waiver or discretionary relief from these disabilities. See § 7.4. For example, if the client has resided in the U.S. continuously for a period in excess of seven years before commission of a deportable offense resulting in a conviction, s/he will be eligible to apply for cancellation of removal to avoid deportation,[18] or for INA 212(h)[19] relief to avoid inadmissibility, if s/he can avoid an aggravated felony conviction.

(B) *Non-Immigrant Visa Holders*. Persons lawfully admitted into the United States on a Non-Immigrant visa, unlike LPRs, "enter the U.S. for a *temporary* period of time and are restricted to the activity consistent with their visas. Unlike immigrants [LPRs], . . . they are more likely to obtain waivers of inadmissibility."[20]

Since they have been admitted into the U.S., they are subject to the grounds of deportability. If they wish to adjust status, and obtain immigrant visas so they have Lawful Permanent Resident status, or if they wish to leave the U.S. and return, they must avoid inadmissibility. All grounds of inadmissibility, including all crime-related grounds, can be waived. Only certain security-related grounds may not be waived.[21] Nonimmigrant visas include visitor (B-1, B-2), student (F, M, J, and H-3), business (H, L, E, I, O, P, Q, and R), diplomatic (A, G, C-2, C-3), family-related (K-1, K-3, and V), transit and crew (C, TWOV, D, N), and law enforcement visas (S [for informants], T, and U).[22]

(C) *Refugees And Persons Granted Political Asylum*[23] have been admitted to the United States or allowed to remain in the United States because of a well-founded fear of persecution in the native land, on account of race, religion, nationality, membership in a particular social group, or political opinion. A

18.5.

[18] See CRIMINAL DEFENSE OF IMMIGRANTS § 24.4.

[19] See CRIMINAL DEFENSE OF IMMIGRANTS § 24.29.

[20] I. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 390 (AILF, 8th Edition, 2002-2003) (emphasis supplied). See also CRIMINAL DEFENSE OF IMMIGRANTS § 24.30.

[21] These include seeking to enter the U.S. to engage in espionage, sabotage, any other unlawful activity, any activity to oppose or overthrow the U.S. government by force or other unlawful means, where the government has reasonable grounds there would be potentially serious foreign policy consequences from admitting the person, and for participants in Nazi persecutions or genocide. INA § 212(d)(3), 8 U.S.C. § 1182(d)(3).

[22] See Kurzban, *supra*, Chap. 5.

[23] See CRIMINAL DEFENSE OF IMMIGRANTS § 24.18.

refugee applied for this status before entry into the United States, and was granted a visa, and then admitted into the United States. A person granted political asylum, also called an asylee, entered the U.S. in some other status or unlawfully and then applied for and was granted asylum after entry. Neither of these groups have yet been granted LPR status, but are eligible to adjust status to LPR after being present in the U.S. in refugee/asylee status for at least one year. Refugees and asylees occupy slightly different positions under immigration law.[24]

These persons must especially avoid deportation to the place where they will likely be persecuted or even killed. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.61.

(D) *Noncitizens Seeking Lawful Status*. A noncitizen who might be eligible now or in the future to obtain lawful permanent resident status, political asylum, or some other status that offers protection against deportation.

Other noncitizens, who are not in lawful status, may still have deep roots in the United States and care very deeply about preserving eligibility for a number of other immigration statuses or forms of relief, principally eligibility for adjustment of status to LPR (through avoiding inadmissibility), or eligibility for relief from persecution by obtaining political asylum, withholding of removal, or relief under the Convention Against Torture (by avoiding a conviction of an aggravated felony or a "particularly serious crime").[25]

(E) *Noncitizens Without Actual or Prospective Status*. A noncitizen who does not have lawful status, nor any hope of obtaining lawful status.

Even if the client does not appear to be eligible now or in the future to obtain LPR status, asylum, or other relief from removal, or does not desire to remain in the United States now or to return lawfully in the future, it may still be in the client's interest to avoid criminal dispositions that trigger immigration disabilities, since (a) the client may change his or her mind in the future, and be much better off without a roadblock to obtaining lawful status, and (b) even if s/he is removed from the United States, the client may wish to obtain various immigration benefits such as voluntary departure (instead of forcible removal), or early release from prison for removal, and to avoid enhanced criminal liability for future illegal reentry into the United States after deportation. Therefore, the client should if possible avoid a disposition triggering inadmissibility, or an aggravated

[24] See, e.g., CRIMINAL DEFENSE OF IMMIGRANTS §§ 17.8(E), 24.20.
[25] See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 24.

felony conviction, or a disposition that would disqualify him or her from early release for removal in an appropriate case.

§ 2.4 Language and Culture

(A) *Language.* Precise and trusting communication between attorney and client is essential not only to effective criminal defense, but to effective protection of the client's immigration status as well. In criminal cases, the client has a constitutional right, and often a statutory right, to an interpreter. Effective implementation of this right is often left to defense counsel, and is more critical than any other constitutional right because for a non- or limited-English speaking defendant, all constitutional rights are implemented through the right to an interpreter. See generally CRIMINAL DEFENSE OF IMMIGRANTS, Chapter 4.

Accurately interpreting from another language to English, and back, in a criminal case presents enormous challenges. Legal English is very difficult at best, both in vocabulary and syntax. There are many players in the courtroom, and sometimes more than one speaks at once. Juggling two languages in this complex setting is extremely difficult. If the client speaks English as a second (or third) language, but not well enough to understand exactly what is going on, it may sometimes be even worse than not understanding English at all. Interpreting is not an exact science. "Interpreters, no matter how bilingual and bicultural, must constantly weigh choices in search of the best ways to convey shades of meaning and speaker intent. A defense attorney must be aware of the task faced by an interpreter and participate in maximizing the accuracy of the interpretation."[26]

(1) *Counsel's Duties.* Counsel has a number of essential duties to ensure the defendant can completely understand the critical proceedings and information in English that the defendant otherwise cannot understand or can understand only imperfectly.[27] Counsel must:

- Assess the client's need for an interpreter.
- Ascertain the exact skills the interpreter must have.
- Find an interpreter possessing the necessary skills.
- Prepare the interpreter to perform the job.

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[26] Kay, Ramirez & Hill, *Using Interpreters*, in CULTURAL ISSUES IN CRIMINAL DEFENSE 2-1 J. Connell & R. Valladares, eds., Juris Publishing, 2000).

[27] Zazueta, *Attorney's Guide to the Use of Court Intepreters with an English and Spanish Glossary of Criminal Terms*. 8 U.C.D. L. REV. 471 (1975).

- Alert the court, well in advance, of the need to have a court-provided interpreter at each court appearance.
- Supervise the interpreter and ensure the interpreter has what s/he needs to do the job.
- Make a record of any errors or problems, request that they be cured, and request appropriate relief from the court.

(2) *Specific Tasks*. The first task is to determine whether a client who does not speak English well, or who speaks English as a second language, needs the assistance of an interpreter. Counsel should not only ask the client whether the client would like an interpreter, but also independently determine whether communication would be enhanced. Counsel should err on the side of caution, recognizing that clients who may have some ability to understand and communicate in English on a daily level may not be able to understand the far more difficult English syntax and vocabulary used in the legal context.

Counsel must obtain the assistance of a competent interpreter solely dedicated to translating between attorney and client. Make sure the interpreter speaks the same language and dialect as the client, that the interpreter is competent, and that the client can affirmatively understand the interpreter.[28]

Counsel must also carefully select a qualified and neutral interpreter. Potentially biased individuals such as family members or friends should not be used.[29] Some court interpreters are highly biased against the defendant. If there is a certification process in the jurisdiction, counsel can easily obtain a listing of minimally qualified interpreters.[30] Other sources include telephonic language line services,[31] or internet listings of regional and national interpreter organizations.[32]

Counsel must ensure that the interpreter speaks exactly the same language and dialect as the defendant, not just a similar one. Even a minor difference

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[28] For a more complete discussion on all issues regarding interpreters, see Chapter 2, *Using Interpreters*, CULTURAL ISSUES IN CRIMINAL DEFENSE (J. Connell & R. Valladares, eds., Juris Publishing 2000); CONSTANCE EMERSON CROOKER, THE ART OF LEGAL INTERPRETATION: A GUIDE FOR COURT INTERPRETERS (Portland State Univ. Press 1996).

[29] See e.g., *Henry v. State*, 462 S.E.2d 737, 743 (Ga. 1995); *In re R.R.*, 398 A.2d 76, 86 (N.J. 1979).

[30] For example, the California Judicial Council maintains a Master List of certified and registered interpreters. http://www.courtinfo.ca.gov/programs/courtinterpreters/

[31] For example, AT&T Language Line Service™ provides access to interpreters for as many as 140 languages, although the interpreters are not necessarily certified.

[32] See, e.g., The National Association of Judiciary Interpreters and Translators (NAJIT) at http://www.najit.org/

between dialects can render a translation unreliable. Be alert to signs that the client does not understand what is going on. Interruptions to consult with counsel, statements that the defendant did not understand something, inappropriate responses to questions, and grammatical errors by the defendant may all provide evidence that the defendant did not understand something, thus demonstrating that an interpreter (or a different interpreter) may be required.

(3) *Payment of Interpreter*. Because the client has a constitutional or statutory right to an interpreter, the court must appoint an interpreter at public expense. The court should provide an interpreter for all defendants, indigent or not. Even if the client has sufficient funds to hire an attorney, or the family retains private counsel, the client may lack sufficient funds to hire an interpreter, and counsel may apply to the court for appointment of an interpreter at public expense. In rare cases, it may be possible to find a volunteer interpreter with sufficient expertise and qualifications to serve.

(4) *Questions for the Interpreter*.[33] Counsel can ask:

Please tell the court your name and address.

Please tell the court where you were born.

Where were you raised as a child?

Where have you lived and for how long?

What language(s) and dialect(s) do you speak?

How fluently do you speak each language?

Please describe when and how you learned English and [the language to be interpreted]?

What is your educational history, in the United States and in your home country?

[33] Some of these questions were drawn from the excellent article, Moore & Mamiya, *Interpreters in Court Proceedings*, in J. Moore, editor, IMMIGRANTS IN COURTS 29, 36 (Univ. of Washington Press 1999).

> Do you read and write English? Please tell us the last book, magazine, or newspaper you read in English.
>
> Please define in English a few legal terms which will be used in this case, such as "prosecutor," "evidence," and "jury." What is the translation for these terms? [Add any terms particular to the case that are of special significance.]
>
> Please describe for me some of the people you see in the courtroom.
>
> Please tell me how comfortable you are understanding and speaking English.
>
> Are you a certified court interpreter? Please show your official identification.

The remaining questions are optional if the interpreter is certified.

> Describe your educational background in both languages, and your speaking, reading, and writing skills in each.
>
> Describe your court interpreting experience. When and where have you interpreted?
>
> Describe any special court interpreter training you have attended.
>
> Describe the simultaneous and consecutive methods of court interpreting.
>
> Do you have any problems communicating with the defendant? If you haven't actually talked with the defendant, do you need a few minutes?

"The proposed interpreter's answers should demonstrate, at a minimum, education or training in both languages, a knowledge of basic interpreting requirements, no apparent conflict of interest, a familiarity with legal terms, and previous interpreting experience."[34]

Counsel may need to consult an expert to evaluate the client's ability to understand and read English through testing, to obtain evidence concerning the

[34] Moore & Mamiya, *Interpreters in Court Proceedings*, in J. Moore, editor, IMMIGRANTS IN COURTS 29, 36 (Univ. of Washington Press 1999).

need for an interpreter.[35] If it is necessary to prove this to have an interpreter appointed by the court, counsel can seek school records of the client in the United States or abroad that may demonstrate English proficiency, such as records from English as a Second Language courses taken by the client. These records may provide a more reliable indication of the client's ability to read and understand spoken or written English, especially if the client took the courses before the criminal case arose. This will avoid the possibility that a suspicious prosecutor or judge will believe the defendant is pretending to know less English than is truly the case.

(5) *Qualifications of Interpreter*. To be qualified for a particular case, the interpreter should be able to perform the following tasks:

(a) The interpreter should be able fluently to speak and understand the same language and dialect spoken by the defendant as the native or "first" language. See CRIMINAL DEFENSE OF IMMIGRANTS § 4.20.

(b) The interpreter should be certified as an interpreter in English and the defendant's native language and dialect, or be able to speak and read at least at the 12th grade level in both languages, to handle difficult legal syntax and vocabulary. See CRIMINAL DEFENSE OF IMMIGRANTS § 4.21.

(c) The interpreter should also be literate in both English and the defendant's language, since court interpretation in criminal cases often requires translation of plea waiver forms containing complex syntax and vocabulary. See CRIMINAL DEFENSE OF IMMIGRANTS § 4.22.

(d) The interpreter should be free from any bias or conflict of interest. See CRIMINAL DEFENSE OF IMMIGRANTS § 4.23.

(6) *Supervision of Interpreter*. Counsel should meet with the interpreter in advance, and brief him or her on the nature of the case, the charges against the defendant, the defendant's background, the factual situation underlying the case, and any other information concerning the case or the defendant that will help the interpreter understand the situation. Counsel may also provide the interpreter with a copy of the charges against the client, the police reports, motions, or other documents the interpreter will need in order to translate questions and answers during an interview or in court. Counsel should furnish the interpreter with as

[35] If language proficiency becomes an issue, counsel should have the client's language proficiency tested by a qualified linguist.

much documentation as possible prior to trial, including indictments or complaints and expert reports. Jury instructions in particular often contain a great deal of frozen language, archaic usage, and terms of art, and present highly technical and complex legal issues. All of these factors combine to make the reading of jury instructions one of the most difficult tasks for an interpreter.

In the first interview, counsel should introduce the interpreter to the client and allow the interpreter to speak briefly with the client in the presence of the attorney, before proceeding with the interview or court proceeding, to make sure that the interpreter and client can readily understand one another. Counsel should advise the client or witness that s/he should immediately notify the attorney if s/he experiences any difficulty in understanding the interpreter, or the interpreter seems to have any difficulty understanding the client.

Once a qualified interpreter has been found, counsel must maximize the interpreter's usefulness in court or at trial. The interpreter should be located where s/he can hear all witnesses, the defendant can hear the interpreter, and where no one's back is facing the interpreter. Counsel should not turn his or her back to the interpreter when speaking. One of the most challenging aspects of simultaneous court interpreting is the poor acoustics in most courtrooms.

Counsel should keep the following issues in mind to reduce interpreter error:[36]

Keep questions short.

Avoid the passive voice.

Avoid double negatives such as "Isn't it true that you weren't there?" This form is often alien to non-English speakers and its use increases the chances that a witness will not understand the question, or that either a "yes" or "no" answer will be wrong.

Give the gender of neuter English words that have a feminine or masculine form in the source language. Examples of words of this type in Spanish are "cousin," "friend," "teacher," "supervisor."

[36] These suggestions are drawn from Kay, Ramirez & Hill, *Using Interpreters*, in J. CONNELL & R. VALLADARES, EDS., CULTURAL ISSUES IN CRIMINAL DEFENSE 2-1, 2-29 through 2-31 (Juris Publishing 2000).

Clarify pronouns. In English, the second person pronoun "you" is both singular and plural. In other languages, such as Spanish, French, and Mandarin, the singular second person pronoun may be different from the plural second person pronoun. Counsel can avoid confusion by refining the use of "you" in English by saying "you yourself" or "you and Mrs. Jones," or "you, Mr. Ramirez."

Counsel should advise the client or witness to speak clearly and wait until the interpreter has finished before answering. Counsel should likewise wait until the interpretation has been completed before asking further questions or making objections.

At times, persons with some English language skills will answer in English, especially if the answer is "yes" or "no." Counsel should instruct them always to answer in the source language.

Counsel should respect the fact that interpreters are primarily language conduits and should not be used or viewed as an advisor, informant, consultant, or assistant, unless specifically engaged for these purposes.

Counsel should avoid interpreter fatigue and schedule breaks at regular intervals during a court proceeding. In a lengthy proceeding, two interpreters should work in shifts.[37]

If possible, counsel should use the same interpreter for a client throughout the case. Regularly using the same interpreter can enhance the quality of the communication, since an interpreter familiar with a speaker's vocal style and customary phrases will be able to interpret more effectively.

Counsel should not avoid an interview or consultation with a non-English speaking client because of the belief it will be too cumbersome to arrange for an interpreter.

Counsel should speak slowly, especially if reading something. It is always more difficult to interpret someone who is reading, as there are fewer pauses, the pace is faster, and the intonation is not always natural.

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[37] Conference interpreters employed by the United Nations are replaced every forty-five minutes by a co-interpreter. Interpreting in court is very taxing and an awareness of the fatigue issue and making arrangements to replace interpreters can reduce interpreter error. JUDGE'S GUIDE TO STANDARDS FOR INTERPRETED PROCEEDINGS 139.

(7) *Making a Record*. As with all issues, defense counsel has a professional obligation to make a record of what happens in court for purposes of later motions in the trial court, and to raise claims of error on appeal. Issues of language interpretation pose special difficulties for counsel, since normally defense counsel does not speak the language the defendant speaks and cannot personally detect most errors in interpretation. Aside from having a second interpreter present to detect and report errors of the primary interpreter, how can counsel detect errors in interpretation?

Counsel may be able to see whether the interpreter is providing the *verbatim* and complete interpretation required, or is merely paraphrasing and summarizing the foreign-language testimony or statements of the defendant. A translation in some languages, Spanish, for example, may require more words than the original English, but counsel may still be able to tell whether the interpreter is providing a complete translation. Unresponsive answers from the defendant to counsel's questions, or from a witness in court, may also signal inadequate interpretation.[38]

Another valuable source of information is the defendant. Defense counsel can ask the defendant if the interpretation is adequate, and if the defendant is able to understand the translation provided by the interpreter. Counsel may be able to ascertain, even independently of the interpreter, whether the defendant understands the proceedings. Many defendants speak some English, though imperfectly, but nonetheless require the assistance of an interpreter.

(a) Use a tape recorder if possible to create an exact factual record. See CRIMINAL DEFENSE OF IMMIGRANTS § 4.27.

(b) Make timely objections to interpreter errors, such as:

> 1) switching first person to third person; 2) literal translation; 3) inadequate language proficiency; 4) omission resulting from a deficient memory span or fatigue; 5) distortion resulting from an interpreter's failure to preserve the hesitation words, fillers, interrupted and incomplete sentences characteristic of real speech; 6) switching active and passive verbs; 7) adding or deleting "politeness

[38] E.g., *Siong v. INS*, 376 F.3d 1030 (9th Cir. 2004) (Hmong-speaking asylum applicant established plausible grounds for relief and hearing included faulty interpretation as manifested by unresponsive answers).

markers";[39] 8) cleaning up the language used by a witness due to a hesitancy to use Street language in court.[40]

(c) Object to any bias of an interpreter, and ask the court for an unbiased interpreter. See CRIMINAL DEFENSE OF IMMIGRANTS § 4.23.

(d) Object to gaps in coverage.

(e) Preserve the claims. The federal statutory predicate for the appointment of an interpreter is a finding by the judicial officer that a non-primary English speaker's skills are so deficient as to inhibit comprehension of the proceedings.[41] The constitutional basis for a right to an interpreter rests on the confrontation clause and due process clause as well as explicit state constitutional provisions. Counsel must raise both statutory and constitutional arguments where appropriate, and raise state as well as federal claims from the beginning in the trial court in order to preserve them for appeal.

(B) *Specific Cultures*. The literature on the relationship between different cultures and the court system in general,[42] and the criminal process in particular,[43] has been growing:

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[39] Linguist Susan Berk-Seligson calls expressions like "Sir," "Ma'am," or "Your Honor," "politeness markers." The addition or deletion of these terms by an interpreter can distort the message of the speaker. Berk-Seligson observed and recorded many hours of in-court interpretation, and identified some of the most common interpreter errors. She reported her conclusions in S. Berk-Seligson, THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS 11 (1990). Another in-depth look at interpreter errors is R. GONZALEZ, FUNDAMENTALS OF COURT INTERPRETATION 281 (1991).

[40] Kay, Ramirez & Hill, *Using Interpreters*, in J. CONNELL & R. VALLADARES, EDS., CULTURAL ISSUES IN CRIMINAL DEFENSE 2-1, 2-32 (Juris Publishing 2000).

[41] See *United States v. Sanchez*, 928 F.2d 1450, 1454 (6th Cir. 1991).

[42] See generally J. Moore, editor, IMMIGRANTS IN COURTS (U. Wash. Press 1999); Brauer, *Speaking of Culture: Immigrants in the American Legal System*, in IMMIGRANTS IN COURTS 8 (J. Moore, ed., Univ. of Washington Press 1999).

[43] J. Connell & R. Valladares, eds., CULTURAL ISSUES IN CRIMINAL DEFENSE (Juris Publishing 2000); Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193 (1997); Margolin, *Working With Clients from a Different Culture*, in J. Connell & R. Valladares, eds., CULTURAL ISSUES IN CRIMINAL DEFENSE 1-1 (Juris Publishing 2000); Rupp, *Special Considerations in Representing the Non-Citizen Defendant*, in DEFENDING A FEDERAL CRIMINAL CASE 813 (Federal Defenders of San Diego, Inc., 1998).

(1) *American Indian Culture*. Chapter 9 of CULTURAL ISSUES IN CRIMINAL DEFENSE, entitled "American Indian Culture and Federal Crimes," by Michael D. Gordon and Jon M. Sands, discusses how cultural differences between native Americans and the dominant society affect the litigation of a federal criminal case.

(2) *Chinese Culture.* Potter, *Law and Legal Culture in China*, in J. Moore, editor, IMMIGRANTS IN COURTS 55 (Univ. of Washington Press 1999).

(3) *Hmong Culture*. Ly, *The Conflict between Law and Culture: The Case of the Hmong in America*, 2001 WIS. LAW REV. 471 (2001) (tension between Hmong cultural practices and the American courts, including marriage by capture, medicinal use of opium, and ritual sacrifice of animals); Sheybani, *Cultural Defense: One Person's Culture is Another's Crime*, 9 LOYOLA L.A. INT'L & COMP. L.J.75l (1987) (discusses *mens rea* for different types of homicides in the context of the Moua (Hmong marriage by capture case); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 481-82 (9th Cir. 1991) (approving admissibility of testimony of cultural expert on gender roles among Hmong people of Southeast Asia); *United States v. Vue*, 865 F. Supp. 1353 (D. Neb. 1994) (background as Hmong war refugees with no formal education, illiterate, unable to speak English, and attempts to lead a decent life in the face of adversity justified downward departure).

(4) *Mexican Culture.* Palerm, *Mexican Immigrants in Courts*, in J. Moore, editor, IMMIGRANTS IN COURTS 73 (Univ. of Washington Press 1999).

(5) *Muslim Culture*. Bassiouni, *The Shari'a: Islamic Law: What Muslims in the United States Have in Common*, in J. Moore, editor, IMMIGRANTS IN COURTS 98 (Univ. of Washington Press 1999); Hamed & Moore, *Middle Easterners in American Courts*, in J. Moore, editor, IMMIGRANTS IN COURTS 112 (Univ. of Washington Press 1999); Brelvi, *'News of the Weird': Specious Normativity and the Problem of the Cultural Defense*, 28 COLUMBIA HUM. B. L. REV. 657 (1997) (discusses the Krasniqi case, in which an Albanian Muslim was unsuccessfully prosecuted but his children were taken away from him and his wife and given to a Christian family to adopt, when he was seen touching his daughter at a sporting event in a manner accepted in Albania but considered molestation here).

(6) *Russian Culture*. Korkeakivi & Zolotukhina, *The Russian Federation*, in J. Moore, editor, IMMIGRANTS IN COURTS 117 (Univ. of Washington Press 1999).

(7) *Vietnamese Culture.* Ta, *Vietnamese Immigrants in American Courts*, in J. Moore, editor, IMMIGRANTS IN COURTS 140 (Univ. of Washington Press 1999).

§ 2.5 Prior Criminal History

Counsel must examine each prior criminal conviction to determine whether it triggers adverse immigration consequences. In general, minor traffic convictions that do not involve drugs or any *mens rea* more serious than negligence do not trigger adverse consequences. (Exception: a client can be disqualified from several immigration programs by two or more misdemeanor convictions with a maximum sentence in excess of five days in custody.)[44] After obtaining the relevant criminal history reports, counsel should obtain the court documents necessary to identify the "nature" of the conviction for immigration purposes.

(A) *Plea Records.* Immigration courts and agencies determine the nature of a criminal conviction, for purposes of deciding whether it triggers a given immigration consequence, by examining the "record of conviction" of a criminal case. Where a conviction results from entry of a plea of guilty or nolo contendere, the following documents form the record of conviction:[45]

(1) The statute and subdivision defining the offense of which the defendant was convicted, as it existed on the date on which the offense was committed.

(2) The charging paper, as amended, as of the time the plea was entered.

(3) The reporter's transcript of the entry of the plea.

(4) The clerk's minutes of entry of plea.

(5) Any waiver form or plea agreement signed by the defendant in connection with the plea.

(6) Any documents stipulated to be the factual basis for the plea.

(7) The clerk's minutes recording the judgment and sentence.

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[44] See CRIMINAL DEFENSE OF IMMIGRANTS § 10.92(B)(3).
[45] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.15-16.33.

(8) The clerk's minutes of any later alteration of plea or sentence.

(9) Any Judicial Recommendation Against Deportation signed by the sentencing judge prior to November 29, 1990.

(B) *Court Trial Records*. If the defendant was convicted at court trial, obtain all documents forming part of the plea record, § 2.5(A), with the following additions:

(1) The court's verdict or order finding the defendant guilty.

(2) The reporter's transcript of the trial insofar as it contains findings as to the elements of the offense of conviction.

(C) *Jury Trial Records*. If the case went to jury trial, all documents forming part of the plea record must be obtained. See § 2.5(A). In addition, the following documents are also included in the record of conviction:

(1) The text of the jury instructions as they were delivered to the jury (i.e., the reporter's transcript) defining the charge and elements of the offenses of which the client was convicted, and

(2) The text of the jury verdicts finding the defendant guilty.

(D) *Post-Conviction Records*. The following records of post-conviction proceedings should be obtained as well:

(1) If an appeal was taken from the judgment, the appellate record will often contain the complete record of conviction. In addition, the appellate court's decision forms part of the record of conviction, as well as any additional documents on the foregoing lists that are created after remand.

(2) Any post-conviction motions or petitions, oral or written, that specify the grounds on which post-conviction relief is sought, together with any evidence submitted in support. The court's order granting post-conviction relief from a conviction or sentence.

(3) In Ninth Circuit minor first-offense drug cases, any court order granting rehabilitative relief from the conviction. See § 5.1(D).

(4) Any executive pardon from a state court conviction.

(E) *Federal Convictions*. In addition to the records listed above, federal court records should be examined to obtain a copy of the following:

(1) Any Presidential Pardon from a federal conviction.

(2) Any Federal First Offender Act dismissal. See 18 U.S.C. § 3607.

(3) Any dismissal under the former Federal Youth Corrections Act.

(F) *Other Documents*. While they are not considered part of the record of conviction, counsel should if possible also obtain the following documents:

(1) Defense counsel's complete file. See § 2.2(G).

(2) Any investigation reports, psychological reports, and medical records or reports concerning the defendant.

(3) Any judicial records of the issuance and service of any domestic violence protection orders restricting the defendant's activities, together with any charges before any civil, family, juvenile, or other court alleging that the defendant violated any portion of such an order, and any court's findings with respect to each such charge. (A finding by any court that the defendant violated certain portions of a domestic violence TRO can trigger deportation.)[46]

§ 2.6 Current Criminal Case

Counsel will obtain all documents normally required for the defense of the criminal case. If the potential immigration consequences of the current case are grave, counsel may after consulting the defendant commit additional resources to the defense of the current case commensurate with the importance of the case to the client. The documents from the current case with special immigration significance are listed in §§ 2.5(A)-(D).

§ 2.7 Chronology

Counsel can develop a strategy for the defense of a criminal case involving a noncitizen defendant by (1) creating a chronology of the critical immigration and

[46] See INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii).

criminal history dates on which important events occurred, see CRIMINAL DEFENSE OF IMMIGRANTS § 5.17, (2) analyzing the client's immigration situation at each point in time to discover the immigration damage caused by each significant criminal event, see CRIMINAL DEFENSE OF IMMIGRANTS § 5.18, (3) discovering a solution to each problem, see CRIMINAL DEFENSE OF IMMIGRANTS § 5.19, and (4) evaluating the chances of success in obtaining each solution. See CRIMINAL DEFENSE OF IMMIGRANTS § 5.20.

The importance of preparing this chronology cannot be overstated. It can be kept up to date with each change in the law, and will provide an important tool for the ongoing development of the strategy.

(A) *Preparation*. This time line includes each significant event from each criminal case, as well as each significant immigration event, and permits immigration counsel to go down the chronology identifying the exact immigration consequences of each event, culminating in the defendant's precise immigration situation immediately prior to the entry of a plea in the current case. This enables counsel to identify the exact type of target disposition of the current case that will avoid unnecessary immigration consequences.

An intake questionnaire, Appendix A, contains all the dates of key criminal and immigration events normally required to create the chronology and analyze the client's immigration situation.

This chronology will also give counsel all the information necessary to determine the changes in the criminal history necessary to eliminate adverse immigration consequences, and basic eligibility requirements for the different forms of post-conviction relief. This information can then be provided to immigration counsel, to obtain a reliable evaluation of the immigration situation, so defense counsel can identify the disposition of the current criminal case necessary to protect the client.

(B) *Significant Criminal Events*. For each prior conviction or other disposition of a prior criminal case, list in chronological order the following events:

(1) The date on which each offense was committed.

(2) The date of each plea or verdict of guilty to an offense, identifying the exact statute and subdivision of the offense.

(3) The date on which each sentence was imposed. This includes the initial sentence, any change of sentence, and any reduction of the level of the offense (e.g., from felony to misdemeanor).

(4) The exact date of the client's release from criminal custody and the termination of probation or parole.

(C) *Significant Immigration Events*. The same chronology should contain the following critical immigration dates and events as well:

(1) Date and place of birth.

(2) The original date on which the client entered the United States, as well as the client's immigration status at the time of entry.

(3) Each later date on which the client entered or left the United States, and the manner (e.g., with or without inspection by the Border Patrol) in which it was conducted.

(4) Each date on which the client's immigration status changed, and the nature of the change.

(5) The date of any immigration arrest or detention, and the date of each release from custody.

(6) The date any OSC or NTA[47] was filed containing an immigration charge of deportability or inadmissibility and beginning removal proceedings.

(7) Significant dates affecting the immigration status of immediate family members. For example, the date of the client's marriage to a United States citizen; and the date of naturalization to U.S. citizenship of the client's mother or father.

(D) *Sample Chronology*. The following chronology shows how to integrate the critical criminal and immigration dates in a single timeline:

[47] The Order to Show Cause is the charging paper used by the INS to initiate deportation proceedings begun prior to April 1, 1997. The Notice to Appear serves the same function for removal cases initiated on or after that date.

Chronology

05/10/75 DOB, Fiji

11/22/91 EWI ("entry without inspection")

01/24/96 LPR ("Lawful Permanent Resident") status granted

01/24/01 Five years after admission as LPR

02/26/01 **Offense #1** Committed, Solano County, Calif.
(Case # VCR XXXXXX)
Charge: Misd Penal Code § 488 shoplifting (maximum: 6 months jail)

08/20/01 **Offense #1** Date of Plea Misd Penal Code § 488 shoplifting
Sentence: imposition of sentence suspended, three years probation, one day in custody

01/24/03 7 years LPR

08/20/04 **Offense #1** Probation successfully completed

03/11/05 Married USC

10/21/07 **Offense #2** Date of Offense, Solano County
(Case # VCR YYYYYY)
Count One: F Penal Code § 666/488 Petty theft with prior
Count Two: F Penal Code § 459 second-degree commercial burglary

(E) *Analysis*. The investigation is now complete, and counsel has sufficient information to enable immigration counsel to analyze the situation. Each significant criminal event (i.e., each offense, plea and sentence) must be examined to determine what, if any, immigration damage it causes. Most of the adverse immigration consequences of crimes are triggered upon a "conviction." See § 3.5; CRIMINAL DEFENSE OF IMMIGRANTS § 5.18(B). A relatively smaller number of immigration consequences are triggered by criminal conduct, even if no conviction results. See § 3.7; CRIMINAL DEFENSE OF IMMIGRANTS § 5.18(A). After the immigration damage from each criminal event is listed, counsel must seek a solution to each problem. See CRIMINAL DEFENSE OF IMMIGRANTS § 5.19.

In the Sample Chronology case, the client gained Lawful Permanent Resident status on 01/24/96. He passed the next five years without a problem. Six years after he acquired lawful status, he was convicted of misdemeanor petty theft with a six-month maximum possible sentence. While this conviction constitutes a "crime of moral turpitude," which can trigger deportation and inadmissibility, in this case it does not trigger deportation because (a) it was committed more than five years after the client obtained lawful status, and (b) the maximum possible sentence is less than one year. It does not trigger inadmissibility, because it falls within the petty offense exception to inadmissibility for one conviction of a crime of moral turpitude. At this point, the first conviction does not trigger any immigration consequences.

Then he is arrested on the current case, again for shoplifting. The prosecution, however, charges him with felony petty theft with a prior, a crime of moral turpitude with a maximum three-year prison sentence, and second-degree commercial burglary, entering a store with intent to commit theft, also a crime of moral turpitude with a maximum three-year prison sentence. Defense counsel consults immigration counsel, to determine the actual immigration consequences of various possible dispositions of the current case.

If the client pleads to petty theft, even as a six-month misdemeanor, like the first conviction, he becomes deportable for multiple moral turpitude convictions, regardless of sentence, but he is eligible to apply for discretionary cancellation of removal. If he pleads guilty to misdemeanor or felony theft as charged in Count I, the maximum is one year. If he receives a sentence of one year, suspended or not, he is deportable for a theft aggravated felony and is disqualified from cancellation.

The solution is for him to plead to second-degree commercial burglary in Count II, phrased as “entry with intent to commit theft or any felony,” which is not a crime of moral turpitude *or* aggravated felony for deportation purposes. See Appendix G[1].

Chapter 3:
Consultation

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§ 3.1 Finding Counsel

Criminal defense counsel can, in theory, research the immigration consequences and other criminal-immigration issues themselves. A welcome trend has been the development of charts giving immigration consequences for different criminal offenses. Defense counsel can simply locate the immigration consequences chart for the jurisdiction of conviction, look up the statute charged or of which the client has been convicted, and obtain a quick indication of some of the more important immigration consequences, such as whether the conviction constitutes an aggravated felony, crime of moral turpitude, or other common ground of deportation. For collections of these charts from different jurisdictions, see www.NortonTooby.com, www.NationalImmigrationProject.org, www.ilrc.org, www.nysda.org [Immigration Defense Project], and www.nlada.org.

These charts, however, do not give advice concerning the dozens of other topics on which criminal counsel should consult with immigration counsel. E.g., § 3.2. They should be regarded as the starting point for brainstorming and research, rather than a source of authoritative answers to the question: what is a safe disposition for the client? Even if a chart entry is found with a case "on point" indicating the disposition does not trigger a given immigration consequence, there is no substitute for reading the case and analyzing whether it indeed governs the client's precise situation. Is the statute in the case identical to the client's statute? Has it been amended? Is the record of conviction identical? Are any differences significant? Without answering these and other questions, counsel cannot be sure the case really answers the client's question.

(A) *Immigration Counsel*. Criminal defense counsel must often obtain expert advice from immigration counsel during the defense of a criminal case. *Unless you have yourself researched the specific immigration questions facing your individual defendant, expert immigration advice is absolutely necessary*. There is no substitute for consulting an immigration expert to find out (a) the client's exact immigration situation prior to any new conviction, and (b) the exact immigration effects for the client of each of the various possible alternative dispositions of the new criminal case. Immigration counsel will hopefully be able to assist criminal defense counsel to identify a realistic target disposition that will not trigger deportation.[1]

Crimes-related deportation defense is very complicated, and an immigration specialty of its own. Many immigration attorneys specialize in what is called business immigration: obtaining work permits, labor certificates, and visas for employees of corporations. They may never, or only very rarely, handle a removal case or try to obtain cancellation of removal for a client convicted of a criminal offense. Criminal counsel must inquire specifically about potential immigration counsel's experience with criminal issues.

(B) *Expert v. Local Counsel*. Counsel must balance expertise in this specialty against the advantages of local counsel, who:

- knows the personalities s/he sees in the immigration courts on a daily basis and enjoys their respect;

- knows local practice; and

- has offices close to the immigration court.

On the other hand, an expert:

- knows the arsenal of various forms of relief available in immigration court to noncitizens convicted of crimes;

[1] See generally N. TOOBY & J. ROLLIN, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005)(giving advice on how to avoid triggering the 52 different grounds of deportation).

- is accustomed to cooperating with criminal and post-conviction counsel; and

- either knows or is willing to learn the necessary criminal and post-conviction law.

(C) *Screening Possibilities*. Look for names that come up repeatedly when you consult public defenders, reputable criminal defense lawyers, judges, local bar associations, and local criminal defense bar associations concerning local immigration lawyers experienced in criminal issues.

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 deportation defense of immigrants with criminal convictions?

(2) How many crime-related immigration cases have you handled in the last year? Section 212(c) applications? Cancellation of removal cases? Do you consult with criminal lawyers concerning the immigration consequences of proposed plea bargains? Have you spoken recently to criminal lawyers' groups on this topic? Where? When?

(3) What books do you have in your library concerning crime-related immigration issues? (Look for D. KESSELBRENNER AND L. ROSENBERG, IMMIGRATION LAW AND CRIMES (West Group 2008), K. BRADY, ET AL., DEFENDING IMMIGRANTS IN THE NINTH CIRCUIT (ILRC, 2007), M. VARGAS, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN NEW YORK STATE (2006), N. TOOBY, CRIMINAL DEFENSE OF IMMIGRANTS (National Edition 2007), N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS (2004), N. TOOBY, TOOBY'S GUIDE TO CRIMINAL IMMIGRATION LAW (2008).

(4) What crimes-related immigration work have you done lately and who were the criminal or post-conviction lawyers on those cases? (You can then call them as references.)

(D) *Expert Resource Centers.* Ample resources exist to assist criminal defense counsel in obtaining answers to the immigration questions that arise during the course of representing noncitizens.

(1) *National Resources.* The National Immigration Project of the National Lawyers Guild (14 Beacon Street, Suite 506, Boston, MA 02108, (617) 227-9727) is a valuable resource. Headed by Dan Kesselbrenner, co-author of IMMIGRATION LAW AND CRIMES,[2] it is a clearinghouse on recent developments and litigation in immigration law and criminal issues, and sometimes organizes *amicus* briefing in significant cases.

Many local Bar Associations have lists of immigration attorneys, and a local chapter of the National Lawyers Guild or American Immigration Lawyers Association (AILA) will often be able to help. The Washington, D.C., AILA office (918 F Street, N.W., Washington, D.C. 20004, (202) 216-2400) will provide the name of a local AILA representative or, for a fee, their membership directory.[3]

(2) *State Resources.* Resources (both live and written) specific to individual states include:

California.

The Immigrant Legal Resource Center, in San Francisco, California is a non-profit organization that provides advice, training and materials to non-profit community agencies and immigrants' organizations. For a modest fee, the Immigrant Legal Resource Center lawyers will provide criminal defense counsel with expert telephone consultation about immigration consequences of a criminal conviction. For information, call (415) 255-9499.

California has a wealth of written resources:

K. BRADY, N. TOOBY & M. MEHR, DEFENDING IMMIGRANTS IN THE NINTH CIRCUIT (Immigrant Legal Resource Center 2007), distributed by the ILRC, 1663 Mission Street, Suite 602, San Francisco, CA 94103, (415) 255-9499.

[2] D. KESSELBRENNER & L. ROSENBERG, IMMIGRATION LAW AND CRIMES (Nat'l Lawyers Guild, Nat'l Imm. Project, West Group) (2008).

[3] AILA also provides a referral service (fees not to exceed $100.00 per consultation for clients who call 1-800-954-0254, or sending and email to ilrs@aila.org). You will need to provide your name, location and describe your need for an immigration lawyer.

D. KEENER, M. MEHR, & N. TOOBY, *Representing the Noncitizen Criminal Defendant*, Chap. 52 in California Continuing Education of the Bar, CALIFORNIA CRIMINAL LAW: PROCEDURE AND PRACTICE.

N. TOOBY, CALIFORNIA POST-CONVICTION RELIEF FOR IMMIGRANTS (2002).

N. TOOBY, EXPUNGEMENT OF CALIFORNIA CRIMINAL CONVICTIONS FOR IMMIGRATION PURPOSES (2002).

Minnesota.

M. Baldini-Potermin, DEFENDING NON-CITIZENS IN MINNESOTA COURTS (1998), distributed by the Minnesota Bar Ass'n, (612) 333-1183.

New York.

The Immigrant Defense Project (IDP) of the New York State Defenders Association works to defend the legal, constitutional and human rights of immigrants facing criminal or deportation charges. IDP seeks to (1) minimize deportation and detention under current immigration laws for immigrants facing criminal charges or subsequent deportation, and (2) change the current system so that it does not result in the exile of immigrants from their homes and families in the United States. The Project serves as a legal resource for attorneys, advocates, and immigrants. It also promotes impact litigation by recruiting and mentoring pro bono attorneys and promotes community-based advocacy against unjust immigration laws.

The IDP has a number of legal resources available on its website http://nysda.org/idp/index.htm. IDP has practice materials for criminal defense attorneys and immigration attorneys, including a Removal Defense Checklist and reference charts that list common criminal offenses and whether they might trigger a ground of removability. IDP also has *pro se* materials including "Know Your Rights" charts and guides to help unrepresented individuals understand the criminal justice and deportation systems. In addition, IDP's webpage provides information about its litigation efforts, including its involvement as amicus curiae before the courts of appeals and Supreme Court.

M. Vargas, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN NEW YORK STATE (NY State Defender's Association, Criminal Defense Immigration Project).

Texas.

Lynn Coyle, Barbara Hines, and Lee Teran, BASICS OF IMMIGRATION LAW FOR TEXAS CRIMINAL DEFENSE ATTORNEYS (Tex. Crim. Defense Lawyers Ass'n 2003), available at (512) 478-2514.

Washington State.

ANN BENSON & JONATHAN MOORE, IMMIGRATION AND WASHINGTON STATE CRIMINAL LAW (Washington Defender Association's Immigration Project, 2005).

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(E) *Post-Conviction Counsel*. If the client has prior convictions from the same jurisdiction as the current criminal case, it is sometimes possible for criminal defense counsel to reach a global disposition of the past and current matters that can avoid adverse immigration consequences. This may involve vacating and replacing a prior conviction with an immigration-harmless substitute disposition, as part of the same plea bargain that disposes of the current criminal case. If the client has prior convictions from other jurisdictions, however, or the prosecution is likely to oppose altering a prior conviction so as to neutralize its adverse immigration consequences, it may be wiser to employ a post-conviction specialist.

Different attorneys with different skills may best be able to handle these different stages. An attorney experienced in post-conviction relief, or better yet, the immigration aspects of post-conviction relief, is often best equipped to vacate or reduce a sentence. Once that has been achieved, standard criminal defense tactics will often work to minimize the adverse immigration consequences of any new case. A public defender or other criminal defense attorney can handle the matter as long as s/he has a reliable source of immigration advice on what specific objectives to seek in order to avoid removal and the other adverse immigration consequences that could result from any new sentence. Immigration counsel, of

course, must then defend the client in immigration proceedings against the potential immigration consequences of the new disposition.

Post-conviction work is very complicated, a specialty of its own. Many criminal defense attorneys may never, or only rarely, handle post-conviction writs. 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 being filed in an effort to vacate the conviction;

(4) the even newer re-prosecution if the old case is reopened; and sometimes even

(5) post-conviction relief from the effects of the new resolution of the criminal case, for example, an expungement of the new conviction under California Penal Code § 1203.4(a).

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

- sees the personalities in the courthouse on a daily basis and enjoys their respect;
- knows local practice; and
- has offices across the street from the courthouse.

And on the other hand, an expert:

- knows the arsenal of various forms of post-conviction relief available;
- knows the various possible grounds of legal invalidity; 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 (NACDL), 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 the NACDL at (202) 872-8688.

(2) The local death penalty resource center has staff attorneys with a great deal of experience in post-conviction litigation of capital cases. They may be able to suggest ex-staff or panel 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, asking for someone with post-conviction expertise.

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 questions such as the following:

- 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?

- 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?

- What books do you have in your library concerning post-conviction relief? (Look for state treatises concerning post-conviction relief, and other treatises such as J. LIEBMAN AND R. HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (2 volumes); LARRY W. YACKLE, POSTCONVICTION REMEDIES; D. WILKES, STATE AND FEDERAL POST-CONVICTION REMEDIES (2007); 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.)

- How much immigration-related post-conviction work have you done, and who were the immigration lawyers on those cases. (You can then call the immigration lawyers mentioned as references to check the lawyer out.)

§ 3.2 Topics

Once criminal defense counsel has conducted the necessary investigation, and located immigration counsel experienced with criminal issues, they can discuss a number of important topics. It is often very desirable to maintain on-going consultation as the criminal case develops, since new issues may arise.

(A) *Defense of the Criminal Case*. Immigration counsel can often assist by providing information concerning the client's equities, immigration status, background information, and any threats to the client if removed to the country of origin, as well as the immigration consequences of various dispositions of the criminal case. Disproportionate immigration consequences can often be a powerful equity to motivate the prosecutor and criminal judge to assist in arranging an immigration-harmless disposition. Immigration counsel can provide an opinion letter, or testimony at sentencing, to assist criminal counsel explain the situation to the prosecutor and court.

(B) *Detention Issues*. If criminal counsel can succeed in obtaining the client's release from criminal custody on bond or otherwise, will the DHS lodge an immigration hold? If so, can immigration counsel obtain the client's release from immigration custody so the client can (a) assist in the defense of the criminal case, or (b) attend drug treatment or other rehabilitative programs prior to or after sentence? If an immigration hold is placed against the client while still in criminal custody, can immigration counsel secure the client's release from immigration custody, or is the client subject to mandatory immigration detention without possibility of bond?

(C) *Timing.* What is the best timing of the criminal plea, sentence, or appeal from the immigration standpoint? Would it assist the client to obtain relief from removal or other immigration benefits if the criminal conviction occurred later, rather than sooner? Would it assist the client to delay the beginning of deportation proceedings by filing a direct appeal from the criminal conviction?

(D) *Immigration Consequences*. What immigration consequences will flow from each of the various possible alternative dispositions of the criminal case? Can both counsel working together identify a safe haven disposition for the client that will avoid adverse immigration consequences? Can immigration counsel provide information to help criminal counsel obtain an immigration-harmless disposition? This type of information might include a declaration by immigration counsel, certified copies of immigration-court or other immigration documents to establish the immigration consequences of the criminal case, or verification of the risk of persecution, torture, or death of the client if deported to the home country. See § 3.3.

(E) *Client's Presence*. Can immigration counsel assist criminal counsel to obtain the presence of the client in criminal court after the client has passed into immigration custody? See § 4.1(C).

(F) *Post-Conviction Strategy*. What post-conviction strategies should criminal counsel pursue with respect to the client's prior convictions? What are the immigration effects of different forms of post-conviction relief? See § 5.1.

(G) *Removal Defense*. Can criminal counsel assist immigration counsel to defend against removal during removal proceedings? Would it assist the client if criminal counsel could obtain a ruling from the criminal judge that multiple convictions occurred during a single scheme of misconduct?

PRACTICE TIP: Defense counsel must check carefully with immigration counsel concerning the content of statements and documents provided to the criminal court to ensure that the client is not taking a position, in criminal proceedings, that could prove harmful if it surfaces in later immigration proceedings. If criminal counsel submits to the court, for example, documentation taking the position that a certain conviction is an aggravated felony in order to motivate court and prosecution to impose a sentence imposed of less than one year, that document could come back to haunt immigration counsel who later seeks to put forth arguments in removal proceedings that the conviction does *not* constitute an aggravated felony. It is also independently wise to check the contents of any documentation or admissions relevant to the immigration consequences of the case with immigration counsel, prior to submitting them to the criminal court or prosecution, to ensure that they contain accurate information on these subjects.

(H) *Facing Removal Itself.* After a final disposition has been reached in the criminal case, immigration counsel can describe for criminal counsel the likely progress of any removal case the client will face. See Chapter 7. If the situation is hopeless from an immigration standpoint, criminal counsel can let the client know not to serve dead time in immigration custody fighting a hopeless cause, but rather to accept removal immediately to be free in the client's country of origin.

On the termination of the client's criminal case, counsel should describe the immigration proceedings that will follow, and give basic advice on how to meet them See Chapters 6 and 7.[4] This description of the legal process an immigrant faces in immigration court gives sufficient detail to permit criminal counsel to explain to the client what the client will face after the criminal case is over, the sentence has been served, and the client is transferred into DHS custody under an immigration hold to face the prospect of deportation. See Chapter 7; see also CRIMINAL DEFENSE OF IMMIGRANTS, Chapter 15. Federal law generally requires the noncitizen to complete serving the state sentence before being released into immigration custody to face deportation proceedings.[5]

[4] If counsel enters an appearance with the DHS, the DHS is prevented from interrogating the client without counsel being present (or the fruits of the interrogation may be suppressed).
[5] See CRIMINAL DEFENSE OF IMMIGRANTS § 6.21.

If the defendant has been convicted of an "aggravated felony," illegal re-entry after deportation is punishable by up to 20 years in federal prison under 8 U.S.C. § 1326(b)(2). Counsel should warn the client of this possibility. See § 6.3.

§ 3.3 Immigration Consequences

(A) *In General*. Each significant criminal event (i.e., each offense, plea and sentence) must be examined to determine what, if any, immigration damage it causes. After the immigration damage from each criminal event is listed, counsel must seek a solution – either in criminal or immigration court -- to each problem. See CRIMINAL DEFENSE OF IMMIGRANTS § 5.19.

The basic form of analysis of immigration consequences is as follows, under the acronym "DIRS":

Deportability: Does the criminal case make the client *deportable*?

Inadmissibility: Does the criminal case make the client *inadmissible*?

Relief: Does the client have *relief* from deportability or inadmissibility in immigration court?

Safe Haven: Is there a *safe haven* or target disposition of the criminal case realistically available to avert the adverse immigration consequences?

This same analysis can be applied to each prior conviction, each charge in the current criminal case, each alternative possible disposition in the current case, and each conduct-based ground of deportability, inadmissibility, or bar to relief that can be established either by the defendant's admissions, the conviction itself, or the underlying police reports.

(1) *Convictions.* Most of the adverse immigration consequences of crimes are triggered by a "conviction." See § 3.5; CRIMINAL DEFENSE OF IMMIGRANTS § 5.18(B). The immigration authorities are governed by a federal statutory definition of "conviction" that may be different from the definition used by state criminal courts. For example, most state "deferred adjudication" schemes are considered convictions for immigration purposes, even after the case has been dismissed by the state court for successful completion of a program. See § 5.1(D).

(2) *Conduct*. A relatively smaller number of immigration consequences are triggered by criminal conduct, even if no conviction results. These conduct-based immigration consequences, however, cannot be altered by what criminal counsel does in criminal court in arranging or re-arranging a conviction or sentence. Counsel cannot change historical facts. All counsel can do with respect to conduct-based immigration consequences is to decline to create easy proof of the conduct that triggers the consequence. For example, counsel can advise the defendant not to make admissions, during the course of the criminal case, that certain conduct occurred if that conduct would trigger adverse immigration consequences. See § 3.7; CRIMINAL DEFENSE OF IMMIGRANTS § 5.18(A).

(B) *Immigration Status.* Criminal counsel should inform immigration counsel of the contents of the Immigration Status Questionnaire, Appendix A, that has been completed for the client. Immigration counsel may well have additional questions to aid in determining the client's present immigration status and prospects for favorable changes in that status, by obtaining some form of relief in immigration court or before the immigration agencies such as political asylum, naturalized U.S. citizenship, and the like.

(C) *Prior Criminal History.* Criminal counsel can inform immigration counsel of all the relevant facts pertaining to the client's prior criminal history. Ideally, defense counsel will have copies of the record of conviction documents, see § 2.5, from which immigration counsel can determine the nature of each conviction for immigration purposes, and thus infer the exact effect of each prior conviction on the client's current and future immigration status.

(D) *Current Criminal Case.* Criminal counsel can inform immigration counsel of all the relevant facts pertaining to the current criminal case faced by the client. See § 2.6.

(1) *Charge(s).* The current criminal charges are particularly important, since the prosecution will likely accept a plea to one or some of them, and dismiss others. Counsel can confer on which charges are preferable, from an immigration standpoint, and the likely immigration consequences of a conviction on each charge.

(2) *Offer*. The prosecution's offer is also important, and counsel can analyze the immigration consequences of this disposition.

(3) *Alternative Dispositions*. Counsel can brainstorm together concerning possible alternative dispositions and their immigration consequences, seeking a realistic immigration-harmless disposition.

(E) *Deportation.* For each possible disposition, immigration counsel can advise whether it triggers a ground of deportation for the client, and what alterations in that disposition would be likely to avert this result. See § 7.2. For a detailed analysis of the 52 grounds of deportation, and dispositions that would not trigger them, see N. TOOBY & J. ROLLIN: SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005).

(F) *Inadmissibility.* For each possible disposition of the current case, immigration counsel can advise whether it triggers a ground of inadmissibility for the client, and what alterations in that disposition would be likely to avert this result. See § 7.3. For a checklist of the many crime-related grounds of inadmissibility, see CRIMINAL DEFENSE OF IMMIGRANTS Appendix E (2007).

(G) *Relief in Immigration Court.* For each of the possible dispositions of the current case, that establishes a ground of deportation or inadmissibility, immigration counsel can analyze whether the client is eligible to apply for, and evaluate the chances of obtaining, some form of relief from deportation or inadmissibility in immigration court if removal charges are brought against the client. See § 7.4; CRIMINAL DEFENSE OF IMMIGRANTS, Chapter 24.

(H) *Safe Havens.* Criminal and immigration counsel can brainstorm together in an effort to discover a possible disposition of the criminal case that will avoid triggering adverse immigration consequences for the client. Safe havens take many different forms, and some are safer than others.

(1) *Immigration Court*. Some safe havens are safe because an immigration court will decline to order the client to be deported or excluded. One way of achieving this is to arrange the criminal disposition so that the immigration court will conclude that it does not, in fact, trigger any ground of removal. Another way to avoid removal is to arrange the disposition of the criminal case so the client remains eligible, despite the conviction, to apply in immigration court for some form of relief from removal, where the client's equities are such that the immigration court will in fact grant the relief.

(2) *Target Disposition of Criminal Case*. The result of this conference is a joint conclusion that a plea to a certain target offense with a certain sentence

imposed will not in fact trigger adverse immigration consequences, or, if it does, the client can obtain relief from removal in immigration court if removal charges are brought.

§ 3.4 Balancing Criminal and Immigration Goals

(A) *Basic Goals*. A noncitizen in a criminal case has two basic goals:

(1) Minimizing criminal consequences of the case, and

(2) Minimizing adverse immigration and other collateral consequences of the case.

These goals are sometimes congruent, as when the client seeks a sentence imposed of 364 days, instead of 365, in order to avoid an aggravated felony conviction. At other times, however, the goals conflict. Counsel's most important task is to balance these goals to maximize the client's satisfaction with the outcome.

(B) *Minimizing Criminal Consequences*. This goal – minimizing criminal consequences – needs little discussion, for it constitutes the normal goal of criminal defense counsel in all cases. The client's immigration situation, however, can make plea bargaining more difficult if the prosecutor or court harbors a bias against noncitizens in general, or undocumented immigrants in particular. Counsel must be aware, in addition, that the client's immigration situation, especially the existence or threat of an immigration hold, can disqualify the client from participation in a number of very beneficial sentence alternatives that require the client to be at liberty. See §§ 3.4(C)(2)(h), 4.4(D).

(C) *Minimizing Immigration Consequences*. For immigrants, adverse immigration consequences are frequently the most important consequences of a criminal case, often more important than the direct criminal consequences, and more important than other collateral consequences. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 2.2-2.14. Defense counsel has an obligation to investigate, advise the defendant concerning, and attempt to avoid these adverse immigration consequences. See § 5.5(C); CRIMINAL DEFENSE OF IMMIGRANTS Chapter 2.

The following considerations – different aspects of sentence – can be seen as bargaining chips. Counsel must seek to avoid the most important of them – given the client's individual immigration situation, and can sacrifice others. For

example, if the primary consideration is avoiding an aggravated felony conviction caused by a sentence imposed of one year or more, the client might accept an extra three months in custody by waiving pre-sentence credits, to motivate the prosecution and court to grant a total sentence imposed of less than one year.

(1) *Avoiding a conviction* if possible. Various non-conviction alternative dispositions may be available in a criminal case, depending on the jurisdiction. Avoiding a conviction under the criminal law of the jurisdiction of conviction is not necessarily the same as avoiding a conviction under immigration law, as the two definitions of "conviction" frequently differ. For a list of dispositions that do not constitute a conviction for immigration purposes, see § 3.5(B); CRIMINAL DEFENSE OF IMMIGRANTS §§ 5.27, 7.21-7.37.

(2) *Minimizing the seriousness of the offense* of conviction, i.e., minimizing the maximum possible sentence for the offense, as well as any statutory minimum sentence that must be imposed. A number of immigration consequences depend on the maximum possible length of a sentence of imprisonment that can be imposed on account of a conviction. See § 4.4(E)(5); CRIMINAL DEFENSE OF IMMIGRANTS §§ 5.29, 10.19, 10.56-10.60, 10.76-10.80.

(3) *Avoiding a finding of any sentence enhancements* applicable to the offense of conviction. These can be either recidivist enhancements, dependent on prior convictions meeting certain descriptions, or conduct-based enhancements, dependent on a true finding that the defendant committed certain conduct in the commission of the offense. Sentence enhancements formerly did not form part of the record of conviction for immigration purposes. Now, however, counsel should assume that conduct-based sentence enhancements, that increase the statutory maximum possible sentence for the offense, do form part of the record of conviction. See § 4.4(E)(2)(a); CRIMINAL DEFENSE OF IMMIGRANTS §§ 5.29, 10.56-10.60.

(4) *Minimizing the length of the actual sentence* to incarceration (if any) initially ordered for the conviction. A sentence for immigration purposes includes both a judgment imposing a prison sentence and a probation condition requiring service of a sentence to confinement. The court can either order the defendant to begin serving it immediately, or after a short delay, or the court can suspend execution of the sentence it has imposed, so the defendant does not have to begin serving it unless s/he violates probation and the suspended sentence is ordered executed. Different states use different terminology for the act of deferring service of the sentence until the conditions of suspension have been violated and

the court has entered a further order canceling the suspension of the sentence.[6] Under immigration law, there is no difference between a suspended sentence and one that is ordered served immediately. See § 4.4(E)(3); CRIMINAL DEFENSE OF IMMIGRANTS § 5.29 and Chapter 10. Where no sentence has actually been ordered served, however, the conviction does not trigger the grounds of removal that require a sentence to have been ordered.[7]

(5) *Minimizing the level of the conviction*. Counsel also seeks to minimize the level of the conviction. Certain immigration consequences depend on whether the offense of conviction is considered to be a "felony" or a "misdemeanor" under either the law of the jurisdiction of conviction or under a uniform national federal definition of those terms. See § 4.4(E)(7); CRIMINAL DEFENSE OF IMMIGRANTS §§ 10.21, 10.86-10.93. A conviction less serious than a misdemeanor, for example a minor offense that may be called a violation or infraction, depending on the jurisdiction, may not be considered a criminal conviction at all under immigration law. See § 3.5(B)(14).[8]

(6) *Minimizing the restitution ordered*. Defense counsel also seeks to minimize the amount of restitution ordered as part of the sentence. The restitution ordered may have some relationship to the concept of the "loss to the victim" resulting from the offense of conviction, which can have important immigration consequences if it exceeds $10,000 for an offense relating to fraud or deceit. See § 4.4(E)(6); CRIMINAL DEFENSE OF IMMIGRANTS §§ 10.82-10.85, 19.74.

(7) *Minimizing the fine imposed for the conviction*. This sentence element does not have any direct immigration consequences, except that it may be considered a form of penalty sufficient to constitute a conviction under immigration law. See § 3.5.[9]

(8) *Minimizing other direct and indirect criminal consequences of the conviction*. There are a number of other possible statutory benefits and detriments that can greatly affect the defendant's welfare, including youthful offender laws,

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[6] In California, for example, "imposition of sentence suspended" means no prison sentence at all is imposed, so the only sentence imposed would be as a condition of probation. "Execution of sentence suspended" means the court has imposed a prison sentence of one year or more, and suspended execution so the defendant need not serve that prison sentence unless probation is violated.

[7] See e.g., CRIMINAL DEFENSE OF IMMIGRANTS §§ 19.10, 20.29.

[8] *Matter of Eslamizar*, 23 I. & N. Dec. 684 (BIA Oct. 19, 2004).

[9] See INA § 101(a)(48)(A); *Matter of Cabrera*, 24 I. & N. Dec. 459 (BIA 2008).

drug addict rehabilitation laws, and the like. Counsel may also attempt to influence the place of service of any confinement, as well as eligibility for the granting of probation or parole, including any minimum time that must be served before release on parole, and rules relating to stays of service of imprisonment, concurrent, and consecutive sentences. These may have some immigration consequences. See § 3.4(B); CRIMINAL DEFENSE OF IMMIGRANTS §§ 10.62, *et seq.* For example, a person is ineligible for naturalization while on probation or parole. See CRIMINAL DEFENSE OF IMMIGRANTS § 24.13.

(D) *Minimizing Other Collateral Consequences*.

While avoiding immigration consequences of criminal cases is the focus of this Guide, counsel will want to bear in mind that a criminal conviction can have other important collateral consequences as well. The concept of "collateral consequences" has come to mean, in the criminal law, a consequence of a conviction that is triggered by the existence of the conviction but that is not imposed directly by the sentencing court.[10] This doctrine can have important effects on the likelihood of obtaining post-conviction relief from the immigration consequences of a conviction, since prosecutors can argue that the courts should

> categorically bar petitioner's ineffective assistance claim as based on a "collateral" consequence of his criminal conviction. A defense lawyer's giving erroneous advice to a defendant about immigration consequences cannot violate the pleading defendant's right to the effective assistance of counsel, reasons the Attorney General, because knowledge of immigration consequences is not a prerequisite to a determination that the plea was entered voluntarily.[11]

Courts giving thoughtful analysis to this question invariably conclude that the duties of defense counsel are very different from those of the court, so there is no reason to create an exception to the rules relating to ineffective assistance of counsel merely because the *court* does not have to warn the defendant about the collateral consequences of a conviction.[12]

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[10] See *In re Resendiz*, 25 Cal.4th 230, 242, 105 Cal.Rptr. 2d 431 (2001) (rejecting this argument).
[11] *Ibid.*
[12] See *Resendiz, supra*; CRIMINAL DEFENSE OF IMMIGRANTS Chapter 2.

Even though they are considered "collateral," and the court is not obligated to inform the defendant of them at the time of plea to take a valid plea, competent defense counsel will always attempt to minimize not only the collateral immigration consequences of a conviction but also all other collateral consequences of a conviction that are important to the client. As Professor Amsterdam has stated, counsel must in every case research "the possible consequences of a conviction" including:

> (1) *Forfeiture statutes* condemning automobiles and other paraphernalia used to commit liquor, gambling, drug, and like offenses.
>
> (2) *Civil disabilities imposed by state law*, including:
>
> (a) Loss of any outstanding occupational license (hack license, professional license, license to operate a bar, and so forth) and ineligibility for future licensing.
>
> (b) Loss of a driver's license (frequent under traffic and drug legislation) and ineligibility for future licensing.
>
> (c) Loss of public office or employment and ineligibility for future public office or employment.
>
> (d) Loss of voting rights (citations omitted).
>
> (e) Criminal registration requirements [especially including in this day and age sex offender registration requirements].
>
> (3) *Liabilities under federal law or regulations*, including:
>
> (a) Ineligibility for military service (including National Guard service, which, in turn, is the precondition for certain employments).
>
> (b) Ineligibility for public office or employment.

(c) Liability to deportation and other immigration consequences if the defendant is an alien.

(4) *Privately imposed sanctions*:

(a) Higher insurance rates (particularly in traffic cases).

(b) Restrictions on employment, residence, admission to professions, admission to educational institutions, and so forth.

Of course, in addition to knowing each of the consequences that *may* follow conviction, counsel must undertake to calculate the likelihood of actual occurrence of each.[13]

Sometimes these collateral consequences can be extremely important to the client, as with loss of employment or sex offender registration requirements (especially in this era of public posting of the information on the internet). Some people also take very seriously any restriction on the right to own or possess firearms, that can be forfeited on account of certain criminal convictions.

(E) *Balancing Conflicting Goals.* Where the criminal and immigration goals conflict, the client must balance them against each other, and decide what course of action to pursue. This can require criminal counsel, on occasion, to pursue very imaginative or counterintuitive strategies of agreeing to harsh criminal sentences in order to avoid harsher immigration consequences. For example, if the immigration consequences outweigh the criminal consequences, it may be necessary to persuade the prosecution to agree to a non-deportable disposition by offering (a) two convictions instead of one, (b) a felony conviction, instead of a misdemeanor, or (c) a longer sentence instead of a shorter one. This may be in the client's interest because the criminal damage is less serious than the immigration consequences.

(1) *Immigration Effects Are Often Far Worse Than The Sentence*. The normal criminal effects are frequently *secondary*, as where the criminal sentence is

[13] I A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 206, pp. 345-346 (1988) (emphasis in original)(the paragraph numbers of the quotation have been altered to fit the current text).

relatively harmless (e.g., probation with no jail), but the automatic and unavoidable immigration effects of the conviction are life-shattering and permanent deportation. In these cases, the criminal defense strategy should be directed primarily to avoiding the immigration consequences, and only secondarily to minimizing the criminal judgment or sentence.

The immigration consequences frequently outweigh the criminal consequences in the following situations:

-- most misdemeanor cases;
-- most probation felony cases; and
-- most other relatively minor felony cases, even if the defendant receives a sentence of several years in prison. The custody time will pass, whereas deportation is usually permanent and irreversible.

Where a state prison sentence of four or five years is imposed, sometimes the client may feel the immigration and criminal consequences are equivalent. It would not be uncommon for some criminal defendants to choose to receive a shorter prison sentence, even if it meant permanent deportation, while other defendants would take the long view and be willing to spend more time in custody in order to avoid permanent deportation. In cases involving longer prison sentences, more defendants will strike the balance in favor of minimizing the prison time if possible, even if it means automatic deportation. In life sentence and capital cases, of course, the defendant will typically seek to minimize the prison sentence if possible, even if it means accepting deportation.

(2) *Client's Priorities.* This is a highly individualized decision for the client. Counsel cannot make this decision, or assume the client wishes to minimize the custody time. The permanent immigration consequences greatly outweigh the criminal consequences in the vast majority of all criminal cases. Most defendants, who are brought to understand the exact adverse immigration consequences of a proposed plea bargain, will sacrifice traditional criminal defense goals to some extent in order to protect their immigration status. To avoid a disposition that triggers removal, they might choose:

(a) to serve greater time in custody,

(b) to plead guilty to two offenses, instead of one,

(c) to plead guilty to a greater offense, that carries a longer maximum prison sentence in the event of a probation violation.

Seeking these dispositions runs counter to everything criminal defense counsel have learned, but they must learn to think outside the box of ordinary criminal defense strategy in order to accommodate the distinct necessities and choices of immigrant clients. Moreover, counsel must often educate the client on the necessity to prioritize long-term goals, such as staying in the United States or obtaining lawful status here, even if it means sacrificing short-term goals, such as getting out of custody at the earliest possible time.

§ 3.5 Conviction

Most immigration consequences of crimes are triggered by a criminal conviction that meets a certain description. See CRIMINAL DEFENSE OF IMMIGRANTS § 5.18(B). These convictions may trigger a ground of deportation, inadmissibility, or a bar to relief in immigration court. Whether a conviction exists (i.e., whether it has come into being, or whether it has effectively later been erased) is governed by federal immigration law, rather than the law of the several states. See § 1.4; CRIMINAL DEFENSE OF IMMIGRANTS, Chapter 7.

(A) *Immigration Definition.* The statutory immigration definition of conviction provides:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where --
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.[14]

[14] INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

The general rule is that a deferred adjudication of guilt, or similar state disposition, constitutes a "conviction" for immigration purposes if it meets the immigration-law definition, even if the state does not consider it to be a conviction for state-law purposes. See § 1.4.[15]

Where formal adjudication of guilt has been withheld, a conviction requires:

(1) A finding of guilt, which can be based upon:
- A guilty verdict after court trial, or
- A guilty verdict after jury trial, or
- Entry of a plea of guilty, or
- Entry of a plea of *nolo contendere*, or
- An admission by the defendant of sufficient facts to warrant a finding of guilt, *and*

(2) Imposition of sentence, in which the court, as a result of the finding of guilt, orders some form of
- Punishment, or
- Penalty, or
- Restraint on the noncitizen's liberty to be imposed.[16]

If formal adjudication has been withheld, a conviction does not exist under this definition unless there is both (1) a finding of guilt based on one of the enumerated bases, plus (2) imposition of sentence which must include some form of punishment, penalty or restraint on liberty.

(B) *Dispositions That Do Not Constitute Convictions*. Avoiding a conviction entirely is one method of avoiding deportation on account of a conviction-based ground of deportation. The following dispositions do not constitute convictions for immigration purposes, and therefore do not trigger deportation under any conviction-based ground of deportation. Since they are not considered convictions, they do not establish that the client committed certain conduct, and therefore do not provide evidence that might trigger a conduct-based ground of deportation.

[15] D. KESSELBRENNER & L. ROSENBERG, IMMIGRATION LAW AND CRIMES § 2:17 (2007).
[16] INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), as enacted by IIRAIRA § 322(a)(1).

(1) Juvenile delinquency finding. If this is rendered in juvenile court, it is not considered a conviction at all. See § 4.6(A); CRIMINAL DEFENSE OF IMMIGRANTS §§ 7.23, 12.20-12.37.

(2) Acquittal. See CRIMINAL DEFENSE OF IMMIGRANTS § 7.28.

(3) Dismissal before conviction, where no plea of guilt, no contest, or admission of facts sufficient to warrant a conviction has been entered at any time. See CRIMINAL DEFENSE OF IMMIGRANTS § 7.29.

(4) Deferred prosecution. Where the criminal case is postponed, without entry of a plea of guilty, no contest, or admission of facts sufficient to warrant a conviction, and later dismissed, there is no conviction. See CRIMINAL DEFENSE OF IMMIGRANTS § 7.30.

(5) Deferred verdict. Where a trial occurs, but the rendering of court or jury verdict is postponed, without entry of a plea of guilty, no contest, or admission of facts sufficient to warrant a conviction, and the changes are later dismissed, there is no conviction. See CRIMINAL DEFENSE OF IMMIGRANTS § 7.31.

(6) Deferred sentence. If there is no punishment, penalty, or restraint of any kind imposed on the defendant, there is arguably no conviction, but even court costs have been considered to be a penalty for this purpose, so this disposition is quite risky. See § 3.4(C)(2)(g); CRIMINAL DEFENSE OF IMMIGRANTS § 7.32.

(7) Convictions that are not final, because they may still be appealed or a direct appeal is still ongoing. See CRIMINAL DEFENSE OF IMMIGRANTS § 7.37.[17]

[17] This rule is not recognized in all circuits. At the present time, four circuits have held, or suggested, that the new statutory definition of conviction eliminated the finality requirement. *Puello v. BCIS*, 511 F.3d 324, 332 (2d Cir. Dec. 20, 2007) ("IIRIRA did, however, eliminate the requirement that all direct appeals be exhausted or waived before a conviction is considered final under the statute. See *Abiodun v. Gonzales*, 461 F.3d 1210, 1213 (10th Cir. 2006); *Montenegro v. Ashcroft*, 355 F.3d 1035, 1037 (7th Cir. 2004); *Moosa*, 171 F.3d at 1009.") (*dictum*), citing *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999). See also *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001)

(8) Judicial Recommendations Against Deportation, granted by the sentencing judge within 30 days of sentence and before November 29, 1990, are effective to prevent deportation for a crime of moral turpitude or aggravated felony. See CRIMINAL DEFENSE OF IMMIGRANTS § 7.41.

(8) Executive Pardons. See CRIMINAL DEFENSE OF IMMIGRANTS § 7.42.

(9) State rehabilitative relief in certain minor first-offense controlled substances cases in the Ninth Circuit only. See § 5.1(D)(2); CRIMINAL DEFENSE OF IMMIGRANTS § 7.43.

(10) Convictions vacated as legally invalid. See § 5.1(A); CRIMINAL DEFENSE OF IMMIGRANTS § 7.44.

(l2) Convictions by court without jurisdiction. See CRIMINAL DEFENSE OF IMMIGRANTS § 7.34.

(13) Convictions rendered *in absentia.* See CRIMINAL DEFENSE OF IMMIGRANTS § 7.35.

(14) Convictions of minor offenses for which no jail sentence is authorized, and there is no right to jury trial, appointed counsel, or proof beyond a reasonable doubt. See CRIMINAL DEFENSE OF IMMIGRANTS § 7.24.

For more discussion of the various dispositions in criminal cases that do *not* constitute convictions for purposes of deportation, see N. TOOBY & J. ROLLIN, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS § 2.4 and Chapter 4 (2005).

§ 3.6 Nature of Offense

Immigration authorities use a special form of analysis, called "categorical analysis," to determine whether a criminal conviction will cause the noncitizen to

(ignoring finality requirement but remanding because there was no evidence that petitioner had a restraint on liberty).

fall within any of the conviction-based grounds of removal or trigger a bar to relief. Counsel can use this same analysis to identify or create a criminal conviction that will avoid removability. This analysis, however, only applies to the *conviction*-based grounds of removal, not to the *conduct*-based grounds. For a checklist, see Appendix B.

(A) *Looking at the Elements of the Offense*. To determine whether a given conviction will trigger a conviction-based ground of removal, the courts use the following analysis:

(1) Examine the record of conviction[18] to identify the statute that defines the offense of conviction on the date of the offense. This examination is limited to determining the section and subsection number or offense of which the person was convicted.[19]
(2) Determine whether judicial decisions have modified the essential elements specified by the Legislature.[20]
(3) If the statute of conviction includes only one offense, with one set of essential elements,[21] determine the minimum conduct[22] necessary to satisfy the essential elements of the criminal offense.
(4) If the statute of conviction punishes multiple offenses, as delineated by subsections or a disjunctive ("or"),[23] determine by reference to the record of conviction[24] (if possible) the set of elements of which the person was found guilty. Then determine the minimum conduct necessary to satisfy the essential elements of the criminal offense of conviction.
(5) Compare the minimum set of elements necessary to convict to the elements of the relevant ground of removal.
(6) If there is any instance in which all essential elements necessary to convict under the criminal statute are established, yet the offense does *not* fall within the ground of removal, then the conviction in question must be held *not* to fall within that ground.[25]

[18] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.15-16.33.
[19] See CRIMINAL DEFENSE OF IMMIGRANTS § 16.5.
[20] See CRIMINAL DEFENSE OF IMMIGRANTS § 16.6.
[21] See CRIMINAL DEFENSE OF IMMIGRANTS § 16.14.
[22] See CRIMINAL DEFENSE OF IMMIGRANTS § 16.8.
[23] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.10-16.13.
[24] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.15-16.33.
[25] See CRIMINAL DEFENSE OF IMMIGRANTS § 16.8.

PRACTICE TIP: The nature of a conviction is determined according to the elements of the offense, rather than the facts of the offense.[26] The courts may not go behind the record of conviction to ascertain the facts of the case,[27] in order to determine whether the facts trigger a ground of removal.

If it is *not* possible to determine, in step (4), above, the set of elements of which the noncitizen was convicted, the set of elements most beneficial to the party with the burden of proof will be applied to steps (5) and (6).[28]

(B) *Looking at Certain Conviction Records*. Immigration authorities can sometimes go beyond the statute of conviction, and look at certain official documents from the criminal court file called the "record of conviction." If a statute is considered divisible, because it contains more than one distinct criminal offense, then the immigration authorities can examine the record of conviction to determine which offense among the several offenses in the statute is the specific offense of conviction. Then, they apply the basic categorical analysis as usual to determine whether the specific offense of conviction triggers the adverse immigration consequence.

This is called the "modified categorical analysis" and is properly used when (a) the statute has subdivisions (such as subdivision (1), subdivision (2), and so on), or (b) a given statute or subdivision contains several distinct offenses (each with its own set of elements). For example, the California sale of heroin statute penalizes one who "transports, imports into this state, sells, furnishes administers, or gives away, or offers to [do so] any controlled substance . . . ."[29] Each of these verbs defines a separate offense, with separate elements. If a person is convicted of violation of this statute, the immigration authorities may examine the record of conviction to determine whether the person was convicted of sale, offering to transport, etc. Then, the immigration authorities assess the consequences of the specific offense of conviction. See Appendix G(5).

The modified categorical analysis may also be used if the person is convicted of an offense such as burglary, conspiracy, or attempt that requires as an

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[26] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.18-16.20.
[27] See CRIMINAL DEFENSE OF IMMIGRANTS § 16.17.
[28] The government generally bears the burden of proof when the respondent is charged with a ground of deportation. See CRIMINAL DEFENSE OF IMMIGRANTS § 17.9. Who bears the burden in inadmissibility proceedings is more complicated. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 15.26, 18.6.
[29] California Health & Safety Code § 11352(a).

element the intent to commit a target offense. In general, these offenses fall within the definition of a ground of removal only if the target offense falls within the ground of removal, but not otherwise. See Appendix G(1). For example, conspiracy to commit an aggravated felony is an aggravated felony only if the target offense of the conspiracy is itself an aggravated felony.

Immigration authorities have a regrettable tendency to improperly use the modified categorical analysis in any case in which the basic categorical analysis does not result in a clear conclusion, but the court can imagine circumstances in which the conviction might trigger deportation. This is not be proper under the analytical rules, but they are doing it, so criminal counsel must anticipate this possibility and forestall it if possible.

(C) *Record of Conviction*. Two United States Supreme Court cases generally describe the documents that make up the record of conviction. In *Taylor v. United States*, the court considered the record of conviction, in the context of a jury trial, as including the "indictment or information and jury instructions."[30] See § 2.5(C). In *United States v. Shepard*, the court described the record created through a guilty plea as "the charging document, the terms of a [written] plea agreement or transcript of colloquy between the judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[31] See § 2.5(A). The court described these documents as those that would allow a later court to tell whether the conviction "necessarily" rested on a fact that must be proven (i.e., an element) to trigger the sentence enhancement or ground of removal.[32]

The record of conviction generally does not include dismissed counts, police reports, or probation reports. CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.30-16.32. The contents of the record of conviction are described in more detail in CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.15-16.33.

In large part, counsel's work in creating a safe-haven disposition consists in identifying a statute of conviction that is or may be safe, and constructing – piece

[30] *Taylor v. United States*, 495 U.S. 575, 602 (1990).
[31] *United States v. Shepard*, 544 U.S. 13, 125 S.Ct. 1254, 1262 (Mar. 7, 2005). Prior to this case, it was well accepted that the *Taylor* analysis applied equally to guilty pleas. *United States v. Velasco-Medina*, 305 F.3d 839, 851 (9th Cir. Aug. 12, 2001); *United States v. Bonat*, 106 F.3d 1472, 1476 (9th Cir. 1997).
[32] *Id.* at 1260.

by piece – a record of conviction that establishes the offense of conviction as a safe one.

(D) *Looking at the Facts of the Case.* Rarely, courts examine the facts of the case, rather than limiting themselves to the elements of the offense, and sometimes even go beyond the record of conviction documents. This is improper under the normal analytical rules,[33] but to be safe, and to protect the client against this possibility, counsel should try to ensure the defendant does not admit facts during a plea hearing or even outside the record of conviction that would cause the conviction to trigger adverse immigration consequences. There are several contexts in which courts are especially tempted to go outside the elements of the offense: (a) to determine the age of the victim to see whether the offense constitutes (i) aggravated felony sexual abuse of a minor, or (ii) an offense involving a child under the domestic violence deportation ground; (b) to determine the existence of a domestic relationship between the defendant and the victim that might bring a conviction within the domestic violence deportation ground; and (c) to determine the amount of loss to the victim(s) of a fraud offense, to see whether it constitutes an aggravated felony fraud conviction. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 8.63(D), 16.7.

Immigration counsel can challenge this practice, however, by arguing that whether a given conviction falls within a ground of deportation is determined only by the *elements* of the offense of conviction, rather than the facts, even if the *facts* are contained within the record of conviction. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.18-16.21. If the immigration court decides it may go outside the record of conviction to consider these additional facts, certain offenses that would be immigration safe havens without consideration of additional facts may no longer be safe, and it may be necessary for criminal counsel obtain different convictions to avoid these grounds of deportation. It is therefore especially important in these contexts to avoid allowing the defendant to make damaging admissions during a plea colloquy.

[33] This rule may be changing in some circumstances. E.g., *Matter of Babaisakov*, 24 I. & N. Dec. 306 (BIA 2007)(immigration judge can examine probation report, or any other evidence admissible in immigration court, to establish loss to the victim over $10,000 for purposes of an aggravated felony fraud offense under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i)); *Ali v. Mukasey*, __F.3d__, 2008 WL 901467 (7th Cir. April 4, 2008).

§ 3.7 Damaging Admissions and Conduct

A relatively smaller number of immigration consequences is triggered by criminal *conduct,* even if no conviction results. See CRIMINAL DEFENSE OF IMMIGRANTS § 5.18(A). These conduct-based consequences, however, cannot be altered by what criminal counsel does in court in arranging or re-arranging a conviction. Counsel cannot change historical facts; all they can do is to decline to create easy proof of the conduct that triggers the adverse consequences. For example, counsel can advise the defendant not to make admissions, during the course of the criminal case, that certain conduct occurred if that conduct would trigger adverse immigration consequences.

PRACTICE TIP: Defense counsel should consult with immigration counsel on factual admissions to avoid, given the facts of the client's case.

The three primary forms of admission that can cause immigration damage are (a) factual admissions by the defendant that can trigger conduct-based immigration consequences, (b) admissions of committing the elements of a crime of moral turpitude or controlled substances offense, and (c) factual admissions that are included within the record of conviction to cause other damaging immigration consequences.

(A) *Conduct-Based Immigration Consequences*. The client can suffer immigration penalties for some acts even if there is no criminal conviction. See CRIMINAL DEFENSE OF IMMIGRANTS § 8.63(B). Some grounds of deportation,[34] and inadmissibility,[35] do not depend upon the existence of a conviction, but are triggered instead by certain conduct or other factors. For example, a person may be excluded (but not deported) if the government has "reason to believe" the person has been a drug trafficker,[36] or if s/he "has engaged in" prostitution.[37] Drug addiction and drug abuse may be grounds for both deportation and exclusion.[38] See CRIMINAL DEFENSE OF IMMIGRANTS § 8.40(A) and Chapter 16.

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[34] See CRIMINAL DEFENSE OF IMMIGRANTS Appendix D, sections [4], [7], [8], [12-15], [19], [20], [22-31], [33], [36-39], [41-44], [47], [48], [50].
[35] See CRIMINAL DEFENSE OF IMMIGRANTS Appendix E, §§ 5-44.
[36] See CRIMINAL DEFENSE OF IMMIGRANTS Appendix E, § 15.
[37] See CRIMINAL DEFENSE OF IMMIGRANTS Appendix E, § 29.
[38] See CRIMINAL DEFENSE OF IMMIGRANTS Appendix D, section [4](deportation); Appendix G, § 17 (inadmissibility); D. KESSELBRENNER & L. ROSENBERG, IMMIGRATION LAW AND CRIMES § 3.2 (2008).

(B) *Elements of a Moral Turpitude Offense.* A person who admits all the elements of a crime involving moral turpitude is excludable, (but not deporatable), even if the person is not actually *convicted* of a criminal offense. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 8.40(B), 8.63(C). However, if the incident is disposed of by the criminal court in some manner (e.g., dismissal), the government may not go behind the dismissal at all to impose worse immigration consequences. See CRIMINAL DEFENSE OF IMMIGRANTS § 16.8. While immigration authorities may make independent determinations of excludability without regard to judicial action in criminal proceedings because neither proceeding is *res judicata* of the other, there is a long-standing custom for the immigration courts to consider the criminal court's adjudication as binding. For example, the immigration courts generally will not look beyond the criminal court's disposition of a charge to impose immigration consequences against the noncitizen on the basis of a factual "admission" by the noncitizen that arises from the facts of the criminal case.[39]

(C) *Drug Cases*. Controlled substances offenses can trigger several different conduct-based grounds of deportation or inadmissibility: drug abuse or addiction can be both a ground of deportation and inadmissibility; an admission of commission of a controlled substances offense can trigger inadmissibility even without a conviction; and if the government has "reason to believe" that the noncitizen was at any time an illicit trafficker in a controlled substance, s/he is inadmissible. Criminal counsel should therefore take care to assist the defendant in avoiding any admissions of these things on the record during the criminal case, so as to prevent the government from having an easy source of evidence to sustain these conduct-based grounds. For example, the defendant may make a declaration to establish equities, describing the facts of her previous life and how she has changed. In doing so it is important for the defendant to avoid any admission of sale, addiction or abuse of drugs.

(D) *Nature of the Conviction.* Since the defendant's factual admissions during a plea or sentence hearing are included within the record of conviction to determine the nature of the conviction for immigration purposes, the defendant should if possible avoid admitting facts that will cause the conviction to trigger immigration damage. For example, to avoid a firearms conviction ground of deportation, a defendant pleading guilty to a charge of possession of a dangerous weapon will wish to avoid admitting the fact that the weapon he possessed was a firearm. He may want to admit possession of an unidentified weapon instead. The same may apply to the question of the identity of the controlled substances

[39] *Matter of I*, 4 I. & N. Dec. 159 (BIA 1950).

possessed, or the age or family relationship of the victim, or dozens of other facts. See CRIMINAL DEFENSE OF IMMIGRANTS § 8.66.

§ 3.8 Pre-Conviction Strategy

(A) *Defense of Current Criminal Case*. For ease in analysis, the types of immigration damage are grouped as follows:

(1) Deportability.
(2) Inadmissibility.
(3) Eligibility for Relief in Immigration Court. (If relief is granted, the noncitizen is not deported or excluded from admission to the United States on account of the ground of deportation or inadmissibility.)

Immigration and criminal counsel should jointly go through the chronology from the first to last offense and identify the type of immigration damage (if any) caused by each. Start with the first offense. Examine the conduct-based types of immigration damage listed above to determine whether the offense triggers any damage, and, if so, what that damage is. Then, determine whether the criminal offense resulted in a disposition that would be considered a "conviction" under immigration law. See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 7. If so, examine the types of immigration damage that can be triggered by a conviction. See CRIMINAL DEFENSE OF IMMIGRANTS § 5.18(B). List each type of immigration damage caused by the conviction.

For each criminal offense that triggers some form of immigration damage, examine the noncitizen's eligibility for some form of immigration relief in immigration court from that type of damage. See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 24, listing the types of immigration relief from deportation and inadmissibility. For example, if a controlled substance conviction triggers deportation and inadmissibility, consider whether the immigrant is eligible to apply for cancellation of removal which, if granted, would waive the ground of removal.

After examining the first offense in this way, take the second offense and perform the same analysis: Does it trigger deportation? Does it trigger inadmissibility? If so, is the noncitizen eligible for any form of relief from deportation or inadmissibility in immigration court?

(B) *Effect of Multiple Offenses*. Finally, after completing the analysis for each criminal offense individually, consider whether the different offenses or convictions, taken together, trigger deportation or inadmissibility, and, if so, whether there exists some form of relief for the client in immigration court. See CRIMINAL DEFENSE OF IMMIGRANTS § 5.25.

(C) *Setting Realistic Goals*. Once the full scope of the immigration problems has been identified, counsel must assist the client in choosing realistic goals. These goals will always include the normal criminal goals of minimizing the crime and minimizing the time. These goals may or not be realistic. In some jurisdictions, the prosecution or court will actively seek to aid the DHS to deport the client, or have a policy of refusing to make any change in the disposition to avoid adverse immigration consequences. If so, counsel may be wiser to refrain from mentioning immigration consequences, and seek to achieve the immigration goals by arguing the equities in another way. The following immigration-related goals are possible.

(1) *Avoiding Immigration Detention*. Avoiding arrest may often be accomplished, at least temporarily, by avoiding a sentence to incarceration in a jail facility visited by immigration officials during the time the client is incarcerated there. This can seldom be more than a short-term goal, because the client will of necessity come to the attention of the DHS and suffer immigration arrest, if deportable or inadmissible, whenever incarcerated for any significant length of time in a normal jail or prison, as well as whenever it is necessary for the noncitizen to visit DHS offices to seek a new green card or other immigration benefit, such as naturalization. In addition, it will be impossible for the client to leave or re-enter the country through normal lawful channels. Finally, it is increasingly necessary to have current documentation of lawful status in order to obtain employment or a driver's license. Any "under the radar" solution is not very desirable from the client's standpoint.

(2) *Maintaining Lawful Immigration Status*. If the client has lawful immigration status, such as a green card (lawful permanent resident status), or a valid non-immigrant visa, the client will normally wish to preserve this status and avoid deportation. This goal is often more important to the client than avoiding the more modest forms of criminal punishment. This goal is most often achieved by avoiding deportability.

(3) *Freedom to Travel*. Many clients who are here lawfully will not be satisfied by merely avoiding deportation. They will often want to travel outside

the United States, and return freely to their homes here, which means avoiding inadmissibility. A parent may get sick in a foreign country, requiring the noncitizen to travel abroad. If the client is inadmissible, the client can leave but may not be able to return to the United States, even if s/he has a green card or other lawful status in the United States. Avoiding inadmissibility is also necessary to obtain many forms of immigration benefits, such as naturalization to United States citizenship. Defendants should also be counseled regarding the risks of certain types of travel within the United States. See § 6.2.

(4) *Eligibility for New Immigration Status*. Finally, the client may wish to obtain or preserve eligibility for new, improved immigration status, such as naturalization to United States citizenship.

(D) *Post-Conviction Strategy*. During the consultation, criminal and immigration counsel will discuss the adverse immigration effects of the client's prior criminal history, and the changes in the prior convictions and sentences that may be required to avert immigration damage. If the prior conviction and the current criminal case arose within the same jurisdiction, it is sometimes possible to reach a global settlement of both cases in negotiating the current case with the prosecution. For example, if a minor prior case is causing immigration problems, it might be possible to agree with the prosecution that the plea could be withdrawn, on a ground of legal invalidity, in the prior case, as part of a package in which the defendant pleads guilty to a larger current offense. As another example, if a probation violation proceeding in a prior case is triggered by a new offense, counsel may negotiate a custodial sentence on either the prior case or the current case, whichever is necessary to avoid a sentence of one year or more that would trigger an aggravated felony conviction. See § 4.5. The larger questions of investigating the immigration consequences of prior criminal cases, and ascertaining the changes in the criminal history necessary to aver them, are discussed in Chapter 5.

Chapter 4:
Criminal Procedure

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§ 4.1 Release from Custody

(A) *In General*. The first issue counsel confronts is whether to seek the client's release from criminal custody. Normally, of course, counsel always seeks the client's liberty, but if the client is not a U.S. citizen, and therefore has or may in future have an immigration hold lodged against him or her, immediate release from criminal custody may not be best for the client. Immigration detention can have a devastating effect on a client's life and the life of his or her innocent family. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 6.33-6.47.

Sometimes immigration detention is mandatory, and the immigration court is not allowed to release the client on bond, resulting in permanent detention until deportation occurs. Criminal counsel must attempt to avoid a criminal disposition that triggers mandatory detention. See § 7.6(B); CRIMINAL DEFENSE OF IMMIGRANTS §§ 6.10-6.28. The topic of arrest by immigration authorities on immigration (not criminal) charges is discussed in § 7.6(A); CRIMINAL DEFENSE OF IMMIGRANTS § 6.30, and arrest by immigration authorities on new (usually federal) criminal charges, in CRIMINAL DEFENSE OF IMMIGRANTS § 6.31. They are increasingly enforcing arrest warrants issued by state and federal criminal courts. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.32.

At times, criminal counsel must bring a client from immigration custody into criminal custody to appear in criminal court, either to answer a charge or to attempt to obtain post-conviction relief. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.49. Immigration counsel can sometimes obtain advance parole so a client can

be admitted into the United States, even after deportation, to attend a criminal court hearing. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.50.

A more detailed discussion of how to obtain the information necessary to make this decision, and how to decide the question, are found in CRIMINAL DEFENSE OF IMMIGRANTS §§ 6.3-6.5. The effect of noncitizen status on the decision whether and on what terms to release the client from criminal custody is discussed in CRIMINAL DEFENSE OF IMMIGRANTS § 6.7.

(B) *Avoiding Immigration Custody*. The essential strategies for protecting a noncitizen defendant against immigration custody during the criminal case are somewhat different for defendants prior to sentence, and after sentence.

(1) *Prior to Sentence*. For noncitizen defendants in criminal custody *prior* to sentence, the priorities are as follows:

(a) Obtain the defendant's release from criminal custody as quickly as possible, so s/he is released before immigration authorities place an immigration hold. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.5. If counsel can do this, the client will be released to the streets. It is then far less likely that ICE will seek out and arrest the client on removal charges prior to the conclusion of the criminal case when the client is sentenced to custody. If the client is high on the ICE priority list, however, ICE may attend the next criminal court appearance and arrest the client on removal charges at that point. Unless counsel acts quickly to arrange the client's rearrest on a criminal case warrant or hold, the client may then be transported in immigration custody to a distant immigration detention facility, and it may be difficult or impossible to obtain the client's return to criminal court to dispose of the criminal case.

It is far easier to arrange a favorable outcome of a criminal case when the client is at liberty during the criminal proceedings. The client has more equities, can work to raise funds for the defense, and can help counsel investigate the case.

If counsel gets the client out, and can obtain a non-custody sentence, or a sentence to a form of custody (e.g., work furlough or home detention) that is not monitored closely by immigration authorities, the client might not be arrested by immigration authorities at all. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.73. This is a great benefit to the client. This pause in the removal process can allow counsel to seek a non-deportable disposition of the criminal case, as well as any necessary post-conviction relief. By the time the client eventually comes to the

attention of the immigration authorities, s/he may no longer be subject to adverse immigration consequences at all on account of the criminal history. ICE is acting to increase its coverage to all in criminal custody, but it may take several years to reach 100% of all immigrants in criminal custody.

(b) If ICE has placed an immigration hold, or is likely to do so, prior to the client's actual emergence from criminal custody, however, counsel will need to determine:

(i) whether immigration counsel can quickly obtain the client's release from immigration custody, see CRIMINAL DEFENSE OF IMMIGRANTS § 6.6(A), or

(ii) whether the client will be held in immigration custody for an extended period. To answer this question, it will frequently be necessary to consult with immigration counsel. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.6(B). If immigration counsel can obtain the client's release on immigration bond pending removal proceedings, the criminal attorney can then assist the defendant in seeking release on bail or O.R. on the criminal charge. This may require educating the criminal judge about the consequences of an immigration hold. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.19. Once the noncitizen is released on bail or O.R. on the criminal charges, s/he will likely be taken into DHS custody within 48 hours. The defendant may then post bond on the immigration case if the DHS has set bond. Even if immigration bond is possible, it requires real property collateral and 10% cash deposit or full cash deposit and is set at $1,500 or more, as in criminal cases. The noncitizen can request a hearing for redetermination of bond with the immigration judge (similar to a bond reduction hearing) if bond is available. Bond redetermination hearings are often conducted telephonically. See § 7.6; CRIMINAL DEFENSE OF IMMIGRANTS § 6.44.

If the client is held in mandatory detention, without bond, criminal counsel will probably not want to release the client from criminal custody because then s/he would be taken directly into DHS custody and may immediately be transported to some remote location. For example, it is DHS practice to remove noncitizens arrested in some parts of California to remote locations such as Eloy or Florence, Arizona.[1] See CRIMINAL DEFENSE OF IMMIGRANTS § 6.36.

[1] In *Committee of Central American Refugees v. INS*, 795 F.2d 1434, 1439 (9th Cir. 1986), the court refused to restrain transfer of unrepresented noncitizens to remote areas where their access to counsel may be limited. The decision might be different if the transfer violated due process by "impairing an established-ongoing attorney-client relationship." Where a person is transferred to a remote location, the immigration attorney can petition for a change of venue to a closer urban

(c) Inform the defendant immediately of the right to remain silent and the necessity of refusing to talk either to criminal law enforcement agents, or immigration authorities, about their place of birth or immigration status. Inform the defendant, if released, that s/he must not travel outside the United States without first checking very carefully with an immigration lawyer experienced in criminal issues. See § 6.2.

(d) The current criminal case cannot trigger adverse immigration consequences, including an immigration hold, until a conviction occurs that meets the federal immigration definition of conviction (which includes many dispositions, such as deferred entry of judgment, that are *not* considered convictions under state law). See § 3.5.[2] The defendant, however, may be subjected to an immigration hold if *prior* convictions or conduct, such as being undocumented or out of status, make him or her removable. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 6.11, *et seq*.

(e) If an immigration hold has been placed, obtain a copy and determine whether it is informational only, or directly orders the criminal authorities to hold the defendant, and, if so, the legal basis for the hold. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.11. Consult an immigration lawyer to determine whether to continue with efforts to secure the defendant's release from criminal custody. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.4.

(f) If the defendant has an immigration hold, but the DHS does not pick him or her up within the 48 hours allowed, obtain the defendant's release by state habeas corpus or threatening the jailers with false imprisonment liability, or both. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 6.16-6.17.

(g) Make sure the defendant has not signed a voluntary departure agreement, Form I-274, or else s/he is legitimately in DHS custody. This consent can be revoked, but consult an immigration lawyer before doing so. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.5(B)(5).

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center, especially if the client makes bond, in which case venue is routinely changed. 8 C.F.R. § 1003.20.

[2] See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 7.

(h) Attempt to obtain a disposition in the criminal case that will not subject the defendant to mandatory immigration detention. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.40.

(i) If you cannot obtain a disposition which avoids rendering your client deportable, or you have negotiated a safer disposition which still may run the possible risk of deportation, you should try to arrange a disposition of the criminal case that allows a notice of appeal to be filed. While a case is on direct appeal, or a notice of appeal can still be filed, in most circuits there is no final "conviction" for immigration purposes. See § 3.5(B)(7); CRIMINAL DEFENSE OF IMMIGRANTS § 7.37. In most circuits, if an appeal is pending, either your client will not be picked up by DHS at the conclusion of the sentence or an immigration attorney can file a motion to terminate deportation proceedings because the conviction is not yet final. Termination of proceedings must be granted by the immigration judge if the client is not subject to any other ground of removal and is in lawful status.

(j) Try to obtain a sentence that does not subject the defendant to criminal custody, so as to minimize the chances the DHS will identify and interview him or her, and place an immigration hold. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.19.

(2) *After Receiving Sentence.* If the defendant has been sentenced, and has an immigration hold placed against him or her, counsel should consider taking the following steps to secure the client's liberty:

(a) Obtain post-conviction relief from *sentence*, and replace it with a different sentence that does not trigger mandatory detention, if the sentence is triggering mandatory immigration detention. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.9.

(b) Obtain post-conviction relief from the *conviction*, if the conviction is triggering mandatory immigration detention, and replace it with a disposition that does not trigger mandatory detention. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.3.

(c) If your client will be deportable by reason of a conviction, consider a jury or court trial or submitting the matter on a preliminary examination transcript or police report or pleading guilty under circumstances allowing a direct appeal, and then filing an appeal in the criminal case. If the matter is on direct appeal when the defendant finishes the jail or prison sentence, DHS cannot use the

conviction in most circuits as a basis for deportation until the appeal has been completed. See § 3.5(B)(7); CRIMINAL DEFENSE OF IMMIGRANTS § 7.37. If deportation proceedings are begun, the client's immigration attorney can file a motion to terminate proceedings which must be granted in those circuits if there is no other basis for deportation.

(d) If an immigration detainer is filed against your client and your client is eligible for immigration bond, attempt to obtain your client's release first on the criminal charge, and then on the immigration matter after DHS picks up your client. You should plan and coordinate this with an immigration attorney. Most criminal removal grounds make the noncitizen ineligible for release on immigration bond. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.4.

(e) If your client is held on the immigration hold more than 48 hours, excluding Saturdays, Sundays and federal Holidays, beyond the time the defendant would otherwise have been released on the criminal charge, and the client has not signed a voluntary departure request, you should seek your client's immediate release from custody by threatening a false imprisonment or civil rights violation suit against the custodial agency, city or county, and filing a writ of habeas corpus. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 6.16-6.17.

(C) *Bringing Client from Immigration to Criminal Custody*. It can sometimes be quite difficult to obtain the client's presence in court for a criminal hearing: (1) if the client is in immigration custody; (2) if the client has already been deported; or (3) if the client has already been deported but has returned illegally. It is sometimes possible to obtain the client's presence, however — even in these difficult circumstances — and counsel should try to do so.

If it proves impossible to get the client to the criminal court, counsel can seek to arrange a plea or post-conviction relief, or both, with the client attending by phone. In many DHS detention facilities, the client has far better access to the telephone than in criminal custody. The client could call the court, and in effect appear by telephone to enter the plea or obtain post-conviction relief. This is particularly possible where a troublesome conviction is being vacated, and a new disposition entered, by agreement. Some jurisdictions allow a defendant to enter a plea *in absentia,* with appropriate written documentation of the waivers and other prerequisites. In one case, a client appeared in counsel's office, and was allowed to enter a federal misdemeanor plea in a federal magistrate's court in another state by telephone.

Once a client has been released from criminal custody, into immigration custody, s/he may be transferred to a close or distant immigration detention facility. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.36. The DHS decides where the client will be detained, and it is extremely difficult to convince a court to intervene in this decision. The DHS may also maintain the client in immigration custody in the local jail under contract with the DHS.

If the client is held locally, counsel can usually obtain the client's presence at criminal hearings, before or after conviction, since the jail is near the criminal court and the jailers are accustomed to bringing detainees to court. If the client is detained in an immigration detention facility at a greater distance from the criminal court, it may be far more difficult to transfer the defendant from immigration custody to criminal court and back to immigration detention.

(1) *Before Criminal Trial*. DHS policy is to assist state and federal criminal authorities to secure convictions and sentences of noncitizen defendants, so the DHS is generally willing to transfer an immigration detainee from immigration to criminal custody so long as state authorities return him or her in custody to the DHS at the conclusion of the criminal proceedings. The prosecutor can most easily arrange this, since s/he not only can count on the collegial cooperation of a fellow law enforcement agency but also has the power to prevent deportation on demand. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.22(A).

If the client is in immigration custody, but still present in the United States prior to deportation, counsel can try to obtain the client's presence at the criminal hearing by asking the criminal judge to issue two orders:

(a) A *Request for Production of Prisoner*, directed to the Officer in Charge of the immigration detention facility at which the client is being held, requesting him or her to release the client to the duly authorized Transportation Officer of the Sheriff's Department, for transportation to the County Jail for an appearance in a criminal matter on the hearing date, in a specified department of the court, at a specified time. It should provide that, at the conclusion of the criminal proceedings, the client shall be returned to immigration custody. While this is technically a "request," rather than a court order directing compliance, it can be successful in motivating the immigration authorities to release the client to state custody. The client is held under a no-bail immigration hold and returned in custody to the immigration detention facility at the conclusion of the criminal proceedings.

(b) An *Order to Transport Prisoner*, directed to the local Sheriff's Department, ordering it to pick the client up, or arrange to have him or her picked up, at the immigration detention facility at which the client is being held, giving the address, bring him before the court on the hearing date, and thereafter return him or her or arrange for the return of the client to immigration custody at the detention facility where s/he was picked up. This is a standard form used frequently by the court on behalf of prosecution and defense whenever a state prisoner is desired as a witness in a criminal proceeding.

A court will sometimes balk at paying for the transportation of the noncitizen under these circumstances, although it should be strongly urged to do so. It is better for the client to be before the court; in the event the court would otherwise deny the client the right to be present, it is possible for the client's family to pay a private agency to pick him or her up in custody from the immigration authorities and bring him or her to court. In the alternative, counsel could offer to pay the cost of the Sheriff's transportation services. In one case, this service cost about $700 for a round trip between Eloy, Arizona, and Santa Cruz, California, plus $50 per day to house the client in the Santa Cruz County Jail

(c) In federal court, a more formal process is to make Application for a *Writ of Habeas Corpus Ad Testificandum*, pursuant to 28 U.S.C. § 2241(c)(5). This is issued by the court for the presence of a material witness, which the client surely is concerning the factual matters encompassed in his or her petition for post-conviction relief. This writ actually directs the custodian[3] of the client to produce the client before the criminal court at a specified time and place and as ordered thereafter until his or her testimony is no longer required, at which time s/he is to be returned to federal custody. Upon proper application, the superior court issues the writ, which recites upon application by the client, and good cause appearing, "You are hereby commanded to produce the client, Alien Number A-NN NNN NNN, a detainee in DHS custody and confined at your [city] detention facility, located at [address], on the [date] at [time], in Department NN, of the [Superior Court] of [County], located at [address], then and there to appear as a witness in connection with the above-entitled matter, and thereafter to produce him or her as a witness before the court at such times as may be ordered by the judge presiding over those proceedings. Upon conclusion of his or her testimony, s/he is to be returned to the custody of the United States Department of Homeland

[3] The custodian of the client might be the Secretary of the Department of Homeland Security, and the Administrator of the detention facility, such as the Administrator of the Corrections Corporation of America.

Security. Expenses for transportation of the prisoner are to be paid by the County of [county]." The writ is executed by the judge presiding over the post-conviction proceedings. This writ must be accompanied by an *Order to Transport Prisoner*, as indicated *supra*.

If the post-conviction proceeding is in federal court, counsel can assert that the petitioner's rights under 28 U.S.C. § 1654 to "plead and manage their own causes personally" require bringing him or her to the hearing, to avoid denying inmate plaintiffs the "adequate means of securing redress for violations of their constitutional rights."[4]

(2) *After Deportation*. If the client has already been deported, it is somewhat more difficult to arrange for his or her presence in court. The United States Attorney General has statutory authority to parole a noncitizen into the United States on a temporary, nonimmigrant basis.[5] This provision is routinely used by prosecutors who seek temporary admission of noncitizens to serve as witnesses in criminal cases, but there is no reason why it should not be made available temporarily to admit a noncitizen petitioner in a post-conviction proceeding who wishes to attend and testify at his or her hearing. For a discussion of reopening removal proceedings on behalf of clients who were first deported, and then vacated the predicate conviction, see N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS §§ 10.15 *et seq.* (2004); Rosenbloom & Whitworth, *Practice Advisory: Filing Post-Departure Motions and Reopen or Reconsider*, www.bc.edu.centers.humanrights.projects.deportation.html (2008).

(3) *After Illegal Re-Entry*. It is very dangerous for a client who has been deported, especially after a criminal conviction, illegally to re-enter the United States. See § 6.3; CRIMINAL DEFENSE OF IMMIGRANTS § 6.31. If such a client appears in a state criminal proceeding, especially where issues regarding the immigration consequences of a criminal conviction are raised, there is a grave risk that the prosecution will become aware of the client's immigration status, as well as the criminal history, and conclude that the client has committed a serious federal felony: illegal re-entry after deportation. If the prosecution makes a simple phone call to the immigration authorities, at the next court appearance, the client may find s/he is under federal arrest and charged in United States District Court with illegal re-entry after deportation.

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[4] See *Price v. Johnson*, 334 U.S. 266 (1948); *Holt v. Pitts*, 619 F.2d 558 (6th Cir. 1980).
[5] INA §§ 212(d)(1), (d)(3)(B), 8 U.S.C. §§ 1182(d)(1), (d)(3)(B).

It is even problematic to obtain a declaration from a client under these circumstances. The declaration, at the foot, swears that the client signed the declaration on a certain date, at a certain place. If that date is after the client's deportation, and the place is within the United States, the declaration on its face establishes that the client illegally re-entered the United States, and could provide powerful evidence that the client has committed a serious federal felony.

It is better to recommend that such a client return to his or her home country, so (a) counsel can obtain a notarized declaration under penalty of perjury for use in the post-conviction proceeding, and (b) immigration counsel can seek to parole the client into the United States temporarily on a non-immigrant basis as indicated above.

(4) *Entry Into the United States to Attend Criminal Proceedings*. If a criminal defendant is outside the United States, s/he can seek humanitarian parole to enter the country to stand trial,[6] to attend a probation interview, to attend sentencing hearing, or to appear to serve a sentence. See CRIMINAL DEFENSE OF IMMIGRANTS § 15.14. Such an entry would not be within the terms of a non-immigrant visa, such as a non-immigrant business visa, or be considered a formal "admission" for immigration purposes.[7] The defendant needs DHS permission to be paroled into the United States for those purposes. Counsel may make a request for parole of the ICE point of contact for public benefit parole requests that would allow the defendant temporarily to enter the United States for these legal purposes.[8] For future trips, after sentence has been completed, the defendant may qualify for a nonimmigrant waiver of inadmissibility. See CRIMINAL DEFENSE OF IMMIGRANTS § 24.30(E).[9]

§ 4.2 Plea

(A) *Preparation*. In preparation for plea bargaining, counsel should investigate the exact immigration consequences of:

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[6] *Mansour v. Gonzales*, 470 F.3d 1194, (6th Cir. Dec. 14, 2006) (noncitizen who was paroled into the United States to stand trial in a criminal case did not make a lawful admission to the United States, for purposes of becoming eligible to apply for INA § 212(c) relief or making a motion to reopen removal proceedings), citing *Simeonov v. Ashcroft*, 371 F.3d 532, 536 (9th Cir. 2004) (noncitizen paroled into the United States pending completion of exclusion proceedings did not lawfully enter the United States and was therefore ineligible for withholding of deportation).

[7] INA § 101(a)(15)(B), 8 U.S.C. § 1101(a)(15)(B).

[8] This person may be reached at (202) 732-8168.

[9] INA § 212(d)(3), 8 U.S.C. § 1182(d)(3).

(1) a conviction of each offense charged,
(2) a conviction of each lesser-included offense,
(3) a conviction of each alternative or additional offense that might be charged on the basis of the underlying facts of the case,
(4) each existing conviction in a prior criminal case; and
(5) each offense originally charged in each prior case (even if a conviction did not result) if it is contemplated to attempt to reopen the prior conviction in order to avoid its immigration consequences.

In addition, counsel should discover the factual consequences of deportation of the defendant to the specific country of origin. For example, if the client has a political asylum claim in immigration court, counsel can document the torture or persecution to which the client would be subjected if deported to the home country. This information may be useful in plea negotiations, even if the client's asylum claim might not prevail in immigration court. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.61.

(B) *Target Disposition*. After consulting with immigration counsel, criminal counsel will have a target disposition in mind. If the best possible disposition cannot be obtained, there will normally be a range of other possible dispositions, that should be ranked in order of preference.

Pleas of guilty resolve the vast majority of criminal cases, on the order of 95%. In a case with immigration overtones, most of the normal plea-bargaining tactics will apply, but with some differences. Counsel must try to obtain prosecution and court agreement to the safest possible disposition among the range of possible safe havens.

Counsel can more easily construct a safe haven disposition in a criminal case before conviction has occurred. The case is still open, and criminal practice often allows more freedom in selecting one or more offenses to which to enter a plea. See CRIMINAL DEFENSE OF IMMIGRANTS § 8.16(A).

The defendant also enjoys the bargaining power attendant on the right to take the case to trial, a very rare, expensive and time-consuming procedure. Prosecution and courts have the resources to conduct jury trials in only five percent or so of their cases, so in some jurisdictions they have a great incentive to avoid trials whenever possible.

Before conviction, the defendant who realizes the importance of avoiding a removable conviction can marshal whatever resources are necessary. Criminal courts and prosecutors are often overwhelmed by the volume of criminal cases they wish to process, and a defendant who realizes that a removable conviction may be equivalent to lifetime banishment away from home and family can try to mobilize sufficient resources to force or persuade the court or prosecutor to allow a plea to an equivalent non-deportable conviction, so long as the defendant is willing to serve a sentence approximately equal to the sentence they feel is appropriate.

In this context, the chances the court and prosecution will agree to a safe haven disposition are greatest when defense counsel can identify a disposition that meets as many of the following criteria as possible:

(1) the safe haven offense should be as serious as, or more serious than, the offense to which a plea is offered by the prosecution, as defined by the maximum possible sentence;

(2) the safe haven conviction should not trigger any conviction-based or conduct-based ground of removal, or bar a client from some necessary form of relief;

(3) the safe haven sentence should be as serious as, or more serious than, the sentence offered by the prosecution;

(4) the safe haven offense should be one that was in fact committed by the defendant, or at least one that is reasonably related to an offense s/he committed. See CRIMINAL DEFENSE OF IMMIGRANTS § 8.11(C)(3).

These factors may be more or less present in a given case, depending on the strength of the defendant's equities, the strength or weakness of the prosecution's case, the overall seriousness of the offenses committed, the relative culpability of the defendant, and the like. See Appendix D, *infra*.

(C) *Ranking Alternatives*. If counsel cannot avoid a conviction entirely, the next level of safe haven is a conviction that does not fall into any of the conviction-based grounds of removal. Counsel will want to obtain the charging paper and investigation reports in the pending criminal case as a starting point, and then make as large a list as possible of all likely or possible offenses of conviction. This includes (a) all charged offenses, (b) for each, all lesser-included offenses, (c)

all reasonably-related offenses, and (d) all offenses for which there exists a factual basis. If it is not possible to discover a safe haven (i.e., a non-removable offense of conviction) among those, it may be necessary to resort to (e) an unrelated safe-haven offense.

(1) *Range of Possible Convictions*. Once the list of all likely or possible offenses of conviction has been compiled, counsel should evaluate them as follows:

(a) how safe is each as a safe haven?
(b) how closely related is each to an offense committed?
(c) what are the adverse criminal consequences of each?

(2) *Types of Offenses*.

(a) *Charged Offenses*. If the safe haven offense is the lead offense — the most serious offense that is commonly charged in Count I of the charging paper — then the chances are higher that the prosecution will accept a plea of guilty to that charge, thereby protecting the client from deportation on account of the conviction. In other cases, a safe haven may be found as a charged offense somewhere else among the charges against the defendant. This is very favorable, as the prosecution has already concluded that a conviction of that offense is appropriate.

(b) *Lesser-Included Offenses*. Counsel may have more difficulty negotiating a plea to a lesser-included offense because it is not as serious and does not have as large a potential maximum sentence as the charged offense. On the other hand, a lesser-included offense is very closely related to the facts of the offense originally charged, so there would be little difficulty persuading a prosecutor or court that this disposition is factually appropriate so long as the more minor nature of the disposition is not an insuperable obstacle.

(c) *Reasonably-Related Offenses*. Reasonably-related offenses, that have some factual connection with the conduct committed by the defendant, may be acceptable plea bargains depending on the strength of the evidence of guilt and on whether the offenses are roughly equivalent in seriousness and potential maximum sentence to the charged offense.

Some courts require that a factual basis be established before a guilty plea can be entered.[10] Some state courts satisfy this requirement by a simple stipulation that a factual basis for the plea exists, without specifying what it is. Other states, such as California, require that the source of the factual basis be identified, such as an offense report, preliminary hearing transcript, or the like.[11] This expectation is particularly common in federal court. The strength of the factual basis for the plea will affect the willingness of court and prosecution to agree to a particular plea. See CRIMINAL DEFENSE OF IMMIGRANTS § 8.65.

(d) *Unrelated Offenses*. If no safe haven can otherwise be found, counsel might need to find a completely unrelated safe haven and try to convince the prosecution and court to agree a plea to it. This practice is not uncommon for relatively minor offenses. For example, in many jurisdictions, a plea to disturbing the peace is a common unrelated lesser offense to an original charge of soliciting an act of prostitution.

It is lawful for a defendant to enter a plea to an offense even though s/he maintains s/he is factually innocent of the offense. See § 4.4(G)(6)(d); CRIMINAL DEFENSE OF IMMIGRANTS § 8.59. The client may make this tactical decision to avoid suffering worse criminal or immigration consequences if the case is fought and lost. Pursuant to judicial decisions,[12] the client can simply enter a plea of guilty without admitting actual guilt. Thus, the parties can agree, with the court's permission, that the defendant enter a plea to any mutually acceptable offense, even if it is factually unrelated to the charges or the defendant's conduct, and thus avoid adverse immigration consequences. Under federal law, the same procedure is technically permissible, although some district judges resist or refuse to accept a plea where the defendant maintains innocence. In general, the more closely related the negotiated offense is to the offense committed, the easier it is to convince prosecution and court to accept the disposition.

(D) *Target Disposition Checklist*. Before beginning negotiations, defense counsel should have a specific checklist of the elements of the target disposition reached in consultation with immigration counsel and the client.

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[10] D. ROSSMAN, CRIMINAL LAW ADVOCACY: GUILTY PLEAS, Chapter 4, pp. 4-1 ff. (1983).
[11] *People v. Holmes,* 32 Cal.4th 432 (2004).
[12] *North Carolina v. Alford*, 400 U.S. 25 (1970); *People v. West*, 3 Cal.3d 595, 91 Cal.Rptr. 385 (1970).

(1) *Nature of Offense of Conviction and Sentence*. Counsel will have a list of possible safe havens, ranked in order of preference. Counsel should choose as a target disposition the safe haven likeliest to avoid deportation, or other adverse immigration consequences, provided it is a realistic goal as a settlement of the criminal litigation. The tactical goal is therefore obtaining the agreement of the prosecution and court to the entry of a plea to the safest realistic safe haven, with the lowest acceptable sentence.

Counsel should carefully identify all essential elements of this target disposition.[13] See CRIMINAL DEFENSE OF IMMIGRANTS § 5.32.

(a) The statute of conviction.

(b) The offense of conviction within the statute, if the statute is divisible and contains more than one offense. See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 16.

(c) The minimum elements of the offense of conviction.

(d) The maximum possible sentence to custody that can be imposed for the conviction, and still avoid deportation. See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 10.

(e) The actual sentence that will be imposed on account of the conviction, and still avoid deportation. In addition, the checklist should specify the level of the offense: whether it is a felony, misdemeanor, or lesser offense, see § 3.4(C)(7), and any order of restitution that will be imposed. See § 3.4(C)(8); CRIMINAL DEFENSE OF IMMIGRANTS Chapter 10.

(f) Any other significant sentence elements must also be listed, such as any sentence enhancements, probation restrictions, registration requirements, the effect of the conviction as a prior conviction in any future prosecution, amount of any fine, length of probation term, conditions of probation, and the like, as in any other criminal case.

Sometimes other factors can be important, such as the date of the conviction,[14] see CRIMINAL DEFENSE OF IMMIGRANTS § 8.10(B), or the date on

[13] See N. TOOBY & J. ROLLIN, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS §§ 5.3-5.65 (2005).

which the *offense* of conviction — as opposed to the conviction itself — occurred. See § 4.2(D)(3); CRIMINAL DEFENSE OF IMMIGRANTS § 8.10(C).

(2) *Immigration Status When Conviction Occurs.* A conviction cannot trigger deportation (as opposed to inadmissibility) unless it occurs after admission, i.e., after the client has legally entered the country.[15] Some grounds of deportation also have effective dates. See, e.g., the domestic violence ground of deportation.[16] Some forms of relief also depend upon the date of conviction. See, e.g., CRIMINAL DEFENSE OF IMMIGRANTS § 24.28. If new legislation changes the law, that change may have an effective date. Counsel should be alert to see this situation developing, since it may create an opportunity to construct a safe haven by entering a plea before the effective date of a new law with damaging immigration consequences. For example, Congress has considered imposing adverse immigration consequences on multiple DUI convictions, or convictions of gang-related offenses, but has not yet done so.

There is no conviction for immigration purposes unless sentence has been imposed. See § 3.5(A); CRIMINAL DEFENSE OF IMMIGRANTS § 7.15. The DHS thus cannot begin removal proceedings until after sentence.[17] This is consistent with federal practice, which defines the entry of judgment in a criminal case as a finding of guilt plus sentencing. See § 4.4(E)(1)(A).[18] The same is true even

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[14] E.g., INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I) (conviction of crime of moral turpitude); INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (multiple convictions of crimes of moral turpitude "at any time after admission"); INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony "at any time after admission"); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substances conviction "at any time after admission"); INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) (drug abuser or addict who is or "at any time after admission has been" convicted); INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C)(firearms conviction "at any time after admission"); INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) (domestic violence conviction "at any time after admission").

[15] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 17.5-17.8.

[16] A domestic violence conviction must occur on or after September 30, 1996, to trigger deportation under INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i). See § 4.5(B); CRIMINAL DEFENSE OF IMMIGRANTS § 22.15.

[17] Imposition of court costs has been considered sufficient penalty to constitute a conviction. *Matter of Cabrera*, 24 I. & N. Dec. 459 (BIA 2008).

[18] See Fed.R.App.P. 4(b) (conviction is not final for purposes of appeal until entry of judgment after sentencing); Fed.R.Crim.P. 32(d) (a guilty plea does not become final and may be withdrawn for any fair or just reason before sentence is imposed); *Teague v. Lane*, 489 U.S. 288, 314 n.2, 109 S.Ct. 1060, 1077 n.2 (1989) (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Kennedy, J.) ("a criminal judgment necessarily includes the sentence imposed upon the defendant"); *Flynt v. Ohio*, 451 U.S. 619, 620, 101 S.Ct. 1958, 1959 (1981) ("Applied in the

where formal adjudication is withheld, as where probation is granted. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 7.16-7.20.[19]

(3) *Date the Offense Occurred*. At times, offenses occur over a range of different dates. For example, a welfare fraud offense may occur through underreporting of income over a period of years. At times, the immigration consequences of a conviction can vary depending on when the offense occurred. Counsel may select the most desirable date of conviction by picking one count over another, or suggesting a new or amended count. The same is true of many conspiracy offenses, or other continuing offenses which occur over a span of time.

One conviction of a crime of moral turpitude, for example, can trigger deportation if the offense occurred within five years of the noncitizen's admission into the United States.[20] If the span of possible dates of conviction includes dates both before and after the five-year point, counsel can select a date after the five-year point and thus avoid triggering the ground of deportation.

The date of the offense can also be relevant to eligibility for relief from removal in immigration court. See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 24. For example, the seven-year period of lawful residence in the United States necessary to qualify for cancellation of removal for Lawful Permanent Residents terminates on the date certain offenses are committed.[21] Eligibility could be preserved by arranging that the date on which the offense of conviction occurred was after the seven-year point had passed.

Counsel should therefore to be alert to the immigration consequences of arranging the date of the offense of conviction on a specific date within a range of possible dates.

(4) *Conviction May Establish Conduct-Based Ground*. A criminal conviction also constitutes proof that the defendant *committed* certain conduct, for

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context of a criminal prosecution, finality is normally defined by the imposition of the sentence."); *Parr v. United States*, 351 U.S. 513, 518, 76 S.Ct. 912, 916 (1956) ("Final judgment in a criminal case means sentence."), quoting *Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 166 (1937); *Miller v. Aderhold*, 288 U.S. 206, 210-11, 53 S.Ct. 325, 325-26 (1933); *United States v. Gottlieb*, 817 F.2d 475, 476 (8th Cir. 1987) (orders regarding a guilty plea are not final decisions until after sentencing).

[19] INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

[20] INA § 237(a)(2)(A)(i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I).

[21] INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1). See CRIMINAL DEFENSE OF IMMIGRANTS § 24.6.

the purpose of establishing one or more *conduct*-based grounds of deportation. If the minimum conduct established by the elements of the conviction falls within the boundaries of a conduct-based ground of deportation, the conviction can trigger deportation under that ground. See § 3.7(A); CRIMINAL DEFENSE OF IMMIGRANTS §§ 17.23-17.29, 18.16-18.27.

(E) *Prosecution Policies Respecting Deportation*. Counsel should ascertain the policies of the particular prosecutor's office respecting plea bargaining to avoid deportation.

(1) *Federal Policies*. Before Congress enacted specific legislation governing stipulated orders of removal,[22] see CRIMINAL DEFENSE OF IMMIGRANTS § 6.20, circuit courts disagreed on whether a prosecutor could bind federal immigration authorities by making promises in a plea agreement with a noncitizen defendant concerning deportation or other immigration consequences.[23] Congress provided that a plea agreement specifically relating to *deportation* requires DHS agreement.[24] By regulation, as well, federal prosecutors lack the authority to bind immigration authorities unless they obtain their written consent and otherwise comply with the pertinent federal regulations.[25] This statute, however, does not necessarily resolve situations in which the agreement affects immigration-related issues other than deportation, such as inadmissibility or relief from removal. Moreover, courts have held that a plea agreement that specifies a fact, such as the amount of loss to the victim, is binding on immigration authorities as to that fact.[26]

On April 28, 1995, the Attorney General issued a memorandum to all federal prosecutors entitled *Deportation of Criminal Aliens*. This memorandum directed that all federal prosecutors become actively and directly involved in the process of removing criminal aliens from the United States.[27] The Department of

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[22] This is now codified at 8 U.S.C. § 1228(c)(5).

[23] *Compare United States v. Igbonwa*, 120 F.3d 437 (3d Cir. 1997) (prosecutor's agreement with the defendant that the government would not deport him if he cooperated in criminal investigation could not bind other federal agencies, even those under the supervision of the Attorney General), and *San Pedro v. United States*, 79 F.3d 1065, 1072 (11th Cir. 1996) (finding prosecutor had no authority to bind immigration authorities, even by signing a written agreement), with *Thomas v. INS*, 35 F.3d 1332, 1334 (9th Cir. 1994) (prosecutor had implied authority to enter into written plea agreements relating to deportation, effectively binding the United States government as a whole), and *Margalli-Olvera v. INS*, 43 F.3d 345, 354 (8th Cir. 1994) (same).

[24] INA § 238(d)(5), 8 U.S.C. § 1228(d)(5).

[25] 28 C.F.R. § 0.197.

[26] *Chang v. INS*, 307 F.3d 1185 (9th Cir. Oct. 11, 2002).

[27] See U.S. ATTORNEY'S MANUAL § 1919, available at www.usdoj.gov.

Justice apparently disfavors the judicial deportation process at federal sentence,[28] but favors instead using summary deportation provisions applicable to noncitizen aggravated felons not lawfully admitted for permanent residence.[29] On August 24, 1995, the INS published the final rule implementing this new procedure.[30] "The availability of this new summary procedure may prove to be a faster and less burdensome method of effecting the deportation of such aliens, as opposed to seeking judicial deportation orders to accomplish the same result."[31]

The Attorney General's policy favors deportation of all deportable noncitizens absent "extraordinary circumstances":

> This Administration is committed to effecting the deportation of criminal aliens from the United States as expeditiously as possible. . . . All deportable criminal aliens should be deported unless extraordinary circumstances exist. Accordingly, absent such circumstances, Federal prosecutors should seek the deportation of deportable alien defendants in whatever manner is deemed most appropriate in a particular case. Exceptions to this policy must have the written approval of the United States Attorney or a designated supervisory Assistant U.S. Attorney. In cases handled exclusively by one of the Department's litigating divisions, an exception to the policy must have the written approval of the appropriate Assistant Attorney General or Deputy Assistant Attorney General.[32]

Federal regulations prohibit federal prosecutors from making plea agreement promises to defendants concerning the immigration consequences of a disposition without the express written agreement of the Department of Homeland Security.[33] See CRIMINAL DEFENSE OF IMMIGRANTS § 8.16(C).

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[28] "With regard to the recently enacted judicial deportation provisions set forth in Section 242A(d) of the Immigration and Nationality Act, 8 U.S.C. § 1252a(d), the memorandum notes that there are ambiguities that may make implementation problematic . . . ." (*Ibid.*) See CRIMINAL DEFENSE OF IMMIGRANTS § 15.22.

[29] INA § 242A(b), 8 U.S.C. § 1252a(b).

[30] 60 FED. REG. 43954 (Aug. 24, 1995).

[31] See U.S. ATTORNEY'S MANUAL § 1919, available at www.usdoj.gov.

[32] See U.S. ATTORNEY'S MANUAL § 1920, available at www.usdoj.gov.

[33] 28 C.F.R. § 0.197 ("The Immigration and Naturalization Service (Service) shall not be bound, in the exercise of its authority under the immigration laws, through plea agreements, cooperation agreements, or other agreements with or for the benefit of alien defendants, witnesses, or informants, or other aliens cooperating with the United States Government, except by the authorization of the Commissioner of the Service or the Commissioner's delegate. Both the agreement itself and the necessary authorization must be in writing to be effective, and the

Federal authorities, however, also recognize the propriety of counsel taking immigration consequences into account in plea bargaining. For example, in *United States v. Gonzalez,* the prosecutor attempted to dismiss a charge in order to prevent the defendant's deportation after he had served his sentence. The defendant, because of inadequate assistance of counsel, had not been informed in advance of the deportation consequences of the conviction. The Ninth Circuit expressed concern that the plea agreement had been "unfairly negotiated" "when the defendant lacked full information regarding the consequences."[34] The court held that the desire to prevent deportation, where the defendant had received such ineffective assistance of counsel, was in the interests of justice and was "a proper and appropriate reason for dismissing an indictment . . . ."[35]

(2) *State Policies*. State prosecutors will normally refuse to make any promises concerning what federal immigration authorities might or might not do. The DHS is increasingly communicating with state prosecutors, urging them not to cooperate with defense efforts to negotiate immigration-safe dispositions, or not to cooperate in vacating prior convictions to avoid immigration consequences. The way some prosecutors frame the issue is that they refuse, or claim it would be unconstitutional for them, to ameliorate the charges with respect to a noncitizen defendant when they would not do so for a defendant who is a United States citizen. They may claim that they do not wish to thwart the will of Congress by interfering with the deportation process.

(F) *Arguments to Minimize Immigration Consequences*. Some suggested arguments to use in negotiations include:

(1) *In General*. Standard criminal defense arguments may be made if the client has maintained a good record since the incident giving rise to the charge, and the equities are strong. The client can take a credible position of refusing to acquiesce in any outcome that will destroy the family and permanently exile the client to a foreign land.

(2) *Importance of the Case*. The client may need to take the case to trial, because the issue is so important to the client, unless a disposition with an acceptable immigration result is offered. If the adverse criminal consequences are

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authorization shall be attached to the agreement.").
[34] *United States v. Gonzalez*, 58 F.3d 459, 462 (9th Cir. 1995).
[35] *Ibid*.

minor in comparison with the drastic immigration effects, the client may be perfectly willing to risk any downside (in terms of jail time, etc.) in order to obtain an opportunity to remain in this country. (Any risks of adverse criminal consequences, of course, should be thoroughly explored with the client. See § 5.8.)[36]

Counsel can bargain with the prosecutor and court concerning (a) the nature of, (b) the number of charges to which the client will plead guilty or no contest, and (c) the nature of the sentence the client will receive.

(3) *Specific Arguments.* Sometimes counsel will encounter a judge or prosecutor with a blanket policy against agreeing to provide immigration relief to noncitizens. To attempt to persuade a court or prosecutor that it is appropriate to renegotiate a case in order to avoid unjustified immigration consequences, a number of arguments can be considered. In those 28 states, such as California, in which the Legislature has required the defendant be informed, prior to plea, of the potential immigration consequences,[37] the following argument could be made:

> In passing California Penal Code § 1016.5, effective January 1, 1978, the California Legislature has determined that in fairness to immigrant criminal defendants, the court must inform each defendant (citizens as well as noncitizens), that *if* they are not citizens of the United States, a plea to the specific offense charged *may* have the consequences of deportation, exclusion, and denial of naturalization. (Penal Code §1016.5(d) (emphasis supplied).)
>
> The Legislature continued: "It is also the intent of the Legislature that the court in such cases shall grant the defendant a reasonable amount of time *to negotiate with the prosecuting agency* in the event the defendant or the defendant's counsel was unaware of the possibility of [the specified immigration consequences]." (*Ibid*. [emphasis supplied].) In other words, the Legislature anticipated that prosecution and defense would renegotiate the case, after the defendant learned of the immigration consequences, to enable the parties to achieve an appropriate criminal disposition without triggering adverse immigration consequences. That appears to be the entire point of this legislation, so renegotiating the criminal disposition, to avoid

[36] See also Chapter 3.
[37] See § 5.5(B).

adverse immigration consequences, is an appropriate goal in the present case now that the defendant has been informed.

(4) *Countering Prosecution Arguments.* Issues to cover when negotiating with prosecutors include the following:

- It is legitimate to negotiate dispositions in light of the immigration consequences to the defendant and innocent family and friends.

- Prosecutorial discretion is broad enough to take into account the totality of the circumstances.

- It is not proper or realistic to act as if the immigration consequences do not exist; this would be an "ostrich approach."

- There is a public interest in punishing only the defendant, but not his or her innocent family.

- The victim very often has a strong interest in avoiding deportation of the defendant, e.g., in domestic violence cases to preserve the parent-child relationship and continue to obtain child support from the defendant, which would terminate upon deportation, and the prosecution should take the victim's interest into account. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 8.16(B)(4); 8.30.

- It is appropriate to differentiate between good guys and bad guys, and to reward defendants who successfully turn their lives around by offering flexibility in plea bargaining to avoid immigration consequences, or in negotiating post-conviction relief for the same purpose.

- It serves the common interest in fairness to give the defendant accurate advance notice of all consequences, including the important immigration consequences, of the plea so the defendant can make an informed decision.

- Noncitizen defendants suffer consequences far worse than U.S. citizens for the same offense, which is not fair or appropriate.

- Prosecutorial discretion should take into account the consequences of a conviction on the defendant's innocent family members.

- Congress did not intend for a noncitizen convicted of a theft offense, for example, to be deported as an aggravated felon unless a sentence of 365 days or more was in fact imposed. Therefore, we are not thwarting the will of Congress by obtaining a sentence of 364 days.

PRACTICE TIP: In some jurisdictions, the prosecution or court may have an absolute policy forbidding them to alter a disposition to avoid immigration consequences. If so, counsel may need to conceal the immigration aspects of the case, and try to obtain an immigration-safe result by indirection.

(G) *Entry of Plea*. Entry of a safe plea involves ensuring that each building block of the record of conviction is rendered safe.

(1) *Plea Agreement*. A written plea agreement or Waiver of Rights form is considered part of the record of conviction,[38] because it contains the defendant's admissions of the facts on which the plea is based, to identify the elements of the offense of conviction. See CRIMINAL DEFENSE OF IMMIGRANTS § 16.24. Counsel must therefore take special care in drafting this portion of the plea agreement to ensure the defendant does not admit as true any fact that would bring the conviction within a ground of removal. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 8.63-8.67.

(2) *Entry of Plea Without Admission of Guilt.* While the court may be required to establish that a factual basis exists for the entry of the plea, a defendant can often enter a plea without admitting, and even while continuing to deny, factual guilt. See § 4.2(G)(2); CRIMINAL DEFENSE OF IMMIGRANTS § 8.59. The factual basis can still be stated by the prosecution, without the defense agreeing or admitting that it is true. See § 4.2(G)(7)(2); CRIMINAL DEFENSE OF IMMIGRANTS § 16.33. Then the facts on which the plea is based should not be considered part of the record of conviction for immigration purposes.

[38] *Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. July 16, 2004) (defendant's factual admissions during plea hearing may be used to identify particular elements of divisible statute that form the offense of conviction); *Matter of Madrigal*, 21 I. & N. Dec. 323 (BIA 1996) (admission by the defendant during plea hearing that weapon was a firearm). See also *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 1263 (Mar. 7, 2005).

(3) *Limiting Record of Conviction*. This rule of the binding nature of a plea agreement, however, can work to the defendant's benefit. For example, in *Chang v. INS*,[39] the plea agreement provided that the loss resulting from the crime contained in the count of conviction was $605.30. The court of appeals held this agreement was binding on the United States, which could not later attempt in removal proceedings to characterize this conviction as an aggravated felony fraud conviction with a loss in excess of $10,000, even though the restitution order was in excess of that amount and the scheme as a whole factually (at least according to the presentence report) caused a loss in excess of that amount. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 8.65-8.66. The plea agreement can also specify the elements of the offense of conviction, which can potentially avoid the conviction falling within a ground of removal. It can also specify the date of the offense to which a plea is entered, which can have important effects on whether the conviction will have adverse immigration consequences. See § 4.2(D)(3).

(4) *Offense of Conviction*. The record of conviction generally includes "the charge (indictment[, complaint, information, citation, or other charge to which a plea or verdict was entered]), plea, verdict and sentence. The evidence upon which the verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted."[40] See § 3.6(C); CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.15-16.33.

(5) *Sentence Bargain*. A plea agreement will also often identify a specific sentence that both parties agree will be imposed. If so, it is necessary to ensure that the immigration consequences of the sentence do not trigger immigration problems. See § 4.3.

(6) *Nature and Wording of Plea*. The defendant's entry of a plea can be very significant in determining the record of conviction and the nature of the conviction.

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[39] *Chang v. INS*, 307 F.3d 1185 (9th Cir. Oct. 11, 2002) (conviction of bank fraud for knowingly passing a $605.30 bad check held not to constitute an aggravated felony, under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i), as a conviction of an offense involving fraud for which the loss to the victim(s) exceeded $10,000, even though losses resulting from the entire scheme described in the PSR exceeded $30,000, since plea agreement specified loss from the count of conviction as $605.30).

[40] *Zaffarano v. Corsi*, 63 F.2d 757, 759 (2d Cir. 1933). Accord, *Matter of Short*, 20 I. & N. Dec. 136, 137-38 (BIA 1989) (including indictment, plea, verdict, and sentence in "record of conviction"); *Matter of Esfandiary*, 16 I. & N. Dec. 659, 661 (BIA 1979) (including charge or indictment, plea, verdict, and sentence in "record of conviction").

(a) *Types of Plea*. Several types of plea exist, with differing immigration consequences. The defendant can enter a plea of guilty, no contest, or *nolo contendere*, which has exactly the same effect as a guilty plea for immigration purposes. S/he can enter a plea of guilty while making it express that s/he is not admitting factual guilt. S/he can enter a plea of not guilty by reason of insanity. S/he can enter what is called a "slow plea" of guilty, but really constitutes an agreement to submit the case to a court trial on the police report or other documents, with the understanding that s/he will be found guilty of specified offenses. The defendant's plea is included in the record of conviction. See CRIMINAL DEFENSE OF IMMIGRANTS § 16.27.[41] Read together with the charge to which a plea is entered, the plea identifies the offense of conviction. "[A] plea of guilty is a judicial admission of all of the elements of the crime and no proof is needed. 'It is as conclusive as the verdict of a jury,' says *United States v. Swaggerty*, 218 F.2d 875 (C.A. 7, 1955)."[42] The transcript of the plea hearing constitutes part of the record of conviction.[43] The stipulated factual basis upon which the plea is based may also be considered as part of the record of conviction.[44]

Typically, there will be a description during the plea hearing of the offense to which a plea is being entered, and that description, coupled with the words of the plea the defendant enters, form part of the record of conviction identifying the offense of conviction.

(b) *Guilty*. If the defendant's plea specifies that s/he is admitting guilt of the offense "as charged in Count I," then it can be taken as admitting all of the factual allegations of that charge.[45] If it merely enters a plea to a violation of the

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[41] *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 759 (2d Cir. 1933).
[42] *Matter of S*, 9 I. & N. Dec. 688, 696 (BIA 1962).
[43] *Matter of Madrigal*, 21 I. & N. Dec. 323 (BIA 1996) (transcript of plea and sentence hearing is part of record of conviction); *Matter of Mena*, 17 I. & N. Dec. 38 (BIA 1979) (considering transcript from proceedings of arraignment in which noncitizen accepted guilty plea as part of "record of conviction").
[44] *United States v. Hernandez-Hernandez*, 374 F.3d 808 (9th Cir. June 30, 2004) (statement of facts stipulated during plea proceedings, and upon which the plea was entered, constituted part of the record of conviction and was sufficient to establish that the California felony false imprisonment conviction was a crime of violence).
[45] *United States v. Alvarez*, 972 F.2d 1000, 1005-06 (9th Cir. 1992) (*per curiam*) (modified categorical approach was satisfied by an information that alleged the requisite elements of the generic crime and a jury's verdict form stating that it found the defendant guilty "as charged in the Information.").

statute, standing alone it is insufficient to determine which offense, among the different offenses charged in the divisible statute of conviction, the defendant was admitting.[46]

The defendant may thus retain considerable control over the plea that is entered. For example, if a divisible statute penalizes sale of heroin (an aggravated felony and controlled substances offense), *or* transportation (a controlled substances offense, but not an aggravated felony),[47] *or* offer to sell (the equivalent of solicitation, which in the Ninth Circuit is not deportable at all, as either an aggravated felony drug trafficking offense or a controlled substances offense), and the charging paper charges the offense in the disjunctive language of the statute, the defendant could state: "Your honor, I enter a plea to offering to transport, but not to sale or transportation. You can find me guilty of violating the same statute, and impose the same sentence, but I am not pleading guilty to those other offenses." It is unlikely the prosecution would choose to take the case to trial over that difference, and the defendant would, at least in the Ninth Circuit, not have pleaded guilty to a removable offense.

Even if the charging paper alleged (a) sale, *and* (b) transportation, *and* (c) offer to sell, the defendant could still attempt the plea outlined above to the safe haven "offer to transport" portion of the divisible statute.

Similarly, even if the court asks the defendant, "What is your plea to sale of heroin *as alleged in Count I*?", the defendant could state: "Your Honor, I plead guilty to a violation of Health & Safety Code § 11352(a), in the words of the statute, but I do not plead guilty to all the allegations of Count I." Again, if the defendant is willing to go to trial over this difference, prosecutors and courts might simply accept the defendant's version of the plea since they can find him or her guilty of exactly the same statutory violation and impose exactly the same sentence.

A defendant can enter a guilty plea either (a) with, or (b) without a factual admission of guilt. If the defendant enters a guilty plea without a factual admission of guilt, it is sometimes called an "*Alford* plea," see CRIMINAL DEFENSE OF IMMIGRANTS § 8.59, and immigration counsel can argue it should not be

[46] *United States v. Parker*, 5 F.3d 1322, 1327 (9th Cir. 1993); *Li v. Ashcroft*, 389 F.3d 892 (9th Cir. Nov. 19. 2004) (record of conviction insufficient to establish that the amount of the loss to the victim(s) was in excess of $10,000 for purposes of establishing the fraud offense aggravated felony as defined in INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i)).
[47] See *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001).

considered to prove the *commission* of the offense, by analogy to a no contest plea. See § 4.2(G)(2); CRIMINAL DEFENSE OF IMMIGRANTS § 8.58.

(c) *No Contest*. The entry of a plea of no contest (*nolo contendere*) satisfies one of the statutory elements of conviction for immigration purposes.[48] See CRIMINAL DEFENSE OF IMMIGRANTS § 7.18. It is nearly indistinguishable from a plea of guilty in its effect in criminal or immigration court.[49] The same considerations apply to the entry of this plea as a plea of guilty. See § 4.2(G)(6)(b); CRIMINAL DEFENSE OF IMMIGRANTS § 8.57.

The only possible exception is that "the nolo plea may not be used against the defendant as an admission in a subsequent civil suit for the same act, and the defendant is not estopped from later denying the facts on which the criminal charge was based. Thus, the primary utility of this plea for the defendant is that it insulates him from automatic civil liability for the same or related wrong."[50] This advice to the defendant may lead to a post-conviction claim of affirmative misadvice of immigration consequences see § 5.5(C)(1), because the defendant may construe this to mean that a *nolo contendere* plea may not be used against him or her in civil immigration proceedings, and if the defendant enters the plea in reliance on this misadvice, the defendant may have grounds to vacate the no contest plea.

The Ninth Circuit has held that a plea of no contest does not establish the fact of the conduct described in the conviction, because the defendant is not admitting that conduct, but merely declining to contest it.[51] Therefore, immigration counsel can argue that while a conviction based on a no contest plea creates a conviction of a certain offense, it does not establish that the defendant in fact *committed* that offense. Certain immigration consequences depend upon

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[48] INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

[49] G. HERMAN, PLEA BARGAINING § 10:06 (2d ed. 2004).

[50] G. HERMAN, PLEA BARGAINING § 10:06, p. 172 (2d ed. 2004)(footnotes omitted), citing *Bell v. Commissioner*, 320 F.2d 953 (8th Cir. 1963); *Duffy v.Cuyler*, 581 F.2d 1059 (3d Cir. 1978); *Ranke v. United States*, 873 F.2d 1033, 1037 n.7 (7th Cir. 1989).

[51] *United States v. Nguyen*, 465 F.3d 1128 (9th Cir. Oct. 18, 2006)(federal conviction under 8 U.S.C. § 1253(b) for willful failure to comply with a term of release under supervision -- which required that he not "commit any crimes" -- is reversed where misdemeanor *nolo contendere* convictions were legally insufficient to support his conviction, because a *nolo contendere* plea is not an admission of guilt to the underlying crime, a conviction based on such a plea does not prove that he "commit[ted] any crimes."and the convictions should not have been admitted under Federal Rules of Evidence 410, 803(22), or 803(8) for the purpose of proving that he actually committed the underlying crimes charged).

proof that the noncitizen "committed" an offense. For example, the petty offense exception to inadmissibility on account of a conviction of a crime of moral turpitude is not available to one who in fact *committed* a second CMT offense. At least in the Ninth Circuit, a no contest plea to a second CMT offense would not disqualify the applicant for admission to the United States from eligibility for the petty offense exception, because the no contest plea does not establish s/he committed the second offense.

Whether a plea is guilty or no contest is theoretically independent of the question whether the defendant is overtly maintaining innocence. It is thus possible to enter a no contest plea, but actually admit factual guilt in the plea colloquy or on a plea form. It is unusual, however, because the normal reason for entry of a no contest plea is the defendant's reluctance to admit guilt. If the defendant enters a no contest plea, but admits factual guilt, the no contest plea itself might not establish the commission of the offense, but the defendant's admission of factual guilt could be used for that purpose, which would nullify the immigration benefits of entry of a no contest plea. A defendant can also enter a guilty plea either (a) with, or (b) without a factual admission of guilt. See § 4.2(G)(2); CRIMINAL DEFENSE OF IMMIGRANTS § 8.59.

(d) *Plea Without Admission of Guilt*. The law allows the defendant to enter a plea of guilty without making a factual admission of guilt, even, indeed, while maintaining his or her innocence.[52] This plea is often called an "*Alford* plea."[53] This plea of guilty constitutes a conviction for immigration purposes just as much as any other guilty plea.[54]

This procedure, however, allows the defendant to make a tactical decision that accepting a plea bargain, as opposed to taking the case to trial, will be in his or her interests even though s/he believes s/he is innocent of the charges. The client may make this tactical decision to avoid worse consequences (criminal or immigration) if the case is fought and lost. The client can simply enter a plea of guilty pursuant to these judicial decisions[55] without admitting actual guilt. If this is

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[52] G. HERMAN, PLEA BARGAINING § 10.05 (2d ed. 2004); D. ROSSMAN, CRIMINAL LAW ADVOCACY: GUILTY PLEAS, Chapter 9 (1983).

[53] *United States v. Tunning*, 69 F.3d 107 (6th Cir. 1995) (''*Alford*'' plea refers to defendant who pleads guilty but maintains that he is innocent).

[54] *Abimbola v. Ashcroft*, 378 F.3d 173 (2d Cir. Aug. 5, 2004) (*Alford* plea is a plea of guilty and a conviction under INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A)).

[55] *North Carolina v. Alford*, 400 U.S. 25 (1970); *People v. West*, 3 Cal.3d 595, 91 Cal.Rptr. 385 (1970).

permitted by the court, then the defendant has not admitted any facts as part of the record of conviction that might bring the conviction within a ground of removal, but must still neutralize the factual basis for the plea. See § 4.2(G)(7).

(e) *Not Guilty by Reason of Insanity*. There is a grave risk that a not guilty by reason of insanity (NGI) disposition constitutes a conviction, at least under California procedure, since the defendant is required first to enter a guilty plea, and in effect be convicted, before entering a NGI plea, and receiving treatment rather than a sentence. It is possible to argue to the contrary, based on "basic principles" such as the "not guilty" part of the "not guilty by reason of insanity" plea. See CRIMINAL DEFENSE OF IMMIGRANTS § 8.60.

(f) *Slow Plea of Guilty*. A "slow plea" of guilty really constitutes an agreement to submit the case to a court trial on the police report or other documents, with the understanding that the defendant will be found guilty of specified offenses, and (perhaps) receive a specified sentence, just as with a normal plea bargain. This will result in a verdict of guilty, which will constitute a conviction for immigration purposes just as surely as if a plea of guilty had been entered.[56] One advantage, in many jurisdictions, is that the verdict can be appealed without seeking a certificate of probable cause to appeal. Many courts err in the requirements of taking a valid slow plea, since they are very similar to those required when a plea of guilty is entered, but the courts frequently do not understand them. During the pendency of the appeal, the conviction is not yet final for immigration purposes in most circuits. See § 3.5(B)(7); CRIMINAL DEFENSE OF IMMIGRANTS § 7.37.

(7) *Factual Basis*. Some states require a factual basis before a plea will be allowed. For example, in *People v. Holmes*, the California Supreme Court held that in order to comply with a state statute, the court must establish a "factual basis" for a guilty plea, either by (a) requiring the defendant to describe the conduct that gave rise to the charge; (b) questioning the defendant regarding the factual basis *described in* the complaint or written plea agreement, or (c) obtaining a stipulation "to *a particular document* that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement." The court explicitly stated that "a bare statement by the judge that a factual basis exists, without the above inquiry, is inadequate."[57] See CRIMINAL DEFENSE OF IMMIGRANTS § 8.11(E).

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[56] INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A).

[57] *People v. Holmes*, 32 Cal.4th 432, 436, 9 Cal.Rptr.3d 678 (2004) (internal citations omitted;

(a) *Legal Basis for Plea to Offense Unrelated to Facts of the Case.* It is lawful, however, for a defendant to enter a plea to an offense even though s/he maintains s/he is factually innocent of the offense. See §§ 4.2(G)(2), 4.2(G)(6)(d); CRIMINAL DEFENSE OF IMMIGRANTS § 8.59.

(b) *Stipulation to Other Documents.* Where both parties in the criminal case agree that certain documents form the factual basis for the plea, these documents can properly be considered by the immigration and federal courts in determining the nature of the offense of conviction.[58]

(c) *Oral Statements of Defendant.* The factual basis can be established through factual admissions, often made by the defendant under oath, particularly in federal court. Oral statements of the defendant during the plea hearing constitute part of the record of conviction for the purpose of establishing the nature of the offense for immigration purposes. See § 3.6(C); CRIMINAL DEFENSE OF IMMIGRANTS § 16.24. Counsel should prevent the defendant from making oral admissions that could bring the offense of conviction within a ground of deportation or inadmissibility, or trigger other adverse conduct-based immigration consequences. See § 3.7. Factual basis stipulations can also qualify as admissions of the defendant and thus become part of the record of conviction, for the purpose of establishing the nature of the offense for immigration purposes. See § 4.2(G)(7)(2).

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emphasis added).

[58] E.g., *United States v. Kiang*, 175 F.Supp.2d 942, 950-951 (E.D.Mich. 2001) ("The sentencing transcript indicates that both parties concurred in the court's proffer that it adopt the preliminary examination transcript (hereinafter "transcript") by reference in order to establish a factual basis for the sentencing proceeding."); *United States v. Hernandez-Hernandez*, 431 F.3d 1212 (9th Cir. Dec. 16, 2005) (California conviction of felony false imprisonment, in violation of Penal Code § 236, constitutes a divisible statute, encompassing some offenses that constitute crimes of violence within the meaning of U.S.S.G. § 2L1.2(b)(1)(A)(ii), and some that do not; if defendant was or might have been convicted of committing false imprisonment by fraud or deceit, the conviction would not fall within the crime of violence portion of the divisible statute, for purposes of assessing a 16-level increase in base offense level for illegal re-entry); *Parrilla v. Gonzales*, 414 F.3d 1038 (9th Cir. July 11, 2005) (where guilty plea agrees that certification for determination of probable cause will be reviewed by the court in determining whether there is a factual basis for the plea and in sentencing, the document is included within the record of conviction for purpose of enabling the immigration court to consider the facts recited within it in determining the elements of the offense to which the defendant engtered a guilty plea, in assessing the immigration consequences).

If the defendant cannot avoid making oral admissions of the offense conduct, counsel should try to script them so they do not cause immigration damage. For example, if the safe haven sought is possession of an unidentified weapon, so as not to trigger a firearms conviction ground of deportation, counsel can draft an oral admission for the defendant that gives factual detail that does not create immigration harm and omits to identify the nature of the weapon: "Your Honor, I admit that on August 24, 2006, on the corner of Hollywood and Vine, at 1:39 in the morning, I had in my pocket a dangerous weapon in violation of Penal Code § 12020(a)." This gives the appearance of a factual admission of guilt, yet does not admit the key fact (the weapon was a firearm) that would bring the conviction within the firearm conviction ground of deportation.

Counsel can achieve the same effect by offering a stipulation to the foregoing facts as the factual basis for the plea. This looks a little better than the defendant reading from a script, but has the same legal effect. Counsel can do the same when drafting an agreed statement of facts in connection with a written plea agreement.

(d) *Admissions of Defendant Made to Probation Officer*. The probation officer's interview with the defendant should not be considered to contain admissions of the defendant or to form part of the record of conviction, any more than the probation report does. See § 3.6(C); CRIMINAL DEFENSE OF IMMIGRANTS § 16.32. It is still wise for the defendant to avoid making damaging factual admissions to the probation officer, in case the courts relax or change this rule.

§ 4.3 Litigation.

If the prosecution will not agree to an immigration-harmless disposition, defense counsel may find it necessary to litigate these cases. A number of special considerations affect the criminal cases of noncitizens, and their impact may permeate the litigation of the case. The following outline is given to assist counsel in identifying possible issues.

(A) *General Considerations*.

(1) The harsh immigration consequences – often, mandatory detention or deportation – will sometimes magnify the importance of otherwise minor criminal cases to the defendants and their families. The threats they may face if deported back to their homelands may magnify the importance of avoiding deportation. Counsel who recognizes an incoming immigration disaster will therefore be more

likely to take a case to trial if the prosecution does not agree to an immigration-harmless result, and clients will be more likely to pay for more litigation.

(2) Immigrant defendants also have other special characteristics. For example, if they are recent immigrants, they may lack fluency or literacy in the English language. Interpreter issues thus become very important, not only to negotiating a plea but also to litigating motions or trial. See § 2.4(A); CRIMINAL DEFENSE OF IMMIGRANTS Chapter 4.

(3) Cultural influences can have a profound impact not only on how clients communicate, but also on how they view lawyers, judges, the legal system, criminal offenses, and the very way they think. Their culture can thus have a profound impact on guilt or innocence,[59] as well as on mitigation of sentence.[60] See §§ 2.4(B), 4.3(D); CRIMINAL DEFENSE OF IMMIGRANTS Chapter 3.59-3.60.

(4) The criminal process may exhibit serious bias against a defendant who does not speak fluent English, or who comes from another country or culture. They may face discrimination, as well, on account of their undocumented immigration status. Special attention may be necessary to try to blunt the damaging effects of official or personal racism or xenophobia on the parts of courts and individual members of the criminal justice system. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.4.

(5) Many immigrants come to the United States not only to seek a better life, but also to flee persecution. They may have suffered great trauma in their native land. For example, a Vietnamese client had suffered painful beatings by police in Vietnam before immigrating. When he was arrested here, he immediately became terrified of a repetition of that traumatic experience, and said yes to anything the police put to him, resulting in a false confession to a crime he did not commit.

(6) Terrible poverty in the native land may have resulted in malnutrition or other diseases that are connected with the commission of the offense, or constitute mitigating circumstances at sentence. Cultural differences may also have an impact on the existence or meaning of medical records documenting medical or

[59] A. Renteln, Raising *Cultural Defenses*, in L. Friedman Ramirez, ed., CULTURAL ISSUES IN CRIMINAL DEFENSE 423 (2d ed. 2007).
[60] M. Shein, *Cultural Issues in Sentencing*, in L. FRIEDMAN RAMIREZ, ED., CULTURAL ISSUES IN CRIMINAL DEFENSE 625 (2d ed. 2007).

psychological conditions of importance to the criminal case. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.62.

(7) It may be necessary to conduct an investigation in a foreign country, to obtain information of use in handling the criminal case. See § 2.2(J); CRIMINAL DEFENSE OF IMMIGRANTS § 3.63.[61]

(8) Finally, special procedures may be applicable to noncitizen defendants in the criminal process, for example, early release from prison to deportation, extradition,[62] or the right to contact the consulate of the client's native country under the Vienna Convention.[63] See § 4.4(G); CRIMINAL DEFENSE OF IMMIGRANTS § 3.63.

(B) *Motions.*

(1) *Fourth Amendment Motions to Suppress Evidence*. Special legal doctrines affect Fourth Amendment rights of noncitizens.[64] In addition, cultural experiences or language issues may affect the question of the voluntariness of consent to a search.[65]

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[61] L. Friedman Ramirez, *Federal Law Issues in Obtaining Evidence Abroad*, in L. FRIEDMAN RAMIREZ, ED., CULTURAL ISSUES IN CRIMINAL DEFENSE 273 (2d ed. 2007).
[62] L. Friedman Ramirez, *Legal Challenges in Extradition Cases*, in L. FRIEDMAN RAMIREZ, ED., CULTURAL ISSUES IN CRIMINAL DEFENSE 245 (2d ed. 2007).
[63] M. Warren, *Consular Resources and Litigation Strategies*, in L. FRIEDMAN RAMIREZ, ED., CULTURAL ISSUES IN CRIMINAL DEFENSE 5 (2d ed. 2007).
[64] B. Horne & R. Valladares, *Cultural Issues in Fourth Amendment Motions*, in L. FRIEDMAN RAMIREZ, ED., CULTURAL ISSUES IN CRIMINAL DEFENSE 305 (2d ed. 2007); Connell & Valladares, *Cultural Factors in Motions to Suppress*, 25 THE CHAMPION 18 (2001); Connell & Valladares, *Search and Seizure Protections for Undocumented Aliens: The Territoriality and Voluntary Presence Principles in Fourth Amendment Law*, 34 AM. CRIM. L. REV. 1293 (1997); Romero, *The Domestic Fourth Amendment Rights of Undocumented Immigrants: On* Gutierrez *and the Tort Law/Immigration Law Parallel*, 35 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 57 (2000).
[65] *United States v. Benitez-Arreguin*, 973 F.2d 823 (10th Cir. 1992)(search of a Mexican defendant's bag containing controlled substance was not consensual when based on police officer's pantomime gestures to the defendant, who did not speak English); *United States v. Gallego-Zapata*, 630 F. Supp. 665 (D. Mass. 1986)(the government did not meet burden of proving that defendant freely and voluntarily consented to search of his jacket during course of an illegal detention; defendant's response to the agents' request to search his jacket – the nonverbal shrugging of his shoulders and the nodding of his head – were gestures of resignation and not indicative of voluntary consent to search).

(2) *Fifth Amendment Motions to Suppress Statements*. Special legal doctrines and cultural considerations also affect motions to suppress statements of a defendant.[66]

(3) *Selective Prosecution Motions*. Law enforcement or prosecution may target noncitizens on the basis of appearance or nationality, giving special importance to these motions.[67]

(4) *Motions to Dismiss for Deportation of Exculpatory Witnesses*. Counsel can seek dismissal or other sanctions against the government for deportation of witnesses with exculpatory testimony, for violation of the right to compulsory process.[68]

(5) *Motions to Withdraw Pleas or Set Aside Prior Convictions*. Defendants can sometimes misunderstand the elements of the charges or the process by which rights are waived and a plea is entered resulting in an invalid plea.[69] See § 5.5(D).

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[66] F. Einesman, *Cultural Issues in Motions to Suppress Statements*, in L. FRIEDMAN RAMIREZ, ED., CULTURAL ISSUES IN CRIMINAL DEFENSE 347 (2d ed. 2007); Einesman, *Confessions and Culture: The Interaction of* Miranda *and Diversity*, 90 J. CRIM. L. & CRIMINOLOGY 1 (1999); Walker, *A Comparative Discussion of the Privilege Against Self-Incrimination*, 14 N.Y. L. SCH. INT'L COMP. L. 1 (1993).

[67] J. Basinger, *Selective Prosecution*, in L. Friedman Ramirez, ed., CULTURAL ISSUES IN CRIMINAL DEFENSE 405 (2d ed. 2007); J. Basinger & W. Buckman, *Racial Profiling*, in L. Friedman Ramirez, ed., CULTURAL ISSUES IN CRIMINAL DEFENSE 413 (2d ed. 2007).

[68] E.g., *Washington v. Texas*, 388 U.S. 14, 87 (1967)("The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense. This right is a fundamental element of due process of law."); *Taylor v. Illinois* , 484 U.S. 400, 408 (1988)(this right "is an essential attribute of the adversary system itself" and that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense."); *Pennsylvania v. Ritchie* , 480 U.S. 39, 56 (1987)("at a minimum . . . criminal defendants have the right to the government's assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt."); *United States v. Vallejo*, 237 F.3d 1008, 1023 (9th Cir. 2001)("Fundamental standards of relevancy . . . require the admission of testimony which tends to prove that person other than the defendant committed the crime that is charged."), quoting *United States v. Crosby*, 75 F.3d 1343, 1347 (9th Cir. 1996). The standard of review appears to be governed by *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-874 (1982)(in cases of deportation of potential defense witnesses, the defendant must make "some plausible showing" that the lost evidence would be "both material and favorable"; mere fact of deportation prior to defense interviews not sufficient to establish Sixth Amendment violation. Due process is violated "only if there is a reasonable likelihood that the testimony could have affected the trier of fact" and this evaluation is to be done in the context of the entire record).

[69] *Valencia v. United States*, 923 F.2d 917 (1st Cir. 1991) (holding the defendant did not

(C) *Jury Trial*.

(1) *Jury Waiver*. If the defendant lacks information about the nature of a jury trial, because of unfamiliarity with the judicial process in the United States, a jury waiver may be invalid.[70]

(2) *Jury Selection*. Noncitizens may face special challenges in obtaining a fair jury.[71] The prosecution (or defense) may object to bilingual jurors, out of concern they may not be able to set aside what they understand in another language.[72]

(3) *Language Interpretation*. See § 2.4(A); CRIMINAL DEFENSE OF IMMIGRANTS, Chap. 4.

(4) *Admissibility of Evidence*. Noncitizens face special issues respecting admissibility of evidence. For example, they may be faced with evidence of what someone said in a foreign language.[73] The prosecution may attempt to introduce inflammatory evidence or argument regarding their language, ethnic background, or culture. Due process may also be violated if the prosecution makes improper or inflammatory argument at the time of sentence,[74] especially before a sentencing

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understand either the elements of the charge or the complex legal questions asked of him, because of his "minimal formal education and little familiarity with the American legal system"); *United States v. Leung*, 783 F.Supp. 357 (N.D. Ill. 1991) (the defendant's culture and language difficulties prevented defendants from understanding the nature of the charges or the consequences of the plea).

[70] *Lopez v. United States*, 615 A.2d 1140 (D.C. Cir. 1992) (court noted possible differences between justice system in Honduras and the United States, especially lack of jury trial there); *Commonwealth v. Abreu*, 463 N.E.2d 1184 (Mass. Sup. Ct. 1984) (court of appeal could not evaluate defendant's understanding of right waived where court below asked only one question, defendant's understanding of English was limited, and his home country may not have had jury trials).

[71] J. Connell, *Cultural Issues in Jury Selection*, in L. FRIEDMAN RAMIREZ, ED., CULTURAL ISSUES IN CRIMINAL DEFENSE 495 (2d ed. 2007).

[72] An analogous issue can be found in the peremptory challenge area where the prosecutor may object to bilingual jurors. *See United States v. Alcantar*, 897 F.2d 436, 437 (9th Cir. 1990) (discussing prosecutor's objection to fluent Spanish-speaking jurors because tapes of the defendant discussing her crimes in Spanish would be introduced as the primary evidence in the case against her).

[73] Annot., *Admissibility of Testimony Concerning Extrajudicial Statements Made to or in Presence of Witness Through an Interpreter*, 12 ALR 4th 1016 (1982).

[74] *Horner v. State of Florida*, 312 F.Supp. 1292 (M.D.Fla. 1967) (sentence infected by

jury.[75] The prosecution has both an ethical and constitutional duty to ensure that its arguments regarding sentence do not lead to a sentence based on prejudice or passion. The prosecution must also not make disparaging remarks regarding racial, ethnic or religious groups.[76] Cultural considerations also affect direct examination and the effect of leading questions.[77]

(5) *Jury Instructions*. Special jury instructions may be required on issues of bias against noncitizens or those who speak different languages. They may also be required on special issues of culture as they affect mental state or other aspects of guilt or innocence. Jurors must be instructed to put aside any information they learn from understanding testimony given in a foreign language, and to rely entirely on the given in English translation.[78]

(D) *Cultural Defenses*. Cultural evidence should always be admissible to negate an element of the offense, such as *mens rea*.[79] This is true, even where a

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prosecutorial "venom"); *United States v. Fogg*, 652 F.2d 551 (5th Cir. 1981); *United States v. Perri*, 513 F.2d 572 (9th Cir. 1975) (improper reference to defendant's connection with organized crime without furnishing basis on which to rebut the allegation); *United States v. Cavazos*, 530 F.2d 4 (5th Cir. 1976) (prosecution argument that all drug offenders are repeat offenders).

[75] See ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 5.3(b) (1968); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985).

[76] Cf. *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000) (due process violated where investigating officer made repeated generalizations based on defendants' national origin when testifying; such comments equal plain error as irrelevant references about Cuban community prejudiced defendant in eyes of jury); *Bains v. Cambra*, 204 F.3d 964, 974 (9th Cir. 2000) (the prosecutor's improper closing argument, which invited the jury to consider prejudices and stereotypes concerning the Sikhs, violated petitioner's constitutional rights; a defendant's due process and equal protection rights are implicated under clearly established federal law where prosecution argument relates to race, ethnicity or religious discrimination); see also *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987) (noting that "[t]he Constitution prohibits racially biased prosecutorial arguments").

[77] Stephen A. Saltzburg, *Non-English Speaking Witnesses and Leading Questions*, CRIM. JUST. 37 (Summer 1998).

[78] *Hernandez v. New York*, 500 U.S. 352, 360-62 (1991) (permitting challenges of bilingual Latino jurors because of their ability to consider Spanish testimony without an interpreter); but see *Miller-El v. Dretke*, 125 S. Ct. 2317, 2339-40 (2005) (finding that the evidence of pretext "is too powerful to conclude anything but discrimination"); Sarah B. Clasby, *Understanding Testimony: Official Translation and Bilingual Jurors in* Hernandez v. New York, 23 INTER-AMERICAN L. REV. 515, 536 (1992).

[79] Levine, *Negotiating the Boundaries of Crime and Culture: A Sociolegal Perspective on Cultural Defense Strategies*, 28 LAW & SOC. INQUIRY 39 (Winter, 2003) (distinguishing between when a defendant offers an alternative explanation of his intent vs. when he uses culture only to explain why he wanted to harm the victim, arguing that the former should be permitted);

separate "cultural defense" is not recognized, since the prosecution always has the burden of proving every essential element of the offense beyond a reasonable doubt. Cultural defenses are increasingly being recognized as important factors in evaluating a noncitizen defendant's guilt or innocence and relative culpability for an offense. "A cultural defense will negate or mitigate criminal responsibility where acts are committed under a reasonable good-faith belief in their propriety, based upon the actor's cultural heritage or tradition."[80]

When a client comes from a different culture, the various decisionmakers in a criminal case often have difficulty fully understanding the client's point of view without expert help in learning about the client's culture. For example, a jury might not understand that a Mexican citizen would accept the job of driving someone else's car across the border for a small amount of money without suspecting criminal activities were afoot, but acquitted the defendant when an expert testified that the Mexican culture emphasized trust and not being suspicious and that he had conducted an experiment in which many randomly picked Mexicans agreed when the expert asked them to do so.[81] The admissibility of the testimony of a cultural expert may be debatable,[82] but at a minimum, defense counsel should ensure that counsel understands the client's position fully. In fact, defense counsel may render ineffective assistance of counsel for failure to consult a cultural expert.[83]

Lyman, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUSTICE J. 87 (1986) (historical and recent cultural defense cases, mental state culpability, concluding that cultural defense is not a viable substantive defense); Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. OF LAW & WOMEN'S STUDIES 437 (1993) (comprehensive article discussing culture in the context of pre-existing defenses' moral bases of punishment, including motive and intent, arguing for its acceptance in that context, and containing a near-exhaustive bibliography of other sources).

[80] Lyman, *Cultural Defense: Viable Doctrine or Wishful Thinking?*, 9 CRIM. JUST. J. 87, 88 (1986).

[81] Charles Sevilla, Preface, in CULTURAL ISSUES IN CRIMINAL DEFENSE, xxii (J. Connell & R. Valladares, eds., 2003).

[82] *United States v. Ruelas-Altamirano*, 463 F.2d1197 (9th Cir. 1972).

[83] See *Mak v. Blodgett*, 754 F.Supp. 1490, 1499 (W.D. Wash. 1991), aff'd and remanded without opinion, 972 F.2d 1340 (9th Cir. 1992)(ineffective counsel for failure to present mitigating testimony of cultural experts on the effects of cultural conflicts on a young Chinese immigrant including an apparent lack of emotion); *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476, 481-82 (9th Cir. 1991) (approving admissibility of testimony of cultural expert on gender roles among Hmong people of Southeast Asia). See generally Timothy P. O'Toole, *Appeal and Post-Conviction Review*, § 13.3(c) in CULTURAL ISSUES IN CRIMINAL DEFENSE (J. Connell & R. Valladares, eds., 2003), concerning ineffective assistance claims based on failure to raise a cultural issue at trial.

Cultural differences can have a profound effect on assessment of criminal liability and sentence in a number of important areas:

(1) *Child Care and Abuse*. Folk remedies and practices can leave scars on children which can be mistakenly considered by U.S. doctors to be evidence of physical child abuse. Some of these remedies may actually harm the patient. In Mexico, for example, weight loss may be considered a result of a fallen fontanel, or mollera caida, for which a folk remedy is holding the baby upside down and shaking it, which can cause brain damage. Certain child-care and disciplinary practices normal in other societies are frowned upon in the United States.[84] Infanticide, of course, cannot be condoned, but culture may offer some mitigation.[85] Some sexual contact with children may be seen as normal in other societies.[86]

(2) *Domestic Violence*. Other societies may tolerate levels of domestic violence that would be considered criminal offenses in the United States.[87] It may be quite risky to introduce this type of evidence, but it may assist participants in the U.S. criminal system to understand that this behavior is regarded as normal in other cultures, and this may result in mitigation if the defendant has not been present in the United States long enough to learn the ways of the dominant culture.

(3) *Family Structure*. In some immigrant contexts, men may fairly commonly have two families: one in the U.S., and another in the country of origin. This may not be taboo in the home country, and thus not immoral under the client's culture.

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[84] Futterman, *Comment: Seeking a Standard: Reconciling Child Abuse and Condoned Child Rearing Practices among Different Cultures*, 34 U. MIAMI INTER-AM. L. REV. 491 (Summer, 2003) (three views on the use of culture as a defense: complete defense, partial defense, and no defense; Part II focuses on Mexican culture in relation to children).

[85] Wu, *Comment: Culture Is No Defense For Infanticide*, 11 AM. U.J. GENDER SOC. P0L'Y & L. 975 (2003) (takes an unsympathetic view towards culture as mitigation or a defense, but includes a good recent survey and analysis of relevant caselaw and includes an interesting historical overview of infanticide).

[86] Brelvi, *'News of the Weird': Specious Normativity and the Problem of the Cultural Defense*, 28 COLUMBIA HUM. B. L. REV. 657 (1997) (discusses the Krasniqi case, in which an Albanian Muslim was unsuccessfully prosecuted but his children were taken away from him and his wife and given to a Christian family to adopt, when he was seen touching his daughter at a sporting event in a manner accepted in Albania but considered molestation here).

[87] M. RAMOS, CULTURAL CONSIDERATIONS IN DOMESTIC VIOLENCE CASES: A NATIONAL JUDGE'S BENCHBOOK (Michael W. Runner, ed., Family Violence Prevention Fund 1999).

(4) *Honor*. Many countries believe it is appropriate, even necessary, to defend honor with violence.

(5) *Intoxication*. In some countries, occasional drinking, even to the point of extreme intoxication, is expected and accepted, and the intoxicated are generally considered less responsible for their behavior. Different societies may consider drinking to include only hard alcohol, rather than beer. It is important to be concrete in asking questions about the amount and type of alcohol consumed.

(6) *Marital Habits*. In other countries, it may be commonplace for men to marry women or juveniles much younger than themselves, whereas in the United States, any sexual contact with people so young is regarded as a very serious offense.

(7) *Dress*. In the U.S., conduct that may be intended as merely friendly, or a type of dress that is merely casual and comfortable (for example, tank top and shorts in summer) may to people from other societies be taken as an expression of willingness or consent to sexual intercourse. In one case, two young women accompanied some Cuban men to their apartment late at night to smoke marijuana. The defendants testified they thought the women consented to have sex with them. Although the convictions and sentences were affirmed on appeal, a concurring justice believed the culture of the defendants to be relevant to sentence. "Perhaps, in his culture, such conduct at such an hour would be widely interpreted as an invitation to play sexual games by willing players . . . eighty years of a person's life is a high price to exact for acts which may have been set in motion by misjudgment about the mores of a new culture, and misreading the signals of its women."[88]

§ 4.4 Sentence

(A) *In General*. Defense counsel can do a great deal at sentence to avoid adverse immigration consequences. See generally CRIMINAL DEFENSE OF IMMIGRANTS Chapter 10. To the extent the sentence is dictated by a plea agreement, counsel must incorporate the sentence necessary to protect the client's immigration status into the plea bargaining process. See § 4.3. This discussion includes suggestions for seeking post-conviction relief during the sentence proceeding itself, both to obtain a sentence in the current case without adverse immigration

[88] *State v. Curbello-Rodriguez*, 351 N.W.2d 758, 770 (Wis. 1984).

effects, and to vacate any prior convictions or sentences that may be of significance to a noncitizen defendant. See § 3.8(D); CRIMINAL DEFENSE OF IMMIGRANTS § 10.35-10.36. Certain special proceedings may also be important to a noncitizen defendant, such as the former Judicial Recommendation Against Deportation, see § 3.5(B)(8); CRIMINAL DEFENSE OF IMMIGRANTS § 10.39, and judicial removal proceedings during federal sentencing. See § 4.4(G)(1)(a); CRIMINAL DEFENSE OF IMMIGRANTS § 10.40. In addition, special proceedings after sentence may be employed to seek a defendant's early release from prison custody to be removed from the United States, see § 4.4(G)(2); CRIMINAL DEFENSE OF IMMIGRANTS § 10.42, and transfer of a prisoner from United States custody to serve the remainder of a prison term in the home country under prisoner transfer treaties. See § 4.4(G)(3); CRIMINAL DEFENSE OF IMMIGRANTS § 10.43.

To minimize the collateral immigration consequences of sentence, see § 4.4(E), counsel will try to:

1. Avoid Immigration Detention. See § 4.4(E)(10); CRIMINAL DEFENSE OF MMIGRANTS Chapter 6.
2. Avoid Deportation. See CRIMINAL DEFENSE OF IMMIGRANTS Chapters and 17.
3. Avoid Inadmissibility. See CRIMINAL DEFENSE OF IMMIGRANTS Chapters 5 and 18.
4. Preserve Eligibility for Relief. See CRIMINAL DEFENSE OF IMMIGRANTS Chapters 5 and 24.

As with the overall strategy, counsel must seek to pursue both criminal and immigration goals, and to harmonize them when they conflict, with assistance from the defendant in setting defense priorities. See § 3.4; CRIMINAL DEFENSE OF IMMIGRANTS § 5.9.

As always, counsel must ensure the defendant avoids making any factual admissions that could damage the defendant's posture during any later immigration proceedings. See § 3.7.

(B) *Court Consideration of Immigration Consequences.* Sentencing courts may consider the immigration consequences of sentence. "To avoid unforeseen or unintended immigration consequences of a particular sentence, courts may nonetheless choose to give such advisements; courts may also consider alternative pleas to charges as well as sentencing alternatives. In addition, courts may make an affirmative recommendation that a noncitizen defendant not be deported and be

granted an immigration benefit. *E.g., Mandarino v. Ashcroft,* 290 F.Supp.2d 253 (C.D. Conn. 2002)."[89] Since the court's sentencing decisions have such a powerful impact on the defendant, as well as his or her family and all who depend upon the defendant, the court may feel it is important for it to be informed of the immigration impact of sentence so it is not making this important decision blind. The American Bar Association has published a benchbook to better inform judges on this subject.[90]

The sentencing court must not consider inflammatory information such as the offender's national origin or other prejudicial and irrelevant references to race, ethnicity or religion.[91] The U.S. Sentencing Guidelines prohibit basing a sentence (or a downward departure) on national origin.[92] Due process is violated where the court bases the sentencing decision in part on the defendant's status as a foreign national.[93]

The Due Process clauses of the Constitution, incorporated in the Fourteenth Amendment and thus applicable to the states, guarantee fundamental fairness in criminal sentencing procedures.[94] Counsel can argue that due process is violated by a sentence framework that systematically excludes noncitizens from rehabilitative benefits routinely extended to U.S. citizen defendants. See § 4.4(D).

In many jurisdictions, the law allows or requires the sentencing court to consider the collateral effects of sentence on the defendant and his or her family

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[89] AMERICAN BAR ASS'N, A JUDGE'S GUIDE TO IMMIGRATION LAW IN CRIMINAL PROCEEDINGS 4-18 (P. Goldberg & C. Wolchok, eds., 2004).

[90] AMERICAN BAR ASS'N, A JUDGE'S GUIDE TO IMMIGRATION LAW IN CRIMINAL PROCEEDINGS (P. Goldberg & C. Wolchok, eds., 2004).

[91] *United States v. Borrero-Isaza,* 887 F.2d 1349 (9th Cir. 1989) (Colombian offender improperly sentenced more harshly than American codefendant in order to send warning to other Colombian drug traffickers).

[92] U.S.S.G. § 5H1.10.

[93] *United States v. Onwuemene,* 933 F.2d 650, 651 (8th Cir. 1991) (sentence vacated since based in part on status of defendant as a noncitizen; the court stated: "The other thing that I feel warrants imposition at the high end of the guideline range: You are not a citizen of this country. This country was good enough to allow you to come in here and to confer upon you . . . a number of the benefits of this society, form of government, and its opportunities, and you repay that kindness by committing a crime like this. We have got enough criminals in the United States without importing any."); *United States v. Borrero-Isaza*, 887 F.2d 1349, 1352 (9th Cir. 1989) (imposition of harsher sentence because of nationality violated due process); *United States v. Edwardo-Franco,* 885 F.2d 1002 (2d Cir. 1989) (improper to create appearance of ethnic bias as contaminating the judicial process).

[94] *Townsend. v. Burke*, 334 U.S. 736 (1948); *Hicks v. Oklahoma,* 447 U.S. 343 (1980).

and other dependents.[95] The implications of this policy include (a) defense counsel must research and argue these effects at the time of sentence; and (b) any adverse prosecution policies are unreasonable, if not illegal. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.26.

(C) *Prosecution Consideration of Immigration Consequences*. Due process can be violated by inflammatory remarks by the prosecutor.[96] See § 4.3(C)(4).[97] To the extent sentence rules require judicial consideration of immigration status, the prosecution must also consider these factors. See § 4.4(B).

(D) *Effects of Immigration Status on Sentence*. Counsel should not only examine and attempt to minimize the immigration consequences of sentence, but also the damaging effects of the defendant's immigration status on the *sentence*, particularly the effects of any immigration hold that may be lodged against the defendant. The defendant may be eligible for, and benefit from, any number of rehabilitative programs, such as alcohol or drug rehabilitation programs, probation or parole supervision, job training programs, boot camp, hospital treatment programs, out-patient programs, English as a Second Language courses, school of various kinds, work and school furlough, half-way houses, community correctional centers, other forms of minimal supervision custody arrangements, home detention or electronic monitoring programs, and the like.

To the extent that the DHS considers these programs to be non-custodial programs, an immigration hold will disqualify the noncitizen from participating in them. Since the hold will be executed on the noncitizen's release from criminal

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[95] E.g., California Rules of Court, Rules 4.414(b)(5), (6) (sentencing court must take into account, in deciding between probation and prison, of facts relating to the defendant, including (5) "The likely effect of imprisonment on the defendant and his or her dependents; (6) The adverse collateral consequences on the defendant's life resulting from the felony conviction . . . .").

[96] See ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, § 5.3(b) (1968); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985).

[97] Cf. *United States v. Cabrera*, 222 F.3d 590 (9th Cir. 2000) (due process violated where investigating officer made repeated generalizations based on defendants' national origin when testifying; such comments equal plain error as irrelevant references to Cuban community prejudiced defendant in eyes of jury); *Bains v. Cambra*, 204 F.3d 964, 974 (9th Cir. 2000) (the prosecutor's improper closing argument, which invited the jury to consider prejudices and stereotypes concerning the Sikhs, violated petitioner's constitutional rights; a defendant's due process and equal protection rights are implicated under clearly established federal law where prosecution argument relates to race, ethnicity or religious discrimination); see also *McCleskey v. Kemp*, 481 U.S. 279, 309 n.30 (1987) (noting that "[t]he Constitution prohibits racially biased prosecutorial arguments").

custody, the client will pass directly from criminal into DHS custody, and in-custody removal proceedings will begin. See § 4.1; CRIMINAL DEFENSE OF IMMIGRANTS § 6.12. Thus, criminal counsel must anticipate this problem and inform the defendant and sentencing court so carefully arranged rehabilitative programs are not unexpectedly derailed. To the extent sentence forms part of plea negotiations, counsel must also take these considerations into account at that stage.

(E) *Tactics to Minimize Immigration Consequences*. Specific tactics that should be considered by counsel, as applicable, include:

(1) *Avoiding Conviction*.

(a) *Avoiding Imposition of Sentence*. A sentence is required before a conviction exists.[98] If for any reason no sentence at all is imposed, no conviction exists for immigration purposes. See § 3.5(A); CRIMINAL DEFENSE OF IMMIGRANTS § 7.20. One way to avoid imposition of any sentence at all is if prosecution and court agree to "deferred sentence," under which sentence is postponed on various conditions, and the charges are later dismissed if the defendant complies with them during the period of deferred sentence. See CRIMINAL DEFENSE OF IMMIGRANTS § 7.32. This may avoid a conviction so long as no punishment, penalty or restraint at all is imposed on account of the plea. This is a risky tactic, however, since immigration authorities may consider any court-imposed penalty or restraint whatsoever, including even court costs, as sufficient to constitute a sentence and thereby a conviction.[99]

(b) *Non-Conviction Sentences*. Certain types of sentence do not constitute convictions for immigration purposes.

(i) *Juvenile Dispositions*. If disposition occurs in juvenile court, or if counsel can obtain an order remanding the case to juvenile court, that will not constitute a conviction for immigration purposes. See § 4.6; CRIMINAL DEFENSE OF IMMIGRANTS §§ 7.23, 12.21. An order for Youthful Offender treatment under the law of some states, New York, for example, is not considered a conviction for immigration purposes. See CRIMINAL DEFENSE OF IMMIGRANTS § 12.21.[100]

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[98] *Perez v. Elwood*, 294 F.3d 552 (3d Cir. 2002) (sentence required to constitute conviction; date of sentencing, not the date of the jury verdict, is controlling as the date of conviction, because it is not until the court either enters judgment or finds guilt and imposes sentence that a conviction has occurred).

[99] *Matter of Cabrera*, 24 I. & N. Dec. 459 (BIA 2008).

[100] *Matter of Devison*, 22 I. & N. Dec. 1362 (BIA 2000) (*en banc*) (youthful offender adjudication

(ii) *Sentence to Non-Imprisonment Institutions*. A sentence to confinement in certain types of non-criminal institutions, such as mental hospitals, may not be considered a term of imprisonment or confinement sufficient to trigger certain adverse immigration consequences. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.63(G). Sentence to juvenile reformatories, as well, may fail to constitute a sentence to imprisonment for these purposes, even for an adult conviction of a juvenile. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 7.23, 10.15(B)(1), 12.21.

(c) *Post-Conviction Relief.* Certain proceedings at sentence may prevent the current offense from resulting in conviction, by means of various types of post-conviction relief, such as a motion to withdraw a plea, see § 4.3(B)(5); CRIMINAL DEFENSE OF IMMIGRANTS § 10.35(A), or a sentence sufficient to qualify for later post-conviction relief. One example of this is a sentence to probation, as opposed to prison, which may in some states qualify the client for state rehabilitative relief which will be effective in the Ninth Circuit in eliminating a conviction of first-offense simple possession of a controlled substance for immigration purposes. See § 5.1(D); CRIMINAL DEFENSE OF IMMIGRANTS §§ 11.17, ff.. Another example is filing a direct appeal from judgment and sentence, which will eliminate the finality of the conviction, in most circuits, and prevent immigration authorities from beginning removal proceedings on the basis of the conviction, which has not yet become final. See § 3.5(B)(7); CRIMINAL DEFENSE OF IMMIGRANTS § 7.37.

(2) *Avoid Expanding Nature of Conviction*. Some judicial actions at sentence can expand the record of conviction, and thus cause an immigration-harmless conviction to fall within a ground of deportation or inadmissibility, or trigger other adverse immigration consequences.

(a) *Sentence Enhancements.* Some sentence enhancements, particularly ones based on some conduct rather than recidivism, can be considered by the immigration courts in assessing the nature of the conviction, to see whether it triggers a conviction-based ground of deportation. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 10.54-10.61.[101] Counsel may therefore seek to avoid a true finding on a conduct-based sentence enhancement, in order to avoid creating a ground of deportation. It may be possible to do so by negotiating in effect an

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under New York law, which corresponds to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, does not constitute a conviction for immigration purposes and re-sentencing following a probation violation does not convert the youthful offender status into a conviction).

[101] *Matter of Martinez-Zapata*, 24 I. & N. Dec. 424 (BIA 2007).

Alford admission of the enhancement, without admitting its truth. See § 4.2(G)(6)(d).

(b) *Excluding Probation Report From Record Of Conviction*. The probation report is generally not considered to be part of the record of conviction, for purposes of determining the nature of the offense of conviction to identify its immigration consequences. See § 3.6(C); CRIMINAL DEFENSE OF IMMIGRANTS § 16.32. In some courts, however, the judge will sometimes incorporate the facts contained in the presentence report into the judgment of the court, which may then constitute part of the record of conviction. Immigration authorities may consider that the court's incorporation of the probation report within the judgment also brings it within the record of conviction, but this is legally proper only if the defendant agrees with the truth of the facts it contains.

Counsel can avoid a stipulation that the court can consider the facts contained within the report as uncontested or admitted facts. Counsel can state that as the court knows, the defendant and the police often disagree on exactly what happened during the commission of the offense, and counsel is not free to stipulate or admit that the facts contained in the police report description of the facts of the offense are true in every detail. It is possible to contest the accuracy of the facts contained in the PSR, but the court is free not to conduct a hearing, or make a detailed finding, if it concludes that the dispute does not affect the sentence choices.[102] The court has discretion concerning whether or not to conduct an evidentiary hearing.[103] Counsel can carefully frame the agreement with the truth of only those facts, which cause no immigration harm. Counsel can frame the plea agreement to specify certain facts, for example, the amount of loss to the victim(s) resulting from the particular count of conviction. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 8.63-8.67. The Ninth Circuit has held that where the plea agreement specifies the loss to the victim, that is binding on the immigration authorities even if the presentence report or judgment reflects a larger restitution amount resulting from the case as a whole.[104] See CRIMINAL DEFENSE OF IMMIGRANTS § 19.74.

(3) *Avoid A Damaging Sentence Order*. Many important immigration consequences flow from imposition of a sentence in which the court orders the

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[102] See F. R. Crim. P. 32(i)(3).
[103] *United States v. Garcia*, 954 F.2d 12 (1st Cir. 1992); *United States v. Real-Hernandez*, 90 F.3d 356 (9th Cir. 1996).
[104] *Chang v. INS*, 307 F.3d 1185 (9th Cir. Oct. 11, 2002).

defendant to serve a certain length of time in criminal custody. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.63. At sentence, counsel can employ various tactics in an effort to prevent this outcome:

- Obtaining a sentence of less than the trigger amount;
- Waiving credit for time previously served;
- Waiving future conduct credits or credit for time served;
- Stacking shorter sentences on different counts even if they are served consecutively; and
- Reducing the level of the offense from felony to misdemeanor.

See CRIMINAL DEFENSE OF IMMIGRANTS §§ 10.64-10.72; 11.13-11.15.

(4) *Avoid Service of Sentence*. While most adverse immigration consequences of sentence are triggered by a court-ordered sentence of a certain length, a few are triggered by actual service of a certain length of time in custody as a result of one or more convictions. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 10.73-10.75. These can be avoided if the client can avoid actual service of the critical length of time in custody. Counsel can employ various tactics to try to achieve this result, such as obtaining suspension of execution of the sentence, obtaining early release from confinement (so long as this is not barred by an immigration hold), or waiving credit for time served on a dismissed charge. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.16(B). In addition to helping the client avoid certain immigration consequences, these tactics may also help the client achieve a core criminal goal by avoiding actual service of all or part of a sentence. In some cases, a noncitizen may face a very serious sentence and decide s/he would prefer deportation to imprisonment. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.16(D).

(5) *Minimize Maximum Sentence*. Certain convictions trigger immigration damage if the maximum possible sentence for the offense of conviction is of a certain length. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 10.76 ff. If the criminal court reduces the level of the offense from felony to misdemeanor, that reduction is binding on the immigration courts. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 11.13, 11.15.[105] By such a reduction, court also reduces the maximum possible sentence to the misdemeanor maximum.[106] This can be

[105] *Garcia-Lopez v. Ashcroft*, 334 F.3d 840 (9th Cir. June 26, 2003).
[106] See also *Lafarga v. INS*, 170 F.3d 1213, 1215 (9th Cir. 1999). See CRIMINAL DEFENSE OF IMMIGRANTS §§ 11.13-11.15.

important in jurisdictions in which the maximum misdemeanor sentence is one year or less. See § 3.4(C)(2).

(6) *Minimize Restitution Order*. Fraud, deceit, and listed tax evasion offenses are aggravated felonies only if the "loss to the victim" or revenue loss to the government is in excess of $10,000. See § 3.4(C)(6); CRIMINAL DEFENSE OF IMMIGRANTS §§ 10.82-10.85, 19.74, 19.93.[107] It is important, therefore, to keep the record of conviction of these offenses barren of any evidence that the loss exceeded this amount.

(7) *Minimize Level Of Offense*. Whether the conviction is considered to be a felony or misdemeanor can cause certain immigration consequences. See §3.4(C)(5); CRIMINAL DEFENSE OF IMMIGRANTS §§ 10.86-10.93. In certain states, and for certain offenses, counsel can attempt to reduce felonies to misdemeanors, and misdemeanors to infractions or other lesser offenses, at the time of sentence in order to minimize the level of the offense of conviction, to avoid these consequences. See CRIMINAL DEFENSE OF IMMIGRANTS § 3.5(B)(14); §§ 10.86-10.91, 11.13-11.16. Doing so also helps the defendant, in purely criminal terms, by minimizing (a) the seriousness of the criminal history, (b) the sentence exposure in the event of a probation violation, and perhaps (c) any aggravation of future sentences that might be triggered by a prior felony or misdemeanor conviction. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.21.

(8) *Qualifying For Post-Conviction Relief*. Certain sentences will bring the conviction within eligibility requirements for various forms of post-conviction relief that can eliminate or minimize adverse criminal and immigration consequences of a conviction. See § 4.4(E)(10)(c); CRIMINAL DEFENSE OF IMMIGRANTS § 10.22.

(9) *Avoiding Probation*. In some circumstances, the very fact the defendant is on probation can trigger negative immigration consequences. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.81. Being on probation temporarily disqualifies a person from eligibility to obtain naturalized United States citizenship, until probation has ended, but some immigration authorities consider being on probation during the period (usually five years) in which Good Moral Character must be shown to be a negative discretionary factor. In some states, such as California, being on probation disqualifies a defendant from obtaining

[107] INA § 101(a)(43)(M)(i)(fraud and deceit offenses), (ii)(certain tax evasion offenses); 8 U.S.C. § 1101(a)(43)(M)(i)(fraud and deceit offenses), (ii)(certain tax evasion offenses).

state rehabilitative relief which in the Ninth Circuit can erase first-offense convictions of simple possession of a controlled substance, and other more minor controlled substances offenses that do not violate federal law. See § 5.1(D)(2). Where this is significant, defense counsel can try to obtain a short probationary period or decline probation entirely (and pay the price the court exacts).

(10) *Avoiding Immigration Detention*. A custodial sentence in a criminal case can trigger an immigration hold by bringing the defendant to the notice of the immigration authorities. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.94(B). The sentence can also form a part of a disposition that triggers mandatory detention. See §§ 3.8(C)(1), 7.6(B); CRIMINAL DEFENSE OF IMMIGRANTS § 10.94(C). Obtaining a non-custodial sentence greatly reduces the chances the DHS will detain the defendant. On the other hand, counsel can attempt to use an immigration hold to arrange the client's deportation in lieu of serving a sentence. See § 4.4(G)(2); CRIMINAL DEFENSE OF IMMIGRANTS § 10.17.

(a) *Immigration Holds*. Before the immigration authorities can lodge an immigration hold against a defendant, the defendant must be in criminal custody. If the defendant avoids a custodial sentence entirely, the defendant is not in custody and the immigration authorities have no opportunity to place a hold. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.19. Some sentences to custody are so short, or place the defendant in a custodial setting in which the immigration authorities have no opportunity to notice the defendant's immigration or criminal status, so no immigration hold is in fact placed. For example, in some jurisdictions, the immigration authorities do not check the immigration status of persons in work furlough programs, school furlough programs, drug treatment programs, sheriff's work programs, probationary sentences without custody, weekend custody sentences, or other non-custodial or very short sentences. In these circumstances, an immigration hold might not be placed against the defendant.

(b) *Mandatory Detention*. Some sentences trigger mandatory immigration detention. For example, a noncitizen is subject to mandatory detention if inadmissible on grounds of a conviction of a crime of moral turpitude. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.37. If the noncitizen qualifies for the petty offense exception, s/he is not inadmissible. If the person is sentenced to six months or less in custody, s/he qualifies for the petty offense exception to inadmissibility for a crime of moral turpitude. A sentence for such an offense in excess of six months, therefore, will disqualify the person from the benefits of the petty offense exception, and therefore make him or her inadmissible and subject to

mandatory detention. Similarly, for a person to be subject to mandatory detention on grounds of being deportable for one conviction of a crime of moral turpitude, a sentence of one year or more must be imposed for that conviction. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.37.

Similarly, certain convictions constitute aggravated felonies only if a sentence of one year or more is imposed, and an aggravated felony conviction can trigger mandatory detention. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.37.

In these cases, a sentence imposed of one year or more can trigger mandatory detention. Even if there is a decent argument the defendant is not subject to mandatory detention, the DHS may take the opposite position and keep the defendant in detention without possibility of bond while the issues are litigated. Many defendants cannot hang on in such difficult circumstances, and agree to be deported, waiving meritorious objections. Criminal counsel must therefore try if possible to obtain a disposition that clearly does not trigger mandatory detention.

(F) *Arguments in Mitigation*. Normal criminal arguments in mitigation can be specially tailored to the noncitizen's particular situation. Resources for rehabilitation or certain kinds of medical treatment are also likely to be far greater in the United States.

Sometimes, the treatment the defendant will face abroad will be so terrible as to constitute an argument in mitigation of the immigration consequences of sentence. For example, if the defendant faces persecution or torture if deported, a court or prosecutor may be willing to cooperate in avoiding immigration consequences if the offense is not too serious. A defendant with mental health problems may wind up chained to a bed in a Mexican insane asylum as an ABC Television documentary revealed.

Defense counsel can use many of the arguments here that were used in plea discussions with the prosecution. See § 4.2(F); CRIMINAL DEFENSE OF IMMIGRANTS §§ 8.16(C)(3), 8.19(B),(C), 8.22.

(1) *In General*. An immigration hold is often viewed by the criminal authorities as a bar to the noncitizen prisoner's participation in less restrictive alternatives to incarceration, such as half-way houses, early release programs, out-patient drug rehabilitation programs, and the like. See § 4.4(D); CRIMINAL DEFENSE OF IMMIGRANTS § 6.19.

(2) *National Origin*. National origin, standing alone, is an insufficient and illegal basis on which to deny eligibility for rehabilitative programs or to impose a harsher sentence. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.2(B)(4).

(3) *Undocumented Status*. In some states, the court may consider a defendant's status as an undocumented noncitizen when deciding whether to grant probation.[108] A state residential drug program, such as the California Rehabilitation Center, may properly exclude an undocumented noncitizen because s/he would probably not be available to complete the outpatient component of the program.[109] For immigration purposes, this type of commitment may trigger conduct-based deportability or inadmissibility in any event because it defines the individual, in effect, as a "drug addict." See § 3.7(C); CRIMINAL DEFENSE OF IMMIGRANTS §§ 21.10 (inadmissibility), 21.15 (deportability). Similarly, some states' no-jail drug programs, which are mandatory in general, are not mandatory for a defendant who was an undocumented noncitizen with a substantial criminal history, because it is impossible to condition probation on completion of a drug treatment program in view of the substantial likelihood that the defendant would be deported without being able to complete the program.[110]

A number of courts, however, have held that undocumented noncitizens can qualify for all sorts of civil benefits, despite their status, because there is no assurance that they will in fact be deported.[111] For example, they may avoid deportation by adjusting status and becoming lawful permanent residents.

Counsel can contest these sorts of disqualifications by submitting evidence that the particular defendant will indeed be available to complete the program because s/he will be released from immigration custody after appearing before an immigration judge.

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[108] *People v Sanchez,* 190 Cal.App.3d 224, 235 Cal.Rptr. 264 (1987) (probation denied).
[109] *People v Arciga,* 182 Cal.App.3d 991, 227 Cal.Rptr. 611 (1986).
[110] *People v Espinoza,* 107 Cal.App.4th 1069, 132 Cal.Rptr.2d 670 (2003).
[111] *Caballero v. Martinez,* 186 N.J. 548, 897 A.2d 1026, 1033 (May 18, 2006) (undocumented noncitizen can be a "resident" for purposes of uninsured motorist claim: "Consequently, the fact that an undocumented alien may some day be forced to return to his or her homeland does not necessarily defeat the intent to remain. That is especially true in light of the uncertain nature of deportation. See *St. Joseph's, supra,* 688 P.2d at 991 (finding illegal aliens can be "residents" under emergency care statute because "'there is no assurance that a [person] subject to deportation will ever be deported'") (alteration in original) (quoting *Plyler v. Doe,* 457 U.S. 202, 226 (1982)); *Das, supra,* 254 *N.J.Super.* at 199, 603 A.2d 139 (commenting on "the uncertainty of knowing when, if ever, deportation proceedings will be commenced").")

(4) *Cultural Mitigation*. Differences between the defendant's culture and the dominant culture in this society can constitute a mitigating factor. See §§ 2.4(B), 4.3(D); CRIMINAL DEFENSE OF IMMIGRANTS § 3.60.[112]

(5) *Necessity to Make Restitution or Other Payments*. The need for the client to remain in the United States, productively employed and therefore able to make restitution payments can constitute a powerful argument in favor of obtaining a sentence that does not cause deportation. Similarly, in domestic violence cases, the "victim" or the defendant's children may wish for the defendant to remain in the United States to make spousal or child support payments.

(6) *Foreign Convictions*. A foreign conviction cannot be used to enhance sentence if the foreign conviction failed to meet standards of fundamental fairness.[113]

(G) *Special Immigration-Related Proceedings At and After Sentence*. Certain special proceedings at or after sentence can affect the immigration consequences of sentence or apply particularly to noncitizen defendants.

(1) *Judicial Removal Proceedings at Federal Sentence*. A federal judge, at sentence, may order a noncitizen defendant removed from the United States under two different procedures, as a result of (a) a stipulated judicial order of removal, or (b) judicial removal proceedings at sentence, see CRIMINAL DEFENSE OF IMMIGRANTS §§ 6.20-6.21, but not by means of (c) a condition of probation or supervised release. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.27.

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[112] See, e.g., Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberal's Dilemma*, 96 COLUM. L. REV. 1093 (1996); Holly Maguigan, *Cultural Evidence and Male Violence: Are Feminist and Multiculturalist Reformers on a Collision Course in Criminal Courts?*, 70 N.Y.U. L. REV. 36 (1995); Alison Dundes Renteln, *A Justification of the Cultural Defense as Partial Excuse*, 2 S. CAL. REV. L. & WOMEN'S STUD. 437 (Spring 1993); Nilda Rimonte, *A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense*, 43 STAN. L. REV. 1311 (1991). See AMERICAN BAR ASS'N, A JUDGE'S GUIDE TO IMMIGRATION LAW IN CRIMINAL PROCEEDINGS, Chap. 3, Section VI (P. Goldberg & C. Wolchok, eds., 2004).

[113] *United States v. Moskovits*, 784 F. Supp. 193, 197 (E.D. Pa. 1992) (errors in prior conviction rendered in Mexico and relied upon by the sentencing court required a new sentence); see *United States v. Fleishman*, 684 F.2d 1329, 1346 (9th Cir.), *cert. denied*, 459 U.S. 1044 (1982).

(a) *Judicial Removal Proceedings*. A federal sentencing court may conduct judicial removal proceedings as a part of a federal sentence. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.20.[114] The normal removal procedures, defenses, and relief apply. See §§ 7.5, 7.7.

(b) *Probation Condition Requiring Removal.* Federal probation statutes state that, if no stipulated deportation order has been entered, the court may require deportation as a condition of probation only if, after notice and hearing, the Attorney General demonstrates that the noncitizen is deportable.[115] The federal supervised release statute does not authorize the court to enter a removal order. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.27.

(2) *Early Release to Removal*. Congress allows certain nonviolent criminal offenders with removal orders to avoid completing their sentences by being released early to be deported. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.26.[116]

(3) *Prisoner Transfer Treaties*. Under prisoner transfer treaties, nationals of 59 signatory nations[117] who are serving state[118] or federal prison sentences[119] in the United States could be transferred back to their native land to complete service of their sentences. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.27. The courts will not intervene in the discretion of the executive branch over these decisions.[120]

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[114] Martin Arms, *Comment, Judicial Deportation Under 18 U.S.C. § 3583(d): A Partial Solution to Immigration Woes?*, 64 U. CHI. L. REV. 653, 658-59 (1997).

[115] 18 U.S.C. § 3563(b).

[116] See INA § 241(a)(4)(B), 8 U.S.C. § 1231(a)(4)(B). See generally D. KESSELBRENNER & L. ROSENBERG, IMMIGRATION LAW AND CRIMES § 8:23 (West 2007).

[117] The countries currently include: Austria, Bahamas, Belgium, Bolivia, Bulgaria, Canada, Chile, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Federated States of Micronesia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Netherlands (Netherlands Antilles and Aruba), Norway, Panama, Peru, Poland, Portugal, Republic of Palau, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Thailand, Trinidad/Tobago, Turkey, Ukraine, United Kingdom and U.K. Territories. See Ellis, *An Introduction to International Prisoner Transfers: Going Home*, 23 THE CHAMPION 32 n.1 (National Ass'n of Criminal Defense Lawyers, July, 1999).

[118] Forty-four states — all but Delaware, Georgia, Mississippi, N. Carolina, Tennessee, and West Virginia — have enacted implementing legislation. Prisoners in the Northern Mariana Islands, a United States territory, can also participate. Inmates in Vermont may be transferred only to Canada. (*Ibid*. n.2.)

[119] 18 U.S.C. §§ 4100 *et seq*. Implementing regulations are contained in 28 C.F.R. §§ 527.40 ff.

[120] *Bagguley v. Bush*, 953 F.2d 660 (D.C. Cir. 1991). A noncitizen who was serving a lengthy sentence based on drug convictions requested transfer to England under the Convention on the

A noncitizen with a final removal order is not statutorily entitled to be deported before completing the prison term. Therefore, a noncitizen who was granted "conditional parole for deportation only" was still considered as serving the state sentence and could not challenge the failure of the immigration authorities to execute his removal order.[121]

§ 4.5 Probation Violation Proceedings

(A) *In General*. Probation violation proceedings can have important immigration effects. See generally CRIMINAL DEFENSE OF IMMIGRANTS §§ 10.44-10.49. In general, probation violations do not alter the nature of the offense of conviction for immigration purposes. See CRIMINAL DEFENSE OF IMMIGRANTS § 10.46. The only exception is that a court finding the defendant violated a domestic violence protection order may trigger deportation. See § 4.5(B). As always, counsel must handle the proceedings so as to avoid making admissions that will have a damaging effect on immigration proceedings. See § 3.7; CRIMINAL DEFENSE OF IMMIGRANTS § 10.47. If a probation violation is admitted or found true after hearing, the court will normally conduct a fresh sentencing hearing, which may alter the immigration effects of the conviction and sentence and must be defended so as to minimize immigration consequences, just as the original sentencing proceeding was defended. See § 4.4; CRIMINAL DEFENSE OF IMMIGRANTS § 10.48.

(B) *Domestic Violence Protection Order Violation.* One ground of deportation may be triggered by probation violation proceedings: In 1996, Congress created a new, very broad ground of deportation for those, including juveniles, who suffer court findings of violation of a family-violence protective order.[122] A person becomes deportable whom a civil or criminal court has found to have violated a domestic violence protective order, even without a criminal conviction. The violation itself (not the finding) must have occurred on or after September 30, 1996, to trigger this ground.[123] Immigration authorities might

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Transfer of Sentenced Persons, T.I.A.S. No. 10824, 22 I.L.M. 530 (1988), ratified by the United States and the United Kingdom, and the Transfer of Offenders to and from Foreign Countries Act, 18 U.S.C. §§ 4100 *et seq*., which authorized the Attorney General to implement the Convention. The court found that the Attorney General has unfettered discretion regarding transfer decisions, citing 5 U.S.C. § 701(a)(2); 18 U.S.C. §§ 4100 *et seq.;* and *Scalise v. Thornburgh*, 891 F.2d 640 (7th Cir. 1989), *cert. denied*, 494 U.S. 1088 (1990).

[121] 8 U.S.C. § 1231(a)(4)(A); *Duamutef v. INS*, No. CV-02-1345(DGT) (E.D. N.Y. 2003).

[122] See INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii).

[123] IIRAIRA § 350(b); *Matter of Rodriguez-Tejedor*, 23 I. & N. Dec. 153, n.13 (BIA July 24, 2001) ("IIRAIRA § 350(b), 110 Stat. at 3009-640 (amendment adding domestic violence and stalking as grounds for deportation 'shall apply to convictions, or violations of court orders,

allege a noncitizen was deportable under this ground of deportation if (a) the probation conditions of the original conviction included domestic violence protection order provisions, (b) the defendant was charged with violating probation by violating those conditions, and (c), the court found the defendant had so violated probation. In defending an allegation of probation violation, counsel should carefully check to ensure that deportation is not triggered by the disposition or court finding. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 22.33-22.40.

(C) *Plea Bargaining*. Counsel can try to protect a defendant's immigration status by negotiating a global disposition that includes both the probation violation sentence on the original conviction and a disposition of any new charges resulting from the conduct that gave rise to the probation violation allegation.

(1) *Relationship Between Probation Violation and New Criminal Prosecutions.* The defendant's conduct that violated probation may also constitute a new criminal offense. The prosecution could charge the client with a new crime in a new criminal case, and also allege the same conduct as a violation of probation on the original criminal case. The interplay between these two cases creates an opportunity to negotiate immigration-harmless dispositions.

(2) *Specific Tactics*. Various tactics can reduce the immigration damage that might otherwise flow from a probation violation sentence:

(a) *Accept Custody Time on New Offense*. If prosecution and court wish to impose a certain amount of time in custody, say six months, as punishment for the behavior that is alleged both as a probation violation and a new offense, counsel can seek to accept the custody time on the new offense, instead of as punishment for a probation violation on the original offense, in order to keep the total sentence ordered by the court on the original offense below the amount that would trigger immigration damage. For example, if the client was originally sentenced to six months on a theft offense, and the court wishes to impose an additional six-month sentence for the probation violation, counsel could ask the court to do so on a new theft conviction so the client receives six months on the original theft, and six months on the new theft. The court, however, does not order a total sentence of one year or more on any single theft conviction. This new disposition would therefore not trigger deportation as an aggravated felony.

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occurring after the date" of enactment) . . . .').

The same tactic can be used to accept a sentence on one count of conviction, rather than on a different count. For example, if the defendant was originally convicted of two counts of theft, received a nine-month sentence on each, and must now accept an additional term of six months for a probation violation, counsel could request that the court vacate the original sentence on Count II in its entirety, waive credit for the time the client has already served on that count, and request that the court impose a new six-month sentence on Count II with no deduction for time already served. That way, the court imposes the same additional six-month sentence, but the client does not have any sentence of one year or more on either count.

(b) *Accept Custody Time for Probation Violation.* Similarly, if the new offense is an offense that becomes an aggravated felony of a one-year sentence is imposed, but the original offense is not, counsel could ask the court to impose the additional custody time as punishment for the probation violation, in lieu of filing the new charges as a new criminal case or in lieu of imposing a custody sentence on the new offense. This strategy also works well if receiving an additional sentence on the original count of conviction will be immigration-safe, but conviction of the new offense would trigger adverse immigration consequences in its own right, even without a certain sentence imposed. For example, if the new offense is sexual abuse of a minor, which constitutes an aggravated felony regardless of sentence, it may be advisable to take a prison sentence on the original offense as punishment for the new offense considered as a probation violation, where the original conviction does not trigger deportation, and agree that the new charge will not be filed as a new criminal case.

(D) *Probation Violation Sentences*. The most important immigration effect of probation violation proceedings flows from the new sentence that may be imposed as a result. If a defendant admits a probation violation, or the court finds the probation violation allegation to be true, the court will again impose sentence on the client for the original offense. The law generally requires the court to give the defendant credit, against the new sentence, for any time in custody the defendant has served on the original sentence. The client must serve any additional custody, over and above the original time served, that is ordered by the court as the probation violation sentence. To protect the client's immigration status, defense counsel should defend the client in this new sentencing proceeding in the same way as for the original sentencing proceeding. See § 4.4. The original sentence and the probation violation sentence may, however, interact to cause adverse immigration consequences.

(1) *Original and Later Sentences are Added Together.* The original custody sentence is added to the additional probation violation custody sentence to reach a total sentence of imprisonment imposed for the offense of conviction, if both sentence orders remain in effect.[124] If an initial sentence to imprisonment is imposed, and the noncitizen is placed on probation, followed by a probation or parole violation and a second sentence to imprisonment, immigration law requires adding the initial and second sentences together to come up with an aggregate sentence imposed for the single offense of conviction.[125] For example, if the client avoids an aggravated felony at the time of the original sentence by receiving nine months custody ordered as a condition of probation, and is later found to have violated probation, the conviction will become an aggravated felony conviction (if it is one of those listed for which a one-year sentence imposed converts it to an aggravated felony conviction, see Appendix G) if the client receives a new sentence to serve an additional three months in custody for the probation violation, since the total sentence ordered for this conviction is now one year.

To avoid adverse immigration consequences based on the total custody sentence ordered by the court, counsel must ensure that the new probation violation sentence, when added to the original custody sentence, does not trigger adverse immigration consequences.

(2) *Final Sentence Governs for Immigration Purposes.* Where a court imposes a later sentence for a parole violation, the later sentence controls the immigration consequences. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.10.[126]

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[124] *Matter of Piroglu*, 17 I. & N. Dec. 578 (BIA 1980) (confinement arising from violation of probation may constitute a bar under INA § 101(f)(7), 8 U.S.C. § 1101(f)(7)).

[125] E.g., *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (noncitizen defendant originally sentenced to probation and later sentenced to two years imprisonment for violation of probation had been convicted of an aggravated felony based on the second term of imprisonment imposed); see also *Matter of CP*, 8 I. & N. Dec. 504 (BIA 1959); *Velez-Lozano v. INS*, 463 F.2d 1305 (D.C. Cir. 1972); *United States ex rel. Fells v. Garfinkel*, 158 F.Supp. 524 (W.D. Pa. 1957); *Matter of M*, 6 1. & N. Dec. 346 (BIA 1954).

[126] See *Matter of Cota-Vargas*, 23 I. & N. Dec. 849 (BIA 2005) (criminal court's decision to modify or reduce a criminal sentence *nunc pro tunc* is entitled to full faith and credit by the Immigration Judges and the Board of Immigration Appeals, and such a modified or reduced sentence is recognized as valid for purposes of the immigration law without regard to the trial court's reasons for effecting the modification or reduction), clarifying *Matter of Song*, 23 I. & N. Dec. 173 (BIA 2001), distinguishing *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003); *Matter of CP, supra.* This is also the case in some criminal contexts. *United States v. Robinson*, 967 F.2d 287, 293 (9th Cir. 1992) (where a defendant is convicted of an alternative "felony-misdemeanor" or "wobbler," the alternative sentence ultimately executed is the one to be used in guidelines calculations).

Therefore, if necessary or desirable, counsel can ask the probation violation sentencing court to alter an aspect of the original sentence, and the final sentence will be the sentence that governs the immigration consequences of the case.

(3) *Waiving Credits and Vacating Original Sentence.* One way to avoid a total original plus probation violation sentence triggering adverse immigration consequences is for the defendant to waive credit for time previously served, ask the court to vacate the original sentence, and impose a probation violation sentence (less than one year) as a replacement for the original sentence that has now been vacated. The court's action in vacating the original sentence eliminates it from consideration in determining the immigration effects of the final sentence. See § 5.1(C); CRIMINAL DEFENSE OF IMMIGRANTS § 11.10. Then it is only the replacement probation violation sentence that remains for immigration purposes. Waiving past credits, vacating the original custody order, and receiving a second sentence too short to trigger adverse immigration consequences gives the defendant a strong argument that the court never ordered service of one year or more (for example) as a result of this conviction, since the new sentence (which is the sentence that counts for immigration purposes) is less than one year.

PRACTICE TIP: Where a sentence is triggering adverse immigration problems, and it is necessary to change the sentence, counsel should always ask the court to vacate the initial troublesome sentence before imposing the immigration-safe new sentence. This ensures the immigration courts will not consider the original sentence as still being in effect.

§ 4.6 Juvenile Proceedings

(A) *In General*. A juvenile is defined, under federal law, as: "A person who has not attained his eighteenth birthday, or for the purpose of proceedings and disposition under this chapter for an alleged act of juvenile delinquency, a person who has not attained his twenty-first birthday."[127] Juvenile delinquency "is the violation of a law of the United States committed by a person prior to his eighteenth birthday which would have been a crime if committed by an adult."[128]

When representing a noncitizen in juvenile delinquency proceedings, defense counsel's task of protecting him or her against adverse immigration consequences is far easier than in adult criminal court, because an adjudication of

[127] 18 U.S.C. § 5031.
[128] 18 U.S.C. § 5031.

juvenile delinquency is not considered a "conviction" for immigration purposes, see CRIMINAL DEFENSE OF IMMIGRANTS § 12.21, and therefore does not trigger any of the adverse immigration consequences of a conviction. See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 7.

Noncitizen juveniles, however, do face many of the *conduct*-based immigration consequences of criminal and related activity, see § 3.7; CRIMINAL DEFENSE OF IMMIGRANTS §§ 12.20, *et seq*. In addition, juveniles do occasionally face two adverse immigration consequences of juvenile-court findings. CRIMINAL DEFENSE OF IMMIGRANTS §§ 12.26 (court finding of violation of domestic-violence condition of probation), 12.37(B) (juvenile delinquency adjudication bars Family Unity under certain circumstances).

(B) *Juveniles in Adult Court*. If a juvenile is transferred to adult court, and is there convicted of a crime, s/he has a conviction for immigration purposes. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 12.2.

There is, however, an exception to the crime of moral turpitude ground of inadmissibility, called the "youthful offender" exception, under which a person will not be found inadmissible if s/he committed only one offense involving moral turpitude, while under the age of eighteen, was transferred from juvenile to adult court, and the commission of the offense and the release from any resulting imprisonment occurred over five years before the current application.[129] If a person comes within this exception to inadmissibility, s/he is simply not inadmissible. See CRIMINAL DEFENSE OF IMMIGRANTS § 20.30. It is not necessary to apply for a waiver; the immigration authorities have no discretion to exclude the person on the basis of the single CMT conviction.[130]

(C) *Advice for Parents and Minor*.

(1) *Parents Should Naturalize Before Minor's 18th Birthday*. The most important advice you can give, if the child is a permanent resident of the United States, is to tell a parents with legal custody of the child to naturalize to U.S. citizenship before the unmarried child turns 18 years of age, since the child then automatically becomes a U.S. citizen. Once the child is a U.S. citizen, no future

[129] INA § 212(a)(2)(A)(ii)(I), 8 U.S.C. § 1182(a)(2)(A)(ii)(I); 8 C.F.R. § 40.21(a)(2).
[130] *Matter of H*, 6 I. & N. Dec. 738 (BIA 1955); *Matter of Jensen*, 10 I. & N. Dec. 747 (BIA 1964) (conviction for forgery and uttering was for single offense).

delinquency disposition or adult criminal conviction can hurt his or her citizenship status. See § 2.1(B); CRIMINAL DEFENSE OF IMMIGRANTS § 12.6.

(2) *Advise Minor Not To Admit Noncitizen Status.* Counsel should advise the minor not to volunteer or admit to noncitizen status when speaking with anyone, particularly court personnel.[131]

(D) *Immigration Consequences of Juvenile Court Actions.* While an adjudication of juvenile delinquency does not constitute a conviction for immigration purposes, juvenile court actions and related facts can nonetheless trigger some adverse immigration consequences. These are described in detail in CRIMINAL DEFENSE OF IMMIGRANTS, §§ 12.20 *et seq*. Consult immigration counsel concerning the details, but the major highlights follow here.

(1) *Negative Discretionary Factor.* An adjudication in juvenile court of the facts underlying an offense can be considered a negative factor in discretionary immigration decisionmaking.[132]

Apart from the bar to Family Unity (which affects a relatively small number of people), see CRIMINAL DEFENSE OF IMMIGRANTS § 12.37(B), a delinquency finding of serious assault or gang-related activity does not cause an automatic immigration bar.[133] Because targeting noncitizen gangs is a high priority to DHS, gang-related activity, gang membership, and other allegations of gang involvement trigger negative discretionary findings. In fact, many juveniles have been subject to detention because of these affiliations. Congress has in the past considered (but not yet adopted) legislation attaching negative immigration consequences to gang-related convictions and behavior, and might in future do so.

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[131] See *In re Adolfo M.*, 225 Cal.App.3d 1225, 1230, 275 Cal.Rptr. 619, 622 (1990) (juvenile court found that minor was noncitizen based on his mother's statements to probation officer; minor transferred to Mexican juvenile authorities).

[132] *Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. Sept. 1, 2006) (adjudication as a "Youthful Offender" under New York State criminal law, N.Y.Crim. Proc. Law §§ 720.10-720.35, may be used in determining whether noncitizen should be granted adjustment of status as a matter of discretion, even though the adjudication is not a "conviction" for removability purposes); see *Matter of Thomas*, 21 I. & N. Dec. 20 (BIA 1995) ("In determining whether an application for relief [in this case, voluntary departure] is merited as a matter of discretion, evidence of unfavorable conduct, including criminal conduct which has not culminated in a final conviction for purposes of the Act, may be considered.").

[133] Practitioners should be aware, however, that Congress in 2005 and 2006 actively tried to push gang legislation that would include immigration consequences for those with juvenile adjudications involving gang related activity such as a violent or controlled substance felony.

(2) *Avoid Damaging Admissions*. As with all other defendants, minors in juvenile proceedings should avoid making damaging admissions that could be used by immigration authorities to trigger conduct-based deportability, inadmissibility, or disqualification from relief in immigration court. See § 3.7.

A minor who admits the truth of charges in delinquency proceedings has not made a damaging "admission" to a controlled substance offense or crime involving moral turpitude. See § 3.7(B), (C); CRIMINAL DEFENSE OF IMMIGRANTS §§ 12.30, 12.32. However, to avoid the possibility an immigration court or agency might disagree, defense counsel should where possible avoid allowing the minor to make such damaging admissions.

One other way to try to avoid these conduct-based grounds of deportation or inadmissibility is to get the juvenile record sealed, so that the convictions do not appear on the FBI criminal history report, which is used against noncitizens by immigration authorities in removal proceedings. In some cases, a juvenile record may only be sealed after the minor turns 18. If so, sealing will not protect the minor if removal proceedings begin while s/he is still a juvenile.

Chapter 5:
Post-Conviction Procedure

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§ 5.1 Immigration Effects of Post-Conviction Relief

Different forms of post-conviction relief have different immigration effects which are covered in this section.[1]

(A) *Effective Orders Vacating Convictions.* The DHS is increasingly challenging the effectiveness of a criminal court order to vacate a criminal conviction, for purposes of eliminating the adverse immigration consequences of the conviction. Counsel must therefore be clear on what is required of an order vacating a criminal conviction so that the vacatur is accepted in the immigration context as eliminating the conviction.

(1) A conviction that is vacated as *legally invalid* on some ground has been eliminated as a source of adverse immigration consequences.[2] This also allows resentencing in federal criminal court: "[A] defendant who successfully attacks a state conviction may seek review of any federal sentence that was enhanced because of the prior state conviction."[3] This is true regardless of the vehicle used to mount the attack, such as a motion to withdraw a plea, habeas corpus, *coram nobis*, a motion to vacate, or a direct appeal -- so long as the order recites that the

[1] See generally CRIMINAL DEFENSE OF IMMIGRANTS §§ 11.3-11.8; POST-CONVICTION RELIEF FOR IMMIGRANTS §§ 6.2-6.10 (2004).
[2] See CRIMINAL DEFENSE OF IMMIGRANTS § 11.4.
[3] *United States v. LaValle*, 175 F.3d 1106, 1108 (9th Cir. 1999), *quoted in United States v. Hayden*, 255 F.3d 768, 770 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 383 (2001).

conviction is vacated *because the conviction is legally invalid* on a ground that existed at the time the conviction arose.

(2) If a conviction is vacated on humanitarian grounds, solely to eliminate the immigration consequences, or on the basis of state rehabilitative statutes, without any claim that the conviction is legally invalid, the conviction generally continues to exist for immigration purposes, and the rehabilitative post-conviction order does not remove the adverse immigration consequences of the conviction.[4] Exception: in the Ninth Circuit, state rehabilitative relief may eliminate the immigration effects of first-time convictions of simple possession and equivalent offenses. See § 5.1(D)(2).[5]

(3) In immigration proceedings, the immigration authorities should not be permitted collaterally to attack a final state or federal criminal court order setting aside a conviction by arguing it was obtained on humanitarian grounds or solely to eliminate the immigration consequences, when the face of the criminal court record demonstrates that it was granted on a ground of legal invalidity.[6]

(4) The DHS may attempt to challenge orders vacating convictions on the basis that they are beyond the jurisdiction of the criminal court. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.8. If this position is sustained, and if the government can actually establish lack of jurisdiction, the vacated conviction would continue to exist for immigration purposes.[7]

(5) Judicial recommendations against deportation, granted by the criminal sentencing judge prior to November 29, 1990, remain effective to prevent adverse immigration consequences of convictions of crimes of moral turpitude and aggravated felonies. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.21.

(6) State or federal executive pardons are effective to eliminate the conviction as an aggravated felony, crime of moral turpitude, or high speed border chase conviction. See CRIMINAL DEFENSE OF IMMIGRANTS §§ 11.22-11.24.

(B) *Effective Orders Reducing Felonies to Misdemeanors*. In some states, such as California and Arizona, the criminal court has discretion to reduce certain felony convictions to misdemeanors. This type of state court order must be

[4] See CRIMINAL DEFENSE OF IMMIGRANTS § 11.18.
[5] See CRIMINAL DEFENSE OF IMMIGRANTS § 11.18.
[6] *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000).
[7] But see *Sandoval v. INS*, 240 F.3d 577 (7th Cir. 2001).

respected by immigration authorities, and can avoid certain types of immigration consequences. See §§ 3.4(C)(5); 4.4(E)(7); CRIMINAL DEFENSE OF IMMIGRANTS §§ 12.13-12.15; POST-CONVICTION RELIEF FOR IMMIGRANTS §§ 6.19-6.23. The contexts in which this is significant include:

> (1) Convictions of crimes of violence must be felony convictions before they can constitute aggravated felonies under 18 U.S.C. § 16(b). See CRIMINAL DEFENSE OF IMMIGRANTS § 11.14.
>
> (2) Where a conviction is punishable, as a misdemeanor, by no more than one year in custody, a reduction from felony to misdemeanor will enable the maximum sentence to qualify for the Petty Offense Exception to inadmissibility on account of a conviction for a crime of moral turpitude. See CRIMINAL DEFENSE OF IMMIGRANTS § 20.29.

(C) *Effective Orders Vacating or Modifying Sentence*. A state or federal criminal court order vacating or modifying a sentence is effective in altering the character of the sentence for immigration purposes. The reason given for the order does not matter; it is the final sentence that counts for immigration purposes. See § 4.5(D)(2); CRIMINAL DEFENSE OF IMMIGRANTS §§ 11.9-11.12; POST-CONVICTION RELIEF FOR IMMIGRANTS §§ 6.24-6.28.

(D) *Effective Rehabilitative Relief.* Relief under some federal and state rehabilitative statutes is effective to eliminate a criminal conviction for immigration purposes. A Judicial Recommendation Against Deportation, granted by the state or federal sentencing judge within 30 days of sentence and before November 29, 1990, eliminates a conviction as a crime of moral turpitude or aggravated felony. See § 3.5(B)(8).

(1) *Federal Relief.* The Federal First Offender Act provides for withholding judgment, followed by dismissal, for first convictions in federal court of simple possession of any controlled substance. After dismissal, this disposition shall not be used against the defendant for any purpose whatsoever, which includes immigration purposes. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.19. One circuit has disagreed with this analysis.[8] Convictions expunged under the

[8] *Acosta v. Ashcroft*, 341 F.3d 218 (3d Cir. Aug. 15, 2003) (Pennsylvania first offender rehabilitative scheme, deferring sentence and dismissing guilty plea, constituted a conviction for immigration purposes; court rejected Equal Protection argument that the definition of conviction for immigration purposes, INA § 101(a)(48), 8 U.S.C. § 1101(a)(48), implicitly incorporated the Federal First Offender Act (FFOA), or that the FFOA exception should also be applied to state

former Federal Youth Corrections Act should also be eliminated for immigration purposes. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.19(B).[9]

(2) *State Relief.* Convictions that were eliminated under state rehabilitative statutes without any claim of legal invalidity will generally continue to exist for immigration purposes. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.18. The Ninth Circuit has held, however, that state or foreign rehabilitative relief is effective to eliminate the immigration consequences of a short list of minor, first-offense controlled substances convictions where the defendant would have qualified for Federal First Offender Act treatment if s/he had been prosecuted in federal court. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.20.[10] This rule now includes not only simple possession of any controlled substance, but also possession (not sale) of drug paraphernalia and perhaps other more minor controlled-substance convictions of offenses that are not prohibited under federal law, such as being under the influence of drugs, or being in a place in which drugs are used.[11] This rule allows effective expungements of a second qualifying offense, if (1) at the time of commission of the second offense, the defendant had not yet been convicted of the first, and (2) both convictions are expunged at the same time, since at the time of the second conviction, the defendant did not have a prior disqualifying conviction and had never before received FFOA-type treatment. A second controlled substances offense may effectively be expunged in the Ninth Circuit as long as the first conviction had not become final by the time of the commission of the second offense.[12] See N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS §§ 8.2-8.20 (2004).

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rehabilitative statutes).

[9] *Matter of Nagy*, 12 I. & N. Dec. 623 (BIA 1968) (federal conviction for transporting stolen vehicle in foreign commerce, in violation of 18 U.S.C. § 2312, resulting in commitment as youthful offender under FYCA, 18 U.S.C. § 5021, did not constitute a conviction for deportation purposes, after defendant had been unconditionally discharged prior to expiration of maximum term, since conviction was thereby automatically set aside and the offender issued a certificate to that effect).

[10] *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

[11] *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).

[12] *Smith v. Gonzales*, 468 F.3d 272 (5th Cir. Oct. 24, 2006) (for purposes of the Controlled Substances Act, a conviction does not become final until time for direct appeal and time for discretionary review have elapsed).

§ 5.2 Evaluation of Chances.

The substantive and procedural law governing post-conviction relief in various jurisdictions is the subject of a lengthy literature.[13] Some important factors to consider, in evaluating the chances of success, are listed in Appendix D, *infra*. A free article discussing each factor may be found at www.NortonTooby.com. These factors make it possible to evaluate the chances of success before investing a great deal of work in the case. See POST-CONVICTION RELIEF FOR IMMIGRANTS, Chap. 2 (2004).

§ 5.3 Requirements for Success

The four necessities for success in obtaining post-conviction relief for immigrants are: (1) a vehicle by which to obtain it, see § 5.4; (2) grounds of legal invalidity by which to persuade the court to vacate a conviction, see § 5.5; (3) a safe haven disposition to offer the prosecution to replace the conviction that will be vacated, see § 5.6, and (4) equities or favorable factors that can be used to persuade the judge and prosecution that the noncitizen merits post-conviction relief, and that they are doing the right thing by granting it. See § 5.7.

§ 5.4 Procedural Vehicle

There are several qualities a procedural vehicle must have to be successful. First, the vehicle must – if relief is granted – have the immigration effect necessary to prevent the particular adverse immigration consequences with which the client is threatened. See § 5.1; CRIMINAL DEFENSE OF IMMIGRANTS § 11.34. The procedural vehicle must be an appropriate way to raise the claim of invalidity present in the case. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.35. The requirements for the vehicle must be present in the case. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.36. The vehicle must be capable of being successful quickly enough to avoid the immigration consequences. See § 5.4(D); CRIMINAL DEFENSE OF IMMIGRANTS § 11.37.

[13] For example, see J. LIEBMAN & R. HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (5th ed. 2002); L. YACKLE, POSTCONVICTION REMEDIES (2003); I. ROBBINS, HABEAS CORPUS CHECKLISTS (published annually); N. TOOBY, CALIFORNIA POST-CONVICTION RELIEF (2002) (California law); D. KESSELBRENNER & L. ROSENBERG, IMMIGRATION LAW AND CRIMES (2008), Chap. 4.

(A) *Matching Vehicle to Immigration Effect*. Counsel must first determine what change in the criminal history is needed in order to avoid or ameliorate the adverse immigration effect. For example, if the *conviction* is triggering deportation, counsel must choose a vehicle capable of vacating the conviction on a ground of legal invalidity. If the *sentence* imposed is transforming a crime of violence into an aggravated felony, counsel must find a vehicle capable of vacating or reducing the sentence. If the conviction is a felony and thus falls within the ambit of 18 U.S.C. § 16(b), creating a crime of violence aggravated felony, then a motion to reduce a felony to a misdemeanor may be sufficient to avert the immigration damage. If time is needed to assess the situation, it may be possible to file a direct appeal from the conviction, in order to avoid a "final" conviction and thus in many circuits obtain the client's release from mandatory immigration detention and buy time to plan a more durable strategy. See § 3.5(B)(7). The mere *filing* of a request for post-conviction relief, other than a direct appeal of right from the conviction, does not destroy the finality of the conviction[14] or disable the immigration authorities from initiating removal proceedings.

(B) *Matching Vehicle to Ground of Legal Invalidity*. Some forms of post-conviction relief are general in nature, such as habeas corpus, and can be used to raise virtually any ground of legal invalidity. Other forms of post-conviction relief, such as a statutory motion to vacate a conviction for violation of a state advisal requirement, are limited to the specific statutory grounds. See § 5.5(B).[15]

Counsel must ensure that the chosen vehicle is an appropriate way to raise the grounds of legal invalidity present in the case, and that the ground of legal invalidity may be raised by the chosen vehicle. For example, in California, habeas corpus requires actual or constructive custody. Habeas corpus has been held to be an appropriate way of raising the claim of ineffective assistance of counsel, but if custody has expired, habeas cannot be used. On the other hand, California *coram nobis* does not require custody, but may not be used to raise ineffective assistance of counsel. It may be necessary to try to transform a claim of ineffective

[14] *Okabe v. INS*, 671 F.2d 863 (5th Cir. 1982) (motion for status conference to reduce sentence); *Morales-Alvarado v. INS*, 655 F.2d 172 (9th Cir. 1981) (possibility of obtaining approval of discretionary appeal to state highest court does not impair finality of conviction; this ruling was *dictum* since petition for review was dismissed as moot because conviction was affirmed by state high court after BIA decision relying on it); *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975).

[15] See, e.g., California Penal Code § 1016.5. See § 5.5(B).

assistance of counsel into a *coram nobis* claim that "no one knew that the conviction would trigger mandatory immigration consequences."

(C) *Choosing a Vehicle that Works.* The client must be able to satisfy the requirements for the chosen vehicle. For example, if the vehicle requires actual or constructive custody, it can only be used if the client is still incarcerated or still on probation or parole. If the vehicle requires a certain ground of legal invalidity, and that ground is not present in the case, the client cannot be successful using that vehicle in that particular case. Some vehicles have statutes of limitations, and become unavailable if the deadline has passed. For example, a federal habeas corpus petition or motion pursuant to 28 U.S.C. § 2255 must be filed within one year after the conviction has become final.

(D) *Timing of Relief.* Counsel must choose a vehicle that can vacate the conviction quickly enough to avert deportation, since the mere filing of a petition for post-conviction relief does not affect the finality of the conviction for immigration purposes or delay the time at which the government may initiate removal proceedings.[16] For example, the immigration courts may not take a post-conviction order vacating a conviction into account if it was not presented to the immigration courts prior to the finding of deportability based on that conviction.[17] Where a noncitizen has been deported before the post-conviction order could be obtained, it is far more difficult to reopen the removal proceedings to present the new evidence. See § 4.1(C)(2).

Immigration and criminal counsel must cooperate concerning the timing of the case. In some cases, after the original conviction has been vacated, counsel can achieve considerable benefits for the client — even if the client is later convicted of the original offense a second time — if reconviction is avoided until enough time has elapsed to enable the client to apply for some type of immigration relief or avoid an adverse immigration deadline.

If the DHS has filed removal proceedings against the client, very often the client can terminate proceedings by providing satisfactory evidence that the conviction is *not* final since a direct appeal is pending. See § 3.5(B)(7). Thereafter, the client may not come to the attention of the immigration authorities

[16] See, e.g., *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

[17] See, e.g., *Lukowski v. INS*, 279 F.3d 644 (8th Cir. 2002), citing 8 U.S.C. § 1252(b)(4)(A) (refusing to consider a resentencing order that had not been presented in the immigration proceedings, and was thus not a part of the administrative record).

unless s/he is again jailed, and removal proceedings may never be renewed, or may be renewed only after the client has been able to qualify for some sort of immigration relief. The federal government is beginning to devote much more funding and attention to the task of identifying and removing noncitizens with criminal convictions, so this situation may change, particularly with high-priority cases.

The client may face other immigration deadlines. Immigration counsel may be able to obtain more time from the immigration court to allow post-conviction counsel to investigate, research the case, and apply to the criminal courts for post-conviction relief.[18] Likewise, the client may need to obtain enough time in the criminal courts before the client receives a final judgment of conviction in order to permit the client to obtain immigration relief based on having held a certain immigration status for a certain length of time.

Moreover, if considerable time has passed since the original offense was committed, the prosecution may find it more difficult to prove its case after the criminal conviction has been reopened.

In some cases, deportation or denial of immigration benefits based upon the conviction can be reversed after the conviction has been vacated. See § 4.1(C)(2).

§ 5.5 Grounds of Invalidity

(A) *Geography of the Field*. Most criminal convictions occur in state courts. Generally speaking, in federal courts, court and counsel take greater care to follow the procedures required to produce a legally valid conviction, although even there, in busier courts, in more minor cases, mass-production techniques produce frequent errors giving rise to grounds of legal invalidity.

Most convictions follow pleas of guilty or no contest (which have the same effect). Relatively few criminal convictions occur as a result of jury trials, and even fewer as a result of court trials. It is usually quite a bit more work and more difficult to set aside a conviction that flowed from a trial than one resulting from a plea. On the other hand, a guilty plea waives all errors in the proceedings other than constitutional and jurisdictional defects, and in some states, the denial of a motion to suppress evidence.[19] Thus, the possible claims for relief following a

[18] Immigration courts may have informal or formal discretion to delay deportation proceedings until the client has had an opportunity to complete probation and apply for expungement or conclude a post-conviction attack. See *Matter of Tinajero*, 17 I. & N. Dec. 424 (BIA 1980).
[19] E.g., California Penal Code § 1237.5.

guilty plea are more limited than those following a trial. Potential grounds to vacate a conviction following a trial are numerous.[20] The focus here is therefore on grounds to invalidate guilty pleas.

(B) *State Advisal Statute Violations.* Unless state statutes provide otherwise, the court in which the conviction occurs is generally under no duty to advise the defendant as to the possibility of deportation.[21] A guilty plea has the effect of admitting the entire charge.[22]

Some 28 states have so far required the court to advise the defendant of the possible immigration consequences of a guilty plea prior to its entry.[23] In some, the conviction may be invalidated if the defendant did not receive the required advice. Absent legislation, the court's failure to give such advice does not invalidate the conviction.[24]

Where a conviction is invalidated on the basis of a violation of such a statute, it is likewise legally invalid at the time of the plea — since that is when the

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[20] For other collections of grounds on which habeas corpus has been granted, see 1 J. LIEBMAN & R. HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 7-13 (1993 Cum. Supp.); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U.PA.L.REV. 460, 481-88 (1960); Wells, *Habeas Corpus and Freedom of Speech*, 1978 DUKE L.J. 1307, 1349-51; D. WILKES, FEDERAL POST-CONVICTION REMEDIES AND RELIEF §§ 4-4 to 4-9 (2003).

[21] *George v. Black*, 732 F.2d 108 (8th Cir. 1984); *United States v. Santelises*, 476 F.2d 787 (2d Cir. 1973); *Durante v. Holton*, 228 F.2d 827 (7th Cir. 1956); *Matter of Espinoza*, 15 I. & N. Dec. 328 (BIA 1975); *Matter of Rodriguez*, 14 I. & N. Dec. 706 (BIA 1974); *Matter of Fortis*, 14 I. & N. Dec. 576 (BIA 1974) (defendant not denied due process when not informed of immigration consequences of guilty plea).

[22] *Matter of S*, 9 I. & N. Dec. 688 (BIA 1962).

[23] Alas.R.Crim.P. 11(c)(3)(C); Arizona Rules of Court, rule 17.2(f) (2004); Ark. Rules of Court, rule 17.2(f)(2004); Cal. Penal Code § 1016.5 (West 1995); Conn. Gen. Stat. Ann. § 54-1j (West 1994); D.C. Code Ann. § 16-713 (West 1994); Fla. R. Crim. P. 3.172(8) (West 1995); Ga. Code Ann. § 17-7-93 (1997); Haw. Hawaii Stat. Ann. §§ 802E(1), (2), (3) (West 1994); Id. Crim. Rule. 11(d)(1); Ill. Comp. Stat. 5/113-8 (2006); Iowa R. Crim. Proc. 2.8(2)(b)(2005); Me. R. Crim. P. 11(b)(5) (West 2002); Md. R. 4-242(e) (Michie 2001); Mass. Gen. Laws Ann. ch. 278, §29D (West 1994); Minn. Rule Crim. Proc. 15.01(10)(c) (2000); Mont. Code Ann. § 46-12-210(1)(f) (1997); Neb. Rev. St. §29-1819.02 (West 2003); N.M. Dist. Ct. R.Cr.P. 5-303(E)(5) (1992); N.Y. Crim. Proc. Law § 220.50 (7) (McKinney 2001 Cum. Supp. Pamphlet); N.C. Gen. Stat. § 15A-1022 (a)(7) (West 1994); Ohio Rev. Code Ann. § 2943.031 (West 1989); Ore. Rev. Stat. § 135.385 (2)(d) (1997); R.I. Gen. Laws § 12-12-22 (West 2003); Tex. Code Crim. Proc. Ann. art. 26.13(a)(4) (West 1994); 13 S.A. § 6565; Wash. Rev. Code Ann. § 10.40.200 (West 1995); Wis. Stat. §§ 971.08(1)(c), (2) (West 1994).

[24] *United States v. Garrett*, 680 F.2d 64 (9th Cir. 1982); *Steinsvik v. Vinzant*, 640 F.2d 949, 956 (9th Cir. 1981); *Fruchtman v. Kenton*, 531 F.2d 946 (9th Cir. 1976); *United States v. Santelises*, 509 F.2d 703 (2d Cir. 1975).

statute was violated. This ground, therefore, also qualifies under *Pickering* to eliminate the immigration consequences of the conviction.[25] The Seventh Circuit has held the subjective intent of the state court judge to be irrelevant, so long as a vacatur is granted on a ground of legal invalidity.[26]

(C) *Ineffective Assistance of Counsel.* Several different claims of immigration-related ineffective assistance of counsel can be raised in these cases, in addition to all the normal grounds.

(1) *Affirmative Misadvice of Immigration Consequences*. Affirmative misadvice by defense counsel concerning immigration consequences constitutes a federal constitutional ground to set aside a conviction, in a majority of the circuits.[27] See CRIMINAL DEFENSE OF IMMIGRANTS § 11.70(D). The prevailing federal rule,[28] which applies as well in all state courts, holds that a conviction is legally invalid at the time it came into existence if it results from ineffective assistance of counsel in giving *affirmative misadvice* concerning the immigration consequences of the plea, so long as the error is prejudicial.[29] This ground of invalidity therefore meets the *Pickering-Adamiak* test, and is sufficient to erase the immigration consequences of a conviction. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.4, *supra*. This ground often exists under state law as well.[30] However, it is difficult in most cases actually to show that an attorney in fact gave affirmative misadvice to the client, without the cooperation of the original attorney in giving a declaration, as this misadvice often occurs off the record.

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[25] *Matter of Adamiak*, 23 I. & N. Dec. 878, 879-880 (BIA Feb. 9, 2006).
[26] *Sandoval v. INS*, 240 F.3d 577 (7th Cir. 2001).
[27] See N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS § 6.18 (2004).
[28] *United States v. Couto*, 311 F.3d 179 (2d Cir. 2002) (defense counsel gave affirmative misadvice by saying that a conviction would not trigger deportation, where in fact it was an aggravated felony triggering mandatory deportation); see also *Downs-Morgan v. United States*, 765 F.2d 1534, 1541 (11th Cir. 1985); *Holmes v. United States*, 876 F.2d 1545 (11th Cir. 1989); *Ostrander v. Green*, 46 F.3d 347, 355 (4th Cir. 1995), *overruled on other grounds*, *O'Dell v. Netherland*, 95 F.3d 1214, 1222-23 (4th Cir. 1996); *Bowers v. Saffle*, 216 F.3d 918, 925-26 (10th Cir. 2000); *Goodall v. United States*, 759 A.2d 1077, 1082 (D.C. App. 2000); *Hill v. Lockhart*, 894 F.2d 1009 (8th Cir. 1999), *cert. denied*, 497 U.S. 1011 (1999).
[29] *United States v. Kwan*, 407 F.3d 1005, 1014 (9th Cir. 2005) (affirmative misadvice concerning adverse immigration consequences of a plea constitutes ineffective assistance of counsel); see *In re Resendiz*, 25 Cal.4th 230 (2001) (reviewing federal authorities on this point, and applying them in a state case).
[30] See, e.g., *Rollins v. State*, 591 S.E.2d 796 (Ga. Jan. 12, 2004); *Crabbe v. State*, 248 Ga.App. 314, 315-16, 546 S.E.2d 65 (2001).

Some courts have held that where a noncitizen has been convicted of an aggravated felony, mandating deportation, the fact that counsel told his client that the conviction *may* result in deportation is in itself affirmative misadvice, since aggravated felony deportation is effectively *mandatory*.[31] *Couto* did not reach the issue, but discussed it.[32] The First, Sixth, and Ninth Circuits have declined to reconsider their prior holdings rejecting this argument.[33]

(2) *Failure to Advise of Immigration Consequences.* Counsel's failure to advise the client of the collateral immigration consequences of a plea does not invalidate the conviction in most federal[34] or state courts.[35] Some states, however, hold that ineffective counsel includes a *failure to advise* concerning the immigration consequences.[36] Convictions vacated on this ground no longer exist for immigration purposes. See § 5.1(A).

In *People v. Soriano*,[37] a California court held that counsel has an affirmative duty, when counsel is aware that the client is a noncitizen, to

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[31] *Vega-Gonzalez v. State*, 191 Or. App. 587 (2004); but see *State v. Rojas-Martinez*, 125 P.3d 930 (Utah Nov. 22, 2005).

[32] *United States v. Couto*, 311 F.3d at 188-192 (finding such arguments persuasive).

[33] See *El-Nobani v. United States*, 287 F.3d 417, 421 (6th Cir. 2002), *cert. denied*, 537 U.S. 1024, 123 S.Ct. 535 (Nov. 12, 2002); *United States v. Amador-Leal*, 276 F.3d 511, 516-17 (9th Cir. 2002), *cert. denied*, 122 S.Ct. 1946 (2002); *United States v. Gonzalez*, 202 F.3d 20, 28 (1st Cir. 2000).

[34] *United States v. Fry*, 322 F.3d 1198 (9th Cir. Mar. 18, 2003) (defense counsel's failure to advise a defendant of collateral immigration consequences of criminal conviction does not violate the Sixth Amendment right to effective assistance of counsel). This case does not undercut the argument that counsel's mistaken advice, rather than a mere failure to advice, can constitute ineffective assistance of counsel. See *In re Resendiz*, 25 Cal.4th 230 (2001) (citing federal authorities); *United States v. Banda*, 1 F.3d 354 (5th Cir. 1993); *Varela v. Kaiser*, 976 F.2d 1357 (10th Cir. 1992); *United States v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990); *United States v. George*, 869 F.2d 333 (7th Cir. 1989); *United States v. Yearwood*, 863 F.2d 6 (4th Cir. 1988); but see *United States v. Mora-Gomez*, 875 F.Supp. 1208 (E.D. Va. 1995) (counsel's misstatement of deportation consequences of plea may constitute ineffective assistance of counsel invalidating the conviction). See also Steven D. Heller, *Criminal Convictions and Aliens: Preventing the "Collateral Consequence" of Deportation*, 94-10 IMMIGRATION BRIEFINGS (Oct. 1994); Lory Rosenberg & Kenneth H. Stern, *Ineffective Assistance of Counsel: An Antidote for the Convicted Alien*, 65 INTERPRETER RELEASES 529 (May 23, 1988). See generally Gordon § 4.01[4].

[35] *In re Resendiz*, 25 Cal.4th 230 (2001) (rejecting the collateral consequences argument and holding that counsel renders ineffective assistance by affirmatively misadvising the defendant of the immigration effects of a plea).

[36] *People v. Soriano*, 194 Cal.App. 3d 1470 (1987); *State v. Paredez*, 136 N.M. 533, 101 P.3d 799 (Aug. 31, 2004).

[37] *People v. Soriano*, 194 Cal.App.3d 1470 (1987).

investigate and advise the defendant of the exact immigration consequences of a plea prior to its entry. Some other states also follow this rule.[38] There is less than unanimity on the subject, however.[39] At least 19 states and the ABA now require counsel to inform a noncitizen of the immigration perils prior to entry of plea.[40] Florida now requires such advice by court rule.[41] See CRIMINAL DEFENSE OF IMMIGRANTS, Chapter 2.

This rule, at least under *Soriano*, creates both a duty for counsel to advise the defendant of the possible immigration consequences of a conviction, and a duty to engage in an investigation of what those consequences could be. Counsel must, after discovering that the client is a noncitizen, analyze the charges to determine whether a conviction will result in deportation or inadmissibility. Counsel also has a duty to determine whether the client would be eligible for some form of relief in immigration court following a plea to the charge. Counsel must then inform the client of the results of this investigation, and give his or her client accurate advice on how to plead in light of the possible immigration consequences. In addition, since many defendants (over 20% in many states, such as California) are noncitizens, who will suffer terrible immigration consequences unless warned, defense counsel has a duty to inquire of each defendant as to his or her immigration status so as to identify the one in five for whom this may be a paramount issue.

As a greater duty is placed upon counsel in jurisdictions that follow a *Soriano*-type rule than where only affirmative misadvice results in ineffective assistance, ineffective assistance can be found much more often. In many cases, defense counsel fails to make the effort to investigate the immigration consequences of a conviction. Unfortunately, just as with an affirmative misadvice claim, it is often necessary to try to convince the court that failure to advise happened off the record. A defendant's declaration alone may not be

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[38] See *People v. Pozo*, 746 P.2d 523, 527-529 (Colo. 1987), and authorities cited therein; *Lyons v. Pearce*, 694 P.2d 969, 976-978 (1985); *Daley v. State*, 487 A.2d 320 (Md. 1985).

[39] See *People v. Kadadu*, 425 N.W.2d 784, 785-787 (Mich. 1988) (arraying split of authority). See, e.g., *State v. Ginebra*, 511 So.2d 960 (Fla. 1987); *People v. Huante*, 571 N.E. 2d 736, 741-2 (Ill. 1991).

[40] See *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001); *People v. Pozo*, *supra*, 746 P.2d at 526 n.4.

[41] Florida Rules of Criminal Procedure, Rule 3.172(c)(viii) (*In re Amendments to Florida Rules*, 536 So.2d 992, 994). See Annot., *Ineffective Assistance of Counsel: Misrepresentation, or Failure to Advise, of Immigration Consequences of Waiver of Jury Trial*, 103 A.L.R. FED. 867; Annot., *Ineffective Assistance of Counsel: Failure to Seek Judicial Recommendation Against Deportation* . . . ., 94 A.L.R. FED. 868.

sufficient, and it is always wise to corroborate the defendant as much as possible by independent sources of evidence. If possible, counsel should obtain a declaration from original trial counsel confirming that s/he did not investigate or advise the defendant concerning the immigration consequences of the conviction.

(3) *Failure to Seek Immigration-Harmless Disposition.* Some states, such as California, also recognize a *failure to defend* ground of ineffective assistance. This occurs where counsel fails to identify and try to negotiate a plea to an immigration-harmless disposition. For example, counsel pleads the client guilty to possession for sale of a controlled substance (an aggravated felony), instead of the greater offense of offer to transport (neither an aggravated felony nor a controlled-substances conviction in the Ninth Circuit).[42] Some federal courts are beginning to recognize this ground.[43] Counsel in other states can argue for this extension of the law. Convictions vacated on this ground no longer exist for immigration purposes. See § 5.1(A).

(4) *Failure to Mitigate Offense or Sentence*. An additional ineffective assistance argument is failure to mitigate. Even though immigration consequences may be collateral to the criminal case, criminal defense counsel has always had the responsibility to investigate all facts connected with the case (even collateral facts) in search of exculpatory or mitigating circumstances that can be used in bargaining to reduce the penal seriousness of the plea of conviction or used at sentencing to reduce the length of the sentence. This is traditional ineffective assistance of counsel, since defense counsel must always attempt to reduce the length of the potential or actual sentence, which is a direct penal consequence, not a collateral consequence. Counsel therefore should investigate and discover the immigration disaster that will flow from a 365-day sentence, for example, and attempt to use that mitigating fact to obtain a shorter sentence. The United States Supreme Court has held that a sentence even one day shorter is sufficient to constitute prejudice from ineffective counsel at sentence.[44]

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[42] *People v. Bautista*, 115 Cal.App.4th 229, 8 Cal.Rptr.3d 862 (2004).

[43] *United States v. Kwan*, 407 F.3d 1005, 1014 (9th Cir. 2005)(affirmative misadvice case; once law changed, so correct advice had become misadvice, counsel erred by failing to defend his client against adverse immigration consequences of the plea by failing to seek to negotiate a non-deportable disposition, failing to file a motion to withdraw the plea, and failing to argue the immigration consequences to the sentencing court in an effort to obtain a sentence of less than one year).

[44] *Glover v. United States*, 531 U.S. 198, 205 (2001).

(D) *Other Grounds.* Many other potential statutory and constitutional grounds of legal invalidity can eliminate a criminal conviction for immigration purposes. There are at least 40 federal constitutional grounds for setting aside convictions based on guilty or no contest pleas, that can be used in any jurisdiction. These are documented in N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS, Chap. 6 (Grounds for Vacating the Conviction) (2004). What follows is a checklist of selected grounds for vacating guilty pleas.[45]

(1) The court may fail to secure voluntary, knowing and intelligent waivers of the fundamental constitutional rights waived by a plea of guilty or no contest.[46] The plea must be vacated where the district court failed to take full Rule 11 waivers from a criminal defendant, even though the defendant had prior experience with guilty pleas, failed to raise an objection, and was advised of his right to a jury trial.[47] The court must conduct an on-the-record colloquy with the defendant, in addition to obtaining a written waiver, to take a valid waiver of the right to jury trial.[48] The waiver is not knowing and intelligent, free and voluntary where the nature of the right was not sufficiently explained to the defendant.[49]

(2) A defendant can claim that his guilty plea was involuntary because of his inability to speak sufficient English.[50] These claims, however, are very fact-intensive, and can be documented, perhaps with the aid of a linguistics professor. See § 2.4(A)(1); CRIMINAL DEFENSE OF IMMIGRANTS, Chapter 4.

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[45] For other collections of grounds on which habeas corpus has been granted, see 1 J. Liebman & R. Hertz, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 7-13 (1993 Cum. Supp.); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U.PA.L.REV. 460, 481-88 (1960); *Wells, Habeas Corpus and Freedom of Speech*, 1978 DUKE L.J. 1307, 1349-51; D. Wilkes, FEDERAL POST-CONVICTION REMEDIES AND RELIEF §§ 4-4 to 4-9 (1996 & 1998 Supp.).

[46] *Boykin v. Alabama*, 395 U.S. 238 (1969).

[47] *United States v. Hernandez-Fraire*, 208 F.3d 945 (11th Cir. 2000) (court failed to inform defendant of right to plead not guilty, right to assistance of counsel at trial, right to confront and cross-examine adverse witnesses at trial, and right against compelled self-incrimination).

[48] *Cabberiza v. Moore*, 217 F.3d 1329 (11th Cir. 2000) (Seventh Circuit agrees; Fifth, Sixth, Ninth, and Tenth Circuits disagree).

[49] See *Johnson v. Zerbst*, 304 U.S. 458 (1938); *United States v. Duarte-Higareda*, 113 F.3d 1000 (9th Cir. 1997); *United States v. Martin*, 704 F.2d 267, 273 n.5 (6th Cir. 1983) ("a defendant can hardly be said to make a strategic decision to waive his jury trial right if he is not aware of the nature of the right or the consequences of its waiver"); *United States v. Delgado*, 635 F.2d 889, 890 (7th Cir. 1981) (reversing conviction after bench trial where record did not reveal whether defendant understood his right to a jury trial and the consequences of waiver); see also *United States v. Lyons*, 898 F.2d 210, 215 (1st Cir. 1990) (knowing waiver requires defendant be fully informed about the right s/he is waiving).

[50] *United States v. Martinez-Cruz*, 186 F.3d 1102 (8th Cir. 1999).

(3) Improper use of a prior conviction, that has been or should have been[51] invalidated, to contribute to a later conviction or sentence.[52]

(4) Denial of the right to counsel.[53]

(5) Denial of the right to an effective appeal.[54]

(6) Ineffective assistance of counsel, for any reason that calls the outcome of the case into question.[55]

(7) Reliance on inaccurate legal advice.[56]

(8) Failure to inform the defendant of the nature of the charge and elements of the offense.[57] The court can look to defendant's prior life experiences in deciding whether s/he adequately understood the nature of the offense to which a plea was entered.[58]

(9) Failure of the court to inquire into the defendant's mental competence if it was or should have been on notice of the problem.[59]

(10) Inability of defense counsel to render effective assistance because of a

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[51] *Cook v. Lynaugh*, 821 F.2d 1072, 1978 (5th Cir. 1987) (ineffective counsel to admit prior conviction allegation without investigating whether it was constitutionally invalid).
[52] *Johnson v. Mississippi*, 486 U.S. 578, 580-84, 585 n.7 (1988).
[53] *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764 (2002) (suspended sentence that may result in deprivation of liberty cannot be imposed unless the defendant is afforded the assistance of counsel); *United States v. Tucker*, 404 U.S. 443 (1972); *Burgett v. Texas*, 389 U.S. 109 (1967).
[54] See *Johnson v. Mississippi*, 486 U.S. 578 (1988).
[55] *Darden v. Wainwright*, 477 U.S. 168 (1986); *Strickland v. Washington*, 466 U.S. 668 (1984); see *In re Alvernaz*, 2 Cal.4th 924 (1992) (ineffective assistance of counsel for mistaken advice in rejecting plea and going to trial); *Lord v. Wood*, 184 F.3d 1083 (9th Cir. 1999) (failure to interview witnesses); *Hart v. Gomez*, 174 F.3d 1067 (9th Cir. 1999) (same); *Delgado v. Lewis*, 223 F.3d 976 (9th Cir. 2000) (finding "constructive withdrawal from [] representation" where counsel was absent from virtually every important court proceeding, including sentencing, and failed to raise requested issues on appeal).
[56] E.g., *United States v. Toothman*, 137 F.3d 1393 (9th Cir. 1998) (mistake in the estimate of appellant's sentence).
[57] *Henderson v. Morgan*, 426 U.S. 637, 647 (1976).
[58] *United States v. Mosley*, 173 F.3d 1318 (11th Cir. 1999); *United States v. Lujano-Perez*, 274 F.3d 219 (5th Cir. 2001).
[59] *Godinez v. Moran*, 509 U.S. 389 (1993); *Seals v. State*, 23 Tenn. 272 (2000).

conflict of interest.[60] Where the trial court knew, or reasonably should have known, of a conflict of interest, it was required to inquire as to the conflict, but the defendant must show adverse performance of his attorney to win reversal of conviction on this ground.[61]

(11) Invalid waiver of right to counsel without adequate warning of the dangers of self-representation.[62] The Supreme Court has weakened, but not destroyed, this ground of legal invalidity.[63]

(12) Failure to find a proper factual basis for the plea, where during the plea colloquy the defendant made factual statements negating essential elements of the crimes charged.[64] Once the court finds a factual basis exists, however, Rule 11 does not require that the issue be reopened if the defendant later makes a statement suggesting the affirmative defense of justification.[65]

(13) The omission of an essential element of an offense from the charging paper constitutes error.[66] These decisions distinguished *Neder v. United States*,[67] which held that jury instructions omitting offense elements could be found harmless. The Ninth Circuit has indicated *in dictum* that, after *Apprendi v. New Jersey*,[68] the failure to charge facts proved at trial that increase the maximum penalty may constitute a variance between pleading and proof in violation of due

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[60] *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978).
[61] *Mickens v. Taylor*, 122 S.Ct. 1237 (2002) (relief denied for lack of showing of adverse performance where capital murder defendant was given an attorney who had previously represented the victim of the murder, in another criminal matter, which the trial judge had previously dismissed before he appointed him to represent the defendant in this murder).
[62] *United States v. Balough*, 820 F.2d 1485, 1487-90 (9th Cir. 1987).
[63] *Iowa v. Tovar*, 541 U.S. 77, 124 S.Ct. 1379 (Mar. 8, 2004) (trial court must inform unrepresented defendants of nature of charges against him or her, right to counsel regarding plea, and range of allowable punishments for plea to be "knowing and intelligent"; trial court does not need to inform accused that viable defense will be overlooked, or that he will lose opportunity to obtain independent opinion on whether it is wise to plead guilty).
[64] *Montgomery v. United States*, 853 F.2d 83 (10th Cir. 1988).
[65] *United States v. Smith*, 160 F.3d 117 (2d Cir. 1998).
[66] *United States v. Du Bo*, 186 F.3d 1177 (9th Cir. 1999) (indictment alleging violation of Hobbs Act, 18 U.S.C. § 1951, failed to specify mental element); *United States v. Spinner*, 180 F.3d 514 (3d Cir. 1999); *United States v. Prentiss*, 256 F.3d 971 (10th Cir. 2001) (*en banc*) (omission of element in indictment subject to harmless-error analysis).
[67] *Neder v. United States*, 527 U.S. 1 (1999).
[68] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000).

process.[69] However, defects in the indictment are not jurisdictional errors and do not deprive the court of the power to adjudicate a case.[70]

(14) Breach of plea-bargain. The circuits are divided concerning the enforceability of a federal prosecutor's promise in a criminal plea bargain not to deport the defendant as a result of the conviction. The Ninth Circuit held that 28 U.S.C. § 547(1), which authorizes the U.S. Attorney "to prosecute for all offenses against the United States," requires the court to enforce a federal prosecutor's promise, made in a plea agreement, not to deport the defendant, despite the prosecutor's lack of express authority to bind the INS, provided the agreement falls within the scope of § 547(1).[71] The Eighth Circuit held that the federal prosecutor has authority to bind all government agencies to abide by plea agreements by virtue of § 547(1).[72] The Eleventh Circuit disagreed, concluding that because only officers and employees of the INS can initiate or terminate deportation proceedings, the criminal prosecutor cannot prevent the INS from initiating a deportation proceeding by promising a noncitizen defendant in a plea agreement that s/he will not be deported.[73] It held to do so would constitute an impermissible exercise of authority over the INS and permit the U.S. Attorney's general power of prosecution to usurp the attorney general's specific power to deport certain classes of noncitizens, a result not intended by Congress. Thus, the court held, a prosecutor should not, as part of a plea agreement, promise a noncitizen that s/he will not be deported unless prior authorization from the Criminal Division of the Department of Justice has been received.[74] The *San Pedro* decision, however, runs contrary to the United States Supreme Court's decision in *Santobello v. New York*: "[W]hen a plea rests in any significant degree on a promise or agreement of a prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L. Ed. 2d 427 (1971)." The dissent in *San Pedro* pointed out that the decisive issue was not whether the prosecutor may make an effective non-deportation promise, but whether the defendant's due process rights were violated by the government's decision to violate its promise. Where prosecutors, as part of the plea agreement, promised the defendant that he would not be deported, due process requires the court to afford the defendant specific performance of the

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[69] *Jones v. Smith*, 231 F.3d 1227 (9th Cir. 2000).
[70] *United States v. Cotton*, 122 S.Ct. 1781, 152 L. Ed. 2d 860 (2002).
[71] *Thomas v. INS*, 35 F.3d 1332 (9th Cir. 1994).
[72] *Margalli-Olvera v. INS*, 43 F.3d 345 (8th Cir. 1994).
[73] *San Pedro v. United States*, 79 F.3d 1065 (11th Cir. 1996).
[74] *San Pedro v. United States*, 79 F.3d 1065 (11th Cir. 1996); see also UNITED STATES ATTORNEYS MANUAL, § 9-73.510.

promise contained in the plea agreement, or the opportunity to withdraw his guilty plea. If the prosecutor's promise is breached, the plea on which it was based must be held involuntary and therefore unconstitutional unless the breach is remedied.[75]

(15) A district court must warn a defendant pleading guilty to certain drug-related offenses under 21 U.S.C. § 862(a) that s/he will be ineligible for certain federal benefits, including food stamp and social security programs, as ineligibility is automatic upon conviction and therefore not a collateral consequence.[76]

(16) A district court's advice to the defendant that he faced a mandatory minimum sentence lower than he actually faced rendered the plea involuntary.[77]

(17) Denial of right of self-representation.[78]

(18) Coercion of guilty plea by "package-deal" plea bargain.[79] The potential for coercion has been recognized by the Minnesota Supreme Court, especially when codefendants are family members.[80] Federal courts as well have required special care when a family member's consent is required for another's plea agreement.[81]

§ 5.6 Safe Havens

A safe haven is an alternative disposition of the criminal case that does not trigger the adverse immigration consequences. See 4.2(D). A safe haven is often necessary, in two ways, to successful post-conviction relief:

(1) A safe haven is what original defense counsel should have obtained in the first place. It is necessary to show it in order to establish prejudice from counsel's error in a claim of ineffective assistance of counsel.

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[75] *San Pedro v. United States*, 79 F.3d 1065 (11th Cir. 1996) (Goettel, J., dissenting).
[76] *United States v. Littlejohn*, 224 F.3d 960 (9th Cir. 2000).
[77] *United States v. Santo*, 225 F.3d 92 (1st Cir. 2000).
[78] See *United States v. Kaczynski*, 239 F.3d 1108 (9th Cir. 2001), *reh'g and reh'g en banc* denied, 262 F.3d 1034 (9th Cir. 2001) (conviction affirmed).
[79] *State v. Bey*, 270 Kan. 544, 17 P.3d 322 (2001).
[80] *State v. Danh*, 516 N.W.2d 539 (Minn. 1994).
[81] *United States v. Wright*, 43 F.3d 491 (10th Cir. 1994); *United States v. Abbott*, 241 F.3d 29 (1st Cir. 2001) (failure to inform court that defendant's plea was linked to his mother's).

(2) It is also necessary to obtain a safe haven now. The two safe havens may well, but need not, be the same. For example, if defense counsel should have obtained a judicial recommendation against deportation in the first place, the court may vacate the sentence on grounds of ineffective counsel for failing to do so. The JRAD, however, has been abolished, effective November 29, 1990, so it is not possible to obtain one now. Therefore, a different safe haven must now be obtained in order to avoid removal. See N. TOOBY & J. ROLLIN, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005).

§ 5.7 Equities

The client's equities will have a profound impact on the chances of obtaining post-conviction relief. See § 2.1(B)(2).

§ 5.8 Assessing Risk of Worse Outcome

If a conviction is vacated, and the case is reopened, it is sometimes possible for something worse to happen to the client. Possible adverse consequences include adverse *criminal* consequences, such as a greater jail sentence or more convictions than in the original case, and adverse *immigration* consequences, such as a later conviction of an aggravated felony, when the original conviction was only a crime involving moral turpitude, or coming to the attention of the DHS and being placed in removal proceedings, where before, the client was under its radar.

(A) *Adverse Criminal Consequences.* If the conviction is set aside, all original charges, including any that were dismissed, are reinstated, and the promises of a limited sentence are set aside. The client is placed in the same situation s/he occupied right before the plea was entered.

(1) *Worse Convictions.* The prosecution can then pursue conviction on any charges on file at the time of the original plea bargain. In general, the statute of limitation bars filing of any additional charges that are now barred. The client may therefore be convicted of more charges, or greater charges, than those to which a plea was entered originally.

Since the client is now facing the original charges again, the court can set bail and jail the client until the bail is posted.

(2) *Greater Sentence*. Technically the client can receive a greater sentence if convicted a second time. It is very unlikely, in general, that a client who has led

a law-abiding life since the original offenses were convicted would receive a greater sentence the second time around. However, the client might receive a greater sentence the second time if:

(1) The prosecution is angry that the case was reopened and the judge does what the prosecution wants;

(2) The prosecution is able to force conviction of offenses and enhancements that trigger mandatory sentencing laws, so the judge has no choice but to sentence the client more harshly the second time around;

(3) The prosecution is able to force conviction of more or greater offenses that the court feels require a greater sentence;

(4) The client has reoffended (or is thought to be continuing a life of crime, even if not rearrested), or the client has performed very badly on probation or parole, so that the court has a good reason to hand down a stiffer sentence the second time around.

Counsel can argue that the client cannot legally receive a greater sentence as a penalty for the exercise of the rights which required that the conviction be vacated, and that the client must be given credit for all time served, and all other punishment previously served, but if the court can point to some changed circumstance since the original sentence that would justify a greater sentence, imposition of a greater sentence may not be legally barred.

Generally speaking, it is very unlikely for the client to suffer adverse criminal consequences as a result of reopening a case. It only occurs in 5-10% of the cases, since the client's bargaining position has improved greatly because of the additional defense investigation and research that has gone into the case, the expense to the state of a jury trial, the difficulty for the prosecution to reconstruct an old case, and (presumably) the client's rehabilitation since the original disposition.

(B) *Immigration Consequences.* The client might also sometimes receive a disposition of the criminal case triggering worse immigration consequences than those resulting from the original disposition. For example, if the client has not previously come to the attention of the DHS, the prosecution may report the client to the immigration authorities during the course of the post-conviction litigation.

The DHS may therefore arrest the client and place the client in removal proceedings, without bond.

If the criminal case is relitigated, it is possible the prosecution could amend the charge to different charges with worse immigration consequences than the original charges, although generally, the statute of limitations would bar filing of additional charges that are now time-barred. The client might also receive a sentence with worse immigration consequences than those triggered by the original sentence.

§ 5.9 Cooperation With Successor Counsel

(A) *Obtaining Original Counsel's Case File*. Successor counsel should immediately obtain a complete copy of the case file from the original defense counsel. This includes the attorney's notes, investigation reports, and everything else contained in the file. Submit a written request, accompanied by an information release executed by the client. Since the entire file is the property of the client, should be no difficulty. If the attorney balks, gently educate him or her concerning the ethical obligation to deliver the entire file to successor counsel. (Original counsel may, of course, keep a copy at his or her expense.)

(B) *Interviewing Original Counsel*. When vacating a conviction requires making a case that original defense counsel was constitutionally ineffective, trial counsel may either: (a) place the interests of the client first, and be willing to cooperate by providing the defendant's new counsel with a truthful declaration even though it may expose their mistakes, and (b) place their own self-esteem and reputation ahead of any duty to their client, and be defensive.[82]

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[82] Some state laws, e.g., California Business & Prof. Code § 6086.7, may require a court which reverses a judgment on grounds of ineffective counsel to report its action to the State Bar, although there is a great distance between a mistake, even a serious one, and any realistic grounds for discipline. It is quite rare for an attorney even to be reported to the State Bar. Responsible persons with the California State Bar disciplinary system have indicated that even when a finding of IAC is made, no lawyer, to their knowledge, has ever been disciplined for simply making a mistake. In *People v. Shelley*, 156 Cal.App.3d 521, 202 Cal.Rptr. 874, 881 n.1 (1984), in which trial counsel sat mute during trial in protest against the trial court's order throwing his client in custody during trial, the court reported the IAC reversal to the State Bar. The California statute, however, does not even suggest that it is appropriate to initiate disciplinary action in connection with an IAC reversal. The decision in *People v. Ledema*, 43 Cal.3d 171, 233 Cal.Rptr. 404 (1987), the only reported California judicial decision discovered in which disciplinary action resulted from an IAC finding, illustrates how very extreme the misconduct must be to result in discipline. A simple mistake is simply not enough.

The tactics of the interview will differ, depending on which view the original trial counsel takes. It is not always possible to tell in advance what the former attorney's position will be. Obviously, it is in the client's interest to preserve the cooperation of all who place the client's interests first, to convert as many as possible into placing the client's interests first, and to obtain the truth from those who place themselves before their clients, even though they may only reluctantly reveal it.

Counsel can emphasize the following issues, if they are appropriate:

- New and old counsel share the common professional responsibility to act in their mutual client's best interests.

- Original counsel has a legal duty to cooperate with successor counsel and promptly return the client's entire case file upon termination of the representation.[83]

- Any statements the original counsel makes in a declaration intended to reduce the damage to the client from counsel's actions are inadmissible in any malpractice action against counsel.[84] This ruling follows the same line of reasoning that renders inadmissible evidence of the correction of an unsafe condition. As the court stated, "[A]n attorney should be able to admit a mistake without subjecting himself [or herself] to a malpractice suit."[85]

- An isolated mistake by counsel does not generally constitute grounds for discipline by the state bar.[86]

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[83] Rules of Conduct of the State Bar of California 2-111 (A)(2); *Finch v. State Bar*, 28 Cal.3d 659, 665, 170 Cal.Rptr (1981) (duty to forward the file to client or successor counsel); *Kallen v. Delug*, 157 Cal.App.3d 940, 950, 203 Cal.Rptr. 879, 884-885 (1984). State Bar Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1992-127 discusses the extent to which a criminal defense attorney, after being relieved by successor counsel, must cooperate with new counsel. It held original counsel must turn over the entire file (which belongs to the client) including the attorney's notes, and must answer all oral questions if failure to do so would prejudice the client. This Ethics Opinion, which was mailed to all California attorneys, is extremely useful in obtaining cooperation of original counsel.

[84] *Smith v. Lewis*, 13 Cal.3d 349, 118 Cal.Rptr. 621 (1975). It is also wise for counsel to attempt to mitigate any damage suffered by the client.

[85] *Id.*, 118 Cal.Rptr. at 631.

[86] E.g., *In re Torres*, 4 Cal. State Bar Ct. Rptr. 138, 149 (Rev. Dept. 2000)("We have repeatedly

Sometimes, reluctant counsel may not wish to produce the file, and may claim not to have retained it. Counsel, however, is ethically required to retain the file. For example, Los Angeles County Bar Association, Formal Ethics Opinion No. 420 states: "In the absence of written instruction by the client, the client's file relating to a criminal matter in the possession of an attorney should be retained by the attorney and not destroyed."

One approach is to make an appointment with original counsel to review that counsel's file and discuss the case.[87] It is important to arm oneself with an information release signed by the client so original counsel is authorized and feels free to discuss the confidential aspects of the case with successor counsel. After reviewing the file, interview counsel concerning the following issues:

- Was counsel aware of the client's nationality and immigration status at the time of the original representation?

- What research and investigation did counsel conduct to determine the actual immigration consequences of a particular conviction? Specifically, what did counsel think the full immigration consequences of the conviction would be?

- What was the strategy, if any, to minimize adverse immigration consequences?

- What did the attorney and client discuss concerning adverse immigration consequences of a conviction? It is important to ask specifically what advice the attorney gave the client. If the attorney is a

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held that negligent legal representation, even that amounting to legal malpractice, does not establish a rule 3-110(A) violation. (*In the Matter of Riley* (Review Dep't 1994) 3 Cal.State Bar Ct. Rptr. 91, 113, and cases there cited.) "). Accord, *In the Matter of Fonte*, 2 Cal.State Bar. Ct. Rptr. 752, 757 [failure to respond to interrogatories when due flowed from a simple calendaring error complicated by a recent computer change held not a basis for discipline]; see Cal. Rules of Prof'l Conduct, Rule 3-110 ("a member shall not intentionally, recklessly, or repeatedly fail to perform legal services with competence.").

[87] It is wise, if not ethically required, for post-conviction counsel to be accompanied by an investigator or to use an investigator to conduct this interview, since former defense counsel is in effect a witness. See *People v. Jackson*, 187 Cal.App.3d 499, 231 Cal.Rptr. 889 (1986) (possible ineffective counsel for failure to use an investigator while interviewing a prospective witness); see also *People v. Guerrero*, 47 Cal.App.3d 441 (1975).

bit vague, counsel can ask if the attorney informed the client that the conviction "might" result in the client's deportation, exclusion from the United States, or denial of naturalization. Often, perhaps because this is the advice many state courts are required by law to deliver before every plea of guilty, this is the sum total of the information the lawyer imparted to the client.[88] It is important to determine whether the attorney gave any advice that went beyond this general warning, and, if so, exactly what that advice was.

- Does counsel have an attitude of cooperation or defensiveness concerning the possibility that counsel made a mistake to the detriment of the client? It is important to be open concerning the possibility of the need to reopen the conviction in order to reduce or eliminate adverse immigration consequences, and the possible need to raise ineffective assistance of counsel as an issue in order to do so.

If counsel appears to be defensive rather than cooperative, a better policy than confrontation may be simply to make exact notes concerning the advice counsel claims to have given the client, without unduly educating the attorney concerning what advice would have been sufficient to discharge the obligation of effective counsel.

After the interview is over, current counsel can prepare a declaration for former defense counsel recording exactly what defense counsel said. If former counsel knows relatively little concerning the immigration consequences of the conviction, this fact will be clear from the declaration.

[88] This is, of course, inadequate in some jurisdictions to discharge defense counsel's obligation to research the exact immigration consequences of a plea and inform the client, before the plea is entered. E.g., *People v. Soriano*, *supra*.

Chapter 6:
Ending the Criminal Case

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§ 6.1 Immigration Consequences of Final Disposition

(A) *Documenting the Final Disposition*. Once the criminal case is over, defense counsel should document the disposition by obtaining three certified copies of the record of conviction, including the waiver of rights form, the final version of the charge of conviction, clerk's minutes of plea and judgment, and reporter's transcript of plea and sentence. Counsel should give one set to the client, another to immigration counsel, and retain the third in case it is needed in future.

(B) *Correcting Criminal History Reports*. Because federal immigration authorities will be governed by their records of the final disposition, counsel should correct criminal history reports where necessary, as when post-conviction relief has altered the criminal history in the client's favor.

(1) *FBI Records.* Since the FBI is not the source of the records it compiles, a challenge to the correctness of its records, or a request to correct the contents of its records, will be referred to the source agency. If the conviction is a state conviction, that source is the state bureau of criminal identification.

Direct a request to correct the FBI criminal history report to:

Assistant Director of the FBI
Identification Division
Washington, D.C. 20537

The FBI will forward the request to the state agency that submitted the data and make a correction or not as indicated by the source agency.

Obtain certified copies of records from the court of origin documenting the correct state of affairs, and submit them directly to the FBI. The FBI has been

quite willing to correct its records promptly when an error is shown by satisfactory evidence.

(2) *State Records*. The easiest way to ensure the state criminal history records are corrected is to ask the clerk of the criminal court issuing the order vacating the record to do so. The clerk will have submitted a record of the conviction to the state department of criminal identification, when the original conviction occurred. Now that the court has vacated the conviction, the clerk can submit a corrected form to the same state agency in the same matter. Counsel can also do so independently. To do so, first obtain a certified copy of the court order vacating the conviction, and submit it to the state department of justice or bureau of criminal identification,[1] together with a completed form if one is required, or a letter requesting the correction. Once the state agency has corrected its record, counsel can send the corrected state record to the FBI, which will then correct its record. If counsel does not receive satisfaction from the state agency informally, the client may be entitled to a hearing to determine the truth of the matter.[2]

(C) *Obtaining Final Opinion From Immigration Counsel*. Counsel should provide a certified copy of each document from the record of conviction to immigration counsel, asking that s/he give an opinion on the immigration consequences of the final disposition of the criminal case to the client, with a copy to criminal counsel.

If counsel was unable to obtain a non-deportable disposition, the client may be wise simply to agree to deportation, rather than spending dead time in mandatory immigration detention, without possibility of bond, pending litigation of a lost cause.

Even if there is an argument that the disposition does not properly trigger removal, if the client is subject to mandatory detention, the government may be able to keep him or her in custody for many months, or even years, until the final disposition of the immigration appeal before the circuit court of appeals. Many clients cannot hang on that long, even though it is necessary to do so to have any realistic chance of preserving lawful status in the United States.

[1] E.g., California Department of Justice, Record Review Unit, P.O. Box 903417, Sacramento, CA 94203-4170.
[2] See, e.g., California Penal Code § 11126(c).

(D) *Keeping the Case File.* Counsel should keep a copy of the criminal case file indefinitely. There is no time limit within which the immigration authorities must begin removal proceedings, and they sometimes do so many years after the conviction has become final. Immigration counsel may require documents from counsel's file at that point, to verify a safe haven disposition was achieved, or to determine the actual immigration consequences, under current law, of the disposition reached many years before.

§ 6.2 Travel Advice

Counsel should obtain from immigration counsel, and relay to the client, written advice concerning the advisability of travel in light of the immigration consequences of the final disposition.

(A) *International Travel.* If the immigration consequences of the final disposition of the case include inadmissibility, counsel should advise the client not to travel outside the United States. This advice should be delivered in writing, to make it unmistakably clear, since clients may later feel an overwhelming and unwise urge to travel to be with a sick parent or to attend an important funeral. If the client is inadmissible, the DHS can exclude him or her from the United States, and refuse to allow re-entry even if the client is a Lawful Permanent Resident of the United States. At a minimum, the client should be advised to consult carefully with immigration counsel before travelling internationally.

If the client has obtained a result that does not trigger inadmissibility, defense counsel should recommend the client consult an immigration lawyer, and obtain an opinion letter that the client is not inadmissible, to go with the certified copies of the record of conviction, to ease the client's return to the country after international travel.

(B) *Domestic Travel.* If the client is inadmissible or deportable, even domestic travel may raise risks of immigration detention and the beginning of removal proceedings.

(1) *Different Circuit Law.* Immigration law varies from circuit to circuit, since the review of the uniform national rulings of the Board of Immigration Appeals may be sought in the federal circuit courts of appeal, which have the power to overrule the BIA in removal cases arising within the particular circuit. Therefore, a favorable result in a criminal case, that does not result in deportability under the law of the circuit in which the case arose, may lead to a different result

in a different circuit. For example, within the Ninth Circuit, state rehabilitative relief effectively eliminates certain first-offense convictions of simple possession of any controlled substance as a ground of inadmissibility or deportation. See § 5.1(D)(2). If the client who is not removable within the Ninth Circuit were to fly to Paris and return to LaGuardia in New York, however, the immigration authorities could correctly conclude that the expunged simple possession conviction still existed, under Second Circuit law, to trigger inadmissibility. Therefore, a client whose safe haven depends on the law of a particular circuit must be advised not to leave that circuit on pain of possible removal from the United States.

(2) *Travel Near the Border.* Clients should also be advised that travel near the border may be problematic in some cases. Even within the United States, a client who has become deportable or inadmissible may be arrested by the DHS while travelling and placed in detention and removal proceedings. The Transportation Safety Administration is checking visas at some airports where passengers offer foreign passports as identification. This has been reported at Honolulu International Airport, where they are checking flights among different Hawaiian Islands as well as flights between Hawaii and the mainland. Moreover, even ground transportation within areas considered functional equivalents of the border poses a risk that noncitizens may be identified and placed in immigration detention. Domestic travel in Upstate New York, for example, carries a risk, within the area called the "functional equivalent of the border," which allows the Border Patrol to do transportation checks. They are very active all along Route 90, near Buffalo, Rocheser, Suracuse, and Albany, including train and bus stations and airports. There are also USBP checkpoints on Route 87 from Montreal to NYC. Public busses in San Diego and ferries in Seattle have also been subject to CBP searches.

§ 6.3 Illegal Re-Entry Exposure

Anyone who re-enters or attempts to re-enter the United States *illegally* after having been removed is inadmissible.[3] Illegal re-entry is also a federal crime, and a conviction of illegal re-entry following conviction of an aggravated felony is itself an aggravated felony.[4] Defense counsel should advise the client of these facts, and urge them not to re-enter the United States without permission after they

[3] INA § 212(a)(9)(C), 8 U.S.C. § 1182(a)(9)(C).
[4] INA § 101(a)(43)(O), 8 U.S.C. § 1101(a)(43)(O).

have been deported, on pain of serving a federal prison sentence from three to six or seven years if the government thereafter finds them within the United States.

(A) *Federal Prosecution.* A person who is removed by formal removal proceedings, returns to the U.S. without permission, and then is found in the United States by federal authorities,[5] is guilty of a federal criminal offense and can be sentenced to a maximum of 20 years in federal prison if the removal occurred after an aggravated felony conviction.[6] Moreover, the sentence is subject to an increase in the base offense level under United States Sentencing Guidelines § 2L1.2 depending upon the noncitizen's prior criminal history, which can result in a sentence of four to six years if the re-entry occurred after an aggravated felony conviction. Defense of illegal re-entry prosecutions has become increasingly difficult, but a number of defenses remain available.[7]

The Supreme Court held that the prior convictions necessary to enhance a sentence for illegal re-entry are sentence enhancements, not elements of the offense.[8] Prior convictions used to enhance a sentence for illegal re-entry[9] therefore need not be included in the indictment or proven to a jury.[10] The existence of the prior conviction that triggers a sentence enhancement need only be shown by clear and convincing evidence.[11]

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[5] At least one court has found that the noncitizen must be found within five years of illegal re-entry, in order to be able to prosecute. *United States v. Gunera*, 479 F.3d 373, (5th Cir. Feb. 13, 2007) (where the defendant was "found" in the United States more than five years following the defendant's unlawful re-entry, indictment was barred by statute of limitations).

[6] INA § 276(b)(2), 8 U.S.C. § 1326(b)(2).

[7] See generally Note, *Suppressing Defendant's Identity and Other Strategies for Defending Against a Charge of Illegal Reentry After Deportation*, 50 STAN.L.REV. 139 (1997); McWhirter & Sands, *A Primer for Defending a Criminal Immigration Case,* 8 GEO.IMMIGR.L.J. 23 (1994); Yale-Loehr & Valente, *Current Trends in Illegal Reentry Caselaw,* 3 BENDER'S IMMIGRATION BULLETIN 1133 (1998).

[8] *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219 (1998).

[9] INA § 276(b), 8 U.S.C. § 1326(b).

[10] *United States v. Pacheco-Zepeda,* 234 F.3d 411 (9th Cir. 2000); *United States v. Parga-Rosas*, 238 F.3d 1209 (9th Cir. 2001); *United States v. Camarillo-Tello*, 236 F.3d 1024, 1028 (9th Cir. 2001); *United States v. Arellano-Rivera*, 244 F.3d 1119 (9th Cir. 2001).

[11] *United States v. Bonilla-Montenegro*, 333 F.3d 1065 (9th Cir. June 9, 2003) (although presentence report (PSR) is not always sufficient evidence of a prior conviction, government burden may be satisfied if PSR specifies the exact statute under which the defendant was previously convicted; burden met in this case despite citation of the incorrect statute since PSR listed the offense by name and defendant admitted the conviction to the INS).

Under the federal sentence Guidelines, some terms, including "crime of violence" and "drug trafficking offense," are given different definitions than those applied in the aggravated felony context. See CRIMINAL DEFENSE OF IMMIGRANTS § 19.22. Judicial decisions defining these terms must be carefully examined to determine whether they reach differing results based on the different language of the parallel provisions in these different contexts. Some courts have *also* found that while a categorical analysis must be applied to a conviction to determine whether it is an aggravated felony for immigration purposes, a factual approach may be applied in some cases to decide this question in a sentencing context.[12]

The Guidelines apply to all prior offenses, regardless of the date of conviction: "For purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in INA § 101(a)(43), without regard to the date of conviction of the aggravated felony."[13]

There is a large body of case law on whether, and how, a noncitizen facing prosecution for illegal re-entry may collaterally attack the validity of the underlying criminal conviction and/or the underlying deportation.[14]

(B) *Aggravated Felonies.* Noncitizens with aggravated felony prior convictions are adversely affected in several ways. First, the aggravated felony prior conviction may constitute an element of the criminal offense with which the defendant is charged. Second, the aggravated felony prior may increase the statutory maximum prison sentence that may be imposed upon conviction, or

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[12] See, e.g., *United States v. Mendoza-Sanchez*, 456 F.3d 479 (5th Cir. Jul. 14, 2006) (Arkansas conviction of burglary, in violation of Ark.Code Ann. 5-39-201(a), constituted enumerated offense of "burglary of a dwelling," justifying application of sentencing guideline's 16-level crime of violence enhancement; although the record of conviction did not show burglary of a dwelling, defendant admitted to district court in illegal re-entry prosecution that offense was, in fact, burglary of a dwelling).

[13] Application Note 2. See also *United States v. Camacho-Ibarquen*, 404 F.3d 1283 (11th Cir. Mar. 30, 2005) (sentence enhancement proper for illegal re-entry following conviction of crime of violence, even where crime of violence occurred more than 10 years prior to illegal re-entry), *vacated and superseded on denial of rehearing*, 410 F.3d 1307 (11th Cir. June 2, 2005), c*ert. denied*, 126 S.Ct. 457 (Oct. 11, 2005).

[14] See, e.g., *United States v. Charleswell*, 456 F.3d 347 (3d Cir. Aug. 1, 2006) ("where an alien is misled to believe that he has no opportunity for judicial review, the lack of an affirmative notice of the right to an appeal may combine to constitute a denial of the meaningful opportunity for judicial review, satisfying both § 1326(d)(2) and *Mendoza-Lopez*); *United States v. Camacho-Lopez*, 450 F.3d 928 (9th Cir. May 30, 2006); *United States v. Lopez*, 445 F.3d 90 (2d Cir. Apr. 4, 2006).

trigger a sentence enhancement, i.e., an increase in the Base Offense Level, under the United States Sentencing Guidelines.[15] Third, certain federal convictions for illegal re-entry themselves constitute aggravated felonies.[16]

Any person who knowingly assists a noncitizen, who is ineligible for admission into the United States because of an aggravated felony conviction, to enter the United States is guilty of a federal felony punishable by a maximum of 10 years in federal prison, and a fine.[17] The existence of the aggravated felony conviction appears to constitute an element of this offense, which must therefore be alleged in the charging paper, and proven to the satisfaction of the finder of fact beyond a reasonable doubt.

[15] See CRIMINAL DEFENSE OF IMMIGRANTS § 19.22.
[16] INA § 101(a)(43)(O), 8 U.S.C. § 1101(a)(43)(O).
[17] INA § 277, 8 U.S.C. § 1327, as amended by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7346, 102 Stat. 4181, and as amended by the Immigration Act of 1990, Pub. L. No. 101-649, § 543, 104 Stat. 4978.

Chapter 7:
Immigration Procedure

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§ 7.1 Substantive Immigration Law

Immigration law applies to anyone (with very few exceptions)[1] who is not a citizen of the United States. Because of the complexity of the immigration laws,[2] criminal defense counsel must seek advice from an immigration attorney experienced in criminal matters every time defense counsel has a noncitizen client. See § 3.1.[3] Substantively, the most important concepts for criminal defense counsel looking to broaden his or her immigration knowledge are:

(1) The effect a criminal conviction will have upon a noncitizen will, in part, depend upon his or her immigrant "status." Various types of immigrant "status" include: U.S. Citizen, U.S. National, Lawful Permanent Resident, Immigrant, Non-Immigrant, Asylee, Refugee, Parolee, Out-of-Status and Undocumented. See § 2.3.[4]

(2) All noncitizens subject to "removal" proceedings before an immigration judge are charged with *either* inadmissibility *or* deportability. Under

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[1] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.4.
[2] *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977) ("The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges.").
[3] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 3.42, *et seq.*
[4] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.3(A).

current law, a noncitizen physically present within the United States may fall under either category. The category a noncitizen falls into will determine the grounds of removal, the types of relief available, and who bears the burden of proof.[5]

(3) Noncitizens lawfully "admitted" to the United States (i.e., allowed by the government to enter after being inspected) are subject to the grounds of *deportation*, and the DHS must prove that they are deportable by clear and convincing evidence.[6] If they have not been formally admitted, they are subject to the grounds of *inadmissibility*, and will generally bear the burden of showing they are admissible to the United States.[7]

(4) Most criminal activity also poses the threat of harming a noncitizen's "Good Moral Character," which may result in the noncitizen becoming ineligible (at least temporarily) for naturalization or relief from removal.[8]

(5) Even if the noncitizen has a *state* criminal conviction, whether that conviction renders the noncitizen removable from the United States depends mostly upon *federal* law, including the Immigration and Nationality Act, federal criminal laws referred to in that Act, and the decisions of the Board of Immigration Appeals and the federal circuit court with jurisdiction over the state in which the noncitizen is placed in removal proceedings. State law is mainly important for identifying the elements of the state criminal statute of conviction to compare with the relevant federal ground(s) of removal. See § 1.4.[9]

The majority of the federal immigration laws are contained in the Immigration and Nationality Act of 1952 (as amended) ("INA"), codified in Title 8, United States Code. The same provision has a different statute number (parallel citation) in both the INA and Title 8. E.g., INA §101(a)(43), 8 U.S.C. §1101(a)(43). Immigration attorneys are generally more familiar with the INA citations. This book cites both. The relevant regulations are contained in Title 8 of the Code of Federal Regulations. This title is also separated into two parallel parts, one controlling the

[5] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.5.
[6] See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 17.
[7] See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 18.
[8] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.6.
[9] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.7.

Department of Homeland Security, and the other controlling the Executive Office of Immigration Review (i.e., the immigration courts).

§ 7.2 -- Deportation

(A) *Who Is Subject to Deportation*. The grounds of deportation apply *only* to those noncitizens who have been "admitted"[10] to the United States after having been inspected at an official point of entry. People who were admitted with valid visas, but who then did something to overstay or invalidate those visas, are still subject to the grounds of deportability until they leave the United States. Undocumented immigrants, who entered *without* having been admitted, however, are subject to the grounds of *inadmissibility*, not deportability, even if they have been in the United States for many years and have never left.[11]

A person who has been admitted to the United States (even a Lawful Permanent Resident) may be inadmissible and prevented from re-entering if s/he leaves the country and attempts to return. A noncitizen "admitted" to the United States may also be considered deportable because s/he was inadmissible at that time, and therefore the admission was improper.[12]

For these reasons, criminal defense counsel should always consider both whether a criminal conviction could render the client inadmissible and deportable.

(B) *Grounds of Deportation*. While some crime-related grounds of deportation are triggered by a *conviction*,[13] others are triggered by *conduct*. See § 3.3(A).[14] In many cases, however, a carefully constructed criminal disposition may avoid establishing both conviction- and conduct-based grounds.

(1) *Aggravated Felony Convictions*. By far the most devastating ground of deportation is the "aggravated felony." The term "aggravated felony" refers to a group of about 40 criminal offenses Congress has chosen to receive especially harsh immigration treatment.[15] Any conviction that falls within this group is an

[10] INA § 101(a)(13), 8 U.S.C. § 1101(a)(13). See CRIMINAL DEFENSE OF IMMIGRANTS § 17.5.
[11] See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 18.
[12] INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A).
[13] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 17.3-17.22.
[14] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 17.23-17.29.
[15] INA § 101(a)(43), 8 U.S.C. § 1101(a)(43). See CRIMINAL DEFENSE OF IMMIGRANTS Appendix B for an alphabetical listing.

aggravated felony, regardless of the date of commission or conviction.[16] If it fits the definition, it constitutes an aggravated felony even if it is a *misdemeanor*.[17] Conviction of an aggravated felony triggers mandatory deportation. Once deported, the noncitizen will never be able lawfully to return to the United States to live. A comprehensive definition of this term is contained in a 1000-page practice manual. N. TOOBY & J. ROLLIN, AGGRAVATED FELONIES (2006). About half of these offenses are aggravated felonies only if a sentence of one year or more has been imposed (regardless of whether it is suspended). The other half are aggravated felonies, regardless of sentence. Therefore, one of the most important things criminal counsel can do – in those cases where sentence matters – is to obtain a sentence ordered of less than one year. See § 4.4(E)(3).

(2) *Controlled Substances Convictions*. With few exceptions, conviction for violation of any law related to a controlled substance will also render a noncitizen deportable.[18] In most cases, controlled substances offenses are *also* aggravated felonies[19] and crimes of moral turpitude. In many cases, no relief will be available to avoid removal on the basis of a controlled substances offense.[20]

(3) *Convictions of Crime(s) of Moral Turpitude*. Conviction of single crime of moral turpitude[21] triggers deportation if it was committed within five years of admission and is punishable by at least one year imprisonment.[22] Conviction of two crimes of moral turpitude after admission triggers deportation regardless of date or sentence.[23] The phrase "moral turpitude" is not defined by statute, and the immigration authorities have therefore taken a common-law, case by case, approach to defining this vague term. A practice manual summarizes and indexes all decisions defining what is and is not a crime of moral turpitude. See N. TOOBY, J. ROLLIN, & J. FOSTER, CRIMES OF MORAL TURPITUDE (2008).

[16] See CRIMINAL DEFENSE OF IMMIGRANTS § 19.21.
[17] The only exception is that a crime of violence aggravated felony, under 18 U.S.C. § 16(b), must be a felony to be an aggravated felony. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). See CRIMINAL DEFENSE OF IMMIGRANTS § 4.4(E)(7).
[18] See CRIMINAL DEFENSE OF IMMIGRANTS § 20.13.
[19] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 19.55-19.63.
[20] See CRIMINAL DEFENSE OF IMMIGRANTS § 20.16.
[21] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 20.2-20.24.
[22] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 20.32-20.37.
[23] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 20.38-20.41.

(4) *Firearms Convictions*. Certain firearms[24] convictions also trigger deportation, but not inadmissibility. See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 23.

(5) *Domestic Violence Convictions and TRO Violations*. Certain domestic violence convictions[25] (and a court finding of violation of certain domestic violence protection orders),[26] are also criminal grounds of deportation.

(6) *Other Grounds of Deportation*. There are in all a total of 52 different grounds of deportation. These are discussed, and ways to construct non-deportable convictions are suggested, in N. TOOBY & J. ROLLIN, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005). The most recent legislation provides that a federal conviction of failure to register as a sex offender triggers deportation.[27]

(C) *Burden of Proof*. Generally, the DHS bears the burden of proving, by clear and convincing evidence, that the noncitizen is subject to a ground of deportation.[28] The burden of showing whether a noncitizen has been convicted of an aggravated felony may shift if the noncitizen is applying for a form of relief from removal that is barred to aggravated felons.[29] In any case, if the client is or may be also subject to the grounds of *inadmissibility*, whether because of travel or application for adjustment of status, criminal defense counsel may additionally need to avoid a criminal disposition that triggers inadmissibility. See § 7.3; CRIMINAL DEFENSE OF IMMIGRANTS § 18.6.

§ 7.3 -- Inadmissibility

Any noncitizen can be found inadmissible. It does not matter whether the person has a green card or is undocumented (i.e., illegal). It does not matter how long the person has lived in the United States, or whether they have family here.

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[24] INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C). See CRIMINAL DEFENSE OF IMMIGRANTS §§ 23.8, *et seq*.
[25] INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i). See CRIMINAL DEFENSE OF IMMIGRANTS §§ 22.9, *et seq*.
[26] See § 4.5(B); INA § 237(a)(2)(E)(ii), 8 U.S.C. § 1227(a)(2)(E)(ii). See CRIMINAL DEFENSE OF IMMIGRANTS §§ 22.33, *et seq*.
[27] See CRIMINAL DEFENSE OF IMMIGRANTS § 17.19.
[28] See CRIMINAL DEFENSE OF IMMIGRANTS § 17.9.
[29] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.26.

The grounds of inadmissibility apply to any noncitizens who have not been "admitted"[30] to the United States after being inspected and allowed to enter at an official point of entry, or have not obtained some form of legal status after entering the United States without admission (e.g., through amnesty or a grant of asylum).[31] Undocumented immigrants are subject to the grounds of inadmissibility, even if they have been in the United States for 50 years and have never left. People who came into the United States with valid visas, but then overstayed their visas or otherwise did something to invalidate those visas, are subject to the grounds of *deportability* until they leave the United States.

Persons who have been admitted to the United States may later become inadmissible if they leave the country and attempt to return. A noncitizen "admitted" to the United States may also be considered deportable because s/he was inadmissible at the time of their admission, and therefore the admission was improper.[32]

For these reasons, criminal defense counsel should always consider whether a criminal conviction could render the client inadmissible, as well as deportable.

There is a list of 50 or more reasons a noncitizen will be found inadmissible to enter the United States, called "grounds of in admissibility." A checklist of these "crime-related" grounds of inadmissibility may be found as Appendix E to CRIMINAL DEFENSE OF IMMIGRANTS.

The major crime-related grounds of inadmissibility are as follows:

- Any violation of any law related to a controlled substance, no matter how minor, will render a noncitizen inadmissible.[33] In many cases, no relief will be available in immigration proceedings to avoid removal on the basis of a controlled substances offense.[34]

- Conviction of *any* two crimes, even arising from the same act, for which the aggregate sentence imposed is five years or more triggers inadmissibility.[35]

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[30] INA § 101(a)(13), 8 U.S.C. § 1101(a)(13).
[31] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 17.5-17.8.
[32] INA § 237(a)(1)(A), 8 U.S.C. § 1227(a)(1)(A).
[33] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 21.3-21.10.
[34] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 15.16, §§ 21.16.
[35] INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B). See CRIMINAL DEFENSE OF IMMIGRANTS § 18.15.

The nature of these crimes is irrelevant i.e., they do not have to be crimes of moral turpitude or controlled substances offenses.

- Conviction of even a single crime of moral turpitude will render a noncitizen inadmissible[36] unless it falls within the Petty Offense[37] or Youthful Offender[38] exceptions to inadmissibility. The Petty Offense exception applies to a first-time moral turpitude conviction, where the crime is punishable by less than one year, and the noncitizen is not sentenced to more than six months imprisonment. See CRIMINAL DEFENSE OF IMMIGRANTS § 20.29. The Youthful Offender exception applies to certain adult convictions for acts committed while the noncitizen was under 18 years old. See CRIMINAL DEFENSE OF IMMIGRANTS § 20.30. More rarely, a purely "political" offense will also be an exception to the CMT ground of inadmissibility.[39]

- In contrast to these conviction-based grounds, there are important conduct-based grounds of inadmissibility. See § 3.3(A)(2). If the government has "reason to believe" the noncitizen has ever been an illicit trafficker in a federally listed controlled substance, s/he is inadmissible.[40]

There is no aggravated felony ground of inadmissibility, but the conviction itself may trigger inadmissibility under another ground of inadmissibility (such as the controlled substances grounds), and as an aggravated felony conviction will bar most forms of relief from removal.[41] Likewise there are no firearms offense[42] or domestic violence offense[43] grounds of inadmissibility. [44]

Generally, the noncitizen bears the burden of proving s/he is *not* subject to a ground of inadmissibility. This may not be true in the case of a returning lawful permanent resident. In any case, if the client is or may be subject to the grounds of inadmissibility, criminal defense counsel needs to be especially careful in

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[36] INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I). See CRIMINAL DEFENSE OF IMMIGRANTS § 20.26.
[37] INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II).
[38] INA § 212(a)(2)(A)(ii)(I), 8 U.S.C. § 1182(a)(2)(A)(ii)(I).
[39] See CRIMINAL DEFENSE OF IMMIGRANTS § 20.31.
[40] INA § 212(a)(2)(C)(i), 8 U.S.C. § 1182(a)(2)(C)(i).
[41] See CRIMINAL DEFENSE OF IMMIGRANTS § 19.97.
[42] See CRIMINAL DEFENSE OF IMMIGRANTS § 23.5.
[43] See CRIMINAL DEFENSE OF IMMIGRANTS § 22.5.
[44] INA § 212(a)(2)(A)(i)(I), 8 U.S.C. § 1182(a)(2)(A)(i)(I) (crime of moral turpitude "(other than a purely political offense)").

crafting a criminal disposition that will not trigger inadmissibility. See CRIMINAL DEFENSE OF IMMIGRANTS § 18.6.

There are many *conduct*-based grounds of inadmissibility, which may trigger a ground of inadmissibility *regardless* of the criminal disposition. See § 3.3(A)(1); CRIMINAL DEFENSE OF IMMIGRANTS §§ 18.16-18.27. In many cases, however, a carefully constructed criminal disposition may be able to avoid some of these conduct-based grounds.

§ 7.4 -- Relief in Immigration Court

(A) *In General.* In any given case, it may be impossible, or nearly so, to obtain a criminal disposition that will guarantee that a noncitizen client will not be subject to removal *at all*. In many cases, the goal in criminal court will be to prevent the conviction from barring relief in immigration court. Then the client can be ordered removed, but the immigration court can still order that s/he *not* be removed by granting some form of relief from removal. The requirements for the various forms of relief can be extremely complex, and criminal defense counsel will need to work with immigration counsel to determine the noncitizen's immigration status and potential eligibility for (and chances of receiving) some type of relief.[45] An aggravated felony is generally a complete bar to relief in immigration court, although there are some exceptions.[46] A noncitizen subject to *inadmissibility* will be barred from relief for controlled substances convictions *except* a single conviction for simple possession of less than 30 grams of marijuana.

(B) *Uncharged Convictions*. At least one court has held that an immigration judge may deny relief based upon a criminal conviction that was not charged as a ground of removal in the Notice to Appear.[47] This means that both

[45] Immigration counsel should also be aware of potential changes in the laws or regulations, since such changes may suddenly bar a noncitizen who was previously eligible, even where the application has already been made. See, e.g., *Matter of Pineda*, 21 I. & N. Dec. 1017 (BIA 1997) (applying amendment to INA § 212(h) to disqualify applicant who was eligible when request was filed); *Matter of Yeung*, 21 I. & N. Dec. 610 (BIA 1996)(applying amendment to INA § 212(h) waiver to waiver applicant); *Matter of Soriano*, 21 I. & N. Dec. 516 (BIA 1996) (applying amendment to INA § 212(c) to applicant who was eligible when he first applied).

[46] See, e.g., CRIMINAL DEFENSE OF IMMIGRANTS §§ 24.7, 24.28, 24.29, 24.31.

[47] *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063 (9th Cir. Jul. 31, 2006) (criminal conviction not charged in the NTA could be used to find that a noncitizen was ineligible for relief), following *Brown v. Ashcroft*, 360 F.3d 346, 353 (2d Cir. 2004) and *Aalund v. Marshall*, 461 F.2d 710, 712-713 (5th Cir. 1972).

immigration and criminal counsel need to be aware of the potential immigration effects of *every* conviction in a noncitizen client's record, not just the convictions that have been charged by the DHS as grounds of removal.

(C) *Discretionary Decisions.* Most forms of relief from removal are discretionary. In deciding whether to grant relief as a matter of discretion, certain information regarding a respondent's criminal history can be examined by an Immigration Judge even if it *cannot* be considered when evaluating the fact or nature of a conviction.[48] In discretionary decision making, the Immigration Judge is allowed to consider a respondent's criminal history even when that history does not form the basis for the charge of removal.[49] In determining whether relief is merited as a matter of discretion, the Immigration Judge cannot consider arrests not resulting in a conviction, and charges that have been dismissed, other than those dismissed as a result of a diversion program.[50]

§ 7.5 Removal Proceedings

Criminal defense counsel will find it useful (especially when engaging in post-conviction work) to have a basic understanding of (1) when and how their client may come in contact with the immigration authorities, and (2) the process of removal.

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[48] *Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. Sept. 1, 2006) (New York adjudication as a "Youthful Offender" under N.Y.Crim. Proc. Law §§ 720.10-720.35, may be used in determining whether noncitizen should be granted adjustment of status as a matter of discretion, even though the adjudication is not a "conviction" for removability purposes); *Tokatly v. Ashcroft*, 371 F.3d 613, 621 (9th Cir. 2004) ("While 'it is proper [for the Board] to look to probative evidence outside the record of conviction in inquiring as to the circumstances surrounding the commission of [a] crime in order to determine whether a favorable exercise of *discretion* is warranted,' 'the Immigration Judge and this Board may *not* go beyond the record of conviction to determine the guilt or innocence of the alien.'"), *citing Matter of Mendez-Moralez,* 21 I. & N. Dec. 296, 303 n.1 (BIA 1996) (emphasis added).

[49] *Matter of Gonzalez*, 16 I. & N. Dec. 134 (BIA 1977) (immigration judge could consider the conviction in reaching a discretionary decision, even though a JRAD had been granted as to that conviction, and even though the charge of deportability was based on an overstay, rather than the CMT conviction itself).

[50] *Billeke-Tolosa v. Ashcroft*, 385 F.3d. 708 (6th Cir. Sept. 30, 2004) (reversing BIA's failure to follow its case law on significance of dismissed charges in discretionary decision); *Sierra-Reyes v. INS*, 585 F.2d 762 (5th Cir. 1978) (although immigration judge acted improperly in considering police reports implicating noncitizen in criminal activity as "adverse factors" bearing on discretionary relief from deportation, reversal was not required in view of other evidence of record); *Matter of Catalina Arreguin de Rodriguez*, 21 I. & N. Dec. 38 (BIA 1995).

(A) If counsel can understand how their client may come in contact with the immigration authorities, counsel can understand how their client can *avoid* such contact (and likely immigration detention), at least until the client can obtain an immigration-safe disposition in the criminal case. For example, noncitizens are often found by immigration authorities while in criminal custody, and an immigration hold is placed, meaning that they will automatically move directly into immigration detention upon release, instead of being released from criminal custody into freedom.

In general, the immigration authorities do not search out removable noncitizens in the community.[51] Rather, they wait for these noncitizens to come to them. The noncitizen may go into the DHS offices for an interview or to obtain a renewed green card, for example, or try to pass through an immigration checkpoint, airport, or border.

(B) Counsel who has basic knowledge of the removal process can estimate how much time they have to assist their clients in obtaining an immigration-safe alternative disposition. The earlier in the removal process noncitizens can start a post-conviction attack, the better chance they have of succeeding in criminal court before they are physically removed from the United States, after which it is extremely difficult (if not impossible) for them to return legally to the United States.

Once a noncitizen is served with a Notice to Appear before an Immigration Judge, the noncitizen is running against a clock. Proceedings before an immigration judge may run anywhere from a week to (rarely) a few years, depending upon whether the client is in custody, the circumstances of the case, the court's caseload, and the actions of immigration counsel. Cases in which the noncitizen is detained by the DHS are processed more quickly than those in which the noncitizen has been released on immigration bond.

If a noncitizen reserves appeal, after receiving a removal order, s/he has 30 days within which to file a notice of appeal to the Board of Immigration Appeals. Once at the BIA, the case can again take between six months and several years. If the BIA appeal comes to an end, a petition for review can be filed in the federal court of appeals, and ultimately the case can be taken to the United States Supreme Court.

[51] This is beginning to change, starting with sex offenders, but the government may move on to drug traffickers and other high priority cases if greater resources become available.

With Immigration Counsel presenting non-frivolous arguments why a noncitizen is not removable and/or is eligible for relief, a common timeline may look like this:

Immigration Court: 5 months.
Board of Immigration Appeals: 7 months.
U.S. Court of Appeals: 1 year.
Total: 2 years.

The deadline for filing a motion to reopen in the BIA is three months after the BIA decision. After this point, the DHS must be persuaded to file a joint motion or the BIA to reopen *sua sponte*. The earlier in this process a post-conviction attack is successful, the easier it is for the noncitizen to submit proof of that success and receive a judicial response. It is also better for a noncitizen subject to mandatory immigration detention to avoid spending roughly two years in custody before succeeding in the post-conviction work.

§ 7.6 -- Detention

(A) *In General*. Immigration detention is analogous to criminal detention.[52] The person detained may post cash or bond[53] in the amount set by the agency or the court and obtain release just as with a criminal bond, unless the noncitizen is subject to mandatory detention. A noncitizen may be able to work with criminal defense and immigration counsel to avoid a conviction that would trigger mandatory detention. Criminal lawyers should attempt to obtain criminal dispositions that do not trigger mandatory detention, while immigration counsel can argue in immigration court that a given disposition does not do so.

Whether a noncitizen will be subject to detention and whether s/he may be released on bond will depend on the noncitizen's immigration status and the ground(s) of removal.[54]

Once a client has been released from criminal custody, into immigration custody, s/he may be transferred to a close or distant immigration detention

[52] ICE's Detention Operations Manual may be viewed online at http://www.ice.gov/partners/dro/opsmanual/index.htm
[53] Minimum bond is set at $1,500. INA § 236(a)(2)(A), 8 U.S.C. § 1226(a)(2)(A).
[54] INA §§ 235, 236, 236A, 8 U.S.C. §§ 1225, 1226, 1226A.

facility. The DHS decides where a noncitizen will be detained. In some cases a noncitizen arrested by the DHS in California, for example, may be transferred to a detention center in Louisiana.[55] This transfer means that the noncitizen will be subject to the harsher interpretation of the immigration laws that prevails in the Fifth Circuit, rather than the generally more lenient rules of the Ninth Circuit.[56] See § 6.2(B)(1) for a discussion of how immigration law differs from circuit to circuit. It is extremely difficult to convince a court to intervene in this to transfer a client.

The DHS may also keep the client in local criminal facilities under contract with the DHS. Counsel may wish to use ongoing criminal or post-conviction proceedings to encourage the DHS to do so. See CRIMINAL DEFENSE OF IMMIGRANTS § 6.48.

(B) *Mandatory Detention*. Mandatory immigration detention can have a devastating effect on a client's life and the life of his or her innocent family. Because immigration custody is so difficult to tolerate, many immigrants who are not deportable at all are erroneously deported because they cannot stand the harshness of the immigration detention during the months or years that may elapse before the immigration or federal courts eventually exonerate them. It is therefore of the greatest importance for criminal counsel to avoid a disposition in the criminal case that triggers mandatory detention. These include:

Many criminal convictions do not fall into any of the grounds that trigger inadmissibility or deportability.[57] In addition, a considerable number of dispositions that *do* fall within one or another category triggering immigration problems still *do not* trigger mandatory detention, including:

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[55] In *Committee of Central American Refugees v. INS*, 795 F.2d 1434, 1439 (9th Cir. 1986), the court refused to restrain transfer of unrepresented noncitizens to remote areas where their access to counsel may be limited. The decision might be different if such transfer affected due process rights by "impairing an established-ongoing attorney-client relationship." Where a person is transferred to a remote location, the immigration attorney can petition for a change of venue to a closer urban center, especially if the client makes bond, in which case venue is routinely changed. 8 C.F.R. § 1003.20.

[56] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.7.

[57] See N. TOOBY & J. ROLLIN, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005).

(1) *Domestic Violence* convictions or court findings that a protective order has been violated do not trigger mandatory detention (unless they constitute CMTs, in which case they must be analyzed as such).

(2) *High Speed Border Chase* convictions, under 18 U.S.C. § 758, do not trigger mandatory detention.

(3) A single *Crime Involving Moral Turpitude* conviction or admission does not trigger mandatory detention for deportable *or* inadmissible noncitizens if it falls within the Petty Offense, Youthful Offender or Political Offense Exceptions to inadmissibility.

(4) Conviction of a single *Crime of Moral Turpitude* does not trigger mandatory detention for noncitizens subject to *deportation* where (a) the crime was not committed within five years of admission, or (b) a sentence of less than one year was *imposed*.[58]

(5) *Controlled Substance* convictions or admissions do not trigger mandatory detention if one of the following conditions applies:

(a) The drug is not listed on the federal schedules.[59]

(b) The record of conviction does not identify the particular drug.[60]

(c) In the Ninth Circuit, no mandatory detention is triggered by a first-offense conviction of simple possession, possession of paraphernalia, and perhaps other offenses that are (i) more minor than simple possession, and (ii) not forbidden under federal law, such as being under the influence, visiting a place where drugs are used, and driving under the influence, where state or foreign rehabilitative relief has been granted under circumstances in which the defendant would have been eligible for relief under the Federal First Offender Act, 18 U.S.C. § 3607, if the charges had been brought in federal court. See § 5.1(D)(2); CRIMINAL DEFENSE OF IMMIGRANTS § 11.20.

[58] Note that the CMT ground of deportability, INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i), now only requires that the *maximum possible* sentence be one year or more.
[59] INA §§ 212(a)(2)(A)(i)(II), 237(a)(2)(B)(i), 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i).
[60] *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965).

(6) An *Aggravated Felony* conviction does not trigger mandatory detention if the conviction is a foreign conviction, and the term of imprisonment was completed more than 15 years ago.[61]

(7) A federal conviction of failing to register as a sex offender, under 18 U.S.C. § 2250, constitutes a new ground of deportation,[62] but does not trigger mandatory detention, assuming it is not considered to be a CMT. (If it is, it must be analyzed as such.)[63]

(8) A conviction does not trigger mandatory detention if the defendant was released from criminal custody prior to October 9, 1998.[64] The government, however, detains many individuals released before October 9, 1998, but who later returned to the United States from a trip abroad. Such detentions may be challenged on constitutional Equal Protection grounds.

(9) To trigger mandatory detention, the release from custody must stem from a criminal matter that triggers mandatory detention.[65]

(10) Despite a BIA ruling to the contrary, the correct rule is that mandatory detention for noncitizens only ought to apply if the person is taken into DHS custody *immediately upon release* from criminal incarceration (on or after October 9, 1998), and not if s/he is arrested by the DHS at any time after the release. A federal district court in Washington state recently upheld this interpretation.[66]

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[61] INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (first sentence following subparagraph [U]).
[62] INA § 237(a)(2)(A)(v), added by Adam Walsh Child Protection and Safety Act of 2006, HR 4472, PL 109-248, § 401 (July 27, 2006).
[63] INA § 236(c)(1), 8 U.S.C. § 1226(c)(1).
[64] *Matter of West*, 22 I. & N. Dec. 1405 (BIA 2000).
[65] This is in accord with the language in INA § 236(c) and was the situation in the published INS cases interpreting INA § 236(c). See *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001); *Matter of West*, *supra*; *Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999).
[66] In *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001), a divided BIA concluded that INA § 236(c) applied to individuals who were not immediately taken into INS custody upon their release from criminal incarceration. The plain language of the statute indicates that only individuals who are taken into custody immediately upon their release from criminal incarceration fall within INA § 236(c). Thus, individuals who were not taken into custody immediately upon release should consider challenging the BIA's interpretation of INA § 236(c) in a habeas corpus action. A federal district court in Washington followed this reasoning to order a bond hearing, on petition for habeas corpus. See *Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221 (D. Wash. 2004). See also the dissent in *Matter of Rojas*, 23 I. & N. Dec. 117 (BIA 2001).

(11) Additionally, post-conviction relief, such as executive pardons, and vacating the conviction on a basis of legal validity, will work to avoid mandatory detention for most, if not all, types of criminal misconduct. See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 11.[67] Judicial Recommendations Against Deportation, granted by the sentencing judge prior to November 29, 1990, also avoid mandatory detention on the basis of CMT and aggravated felony convictions. See CRIMINAL DEFENSE OF IMMIGRANTS § 11.21.

(C) *Arriving Aliens*. Noncitizens subject to inadmissibility (including those who entered the U.S. without inspection) are subject to the general detention provisions, and may or may not be subject to mandatory detention under INA § 236(c).[68]

§ 7.7 -- Hearing

(A) *Master Calendar Hearing*. The first hearing before an immigration judge will generally be a Master Calendar hearing, at which the Immigration Judge ensures that the respondent has received and understands the NTA, determines whether an interpreter is necessary,[69] whether the respondent has or wishes time to find an attorney, and sets briefing schedules.

The Immigration Judge may also request that the respondent admit or deny the allegations in the NTA and ask whether the noncitizen will concede or contest the charges of removal.[70] There will often be more than one master calendar hearing in any given case.[71] During a master calendar hearing there may be more than one respondent in the court, and the judge may address all respondents as a group. This practice is more common in DHS detention centers and can lead to due process violations that the more careful federal courts are more willing to find.

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[67] This includes drug and firearms convictions, aggravated felony convictions, and other convictions, such as espionage, sabotage, treason, sedition, threats against the president or successors, selective service violations, trading with the enemy violations, violations of travel restrictions, or importing a noncitizen for immoral purposes.
[68] INA § 236(c), 8 U.S.C. § 1226(c).
[69] 8 C.F.R. § 1003.22. See CRIMINAL DEFENSE OF IMMIGRANTS Chapter 4.
[70] 8 C.F.R. § 1003.21.
[71] The immigration judge may grant a motion for continuance for good cause shown. 8 C.F.R. § 1003.29.

Immigration hearings may be conducted by teleconference or videoconference.[72] The presence of the respondent may be waived if counsel is present.[73] The proceedings are recorded.[74] A respondent may stipulate to an order of removal, rather than participate in removal proceedings.[75]

(B) *Individual or Merits Hearing*. A respondent may be ordered deported during a master calendar hearing. Generally, however, after one or more master calendar hearings, and after the briefs and applications for relief have been filed with the court, an Individual or merits hearing will be scheduled to allow the parties to present witnesses and evidence in the case.[76]

The immigration judge may then issue an oral decision from the bench, schedule a later hearing at which to issue an oral decision, or reserve the decision to be issued in writing at some later date or by mail.[77]

(C) In Absentia *Hearing*. A noncitizen respondent may be ordered removed *in absentia* if the DHS establishes by "clear, unequivocal, and convincing evidence" that the noncitizen is removable and that written notice of the time and place of the proceedings and consequences of failure to appear were provided to the respondent or respondent's counsel of record.[78] In many cases, after a respondent fails to appear, the case will be set for another date where the Immigration Judge will issue final decisions in numerous *in absentia* cases at a single sitting. A respondent ordered removed *in absentia* is ineligible for most forms of relief for a period of 10 years.[79] The respondent can file a motion to reopen proceedings upon showing lack of notice of the hearing or exceptional circumstances for failure to appear.[80]

(D) *Burdens of Proof*. Since immigration proceedings are considered civil, rather than criminal, and are administrative,[81] the criminal rules on burdens of proof and evidence do not apply. Rather, who bears the burden of proof, and the types of

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[72] 8 C.F.R. § 1003.25(c).
[73] 8 C.F.R. § 1003.25(a).
[74] 8 C.F.R. § 1003.36.
[75] 8 C.F.R. § 1003.25(b).
[76] See 8 C.F.R. §§ 1003.34-1003.35.
[77] 8 C.F.R. § 1003.37.
[78] 8 C.F.R. §§ 1003.27(c), (d).
[79] INA § 240(b)(7), 8 U.S.C. § 1229a(b)(7).
[80] 8 C.F.R. § 1003.23(b)(4)(ii). See, e.g., *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. March 30, 2005) (180-day time limit for filing a motion to reopen removal proceeding following an order entered *in absentia* is in nature of statute of limitations, so as to be subject to equitable tolling).
[81] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.10.

evidence that may be submitted are determined by the INA, the regulations, and case law. Who bears the burden of proof generally turns on whether the noncitizen is charged with grounds of inadmissibility[82] or deportability.[83] However, the DHS always bears the initial burden of showing that the respondent is not a citizen or national of the United States and may be subject to removal as a matter of jurisdiction.[84] The respondent bears the burden of showing that s/he is eligible for relief from removal both statutorily and as a matter of discretion.[85]

(1) *Deportability.* Once alienage is established, the respondent bears an initial burden to show, by clear and convincing evidence, that s/he is lawfully present in the United States "pursuant to a prior admission."[86] If this burden is met, the INA then requires the DHS to show, by clear and convincing evidence, that the respondent is subject to a ground of deportation.[87] Prior case law required the immigration authorities to show deportability by "clear, unequivocal and convincing evidence."[88] This standard is still widely cited in judicial decisions.[89]

(2) *Inadmissibility.* Once alienage is established, the ultimate burden of proof generally lies with the noncitizen respondent to show that s/he "is clearly and beyond doubt entitled to be admitted and is not inadmissible."[90] Somewhat different rules apply to lawful permanent residents who are returning from a trip abroad,[91] and to those charged with inadmissibility because the DHS has "reason to believe"[92] the noncitizen (or a family member), is or has engaged in certain activities, such as drug trafficking,[93] money laundering,[94] and trafficking in persons.[95]

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[82] See CRIMINAL DEFENSE OF IMMIGRANTS § 18.6-18.7.
[83] See CRIMINAL DEFENSE OF IMMIGRANTS § 17.9.
[84] *Murphy v. INS*, 54 F.3d 605, 608-609 (9th Cir. 1995). See also *Matter of Guevara*, 20 I. & N. Dec. 238 (BIA 1991) (respondent's refusal to make any statement regarding alienage is, alone, insufficient to meet the Government's burden of showing alienage by clear, unequivocal and convincing evidence; burden does not shift to respondent).
[85] INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A).
[86] INA § 240(c)(2)(B), 8 U.S.C. § 1229a(c)(2)(B).
[87] INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A).
[88] *Woodby v. INS*, 385 U.S. 276 (1966).
[89] See, e.g., *Pickering v. Gonzales*, 465 F.3d 263, 268 (6th Cir. Oct. 4, 2006).
[90] INA § 240(c)(2)(A), 8 U.S.C. § 1229a(c)(2)(A).
[91] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 17.6, 18.7.
[92] See CRIMINAL DEFENSE OF IMMIGRANTS § 21.6.
[93] See CRIMINAL DEFENSE OF IMMIGRANTS § 21.6.
[94] See CRIMINAL DEFENSE OF IMMIGRANTS § 18.23.
[95] See CRIMINAL DEFENSE OF IMMIGRANTS § 18.25.

(3) *Relief.* Once removability is established, the noncitizen bears the burden of showing s/he is eligible for relief from removal, both statutorily and as a matter of discretion.[96] Three circuits have found that relief may be denied on the basis of criminal convictions or acts that were *not* charged as triggering grounds of removal in the Notice to Appear.[97] Because the determination of whether an offense triggers removal, applying divisible statute analysis,[98] may turn upon who bears the burden of proof, it is possible that a court could find a conviction not to be an aggravated felony (for example) for purposes of proving deportability, but find that it *is* an aggravated felony for purposes of barring relief from removal.

(E) *Categorical Analysis*. The categorical analysis, discussed more fully in § 3.6; CRIMINAL DEFENSE OF IMMIGRANTS Chapter 16, including divisible statute analysis and minimum conduct analysis, is used to determine whether a *conviction* will trigger a conviction based ground of removal.

(1) *Conviction-Based Grounds*. While categorical analysis[99] and divisible statute analysis[100] apply regardless of whether a noncitizen is charged with a ground of inadmissibility or deportability, the *result* may differ because the DHS bears the burden of proof in the deportation context, while the noncitizen bears the burden in the inadmissibility context.

Example: A noncitizen is convicted of burglary with intent to commit theft *or* any felony, and the issue is whether this offense is a crime of moral turpitude. In deportation proceedings, the noncitizen wins because the government cannot show (a) that the conviction was for burglary with intent to commit theft vs. any other felony, and (b) that the term "any felony" includes only CMT offenses. See Appendix (G)(1). In inadmissibility proceedings, the noncitizen loses because s/he cannot prove that the conviction was *not* for theft, as opposed to any felony.

(2) *Minimum-Conduct Analysis*. In the burglary example above, the noncitizen in inadmissibility proceedings was inadmissible because s/he could not prove s/he had not intended to commit theft. However, s/he was *not* inadmissible because the "any felony" language included offenses that could be considered crimes of moral turpitude. Even in inadmissibility proceedings, the noncitizen has

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[96] INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A).
[97] *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063 (9th Cir. Apr. 4, 2006); *Brown v. Ashcroft*, 360 F.3d 346 (2d Cir. 2004); *Aalund v. Marchall*, 461 F.2d 710 (5th Cir. 1972).
[98] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.9-16.14.
[99] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.3-16.8.
[100] See CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.9-16.14.

the benefit of the *minimum conduct* rule, which requires that where a statute cannot be further divided,[101] an immigration court must look to the minimum conduct proscribed under the statute to determine whether the noncitizen has been convicted of a crime that triggers a ground of removal.[102] Because the minimum conduct punishable within the phrase "any felony" is not necessarily a CMT, the immigration court cannot lawfully hold that the noncitizen is inadmissible for conviction of a CMT.

(3) *Conduct-Based Grounds*. Because there is generally no statute of conviction involved where a noncitizen is charged under a conduct based ground of inadmissibility based on an admission by the noncitizen,[103] "reason to believe" on the part of the DHS,[104] or some other test, the categorical and divisible statute analysis does not apply. Counsel should examine what standards are required under the specific conduct-based ground to determine what is necessary to prove or disprove the applicability of that ground to the client.

(F) *Evidence.*[105] Because immigration courts are not criminal courts, Article III courts under the judiciary, or even subject to the Administrative Procedures Act,[106] the rules of evidence are much less developed.[107] "Any oral or written statement which is material and relevant to any issue in the case previously made by the respondent or any other person during any investigation, examination, hearing or trial" may be submitted.[108] Any hearsay evidence is admissible if it is probative and its admission would not be fundamentally unfair.[109]

Although a respondent may be charged with a ground of inadmissibility, the DHS must provide access to the respondent's "visa or other entry document, if any, and any other records and documents, not considered by the Attorney General

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[101] See CRIMINAL DEFENSE OF IMMIGRANTS § 16.14.
[102] See CRIMINAL DEFENSE OF IMMIGRANTS § 16.8
[103] See CRIMINAL DEFENSE OF IMMIGRANTS § 18.8.
[104] See CRIMINAL DEFENSE OF IMMIGRANTS § 21.6.
[105] For more information see Ira J. Kurzban, IMMIGRATION LAW SOURCEBOOK, 291-299 (10th ed. 2006).
[106] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.10.
[107] See *Hassan v. Gonzalez*, 403 F.3d 429, 435 (6th Cir. 2005).
[108] 8 C.F.R. § 1240.7(a). See also *Matter of Wadud*, 19 I. & N. Dec. 182 (BIA 1984).
[109] See, e.g., *Rojas-Garcia v. Ashcroft*, 339 F.3d 814 (9th Cir. 2003) (allowing hearsay evidence); *Renteria v. INA*, 322 F.3d 804 (5th Cir. 2002) (allowing hearsay evidence); *Ezeagwuna v. Ashcroft*, 325 F.3d 396 (3d Cir. 2003) (double and triple hearsay not admissible); *Murphy v. INS*, 54 F.3d 605 (9th Cir. 1995) (double hearsay not sufficient to meet government burden).

to be confidential, pertaining to the [respondent's] admission or presence in the United States."[110]

"No decision on deportability shall be valid unless it is based upon reasonable, substantial and probative evidence."[111] In proving the *existence*[112] of a criminal conviction the DHS may submit any of the following (original or certified) documents:

- Official record of judgment and conviction;
- Official record of plea, verdict, and sentence;
- Docket entry from court records indicating the existence of a conviction;
- Official minutes of court proceedings or a transcript of a court hearing in which the court takes notice of the existence of the conviction;
- An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a state official associated with the state's repository of criminal justice records, that indicates the charge or the section of the law violated, the disposition of the case, the existence and date of conviction, and the sentence;
- Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of the conviction; or
- Any document or record attesting to the conviction that is maintained by an official of a state or federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.[113]

The regulations[114] include a similar list, but also state that "any other evidence that reasonably indicates the existence of a criminal conviction may be admissible as evidence thereof."[115] Whether the *nature* of the conviction triggers a ground of removal must be determined by examination of the record of conviction, which

[110] INA § 240(c)(2), 8 U.S.C. § 1229(c)(2).
[111] INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A).
[112] As opposed to the nature of the conviction for purposes of determining whether a given conviction falls within a ground of removal. See CRIMINAL DEFENSE OF IMMIGRANTS § 16.16.
[113] INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B). This may include certified electronic records. INA § 240(c)(3)(C), 8 U.S.C. § 1229(c)(3)(C).
[114] 8 C.F.R. § 1003.41.
[115] 8 C.F.R. § 1003.41(d).

includes some, but not all, of the documents used to prove the *existence* of a conviction.[116]

§ 7.8 -- Appeal

After a decision is issued by the Immigration Judge, the "losing" party is given the choice whether to waive or reserve appeal. If appeal is waived, the decision becomes final.[117] The waiver must be knowing and intelligent.[118] If appeal is reserved, the party has 30 days from the date the oral decision is read, or the written decision is mailed, in which to file a notice of appeal to the Board of Immigration Appeals.[119] The requirements for a notice of appeal include a description of the factual and legal basis for the appeal.[120] The record of proceedings of the immigration judge will be forwarded to the BIA, and the immigration proceedings transcribed.[121] Briefing schedules are controlled by 8 C.F.R. § 1003(c). Counsel may refer to a practice manual for more information on procedural and filing requirements.[122]

An appeal to the BIA may take six months to a year or more. Appeals in cases in which the noncitizen is in immigration detention are given priority. The BIA is plagued with a huge backlog[123] and has significantly revised its case-review process.[124] Known as "streamlining," under this new process, decisions that

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[116] See § 3.6; CRIMINAL DEFENSE OF IMMIGRANTS §§ 16.15-16.33.
[117] 8 C.F.R. § 1003.39.
[118] See, e.g., *Matter of Rodriguez-Diaz*, 20 I. & N. Dec. 1320 (BIA 2000) (unrepresented respondent must understand that waiver makes appeal impossible); *Biwot v. Gonzales*, 403 F.3d 1094 (9th Cir. 2005); *United States v. Zarate-Martinez*, 133 F.3d 1194 (9th Cir. 1988), *cert. denied*, 525 U.S. 849 (1998) (waiver must be "considered and intelligent"); *Matter of Patino*, 23 I. & N. Dec. 74 (BIA 2001).
[119] 8 C.F.R. §§ 1003.38(b), 1240.15. See *Matter of Liadov*, 23 I. & N. Dec. 990 (BIA Sept. 12, 2006) (BIA lacks authority to extend 30-day time limit for filing appeal); *Huerta v. Gonzales*, 443 F.3d 753 (10th Cir. Apr. 11, 2006) (thirty-day deadline to appeal IJ decision to the BIA is not jurisdictional; if BIA grants a late appeal neither the BIA nor a reviewing court of appeals is barred by an untimely filing of a notice to appeal to the BIA).
[120] 8 C.F.R. § 1003.3(a)-(b); see *Esponda v. U.S. Att'y Gen.*, 453 F.3d 1319 (11th Cir. Jun. 28, 2006) (BIA abused its discretion in dismissing appeal based on failure to submit brief without first determining whether the issues were adequately stated in the notice to appeal; whether BIA was correct in summarily dismissing an appeal where no brief was filed is reviewed for abuse of discretion).
[121] 8 C.F.R. § 1003.5.
[122] http://www.usdoj.gov/eoir/vll/qapracmanual/apptmtn4.htm (last visited 12/4/06).
[123] See, e.g., *Meghani v. INS*, 236 F.3d 843 (7th Cir. 1993) (7 years to issue decision).
[124] 8 C.F.R. § 1003.1(e).

formerly went before a three-judge panel are now reviewed by a single judge,[125] and the decision may merely sustain the findings of the immigration judge in a one-sentence decision.[126] Cases may be transferred from a single judge to a three-judge panel of judges in specified circumstances, such as when the case presents the need to resolve a split among immigration judges or to publish a precedential decision.[127] A number of cases have successfully challenged the new streamlined procedures as violating due process.[128]

The BIA reviews all legal issues *de novo*, including discretionary decisions, but will not generally engage in fact-finding and is not supposed to dispute the facts found by the immigration judge, unless found to be clearly erroneous.[129] Oral argument is possible, [130] but rare.

The BIA may designate a decision as precedent, meaning that the decision is binding on all immigration judges nationwide *unless* the circuit court in which the IJ sits has addressed the same issue and decided it differently than the BIA.[131]

After a decision by the BIA, the parties can either accept the decision as final, the BIA can refer the case to the Attorney General for review,[132] or one of the parties may file an appeal (called a petition for review) in the federal circuit court which has jurisdiction over the locale where the immigration judge sits. See § 7.9.[133] A motion to reopen or reconsider may also be filed before the BIA within 90 days after the BIA decision. See § 7.10.[134]

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[125] *Ibid.*
[126] 8 C.F.R. § 1003.1(e)(4).
[127] 8 C.F.R. § 1003.1(e)(6); *Purveegiin v. Gonzales*, 448 F.3d 684 (3d Cir. Jun. 1, 2006) (court has jurisdiction to review question of whether BIA member responsible for an appeal erred in not referring the appeal to a three-member BIA panel). But see *Guyadin v. Gonzales*, 449 F.3d 465 (2d Cir. May 30, 2006) (court lacks jurisdiction to review question of whether BIA member responsible for an appeal erred in not referring the appeal to a three-member BIA panel).
[128] See, e.g., *Denko v. INS*, 351 F.3d 717 (6th Cir. Dec. 8, 2003); *Falcon Carriche v. Ashcroft*, 350 F.3d 845 (9th Cir. 2003); *Dominguez v. Ashcroft*, 336 F.3d 678, 680 (8th Cir. 2003).
[129] 8 C.F.R. § 1003.1(d)(3).
[130] 8 C.F.R. § 1003.1(e)(7).
[131] 8 C.F.R. § 1003.1(g). *Matter of ELH*, 23 I. & N. Dec. 814 (BIA 2005) (BIA precedent decision remains controlling unless the Attorney General, Congress, or a federal court modifies or overrules a decision). See also 8 C.F.R. § 1003.1(d)(7) (finality).
[132] 8 C.F.R. § 1003.1(h).
[133] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.36.
[134] 8 C.F.R. § 1003.2.

§ 7.9 -- Petition for Review in Circuit Court

The Immigration and Nationality Act allows federal review of final removal orders by the United States Circuit Court of Appeals with territorial jurisdiction over the Immigration Judge who issued the removal order.[135] A petition for review must be filed "not later than 30 days after the date of the final order of removal."[136] Failure to file a timely petition for review is a jurisdictional bar to review.[137] Venue lies in the circuit in which the immigration court proceedings were held.[138] A noncitizen filing a petition for review should specifically request that the circuit court order a stay of the removal order,[139] as well as of any voluntary departure period.[140]

§ 7.10 -- Motions to Reopen and Reconsider

The steps required to give immigration effect to post-conviction relief will differ depending upon the stage of the immigration proceedings at the time criminal counsel is able successfully to obtain a solution in criminal court. The noncitizen may, for example, need to move to reopen some level of the immigration proceedings, or ask for a remand to a lower court. For further discussion on what steps to take, see CRIMINAL DEFENSE OF IMMIGRANTS §§ 11.74-11.85; N. Tooby, POST-CONVICTION RELIEF FOR IMMIGRANTS, Chapter 10 (2004).[141] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.34, concerning a motion to reopen or reconsider a removal order.

(A) *Motions to Reopen*. After the Immigration Judge issues a final order of removal, either party may file a motion to reconsider the decision of the Immigration Judge, or a motion to reopen the proceedings. A *motion to reopen* must be filed within 90 days of the date of entry of a final administrative order of

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[135] INA § 242(a), 8 U.S.C. § 1252(a).
[136] INA § 242(b)(1), 8 U.S.C. § 1252(b)(1).
[137] *Kim v. Gonzales*, 468 F.3d 58 (1st Cir. Nov. 16, 2006) (time limit for appealing issues decided by the BIA to federal circuit court is jurisdictional), following *Ven v. Ashcroft*, 386 F.3d 357, 359 (1st Cir. 2004).
[138] INA § 242(b)(2), 8 U.S.C. § 1252(b)(2).
[139] INA § 242(b)(3)(B), 8 U.S.C. § 1252(b)(3)(B).
[140] See CRIMINAL DEFENSE OF IMMIGRANTS § 15.33.
[141] See also AILF Practice Advisory: Return to the United States after Prevailing on a Petition for Review (Jan. 17, 2007). http://www.ailf.org/lac/lac_pa_index.shtml.

removal, deportation, or exclusion.[142] The motion must state new facts to be proven at a hearing to be held if the motion is granted, and must be supported by affidavits and other evidentiary material.[143] A motion to reopen should be used, for example, when evidence of successful post-conviction relief first becomes available after the removal order has been issued, but before the appeal due date, or where the deadline for appeal has already passed or the respondent has waived appeal to the BIA.

(B) *Motions to Reconsider*. A motion to reconsider specifies errors of fact or law in a prior decision, must be supported by pertinent authority, and must be filed within 30 days of the Immigration Judge's removal order.[144] Such a motion might be appropriate, for example, where the evidence of post-conviction relief was available prior to the order, but the judge failed or refused to consider the evidence.

Generally, the respondent cannot file more than one motion to reopen or motion to reconsider a removal order (though it may be possible to file a motion to reopen followed by a motion to reconsider the denial of the motion to reopen).[145] Filing a motion to reopen or a motion to reconsider does not toll the 30-day period for filing a notice of appeal to the BIA.

If all deadlines have passed, and no appeal is available, the respondent may request that the Immigration Judge that made the decision reopen or reconsider the case upon his or her own motion. A request for such a *sua sponte* order may be made at any time.[146] The noncitizen may also ask the Department of Homeland Security to file a joint motion with the respondent before the Immigration Court.[147] The Immigration Judge has "broad discretion" to grant or deny such motions.[148]

The BIA has held that changed circumstances, such as vacating a criminal conviction, are an appropriate basis for reopening administrative proceedings, even if the procedural requirements for a motion have not been met.[149] The BIA

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[142] 8 C.F.R. § 1003.23(b).
[143] 8 C.F.R. § 1003.23(b)(3).
[144] 8 C.F.R. § 1003.23(b)(2).
[145] 8 C.F.R. § 1003.23(b).
[146] *Ibid*.
[147] 8 C.F.R. § 1003.23(b)(4)(iv).
[148] *INS v. Doherty, supra*; *INS v. Wang, supra*; *INS v. Rios-Pineda,* 471 U.S. 444, 449 (1985).
[149] See, e.g., *Escobar v. INS*, 935 F.2d 650, 652 (4th Cir. 1991) (noting that INS had asked to re-open final order of deportation and terminate proceedings where conviction had been expunged);

has also expressly held that a final order of deportation may be reopened and remanded for further proceedings based on a change in the law.[150] *Sua sponte* motions, however, are rarely granted.[151]

The Ninth Circuit has held that the regulations that bar noncitizens who have been physically removed from the United States following an order of removal from moving to reopen proceedings do not apply when a criminal conviction that formed a "key part" of the order of removal has been vacated on a basis of legal invalidity.[152]

Becerra-Jimenez v. INS¸ 829 F.2d 996, 1000-02 (10th Cir. 1987) (remanding to agency for consideration of motion to re-open after convictions had been expunged); *Haghi v. Russell*, 744 F.Supp. 249, 251-52 (D. Colo. 1990) (motion to re-open pursuant to 8 C.F.R. § 3.2 is proper based on the "new and material" evidence that conviction had been vacated).

[150] In *Matter of XGW*, 22 I. & N. Dec. 71 (BIA 1998), *superceded on other grounds*, *Matter of GCL*, 23 I. & N. Dec. 359 (BIA 2002), the Board decided, due to fundamental statutory changes in the definition of the term "refugee," and in the interest of justice, that it would reopen proceedings *sua sponte* so that petitioners could apply for asylum, despite regulations that specified time and number limitations on motions to reopen. The court noted that "a significant change in the immigration law made relief available to the applicant on the basis of the same asylum application he filed initially, and he has filed his motion promptly following the new developments." In *Matter of GD*, 22 I. & N. Dec. 1132 (BIA 1999), the Board again examined when a change in law is sufficiently fundamental so as to qualify as an exceptional circumstance to merit the BIA to reopen or reconsider a case *sua sponte*. There, the Board found that a judicial decision was not sufficiently fundamental because it was "at most an incremental development in the law, not a departure from established principles."

[151] *Ibid*.

[152] *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9th Cir. Aug. 21, 2006), reaffirming validity of *Wiedersperg v. INS*, 896 F.2d 1179 (9th Cir. 1990), and *Estrada-Rosales v. INS*, 645 F.2d 819, 821 (9th Cir. 1981) (order of deportation based on certain vacated convictions is not legally valid, and thus does not bar motion to reopen).

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Intake Information Sheet

Please read this sheet before completing the attached form.

Thank you for expressing interest in our services.

- Please provide all the requested information. We must have this information in order to properly evaluate your situation, and see whether we can be of help.
- If you do not understand certain words or questions, first refer to the glossary on the last page of this form. All words marked with an * are defined in the glossary. If you still need help, contact our office at (510) 601-1300.
- If you do not remember your criminal history information, for a fee we can help you get the necessary information from the FBI or State Department of Justice.
- If there is not enough space for you to answer a question completely, please continue your response on a separate page, and include it when you submit the form.
- Please make additional copies of the Conviction Information Sheet (Page # 3) in order to provide a separate sheet for every one of your criminal cases.
- All the information that you provide on this form is confidential, and will not be released to anyone without your permission.

For EACH criminal case, please send copies of the following documents, if available:

1. The charging paper (i.e., complaint, information, etc.)
2. The police report
3. The state and / or FBI rap sheet

If you have already been convicted or have pleaded guilty or no contest to a crime, please send copies of the three documents listed above PLUS the following, if available:

4. The docket or minutes from the plea and sentence
5. The reporter's transcript of the plea and sentence
6. Any waiver of rights form signed by the defendant
7. The probation report

Once you have completed the Intake Form, fax it to us at (510) 595-6772, or mail it to us at : 6333 Telegraph Avenue, Suite 200, Oakland, CA 94609.

1. Consultation: If, after reviewing the form we recommend a consultation, we will contact you to schedule an appointment. A consultation in person at our office is up to 1½ hours as necessary. By telephone it is up to one hour. Please do not come to our office without an appointment.
2. For further information on our office, the services we offer, the immigration consequences of criminal cases, and how to clear convictions from your records, visit our website at: **www.NortonTooby.com.**

Contact Person Information

1. Today's Date _____/_____/_____	2. Your Name (LAST, FIRST)	3. Your Relation to Client*:
4. Home Phone: ( )	5. Cell Phone: ( )	

Client* Information (Client = person who has an immigration problem because of a criminal case)

6. Client's Name (LAST, FIRST)	7. Who referred you to our office?
8. Client's Home Phone Number : ( )	9. Client's Cell Phone Number: ( )
10. Address	11. Client's Immigration File Number: A_____
(City) (State) (Zip Code)	12. What language(s) does the Client speak?
13. Client's Occupation	14. Client's Current Employer

Client's Current Criminal and Immigration Situation

15. You are currently:	❑ Not in Custody ❑ In Criminal Custody ➔ ❑ In Immigration Custody ➔		Correctional Facility (Name) (County) (State)	
16. If you are currently in criminal custody, what is the scheduled release date? _____/_____/_____				
17. What is your country of citizenship?				18. In what country were you born?
19. Are you married?	❑ No ❑ Yes ➔		How many years?	Immigration Status* of Spouse:
20. Do you have any children?	❑ No ❑ Yes ➔		How many?	Immigration Status of Children:
21. Do you have any other immediate relatives in the U.S.?	❑ No ❑ Yes ➔		How many?	Immigration Status of Immediate Relatives:
22. Is/was your mother a United States Citizen*?	❑ No ❑ Yes ➔	❑ By Birth ❑ Naturalized* to become a U.S. Citizen on the following date ➔		_____/_____/_____
23. Is/was your father a United States Citizen*?	❑ No ❑ Yes ➔	❑ By Birth ❑ Naturalized to become a U.S. Citizen on the following date ➔		_____/_____/_____
24. Does the client own or is the client in the process of buying a home or business in the U.S.? ❑ No ❑ Yes ➔ Briefly describe:				
25. Do you currently have an immigration attorney?	❑ No ❑ Yes ➔		Name:	Phone ( )

26. Do you currently have a criminal defense attorney or public defender?	❑ No ❑ Yes ➔	Name:	Phone ( )
27. Briefly describe the immigration problem you are having.			

Immigration Chronology

28. Date of Birth _____/_____/_____	29. With what documents did you first enter the U.S., if any?	
30. Date of First Entry Into the U.S. _____/_____/_____	31. What is your current immigration status? (Please select one of the following)	
32. Date you obtained your current immigration status* _____/_____/_____	❑ Undocumented ❑ Legal Permanent Resident* (Green Card Holder) ❑ Work Permit* Holder	❑ Visa Holder ➔ Type: _____ ❑ Other ➔ Please Describe: _____

33. Date(s) you appeared in Immigration Court (if applicable) _____/_____/_____ _____/_____/_____	34. Reason you appeared in Immigration Court
35. Date you were ordered deported by Immigration Judge (if applicable) _____/_____/_____	
36. Date you received a Waiver of Deportability (212(c))* or Cancellation of Removal* or Suspension of Deportation* (if applicable) _____/_____/_____	

37. List the date of departure, date of return, and purpose of <u>each</u> trip exceeding 90 days out of the U.S. since your first entry.

(Date of Departure)	(Date of Return)	(Purpose of Trip)
_____/_____/_____	_____/_____/_____	
_____/_____/_____	_____/_____/_____	
_____/_____/_____	_____/_____/_____	
_____/_____/_____	_____/_____/_____	

FIRST CONVICTION* (If you have more than one conviction, start with the oldest and end with the most recent.)

38. Date Offense* Committed _____/_____/_____	39. City and State of Arrest*	40. County of Arrest
41. Give a brief description of the events that led to your arrest, and list all charges* brought against you.		
42. What court did you appear in?	❑ Municipal Court ❑ Superior Court ❑ Federal Court ❑ Other ➔ _____	
43. Date of Plea* / Verdict _____/_____/_____	Select one: ❑ Guilty Plea ❑ No Contest Plea ❑ Convicted by Trial* ➔ ❑ Jury Trial ❑ Court Trial	

44. List <u>all</u> the charges of which you were convicted. Please include the Penal Code or Statute* number for each charge.		
(Name of Offense)		Statute* (Code Number)
EXAMPLE: **Petty Theft**		**PC 484(a)**
Count 1:		
Count 2:		
Count 3:		
Count 4:		
45. Date of Sentence* _____/_____/_____	46. What was your sentence? (Include length of probation and parole.)	
47. Where did you serve your time? ❑ County Jail ❑ State Prison	48. How much time did you actually serve in custody?	
49. Did you appeal* your conviction? ❑ No ❑ Yes ➔	What was the result of your appeal?	
50. Did you complete probation or parole without a violation? ❑ No ➔ ❑ Yes	If you violated probation or parole, please fill out a separate Conviction Information sheet for the violation.	

SECOND CONVICTION

51. Date Offense* Committed _____/_____/_____	52. City and State of Arrest*	53. County of Arrest		
54. Please give a brief description of the events that led to your arrest, and list all charges* brought against you.				
55. What court did you appear in? ❑ Municipal Court ❑ Superior Court		❑ Federal Court ❑ Other ➔	_____	
56. Date of Plea* / Verdict _____/_____/_____	Select one: ❑ Guilty Plea	❑ No Contest Plea	❑ Convicted by Trial* ➔	❑ Jury Trial ❑ Court Trial
57. Please list <u>all</u> the charges of which you were convicted, and include the Penal Code or Statute* number for each charge.				
(Name of Offense)			Statute* (Code Number)	
EXAMPLE: **Petty Theft**			**PC 484(a)**	
Count 1:				
Count 2:				
Count 3:				
Count 4:				
58. Date of Sentence* _____/_____/_____	59. What was your sentence? (Please include length of probation and parole.)			
60. Where did you serve your time? ❑ County Jail ❑ State Prison	61. How much time did you actually serve in custody?			
62. Did you appeal* your conviction? ❑ No ❑ Yes ➔	What was the result of your appeal?			

63. Did you complete probation or parole without a violation?	❑ No ➔ ❑ Yes	If you violated probation or parole, please fill out a separate Conviction Information sheet for the violation.

THIRD CONVICTION

64. Date Offense* Committed _____/_____/_____	65. City and State of Arrest*	66. County of Arrest
67. Please give a brief description of the events that led to your arrest, and list all charges* brought against you.		
68. What court did you appear in?	❑ Municipal Court ❑ Federal Court ❑ Superior Court ❑ Other ➔ _____	
69. Date of Plea* / Verdict ____/_____/_____	Select one: ❑ Guilty Plea ❑ No Contest Plea ❑ Convicted by Trial* ➔	❑ Jury Trial ❑ Court Trial
70. Please list <u>all</u> the charges of which you were convicted, and include the Penal Code or Statute* number for each charge.		
(Name of Offense)		Statute* (Code Number)
EXAMPLE: Petty Theft		**PC 484(a)**
Count 1:		
Count 2:		
Count 3:		
71. Date of Sentence* _____/_____/_____	72. What was your sentence? (Please include length of probation and parole.)	
73. Where did you serve your time? ❑ County Jail ❑ State Prison	74. How much time did you actually serve in custody?	
75. Did you appeal* your conviction? ❑ No ❑ Yes ➔	What was the result of your appeal?	
76. Did you complete probation or parole without a violation? ❑ No ➔ ❑ Yes	If you violated probation or parole, please fill out a separate Conviction Information sheet for the violation.	

❖ **Glossary of Terms** (words are indicated in form with an * the first time the word appears)

Appeal: Taking your case from the trial court to an appellate court to try to get a conviction overturned because of a mistake

Arrest: Being placed in custody or in jail by the police

Cancellation of Removal: An immigration court order preventing removal even if the immigrant is removable

Client: The person who is facing an immigration problem because of a criminal case who is seeking our help

Charge: An accusation that you committed a crime in violation of a specific criminal law defining a criminal offense

Conviction: A verdict or finding that you are guilty of a certain crime

Immigration Status: The legal basis on which you are present in the United States

Legal Permanent Resident or LPR: A person who has received a green card or "mica" from the Immigration and Naturalization Service granting official permission to live legally in the U.S. on a permanent basis

Naturalized: Granted U.S. citizenship after applying for it and passing screening, interviews, and being sworn in as a citizen

Offense: A crime defined by a particular criminal law or statute

Plea: An official statement in court by a criminal defendant that he or she is guilty of crime, or chooses not to contest the crime

Sentence: The punishment given to a person found guilty of a crime by the court

Statute: The state law that defines the crime committed and the punishment

Suspension of Deportation: An immigrant court order avoiding deportation

Trial: A court hearing before a judge or jury to decide the guilt or innocence of a person charged with committing a criminal offense, at which witnesses normally testify about what has happened

Undocumented: A person present in the U.S. without any permission or documents from the government

U.S. Citizen: A person who was born in the U.S., or whose parents are U.S. Citizens, or who was granted U.S. citizenship by naturalization

Visa: Official statement of the U.S. government granting a person permission to enter and be present in the U.S.

Waiver of Deportation (212 (c) Relief): An immigration court order preventing deportation under former law even if the immigrant is deportable

Work Permit: U.S. government permission given to a person who is not a citizen of the U.S. allowing him or her to work in the U.S.

Safe Plea Checklist

(1) Check text of statute as it read on day offense was committed.

(2) Check judicial decisions altering the elements of that version.

(3) Choose portion of statute that does not trigger adverse immigration consequences.

(4) Choose portion of statute as to which there is proof (either clear text of statute or judicial decision) showing jurisdiction prosecutes defendants for the portion of the statute that does not trigger adverse immigration consequences.

(5) Ensure text of charge to which plea will be entered does not trigger adverse immigration consequences.

(6) Arrange if possible new count to allege safe offense to avoid inadvertently pleading to portion of (or certain facts contained within) original charge.

(7) Make sure plea is entered only to safe portion of statute and charge.

(8) Make sure defendant does not admit committing any fact that would bring offense within ground triggering adverse immigration consequences.

(9) Make sure no factual-basis stipulation is entered admitting as true any fact that would bring offense within ground triggering adverse immigration consequences.

(10) Make sure no sentence enhancement is found true admitting any fact that would bring offense within ground triggering adverse immigration consequences.

(11) Ensure court does not find true any fact that is admitted by defendant that would bring offense within ground triggering adverse immigration consequences.

(12) Ensure plea bargain does not dictate sentence that would bring offense within ground triggering adverse immigration consequences.

Safe Sentence Checklist

1. *Sentence Imposed*: If offense of conviction becomes an aggravated felony if a sentence of one year or more is imposed, ensure court does not order any prison sentence or custody condition of probation of one year or more. Make sure sentence imposed does not trigger any other immigration consequence, such as disqualification from Petty Offense Exception to inadmissibility for a conviction of a crime of moral turpitude if sentence imposed is greater than six months in custody. Avoid suspended sentence, which is considered just as damaging as an unsuspended sentence. A noncitizen is inadmissible if s/he has been convicted of two or more offenses, other than purely political offenses, for which the aggregate sentences to confinement were five years or more. Mandatory detention is triggered by one conviction of a crime involving moral turpitude with a one-year sentence imposed. Avoid aggregate sentences for one or more aggravated felony convictions that total five years or more, which will disqualify a noncitizen from receiving "restriction on removal," formerly known as "withholding of deportation." A noncitizen who has two or more convictions of crimes of moral turpitude, for each of which a sentence of one year or more was ordered by the court, is ineligible to apply for INA § 212(c) relief if s/he is in deportation proceedings begun prior to April 24, 1996 but before April 1, 1997.

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2. *Maximum Possible Sentence*: If offense of conviction is a crime of moral turpitude (see N. TOOBY, J. ROLLIN & J. FOSTER, CRIMES OF MORAL TURPITUDE (2005)), make sure maximum possible sentence is less than one year to avoid deportability if it was committed within five years of admission. If client seeks Petty Offense Exception to inadmissibility for a crime of moral tupritude, make sure maximum sentence is less than or equal to one year. In addition, three aggravated felony offenses are defined in terms of the maximum possible sentence, as opposed to the sentence ordered by the court:

(a) *Racketeer-Influenced Corrupt Organizations (RICO) Offenses*. A RICO offense "for which a sentence of one year or more *may* be imposed" constitutes an aggravated felony.[1]

(b) *Failure to Appear To Answer a Criminal Charge*. A noncitizen has been convicted of an aggravated felony if convicted of failure to appear "pursuant to a court order to answer or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more *may* be imposed . . . ."[2]

(c) *Failure to Appear for Sentence*. A noncitizen has been convicted of an aggravated felony if convicted of failure to appear for sentencing "if the underlying offense is *punishable* by imprisonment for a term of five years or more . . . ."[3]

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[1] INA § 101(a)(43)(J), 8 U.S.C. § 1101(a)(43)(J) (emphasis supplied).
[2] INA § 101(a)(43)(T), 8 U.S.C. § 1101(a)(43)(T).
[3] INA § 101(a)(43)(Q), 8 U.S.C. § 1101(a)(43)(Q) (emphasis supplied).

3. *Restitution Order*: If offense of conviction constitutes fraud or deceit offense aggravated felony, ensure restitution order does not show loss to victim in excess of $10,000.[4] If offense of conviction constitutes tax evasion aggravated felony (IRC § 7201), ensure restitution order does not show loss to government in excess of $10,000. If offense of conviction is money laundering offense (18 U.S.C. §§ 1956, 1957), ensure record of conviction and sentence do not show amount of funds laundered was in excess of $10,000.

4. *Level of Offense*: Obtain conviction of offense as misdemeanor, if felony conviction will trigger adverse immigration consequences, such as disqualification from Temporary Protected Status or the 1986 IRCA Legalization Programs. Reduce felony to misdemeanor if to do so would avoid offense being considered a crime of violence aggravated felony under 18 U.S.C. § 16(b) since it is no longer a felony. Reduce felony to misdemeanor if to do so would reduce maximum possible sentence to one year, to qualify for Petty Offense Exception to inadmissibility for a crime of moral turpitude.

5. *Actual Confinement Served.*

(1) To be eligible for relief from removal under former INA § 212(c), the noncitizen must avoid service of an actual aggregate sentence of five years or more for one or more aggravated felony conviction(s).

(2) A noncitizen is disqualified from showing Good Moral Character if s/he has actually been confined as a result of one or more criminal convictions for a total of 180 days or more. Good moral character is required to be shown for a wide variety of forms of immigration relief, such as naturalization.

6. *Being on Probation or Parole*. While being on probation or parole is not considered part of a sentence to confinement (unless state law provides for a prison sentence that is then probated), it can cause two negative consequences:

(a) A person cannot be granted naturalization if s/he is still on probation or parole in a criminal case on the day of the naturalization interview.

(b) Being on probation or parole during any part of the time for which Good Moral Character must be established can be viewed as a negative factor in a discretionary finding that the applicant lacks Good Moral Character, although it cannot be the sole basis for the finding.[5] The courts have not, however, established a clear rule regarding whether being on probation or parole standing alone can bar a showing of GMC.[6]

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[4] INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i).
[5] 8 C.F.R. § 316.10(c)(1).
[6] Compare *In re McNeil*, 14 F. Supp. 394 (N.D. Cal. 1936) (GMC precluded until termination of parole) *with Petition of Sperduti*, 81 F. Supp. 833 (W.D. Pa. 1949) (GMC not precluded).

POST-CONVICTION CASE EVALUATION CHECKLIST

CLIENT: _____

DATE: _____

1. THE CURRENT STATUS OF THE CLIENT

a. The Client Is Clean and Sober.

b. The Client Has Strong Equities.

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

d. The Client Has No Outstanding or Potential Arrest Warrants.

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

f. The Client Is Lawfully Present in the United States.

2. THE CRIMINAL SITUATION:

a. A Small Criminal Case Has Large Immigration Effects.

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

c. The Original Charges Were Few and Diverse.

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

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

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

g. There is Small Risk The Client Will Receive Additional Time in Custody if the Case is Reopened and the Client is Reconvicted.

h. The Jurisdiction Where the Conviction Occurred is Relatively Sympathetic.

i. The Initial Defense Investigation Was Incomplete.

j. There Were Technical Problems With the Prosecution Case.

3. THE TIMING OF THE CASE

a. Post-Conviction Deadlines Have Not Passed.

b. The Client has Six Months or More Before Irrevocable Immigration Damage Occurs.

c. There is Still Time to Reopen the Immigration Case if Criminal Convictions are Eliminated.

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

(CriminalAndImmigrationLaw.com/ Free_checklist.asp has free 30-page article explaining these factors; see also Appendix 1 in N. TOOBY, POST-CONVICTION RELIEF OF IMMIGRANTS (2004).)

Selected Resources

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ANN BENSON & JONATHAN MOORE, IMMIGRATION AND WASHINGTON STATE CRIMINAL LAW (Washington Defender Association's Immigration Project, 2005).

K. BRADY, WITH N. TOOBY, M. MEHR, & A. JUNCK, DEFENDING IMMIGRANTS IN THE NINTH CIRCUIT (Immigrant Legal Resource Center 2007).

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LYNN COYLE, BARBARA HINES, & LEE TERAN, BASICS OF IMMIGRATION LAW FOR TEXAS CRIMINAL DEFENSE ATTORNEYS (Tex. Crim. Defense Lawyers Ass'n 2003), available at (512) 478-2514.

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MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY (2d ed. 2007).

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N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS (2007).

N. TOOBY, POST-CONVICTION RELIEF FOR IMMIGRANTS (2004).

N. TOOBY & J. ROLLIN, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005).

M. VARGAS, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS IN NEW YORK STATE (NY State Defender's Association, Criminal Defense Immigration Project 2007).

D. WILKES, STATE POST-CONVICTION REMEDIES AND RELIEF HANDBOOK (2006).

LARRY W. YACKLE, POSTCONVICTION REMEDIES (1981 with 2007-2008 cum. supp.).

Definitions[1]

(A) *Immigration Status.* A person's "immigration status" is the legal category into which a person falls under the federal immigration laws. Some of the more common of these (often overlapping) categories are:

- *Alien:* Any person who is not a Citizen or National of the United States.[2] This book prefers to use the term *noncitizen*.
- *Arriving Alien:* Any noncitizen looking to be admitted to the United States, seeking transit through the United States, or interdicted in international waters and brought to the United States. The definition of "arriving alien" depends upon the definitions of "admission" and "applicant for admission."[3] A lawful permanent resident shall not be regarded as seeking admission unless one or more of six conditions is met.[4] Parolees are considered to be arriving aliens, no matter how long they are in the United States.[5]
- *Asylee:* A person who has been granted asylum *after* coming to the United States by some means.[6]
- *Citizen*: A person who, through birth or naturalization, has the right to live in the United States permanently without being subject to immigration law.
- *Conditional Lawful Permanent Resident:* An immigrant granted lawful permanent resident status through marriage to a United States Citizen or lawful permanent resident, who has not yet had the two-year conditional status removed.[7] The condition is imposed for the purpose of preventing marriage fraud. While in most respects a conditional permanent resident is treated the same as a lawful permanent resident, this status may be revoked (generally) upon divorce within the 2-year period, or a determination that the marriage was only for the purpose of becoming a lawful permanent resident. Certain exceptions exist for persons subject to domestic abuse.
- *Deportable:* A noncitizen who has been admitted into the United States and is subject to one or more grounds of deportation.
- *Entered [or Present] Without Inspection ("EWI" or "PWI"):* A noncitizen who has entered the United States without having been lawfully admitted (a.k.a., "illegal alien").
- *Inadmissible:* A noncitizen subject to one or more grounds of inadmissibility. Another term used is "excludable."

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[1] These definitions are taken from N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS, § 15.3 (2007).
[2] INA § 101(a)(3), 8 U.S.C. § 1101(a)(3).
[3] INA §§101(a)(4), (a)(13), 8 U.S.C. §§ 1101(a)(4), (a)(13).
[4] INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C); see 8 C.F.R. § 1001.1(9).
[5] 8 C.F.R. § 1001.1(q).
[6] INA § 208, 8 U.S.C. § 1158.
[7] See INA § 216, 8 U.S.C. § 1186a.

- *Immigrant:* A noncitizen who has been lawfully admitted to the United States with the intent to reside in the United States permanently.[8]
- *Lawful Permanent Resident ("LPR"):* An immigrant who has been granted the right to reside in the United States permanently, subject to the immigration law.[9] This status is evidenced by a Form I-551 ("green card").
- *National of the United States:* Certain persons born in outlying territories of the United States, and not subject to removal or other adverse immigration consequences.
- *Noncitizen:* Anyone who is not a Citizen or National of the United States.
- *Non-Immigrant:* A noncitizen lawfully admitted to the United States on a temporary basis (e.g., as a visitor, student or employee).[10]
- *Overstay:* A non-immigrant whose visa has expired, or who has had their visa revoked after violating its conditions.
- *Parolee:* A noncitizen the DHS has allowed to be *physically*, but not *legally* present in the United States.
- *Refugee:* (a) A person eligible to receive asylum;[11] (b) A person granted asylum while *outside* the United States.[12]
- *Removable:* A noncitizen who falls under any of the grounds of inadmissibility *or* deportability.[13]
- *Respondent:* A noncitizen party in immigration proceedings.[14]
- *Temporary Protected Status:* A noncitizen temporarily protected from removal from the United States to designated countries suffering from natural disasters or internal political strife.
- *Undocumented:* A noncitizen present within the United States in violation of law due to (a) entry without admission, or (b) expiration or violation of the conditions of the visa with which s/he was allowed to enter the United States.

(B) *Coming to the United States:* There are various terms (in addition to those above) used in discussing noncitizens coming to the United States:

- *Admission:* Any noncitizen coming to the United States must be lawfully "admitted" into the United States after inspection by an immigration official at a port of entry.
- *Deferred Inspection:* Paroling an arriving alien into the United States temporarily in order to give the noncitizen a chance to prove that s/he is admissible to the United States.

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[8] See INA § 101(a)(15), 8 U.S.C. § 1101(a)(15). Technically, the definition of "immigrant" under the INA includes those *not* lawfully admitted to the United States.
[9] INA § 101(a)(20), 8 U.S.C. § 1101(a)(20); 8 C.F.R. § 1001.1(p).
[10] INA § 101(a)(15), 8 U.S.C. § 1101(a)(15).
[11] INA § 101(a)(42); 8 U.S.C. § 1101(a)(42).
[12] See INA § 207, 8 U.S.C. § 1157.
[13] INA § 240(e)(2), 8 U.S.C. § 1229a(e)(2).
[14] 8 C.F.R. § 1001.1(r).

- *Entry:* Although no longer defined for immigration purposes,[15] entry can be taken to mean physically crossing the border into the United States.
- *Immigrant Visa:* A travel document issued by the Department of State that allows a noncitizen intending to *permanently* reside in the United States to be admitted into the United States.
- *Non-Immigrant Visa:* A travel document issued by the Department of State that allows a noncitizen intending to *temporarily* reside in the United States to be admitted into the United States.
- *Returning Lawful Permanent Resident:* An LPR returning to the United States from a trip abroad is *not* generally considered a applicant for admission (or an arriving alien). A returning LPR only becomes an applicant for admission if one or more of certain conditions is met (including being inadmissible due to criminal offenses).[16]
- *Visa Waiver Program:* A program that allows noncitizens from certain designated countries[17] to enter the United States temporarily without a visa.[18] Noncitizens who enter via this program are severely restricted in what they can do while in the United States, and automatically waive a number of rights, including the right to a removal hearing before an immigration judge and the right to apply for relief from removal.[19]

(C) *Criminal/Immigration Concepts:* The following terms are commonly used in describing the various crime-related grounds of removal and the analysis applied to determine removability:

- *Admission:* Where a noncitizen admits committing a crime, this admission may trigger certain grounds of removal.[20]
- *Aggravated Felony:* Any criminal conviction that falls within one of the categories of crimes listed at INA § 101(a)(43).[21]
- *Categorical Analysis:* The means of determining whether a given criminal conviction falls within one of the crime-based grounds of removal. This analysis may differ from jurisdiction to jurisdiction, i.e., from circuit to circuit.
- *Conduct-Based Grounds:* A ground of removal that does *not* require a criminal conviction.
- *Conviction:* A criminal disposition that meets all the requirements of INA § 101(a)(48).[22] This definition is *broader* than that generally used in criminal law, and

[15] "Entry" was previously defined at INA § 101(a)(13), 8 U.S.C. § 1101(a)(13) (1995).
[16] INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C).
[17] 8 C.F.R. § 217.2.
[18] INA § 217, 8 U.S.C. § 1187; 8 C.F.R. §§ 217.1-217.6.
[19] Asylum seekers are excepted. 8 C.F.R. § 217.4(b), (c).
[20] See § 18.8, *infra*.
[21] INA § 101(a)(43), 8 U.S.C. § 1101(a)(43).
[22] INA § 101(a)(48), 8 U.S.C. § 1101(a)(48).

may include expunged convictions, deferred adjudications, and the like, that are *not* regarded as convictions under state law.

- *Conviction-Based Grounds:* A ground of removal that requires a criminal conviction.
- *Crime of Moral Turpitude:* A category including crimes (including theft and fraud) that involve some sort of "evil intent" or are contrary to contemporary social mores.
- *Divisible Statute Analysis:* An aspect of categorical analysis that becomes relevant when the statute of conviction may be divided into separate sets of criminal elements, and it is necessary to determine which offense, within the statute of conviction, was the defense of which the defendant was convicted.
- *Good Moral Character:* A state in which one has not committed any acts[23] [within specified periods] that would evidence a *lack* of Good Moral Character.
- *Reason to Believe:* Certain grounds of removal may be triggered where the immigration authorities simply have "reason to believe" that the noncitizen has committed a crime, even if there is no conviction.
- *Record of Conviction:* The documents in the criminal record that may be used in divisible statute analysis to determine the set of elements (i.e., the offense) of which the noncitizen was convicted.

(D) *Procedural Terminology:* The following are some additional terms used to describe key documents or information used in immigration proceedings:

- *A-Number*: The unique eight or nine digit number used by the immigration authorities to identify a noncitizen.
- "*FOIA*" *(Freedom of Immigration Act)*: A document that may be filed requesting the immigration authorities' records regarding a noncitizen.
- *I-94: Arrival-Departure Record*. A small card usually placed in a noncitizen's passport that generally contains information regarding the period during which the noncitizen is allowed to remain in the United States.
- *I-485: Application for Adjustment of Status*.
- *I-551 ("Green Card")*: A card used to identify a noncitizen as a lawful permanent resident. The card may have a two or ten year expiration date. Some older cards do not have an expiration date, but the DHS is now requiring that these cards be replaced with ones that do.
- *"NTA" (Notice to Appear)*: The document used after April 1, 1997 to charge a noncitizen with removal.
- *"OSC" (Order to Show Cause)*: The document used before April 1, 1997 to charge a noncitizen with deportation or exclusion.
- *"ROP" (Record of Proceedings)*: The Immigration Court's file containing all the court records of a removal proceeding.

[23] INA § 101(f), 8 U.S.C. § 1101(f).

Illustrative Examples

These examples illustrate the principles described in this Guide. They should not be taken as gospel.

CAVEAT: The law described here is accurate at the time of writing, but changes all the time. Moreover, any secondary source should be treated not as a definitive answer, but as the starting point for research, because (a) the statute in a given case may differ from the statute in your case; (b) even if the statute is the same, it may have been amended so it does not read the same on the date of the offense in your case as it did on the date of conviction described in the reported decision; (c) different circuits have somewhat different rules on these issues; (d) the law on the deference required to be paid by the circuit courts to the Board of Immigration Appeals is developing, and the BIA is declining to follow circuit decisions where it concludes the circuit was required to defer to the BIA, rather than the other way around.

[1] Burglary

A state burglary conviction may trigger any or all of the following conviction-based grounds of deportation (1)-(4) and the final ground (5) of inadmissibility:

(1) Aggravated felony crime of violence, with a sentence imposed of one year or more.[1] The solutions to this problem are (a) a conviction specified as nonresidential or auto burglary, or (b) obtaining a sentence imposed of less than one year.

(2) Aggravated felony burglary, with a sentence imposed of one year or more.[2] The solutions to this problem are (a) a conviction with an element of entry, rather than unlawful or unprivileged entry, or (b) obtaining a sentence imposed of less than one year.

(3) Aggravated felony theft, with a sentence imposed of one year or more.[3] The solutions to this problem are (a) a conviction with no element of intent to steal, or (b) obtaining a sentence imposed of less than one year. Many state burglary statutes are divisible statutes that can be violated with the "intent to commit theft or any felony." If a plea is entered to a charge in the language of the statute ("or any felony"), this conviction is not necessarily a theft offense unless the record of conviction specifies that theft was the intended felony. It is better still to find a specific non-theft-related felony, but this may be difficult and it is unlikely there is a factual basis for a non-theft felony, so the usual solution is to leave the record ambiguous and specify "theft or any felony."

[1] INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).
[2] INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).
[3] INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

(4) Crime of moral turpitude, with a maximum of one year or more committed within five years of admission.[4] Burglary, however, is a crime of moral turpitude only if the crime intended to be committed is itself a crime of moral turpitude. Theft is a crime of moral turpitude, so if the burglary is committed with the intent to commit theft, the burglary is also a crime of moral turpitude. The solutions to this problem are: (a) entering a plea to a charge in the language of the statute ("or any felony"), so this conviction is not necessarily a crime of moral turpitude, since the record does not necessarily establish that the "or any felony" intended is in fact itself a crime of moral turpitude;[5] or (b) if deportation is threatened on the basis of this single CMT conviction, and the jurisdiction has a maximum misdemeanor sentence of one year or less for this offense as a misdemeanor, and the jurisdiction has a maximum of one-half the normal maximum for an attempt, a plea to attempted misdemeanor burglary will have a maximum of six months or less, which is less than the one-year maximum required for a single CMT to trigger deportation.

(5) Inadmissibility: While none of the aggravated felonies as such triggers inadmissibility, a burglary conviction may also be considered a crime of moral turpitude and a single CMT conviction will trigger inadmissibility, regardless of sentence.[6] The solutions to this problem are: (a) pleading to a misdemeanor offense with a maximum of one year or less, and receiving a sentence ordered of six months or less, where the defendant has *committed* only this single CMT. This disposition qualifies for the Petty Offense Exception to inadmissibility, so the client is not inadmissible at all; or (b) if the client is eligible, s/he can seek a waiver of inadmissibility under INA § 212(h), which, if granted, prevents this conviction from triggering inadmissibility.

[2] Domestic Violence

Another common situation is where the client is charged with spousal battery. This offense can trigger any or all of the following conviction-based grounds of deportation (1)-(3) or inadmissibility (4):

(1) Domestic violence ground of deportation.[7] Solutions to this problem include: (a) in most circuits, a simple battery conviction, even simple battery on a spouse, will not be considered a "crime of violence," and thus cannot be a "crime of domestic violence" under this ground of deportation, if the state offense can be committed by the slightest

[4] INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).
[5] E.g., *Matter of M,* 2 I. & N. Dec. 721 (BIA 1946) (conviction of third-degree burglary, in violation of New York Penal Law § 404, is not an offense involving moral turpitude where the conviction record does not indicate the particular crime that accompanied the breaking and entering, since the determinative factor is whether the crime intended to be committed at the time of entry involves moral turpitude).
[6] INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).
[7] INA § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i).

touching.[8] (b) In some circuits, the conviction will not fall under this ground unless the record of conviction establishes the required domestic relationship between offender and victim, so a plea that does not identify the victim will not trigger this ground of deportation.[9]

(2) Aggravated felony crime of violence, with a sentence imposed of one year or more.[10] The solutions to this problem are (a) a conviction as described in (1)(a) above, that is not a crime of violence, or (b) if the offense can be committed with mere negligence, then it cannot be a crime of violence;[11] or (c) obtaining a sentence imposed of less than one year.

(3) Crime of moral turpitude, with a maximum of one year or more committed within five years of admission.[12] In most circuits, a simple battery conviction, even simple battery on a spouse, can be committed by the slightest touching, and is not considered sufficiently evil to constitute a CMT.[13] The solutions to this problem are: (a) pleading to such a simple battery offense; or (b) if deportation is threatened on the basis of this single CMT conviction, and the jurisdiction has a maximum misdemeanor sentence of one year or less for this offense as a misdemeanor, and the jurisdiction has a maximum of one-half the normal maximum for an attempt, a plea to attempted misdemeanor burglary will have a maximum of six months or less, which is less than the one-year maximum required for a single CMT to trigger deportation.

(4) A domestic violence conviction does not trigger inadmissibility, but the same offense may do so if it constitutes a conviction of a crime of moral turpitude.[14] The solutions to this problem are as described under Appendix G[1](5) above.

[3] Driving Under the Influence of an Intoxicant

Driving under the influence of alcohol, standing alone, does not trigger adverse immigration consequences. The only exception is that certain immigration relief may be precluded by a felony or two or more misdemeanor convictions, and a DUI conviction may bar these types of relief. See § 4.4(E)(7).

(1) Even a felony DUI with a sentence of one year or more, if as is no longer considered an aggravated felony crime of violence, most DUI offenses it may be committed with mere strict liability or negligent *mens rea*.[15]

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[8] *Matter of Sanudo*, 23 I. & N. Dec. 968 (BIA 2006). But not in the Eleventh Circuit. *United States v. Griffith*, 455 F.3d 1339, 1340-1345 (11th Cir. 2006).
[9] E.g., *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004).
[10] INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).
[11] *Leocal v. Ashcroft*, 543 U.S. 1 (2004).
[12] INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i).
[13] *Matter of Sanudo*, 23 I. & N. Dec. 968 (BIA 2006). See n.8, *supra*.
[14] INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i).

(2) In general, it is not a crime of moral turpitude, for similar reasons.[16] The only exception is that a DUI offense requiring knowledge that one's license had been suspended or revoked is a crime of moral turpitude.[17]

(3) Driving under the influence of a federally listed controlled substance, however, may trigger deportation or inadmissibility as a controlled substances conviction.[18] The solutions to this problem are (a) to keep the record of conviction clear of any reference to a federally listed controlled substance; or (b) if the issue is deportation, an ambiguous record of conviction of "driving under the influence of alcohol and/or a drug" will not necessarily establish a controlled substance conviction, and thus the government cannot not establish deportability by clear and convincing evidence.

[4] Drug Possession

Convictions of possession of a federally listed controlled substance may trigger deportation or inadmissibility under the following theories:

(1) A conviction of possession cannot be considered an aggravated felony drug trafficking conviction,[19] except under the following circumstances:[20] (a) possession of more than five grams of crack cocaine, or any amount of the date-rape drug flunitrazepam; (b) in most circuits, a second conviction of simple possession of any other federally listed controlled substance can be an aggravated felony only if the first conviction was final prior to the commission of the second, and the first conviction was pleaded and proven beyond a reasonable doubt to a court or jury, or admitted by the defendant, in the second prosecution.[21]

(2) Possession of a federally listed controlled substance triggers deportability and inadmissibility as a controlled substances conviction.[22] Solutions to this problem include: (a) cancellation of removal in immigration court, assuming the client is eligible; or (b) negotiating a plea to a state possession offense that does not identify the particular controlled substance involved. This will avoid deportability, since the substance may or

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[15] *Leocal v. Ashcroft*, 543 U.S. 1 (2004).
[16] *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001) (*en banc*).
[17] *Matter of Lopez-Meza*, 22 I. & N. Dec. 1188 (BIA 1999).
[18] INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II)(inadmissibility); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i)(deportability).
[19] INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).
[20] *Lopez v. Gonzales*, 549 U.S. ___, ___ n.6, 127 S.Ct. 625, 630 n.6 (Dec. 5, 2006).
[21] This is a complex area in which the law is developing rapidly. See www.nysda.org/idp for an excellent practice advisory on this subject.
[22] INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II)(inadmissibility); INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i)(deportability).

may not be on the federal list, it is impossible to tell without knowing what the substance is, and the government thus cannot establish that it is.[23]

[5] Drug Trafficking

A drug trafficking conviction can trigger many different grounds of removal,[24] and bar many forms of relief.[25] Compared with state convictions, federal post-conviction work is more complex, the federal prosecutors fight harder, and there are fewer safe haven alternatives available.[26] Even if successful, post-conviction relief will not, in most cases, protect against a finding that the DHS has reason to believe that the noncitizen has been an illicit drug trafficker, which will cause inadmissibility.[27]

Possible federal safe haven alternatives to a drug trafficking conviction include: Unlawful Transportation of Hazardous Material Without a Permit (15 year maximum);[28] Smuggling Goods into the United States (five year maximum);[29] Misprision of a Felony (three year maximum);[30] and Accessory After the Fact (1/2 maximum term of the underlying offense).[31] Each of these potential alternatives is an attempt to avoid the "drug trafficking" and "controlled substances offense" label. However, many of these alternatives may cause other immigration damage, depending on the circuit.[32]

Possible state safe havens include: unauthorized disposal of hazardous waste without a permit, accessory after the fact to drug trafficking (which, in some circuits, is

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[23] *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. Jan. 18, 2007) cf. *Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003).

[24] See, e.g., INA §§ 101(a)(43)(B) (aggravated felony), 212(a)(2)(A)(i) (crime of moral turpitude), 212(a)(2)(A)(ii) (controlled substances offense), 212(a)(2)(C) (reason to believe a drug trafficker), 237(a)(2)(A)(i) (crime of moral turpitude), 237(a)(2)(A)(ii) (multiple crimes of moral turpitude), 237(a)(2)(B)(i) (controlled substances conviction).

[25] See, e.g., INA § 212(h). As most drug trafficking offenses are aggravated felonies, any relief barred by an aggravated felony conviction is also barred by a aggravated felony drug trafficking conviction. See, e.g., INA §§ 101(f)(8) (good moral character), 212(h), 208(b)(2)(B)(i) (asylum); 240A(a)(3) (cancellation), 241(b)(3)(B) (withholding).

[26] For example, the *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965) argument that the state conviction concerned a controlled substance not on the federal controlled substances list is not available for federal convictions.

[27] See, e.g., *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. June 2, 2004) (suspicious meetings between noncitizen and other suspects, several of whom were arrested with several thousand dollars in cash, noncitizen's attempt to escape when police stopped the vehicle he was driving, and discovery of 147 pounds of marijuana in the trunk, plus a guilty plea to failure to disclose to authorities his knowledge of a conspiracy to distribute marijuana, not rebutted by the noncitizen, constituted sufficient evidence to support reason to believe he was inadmissible as illicit trafficker).

[28] 42 U.S.C. 6928(d)(1).

[29] 18 U.S.C. § 545.

[30] 18 U.S.C. § 4.

[31] 18 U.S.C. § 3.

[32] See, e.g., *Matter of Robles*, 24 I. & N. Dec. 22 (BIA 2006) (federal conviction of misprision of a felony, in violation of 18 U.S.C. § 4, was a CMT).

considered a crime of moral turpitude); solicitation or offering to commit a drug trafficking crime (in the Ninth Circuit only); misprision of a felony (which, in some jurisdictions, is considered a crime of moral turpitude); a vague plea to admissible statute that also contains non-drug trafficking offenses, such as purchase or possession of drugs; or a plea to an offense that does not specify a controlled substance on the federal list, where the state list includes one or more drugs that are not on the federal list.

Aggravated Felony Alphabetical Quick Checklist

Alien harboring, smuggling, or transportation (N);
Attempt to commit an aggravated felony offense (U);
Bribery, commercial (R) or *of a witness* (S), with at least one year sentence;
Burglary with at least one-year sentence imposed (G);
Child pornography (I);
Counterfeiting, with at least one-year sentence imposed (R);
Conspiracy to commit an aggravated felony offense (U).
Controlled substances trafficking (B);
Crime of violence with at least one-year sentence imposed (F);
Document fraud with at least one-year sentence imposed (P);
Extortion offenses (H);
Failure to appear offenses (Q) and (T);
Firearms offenses specifically listed in (E);
Firearms or explosives trafficking (C);
Forgery for which the term of imprisonment is at least one year (R);
Fraud or deceit offenses in which the loss to victim(s) exceeds $10,000 (M)(i);
Gambling offenses, for which sentence of one year or more *may be* imposed (J);
Illegal re-entry offenses (O);
Kidnapping offenses (H);
Money laundering if the amount of the funds exceeds $10,000 (D);
Murder (A);
Obstruction of justice, for which the term of imprisonment is at least one year (S);
Passport fraud with at least one-year sentence imposed (P);
Perjury, and subornation, with at least one-year sentence imposed (S);
Prostitution business offenses (K)(i) & (ii);
Ransom offenses (H);
Rape (A);
Receiving stolen property with at least one-year sentence imposed (G);
RICO offenses, for which sentence of one year or more *may be* imposed (J);
Security offenses: Classified information (L)(i); Espionage (L)(i); Revealing undercover agents' identity (L)(i); Sabotage (L)(i); Treason (L)(i).
Sexual abuse of a minor (A);
Slavery offenses (K)(iii);
Tax evasion offenses in which the loss exceeds $10,000 (M)(ii);
Theft with sentence imposed of at least one year (G);
Trafficking in vehicles with altered ID numbers with at least one-year sentence imposed (R).

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Norton Tooby is a criminal defense attorney practicing in Oakland, California. After graduating from Harvard University in 1967, he attended Stanford Law School where he served as President of the STANFORD LAW REVIEW. His career has been devoted almost entirely to criminal defense work, both at the trial and appellate levels, culminating in the successful appeal of a death penalty case before the California Supreme Court in 1988 in which all convictions were reversed. *People v. Marks*, 45 Cal.3d 1335, 248 Cal.Rptr. 874, 756 P.2d 260 (1988).

He is listed in Best Lawyers in America, and in 2000, the Immigrant Legal Resource Center, of San Francisco, awarded him the Philip Burton Immigration & Civil Rights Award for Immigration Lawyering.

Since 1986, when the Legalization Program offered many noncitizens the chance to obtain lawful status in the United States, he has increasingly specialized in criminal defense of noncitizens, both before and after conviction, to avoid or minimize adverse immigration consequences. He has written extensively in the fields of criminal defense of noncitizens, ineffective assistance of counsel, post-conviction relief, and immigration consequences of criminal cases and how to ameliorate them, including SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005) (with Joseph Justin Rollin), (CRIMES OF MORAL TURPITUDE (2008) (with Joseph Justin Rollin and Jennifer Foster), CRIMINAL DEFENSE OF IMMIGRANTS (4th ed. 2007) (with Joseph Justin Rollin), CALIFORNIA POST-CONVICTION RELIEF (2002), POST-CONVICTION RELIEF FOR IMMIGRANTS (National ed. 2004), and AGGRAVATED FELONIES (2006) (with Joseph Justin Rollin). For the five years from 1998 through 2002, he served as Update Editor for D. Kesselbrenner & L. Rosenberg, IMMIGRATION LAW AND CRIMES (West Group 2004).

He represented *amici curiae* in *In re Resendiz*, 25 Cal.4th 230 (2001) (holding that defense counsel's misadvice concerning actual immigration consequences of a guilty plea constitutes ineffective assistance of counsel, resulting in reversal if prejudice is shown), and Mr. Totari in *People v. Totari*, 28 Cal.4th 876, 123 Cal.Rptr.2d 76 (2002) (holding that denial of a motion to vacate a conviction for lack of an immigration warning is appealable).

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