

December, 2014

This Newsletter contains selected recent developments in criminal immigration law occurring during December, 2014.

The coded references following each case summary refer to the title and section number in our practice manuals in which the subject of the recent development is discussed more fully. For example, CD 4.19 refers to N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS § 4.19 (2007), with monthly updates online at [NortonTooby.com](http://NortonTooby.com).

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**RECENT DEVELOPMENTS**

**Articles & Resources**

**RESOURCES – EXECUTIVE ACTIONS – DACA & DAPA**

The Immigrant Defense Project has updated its two-page checklist which summarizes the criminal offenses that might have immigration consequences for immigrant defendants, with a new summary of criminal bars relating to DACA and DAPA temporary administrative status programs as announced by DHS, available [here](#). The Immigrant

Legal Resource Center and National Immigration Project of the National Lawyer’s Guild have also issued a practice advisory related to criminal bars to DAPA, available [here](#). A helpful guide to the good, bad, and ugly parts of the executive actions can be found [here](#).

CD4:24.25;AF:2.37;CMT3:3.36

**CONTROLLED SUBSTANCE OFFENSES – UNLISTED CONTROLLED SUBSTANCES – PRACTICE ADVISORY – CLOZAPINE**

Clozapine is not on the federal controlled substance schedules (aka its chemical name (8-chloro-11-(4-methyl-1-piperazinyl)-5H-dibenzo [b,e] [1,4] diazepine) as reflected in the Code of Federal Regulations. In addition, its manufacturer, Novartis, indicated that clozapine is not a federally controlled substance. This substance is listed in the Massachusetts controlled substances schedules.

CD4:21.34, 19.42;SH:7.143, 7.67;AF:42

**Fourth Circuit**

**AGGRAVATED FELONY – THEFT OFFENSES – THEFT OR FRAUD**

*Omargharib v. Holder*, \_\_\_ F.3d \_\_\_, 2014 WL 7272786 (4th Cir. Dec. 23, 2014) (Virginia conviction of grand larceny, in violation of Va.Code Ann. § 18.2–95, is categorically not an aggravated felony “theft” offense, under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G), since the mere use of the disjunctive “or” in the offense definition (the larceny offense can be committed by means of theft or fraud) does not automatically render it divisible; Virginia state law treats “theft or fraud” as a unitary concept; the offense is indivisible as a matter of state law, and thus the modified categorical approach may not be applied).

CD4:19.94;AF:5.78, A.42, B.43;SH:7.103, 8.46



## Publication Announcement

### **California Criminal Defense of Immigrants Newsletter (CEB 2014)**

**By Norton Tooby**

We are happy to announce a new newsletter, the *California Criminal Defense of Immigrants E-Newsletter*. Continuing Education of the Bar is kind enough to publish this new online newsletter, beginning with the October 2014 issue. This newsletter will cover the relevant national immigration law that affects criminal defense of immigrants in California, as well as the California law on the subject. The case summaries and other developments will be cross-referenced to the relevant sections of the new CEB practice manual, *California Criminal Defense of Immigrants*, so the newsletter will serve as a cumulative indexed update from the research cutoff date for the printed volume of the current edition to the present on an ongoing basis. You may subscribe to this newsletter from [Continuing Education of the Bar](#).

The Law Offices of Norton Tooby will continue to publish monthly online updates to the 3000-page, three-volume Criminal Defense of Immigrants, along with all of our other practice manuals, through our [Premium Web Updates](#). These updates are keyed to our practice manuals, making it easy for you to check each month to see if a new development has occurred concerning the particular practice manual, and section number, that is relevant to your work, to ensure you are aware of the most recent legal authorities on each topic.

While this office is discontinuing its California Post-Conviction Relief for Immigrants newsletter, those interested may obtain the same content, and more, by subscribing to the new CEB newsletter, *California Criminal Defense of Immigrants E-Newsletter*. In addition to the California developments on post-conviction relief for immigrants, this new newsletter will cover other topics of great importance to immigrants, including safe havens that can be used as replacement convictions when a problematic conviction is vacated, and the actual immigration consequences of most of the most common California convictions, which can be very useful in establishing claims of ineffective assistance of counsel. Subscribers to our California post-conviction relief newsletter are urged to consider subscribing to the new CEB newsletter, *California Criminal Defense of Immigrants E-Newsletter*.

## **Fifth Circuit**

### **CRIMES OF MORAL TURPITUDE – SEX OFFENSES – PUBLIC LEWDNESS**

*Cisneros-Guerrerro v. Holder*, \_\_\_ F.3d \_\_\_, 2014 WL 7398643 (5th Cir. Dec. 29, 2014) (Texas conviction of public lewdness, under V.T.C.A., Penal Code § 21.07, was not categorically a crime of moral turpitude, for purposes of eligibility for cancellation of removal under INA § 240A(b)(1), 8 U.S.C. § 1229b(b)(1), because the statute, coupled with caselaw, proscribes some conduct that is not moral turpitude, but is inoffensive and ubiquitous conduct, such as the consensual touching of another person's breast, even if clothed, in public, “with intent to arouse or gratify the sexual desire of any person”).  
CD4:20.8;CMT3:8.9, 9.99, CHART:SH:7.111, 8.79

## **Sixth Circuit**

### **RELIEF – ADJUSTMENT OF STATUS – TPS**

*Medina v. Beers*, \_\_\_ F.Supp.3d \_\_\_ (E.D.Pa 11/05/2014 ) (TPS beneficiary may adjust status under INA § 245(a), despite illegal entrance, since TPS grant is an ‘admission’), following *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013).  
CD4:24.25;AF:2.37;CMT3:3.36

## **Ninth Circuit**

### **POST CON RELIEF – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO INVESTIGATE**

*Mann v. Ryan*, \_\_\_ F.3d \_\_\_, \_\_\_, 2014 WL 7345864 (9th Cir. Dec. 29, 2014) (“A decision to not pursue or present mitigating evidence cannot be considered a reasonable strategic decision unless counsel supports that decision with investigation. *Wiggins*, 539 U.S. at 521 (explaining that ‘the deference owed such strategic judgments’ is defined ‘in terms of the adequacy of the investigations supporting those judgments’); *Strickland*, 466 U.S. at 691 (‘[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’). In other words, ‘[a]n uninformed strategy is not a reasoned strategy.’ *Correll*, 539 F.3d at 949. ‘It is, in fact, no strategy at all.’ *Id.*”).

### **AGGRAVATED FELONY – CONSPIRACY – NEVADA CONSPIRACY OVERBROAD**

*United States v. Garcia-Santana*, \_\_\_ F.3d \_\_\_, 2014 WL 7012412 (9th Cir. Dec. 15, 2014) (Nevada conviction for conspiracy to commit burglary under Nev. Rev. Stat. sections 199.480 and 205.060(1), did not constitute an aggravated felony under INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U), because Nevada's conspiracy statute requires no proof of an overt act).  
CD4:19.32;AF:5.12, A.12, B.64;SH:7.39, 8.67

## **Ninth Circuit Lower Courts**

### **CAL POST CON – PRACTICE ADVISORY – PROP 47 – DA ARGUMENT THAT REDUCTION OF FELONY TO MISDEMEANOR VIOLATES PLEA AGREEMENT –RESPONSE**

In opposing a motion to reduce a felony listed in Proposition 47 to a misdemeanor, the prosecution may argue that to do so would violate the plea agreement. Defense counsel can argue, to the contrary, that to prevent this reduction would be inconsistent with the plain language of the statutes amended by Proposition 47.

Plea agreements contemplate retroactive application of new legislation. See *People v. Gipson* (2004) 117 Cal.App.4th 1065, 1070. In addition, the Supreme Court stated: For the reasons we have explained, the general rule in California is that a plea agreement is “ ‘deemed to incorporate and contemplate not only the existing law but the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy....’ ” (*Gipson*, supra, 117 Cal.App.4th at p. 1070, 12 Cal.Rptr.3d 478.) It follows, also as a general rule, that requiring the parties' compliance with changes in the law made retroactive to them does not violate the terms of the plea agreement, nor does the failure of a plea agreement to refer to the possibility that the law might change translate into an implied promise the defendant will be unaffected by a \*74 change in the statutory consequences attending his or her conviction. To that extent, then, the terms of the plea agreement can be affected by changes in the law.

*Doe v. Harris*, 57 Cal. 4th 64, 73-74, 302 P.3d 598, 605 (2013).  
Cal Post Con 9:16

THE LAW OFFICES OF

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TOOBY

# Consultations

Since 1989, the Law Offices of Norton Tooby have offered expert advice and highly successful services to immigration attorneys, criminal attorneys, and clients. Our nationwide law practice assists foreign nationals in avoiding adverse immigration consequences of crimes anywhere in the country.



## **Immigration Lawyers**

We investigate criminal histories nationwide, and analyze them to provide (a) cutting-edge immigration-court arguments why a given conviction does not trigger removal, and (b) post-conviction efforts to vacate criminal convictions to avoid immigration consequences.

## **Criminal Lawyers**

We investigate criminal and immigration histories nationwide and offer strategies for obtaining (a) immigration-safe dispositions, and (b) post-conviction relief to eliminate immigration damage.

## **Individuals**

We investigate your situation to (a) advise your criminal lawyer what plea will avoid deportation, (b) advise your immigration lawyer on new immigration-court arguments to avoid removal, and (c) erase convictions in criminal court to avoid immigration damage.

## **Testimonials:**

*"If you are an immigration lawyer with a defendant who has criminal issues, you only need to know two words: Norton Tooby." - Dan Kowalski*

*"Brilliant legal strategies."*

-Ann Benson, Directing Attorney, Washington Defender Association's Immigration Project

For Mr. Tooby's biography [click here](#).

**Interested in our services?** Contact our office at (510) 601-1300 or submit our Intake Form to begin the preliminary review process. Once we receive your Intake Form, we will contact you and let you know if we feel we can help. Consultations can be in person or by phone. Visit [www.NortonTooby.com](http://www.NortonTooby.com) to download the Intake Form.

CAL CRIM DEF – DOMESTIC VIOLENCE –  
MORAL TURPITUDE – CORPORAL INJURY  
OF A SPOUSE

*Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009) (California conviction of corporal injury of a spouse or cohabitant statute is divisible and not categorically a crime involving moral turpitude, since there is no special relationship with a cohabitant making that offense a crime of moral turpitude).  
Cal Crim Def 19.9

**Eleventh Circuit**

POST CON RELIEF – FLORIDA –  
EXPUNGEMENT

Expungements are generally not based on a ground of legal invalidity, and so do not eliminate convictions for immigration purposes. However, they are effective in a few instances. For example, in the Ninth Circuit they will completely eliminate convictions for all immigration purposes, so long as the conviction occurred prior to July 11, 2012, and the offense was simple possession of any controlled substances. See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. Jul. 14, 2011) (en banc). Rehabilitative expungements are also useful in the DACA context.

In Florida, a case in which adjudication is withheld is considered a conviction and the client would not be eligible to expunge it. He can always try to obtain postconviction relief by filing a coram nobis petition, but if two years have passed after he was convicted, it would be very difficult to win that petition to set aside the guilty plea and obtain a trial or a new disposition that would not trigger adverse immigration consequences.

It is difficult, and getting more difficult, to win a petition to expunge a conviction in Florida. If someone has a prior conviction for even a minor traffic offense, such as driving without having a valid drivers license, the government may well refuse even to allow a Petition to Expunge to get certified by the Florida Department of Law Enforcement (FDLE). The process has three parts. First you have to send the FDLE-prescribed form to the Prosecutor's office to allow them to sign off on the client's eligibility to get a certificate

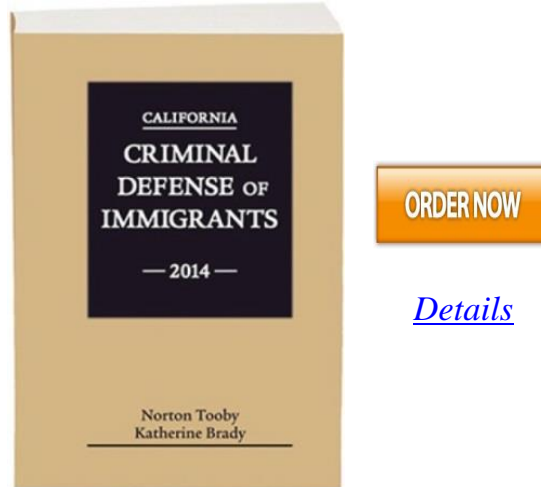
for a Petition to Expunge. Once that is obtained, you have to send it to FDLE to get their approval. If that is approved, the FDLE will issue a Certification for the Application to Expunge. Once that is received, counsel then files it with the Court. Depending on the County and the Judge assigned, a full-blown hearing may be scheduled instead of obtaining an agreement to grant the expungement. In Orange County, FL, it really depends on the Judge. In Lee County, a hearing is always required. Thanks to Roshani M. Gunewardene  
PCN 4.8



## *Publication Announcement*

### California Criminal Defense of Immigrants (CEB 2014)

By Norton Tooby & Katherine Brady



We are happy to announce the publication of the new 600-page CEB book, California Crimes and Immigration, written by Norton Tooby and Katherine Brady.

This new practice manual was written specifically for California criminal defense attorneys, to assist them in representing foreign national defendants by (1) preventing the criminal disposition from triggering an immigration disaster, and (2) preventing the immigration status, and an immigration hold, from sabotaging all criminal dispositions that depend on the client actually emerging into freedom.

The heart of the book consists of nine chapters outlining "safe haven" pleas and sentences in general, and in specific areas such as Assault and Battery Offenses and Burglary Offenses. These chapters describe the specific immigration threats and their antidotes, making it easier for counsel to comply with the *Padilla* requirement of giving accurate immigration advice at plea, for a wide range of California offenses. In addition, safer alternate pleas are offered, that give equivalent convictions and sentences, but avoid damaging immigration consequences.