THE LAW OFFICES OF
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# Crimes & Immigration Newsletter

December, 2015

This Newsletter contains selected recent developments in criminal immigration law occurring during December, 2015. The full version , which includes *all* monthly updates, is available here.

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.

Andrew J. Phillips, Esq.
*Editor*

## INSIDE



## RECENT DEVELOPMENTS

### Resources

IMMIGRATION CONSEQUENCES OF CALIFORNIA CONVICTIONS – 2016
IMMIGRANT LEGAL RESOURCE CENTER
CALIFORNIA QUICK REFERENCE CHART

We are pleased to present the January 2016 edition of the California Quick Reference Chart for Determining Key Consequences of California Offenses. Created as a key reference for criminal defenders, the Chart is also used extensively by immigration advocates.

### Practice Advisories

PRACTICE ADVISORY -- DEPORTABLITY—FAILURE TO MAINTAIN STATUS – CRIME OF VIOLENCE
Avoidance of a conviction for a crime of violence for which a sentence of more than one year may be imposed is a condition of a nonimmigrant's admission and continued stay in the United States. 8 C.F.R. § 214.1(g) provides:

(g) Criminal activity. A condition of a nonimmigrant's admission and continued stay in the United States is obedience to all laws of United States jurisdictions which prohibit the commission of crimes of violence and for which a sentence of more than one year imprisonment may be imposed. A nonimmigrant's conviction in a jurisdiction in the United States for a crime of violence for which a sentence of more than one year imprisonment may

be imposed (regardless of whether such sentence is in fact imposed) constitutes a failure to maintain status under Section 241(a)(1)(C)(i) [now 237(a)(1)(C)(i)] of the Act.

The meaning of "crime of violence" as used in this regulation is not further defined. Advocates can argue that this means a felony conviction of a crime of violence as defined in 18 U.S.C. § 16, with all the defenses against that aggravated felony definition. Felony conviction presumably uses the federal criminal definition of felony, as meaning a conviction for which a sentence in excess of one year may be imposed. See 18 U.S.C. § 3559(a)(5); N. Tooby & J. Rollin, Aggravated Felonies §§ 3.57, 5.24 (2006).
CD4:10.91

RELIEF – ILRC 2016 EDITION OF IMMIGRATION RELIEF TOOLKIT FOR CRIMINAL DEFENDERS
Many noncitizen defendants are already deportable ("removable"). This includes undocumented people, as well as lawful permanent residents (green card holders) who have become deportable because of a conviction. If immigration authorities find these people, they will be deported *unless* they are granted some form of immigration relief. For these defendants, staying eligible to apply for immigration relief is their most important immigration goal, and may be their highest priority in the criminal defense.
We are pleased to provide the 2016 update to the *Immigration Relief Toolkit for Criminal Defenders*. The purpose of this toolkit is to help defenders or paralegals spot a defendant's *possible* immigration relief *relatively quickly*. If you determine that your client might be eligible for specific relief, this will help inform your criminal defense goals, and you can tell your client that it is especially important for him or her to get immigration counsel.

The Relief Toolkit contains:
Questionnaire to spot possible relief (takes 10 minutes to complete)
Two-page information sheets on each specific application, e.g. asylum, naturalization, family immigration, whether the client might already be a citizen
Annotated chart listing different forms of relief and their criminal record bars

CAL POST CON – PRACTICE ADVISORY – PENAL CODE § 1203.43 ORDERS
In order to make it clear that an order withdrawing a DEJ plea, under Penal Code § 1203.43, is based on a ground of legal invalidity, that eliminates all immigration consequences of the conviction under the test of *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), vacated by *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006), the following language is suggested for the order: "Pursuant to Penal Code section 1203.43, the court hereby permits the defendant to withdraw his plea of guilty as legally invalid *ab initio*, enter a plea of not guilty, and dismisses the complaint or information against the defendant."
Thanks to Jennifer M. Sheetz.
CCDOI 20.30

## BIA

RELIEF – NACARA – BEGINNING OF CONTINUOUS PRESENCE PERIOD
*Matter of Castro-Lopez*, 26 I. & N. Dec. 693 (BIA Dec. 2, 2015) (the 10 years of continuous physical presence required by 8 C.F.R. § 1240.66(c)(2) for noncitizens NACARA special-rule cancellation, should be measured from the noncitizen's most recently incurred ground of removal, at least where that ground is among those listed in 8 C.F.R. § 1240.66(c)(1)).
CD4:24.12;AF:2.23;CMT3:3.22

SENTENCE – CONFINEMENT – PROBATIONARY CONFINEMENT IS SUBSTANCE ABUSE FACILITY
*Matter of Calvillo-Garcia*, 26 I&N Dec. 697 (BIA Dec. 9, 2015) (confinement in a substance abuse treatment facility, imposed as a condition of probation, is a "term of confinement" under INA §101(a)(48)(B); "Given that a person sentenced to serve a term in an SAFPF is not free to leave the facility absent that determination, we conclude that this sentence is a "period of . . . confinement" under section 101(a)(48)(B) of the Act.").
CD4:10.64;AF:3.62;SH:7.25;PCN:7.2

## First Circuit

CITIZENSHIP – DERIVATIVE CITIZENSHIP – COMMON-LAW MARRIAGE *Thompson v. Lynch*, 808 F.3d 939 (1st Cir. Dec. 29, 2015) (petitioner failed to establish that his parents entered a common-law marriage, and so failed to sustain derivative citizenship claim).
CD4:3.17;AF:3.3;CMT3:2.2

DETENTION – MANDATORY DETENTION – "WHEN RELEASED"
*Castaneda v. Souza*, 810 F.3d 15 (1st Cir. Dec. 23, 2015) (bar to bonded release under detention mandate applied only to those specified criminal aliens whom the Attorney General took into custody "when [they were] released" from criminal custody; word "when" under detention mandate conveyed some degree of immediacy, rather than simply setting forth a condition; noncitizen arrested years after their convictions not subject to 8 U.S.C. § 1226(c)).

NOTE: The court did not establish or suggest what the limits of "reasonable" time after release from criminal custody would be, but clearly "years later" is not reasonable.
CD4:6.39;AF:2.11;CMT3:3.11

RELIEF – POLITICAL ASYLUM – PARTICULARLY SERIOUS CRIME
*Velerio-Ramirez v. Lynch***,** 808 F.3d 111 (1st Cir. Dec. 11, 2015) (case remanded to BIA in post-AEDPA, pre-IIRAIRA case to consider former 8 U.S.C. § 1253(h)(3), which requires compliance with 1967 Nations Protocol Relating to the Status of Refugees, in determining whether an offense is a "particularly serious crime" barring withholding of removal).
CD4:24.19;AF:2.31;CMT3:3.30

AGGRAVATED FELONY – CRIME OF VIOLENCE – 18 U.S.C. § 16(a) – REALISTIC PROBABILITY
*Whyte v. Lynch*, 807 F.3d 463, 468-469 (1st Cir. Dec. 9, 2015) (Connecticut misdemeanor conviction for third-degree assault, Conn. Gen.Stat. § 53a–61(a)(1) [with intent to cause physical injury . . . causes such injury], is not categorically an aggravated felony crime of violence because the statute does not require "violent force" to cause the injury; while the statute punishes "causing injury," it is realistically probable that injury could be caused without the "use" of "violent force").
CD4:19.37, 16.8;AF:5.19, A.14, B.9, 4.7

## Third Circuit

RELIEF – LPR CANCELLATION OF REMOVAL – STOP-TIME RULE – CLOCK CANNOT RESTART BY FRESH ADMISSION
*Singh v. Att'y Gen. of the U.S.*, 807 F.3d 547 (3d Cir. Nov. 4, 2015) (federal convictions in 2000 of crimes of moral turpitude stopped the clock, prior to seven years of continuous residence for purposes of LPR cancellation of removal, and the clock could never thereafter restart); following *Nelson v. Att'y Gen.*, 685 F.3d 318, 325 (3d Cir. 2012).

CD4:24.6;AF:2.6;CMT3:3.6

## Fourth Circuit

JUDICIAL REVIEW – PETITION FOR REVIEW – EXPEDITED REMOVAL – FAILURE TO EXHAUST
*Etienne v. Lynch*, 813 F.3d 135, 138 (4th Cir. Dec. 30, 2015) ("in expedited removal proceedings, an alien has no opportunity to challenge the legal basis of his removal. The INA's administrative-exhaustion requirement therefore does not deprive us of jurisdiction to consider such a challenge in the first instance on appeal."); c*ompare Malu v. U.S. Atty. Gen.*, 764 F.3d 1282, 1288 (11th Cir. 2014) (no jurisdiction), *with Valdiviez–Hernandez v. Holder*, 739 F.3d 184, 187 (5th Cir. 2013) (per curiam) (jurisdiction lies); more generally, see *Aguilar–Aguilar v. Napolitano*, 700 F.3d 1238, 1243 (10th Cir. 2012) (jurisdiction lies); *Escoto–Castillo v. Napolitano*, 658 F.3d 864, 866 (8th Cir. 2011) (no jurisdiction). The Seventh Circuit has arguably come out on both sides of the issue. *Compare Eke v. Mukasey*, 512 F.3d 372 (7th Cir. 2008) (jurisdiction lies), *with Fonseca–Sanchez v. Gonzales*, 484 F.3d 439 (7th Cir. 2007) (no jurisdiction).

CD4:15.37;CMT3:2.19;AF:3.18

AGGRAVATED FELONY – CONSPIRACY – DRUG TRAFFICKING
*Etienne v. Lynch*, 813 F.3d 135, 142 (4th Cir. Dec. 30, 2015) (Maryland conviction of conspiracy to traffic in a controlled substance, which did not require as an element an overt act in furtherance of the conspiracy, nonetheless qualified as aggravated felony conspiracy, under INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U): "a state-law conspiracy conviction need not require an overt act as an element for the conviction to qualify as an 'aggravated felony.'").
CD4:19.32;AF:5.12, A.12, B.64

OVERVIEW – REMOVAL PROCEEDINGS – MENTAL COMPETENCY
*Diop v. Lynch*, __ F.3d __ (4th Cir. Dec. 2, 2015) (rejecting argument that IJ should have continued or administratively closed removal proceeding to allow noncitizen to receive a mental health evaluation).
CD4:15.23

## Seventh Circuit

RELIEF – POLITICAL ASYLUM – PARTICULARLY SERIOUS CRIME – JUDICIAL REVIEW
*Estrada-Martinez v. Lynch*, 809 F.3d 886, 888 (7th Cir. Dec. 31, 2015) (court of appeals lacked jurisdiction to review BIA's discretionary determination that noncitizen's conviction for statutory rape was "particularly serious" for purposes of political asylum).
CD4:24.19;AF:2.31;CMT3:3.30

IMMIGRATION OFFENSES – ILLEGAL REENTRY – SENTENCE – AGGRAVATED FELONIES UNDER 18 U.S.C. § 16(b)
*United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. Dec. 22, 2015) (offense previously found to be an aggravated felony crime of violence, applying 18 U.S.C. § 16(b), cannot be used to increase the maximum sentence for illegal reentry, since 18 U.S.C. § 16(b) has been found unconstitutionally void for vagueness), applying reasoning of *Johnson v. United States*, __ U.S. __, 135 S.Ct. 2551 (2015).
CD4:CHAPT13, 19.41;SH:7.51;AF:5.23

RELIEF – CONVENTION AGAINST TORTURE
*Rodriguez-Molinero v. Lynch*, 808 F.3d 1134 (7th Cir. Dec. 17, 2015) (remand following Immigration Judge's error in finding that noncitizen, who owes the cartel thousands of dollars and has cooperated with the FBI and DEA, did not show a "substantial risk" of torture if removed to Mexico).

NOTE: Judge Posner, writing for the majority, wrote: "A federal regulation states that "an alien who: has been ordered removed; has been found ... to be entitled to protection under the Convention Against Torture; and is subject to the provisions for mandatory denial of withholding of removal ... shall be granted deferral of removal to the country where he or she is more likely than not to be tortured." 8 C.F.R. § 1208.17(a) (emphasis added). The phrase we've italicized, though repeated in numerous opinions, see, e.g., *INS v. Cardoza–Fonseca*, 480 U.S. 421, 431, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987); *Milosevic v. INS*, 18 F.3d 366, 372 (7th Cir.1994), cannot be and is not taken literally, and this for several reasons: It would contradict the Convention (which as noted above requires only "substantial grounds for believing that" if removed the alien "would be in danger of being" tortured). It would dictate that while an alien who had a 50.1 percent probability of being tortured in the country to which he had been ordered removed would be granted deferral of removal, an otherwise identical alien who had "only" a 49.9 percent probability of being tortured would be removed—an absurd distinction. And it is not enforceable. The data and statistical methodology that would enable a percentage to be attached to a risk of torture simply do not exist. All that can be said responsibly on the basis of actually obtainable information is that there is, or is not, a substantial risk that a given alien will be tortured if removed from the United States. As we pointed out in *Yi–Tu Lian v. Ashcroft*, 379 F.3d 457, 461 (7th Cir.2004): "How one translates all this vague information into a probability that [the alien, if removed] will be tortured (remember the test is 'more likely than not') is a puzzler. Maybe probability is the wrong lens through which to view

the problem. 'More likely than not' is the standard burden of proof in civil cases (the 'preponderance' standard) and rarely is the trier of fact asked to translate it into a probability (i.e., more than 50 percent). Maybe some strong suspicion that [the alien] is at risk of being tortured if he is [removed] ... would persuade the immigration authorities to let him stay." (We should note—it relates to this case—that "torture" as defined in the Convention Against Torture as well as in the regulations includes killing whether or not accompanied by other torture—and it is indeed death as well as torture that the petitioner in this case fears. See 1465 U.N.T.S. 85, Art. 1(1), defining torture to include "any act by which severe pain or suffering ... is intentionally inflicted," and 8 C.F.R. § 1208.18(a)(4)(iii), including "the threat [and a fortiori the actuality] of imminent death.")."
CD4:24.7;AF:2.8;CMT3:3.8

## Eighth Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – POINTING FIREARM AT A PERSON
*Reyes-Soto v. Lynch*, 808 F.3d 369 (8th Cir. Dec. 10, 2015) (South Carolina conviction of violating South Carolina Code § 16–23–410 [pointing firearm at another in a threatening manner or with intent to threaten], is an aggravated felony crime of violence, since it cannot be committed without the 'threatened use of physical force against the person or property of another.").
CD4:19.37;AF:5.19, A.14, B.51

## Ninth Circuit

CRIMES OF MORAL TURPITUDE – THEFT – UNAUTHORIZED DRIVING OF A VEHICLE
*Almanza-Arenas v. Lynch*, 809 F.3d 515 (9th Cir. Dec. 28, 2015) (en banc) (California conviction of unauthorized driving of a vehicle, under Vehicle Code § 10851(a), is an overbroad statute, including intent temporarily to deprive, and cannot categorically constitute a crime of moral turpitude for removal purposes; no resort to the modified categorical analysis is permitted because the intent is not an element of the offense).
CD4:20.5;CMT3:8.5, 9.62, CHART;SH:7.121, 8.46

CONVICTION – NATURE OF CONVICTION – CATEGORICAL ANALYLSIS – DIVISIBLE STATUTE – JURY UNANIMITY REQUIRED
*Almanza-Arenas v. Lynch*, 809 F.3d 515 (9th Cir. Dec. 28, 2015) (en banc) (California conviction of unauthorized driving of a vehicle, under Vehicle Code § 10851(a), is an overbroad statute since jury unanimity is not required on issue of temporary or permanent intent to steal).
CD4:16.14;CMT3:7.6;AF:4.13

CONVICTION – NATURE OF CONVICTION – CATEGORICAL ANALYLSIS – DIVISIBLE STATUTE – MEANS OR ELEMENTS – STATE LAW CONTROLS
*Almanza-Arenas v. Lynch*, 809 F.3d 515, 525 (9th Cir. Dec. 28, 2015) (en banc) (California law governs as to whether the jury must be unanimous as to whether defendant committed the unauthorized driving offense, under Vehicle Code § 10851(a), with intent temporarily or permanently to deprive the owner; "As the Supreme Court has counseled, if the state courts have addressed the issue, 'we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.' (Footnote omitted.) *Schad v. Arizona*, 501 U.S. 624, 636, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (plurality opinion); *see also Albertson v. Millard*, 345 U.S. 242, 244, 73 S.Ct. 600, 97 L.Ed. 983 (1953) (per curiam) ('The construction given to a state statute by the state courts is binding upon federal courts.'). We look to a state's laws to determine whether that state's courts 'have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime.' *Schad*, 501 U.S. at 636, 111 S.Ct. 2491. Therefore, we must verify that our interpretation of elements versus means is consistent with how California would instruct a jury as to this offense.").
CD4:16.6;AF:4.5;CMT3:6.5

CONVICTION -- NATURE OF CONVICTION – CATEGORICAL ANALYLSIS – DIVISIBLE STATUTE – DISJUNCTIVE – MEANS VS ELEMENTS

*Almanza-Arenas v. Lynch*, 809 F.3d 515, 523 n.11 (9th Cir. Dec. 28, 2015) (en banc) ("The mere use of the disjunctive term 'or' does not automatically make a statute divisible. *See Rendon*, 764 F.3d at 1085–86 (concluding that when a state statute "is written in the disjunctive ... that fact alone cannot end the divisibility inquiry"); *see also United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014); *United States v. Pate*, 754 F.3d 550, 554–55 (8th Cir.), *cert. denied*, —— U.S. ——, 135 S.Ct. 386, 190 L.Ed.2d 272 (2014); *Omargharib v. Holder*, 775 F.3d 192, 198 (4th Cir. 2014); *United States v. Royal*, 731 F.3d 333, 341–42 (4th Cir. 2013).").
CD4:16.12;CMT3:7.4;AF:4.11

## Tenth Circuit

CRIMES OF MORAL TURPITUDE – POSSESSION OF STOLEN VEHICLE
*De Leon v. Lynch*, 808 F.3d 1224 (10th Cir. Dec. 22, 2015) (Oklahoma conviction of possession of stolen vehicles, under 21 Okl.St.Ann. § 4–103, was crime of moral turpitude; *mens rea* of knowledge is sufficient to render the offense one of moral turpitude; noncitizen failed to show realistic probability that a defendant could be prosecuted under this statute even if defendant intended to return the stolen vehicle).

CD4:20.5;CMT3:8.5, 9.60, CHART;SH:7.121, 8.46