
RECENT DEVELOPMENTS

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

INSIDE

Recent Case Decisions

Resources	1
Practice Advisories	2
Second Circuit.....	2
Fourth Circuit.....	2
Fifth Circuit.....	2
Sixth Circuit.....	3
Ninth Circuit	4
Tenth Circuit	4
Eleventh Circuit	5
Upcoming Seminars.....	5

Resources

RESOURCES – CLIENT INTAKE FORM – INTERACTIVE

The Immigrant Legal Resource Center has produced an Interactive Questionnaire for Immigration Analysis of criminal cases with immigration issues. See www.ilrc.org.

[Here is a fillable form](#), to enable defenders to more easily capture information for an immigration analysis.

[http://www.ilrc.org/files/documents/n._16_crim
imm_questionnaire_2015.pdf](http://www.ilrc.org/files/documents/n._16_crim_imm_questionnaire_2015.pdf)
CD4:3.12

RESOURCES – THIRD CIRCUIT IMMIGRATION BLOG

The Third Circuit Immigration Blog (a collaboration between Penn State Law and PIRC) has been updated to include recent cases and “Resources” tab now includes a few new items, including a chart analyzing select cases involving PWID marijuana offenses under 35 Pa. Stat. Ann. § 780-113(a)(30)

<http://3rdcirimmigrationblog.blogspot.com/>



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*.

Practice Advisories

DETENTION – ALTERNATIVES

DHS Office of Inspector General report on ICE alternatives to detention:

http://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-22_Feb15.pdf

CD4:6.36

OVERVIEW – REMOVAL PROCEEDINGS – MOTIONS TO SUPPRESS

American Immigration Council practice advisory on filing motions to suppress in removal proceedings.

http://www.americanimmigrationcouncil.org/sites/default/files/motions_to_suppress_in_removal_proceedings- a_general_overview_1-26-15_fin.pdf

CD4:15.26

Second Circuit

JUDICIAL REVIEW – PETITION FOR REVIEW – MOTION TO CONTINUE

Flores v. Holder, ___ F.3d ___, 2015 WL 795212 (2d Cir. Feb. 26, 2015) (BIA abused discretion in denying motion to continue by failing to consider factors articulated in Matter of Hashmi: neither the IJ nor the BIA assessed whether Flores's wife's I-130 Petition was prima facie approvable, but instead considered the petition had actually been approved); citing Matter of Hashmi, 24 I. & N. Dec. 785, 790 (BIA 2009) (the following factors must be considered in determining whether good cause exists to continue proceedings to await CIS's adjudication of a pending family-based visa petition: “(1) the [government's] response to the motion; (2) whether the underlying visa petition is prima facie approvable; (3) the [movant's] statutory eligibility for adjustment of status; (4) whether the ... application for adjustment merits a favorable exercise of discretion; and (5) the reason for the continuance and other procedural factors.”); see Rajah v. Mukasey, 544 F.3d 449, 453 (2d Cir.2008) (observing that agency abuses its discretion in denying motion to

continue where its decision “rests on an error of law” (internal quotation marks omitted)).

CD4:15.37;AF:2.19;CMT3:3.18

RELIEF – WAIVERS – INA § 212(h) – AGGRAVATED FELONY BAR

Flores v. Holder, ___ F.3d ___, 2015 WL 795212 (2d Cir. Feb. 26, 2015) (noncitizen convicted of aggravated felony not barred from § 212(h) relief, since he had not previously been admitted at a lawful permanent resident), following Matter of Michel, 21 I. & N. Dec. 1101, 1104 (BIA 1998) (“Section 212(h) of the Act, while specifically precluding waiver eligibility for a lawful permanent resident who has been convicted of an aggravated felony, imposes no such restriction on one who has not been admitted previously as a lawful permanent resident.”).

CD4:24.29;AF:2.45;CMT3:3.44

Fourth Circuit

JUVENILE – SPECIAL IMMIGRANT JUVENILE – RIGHT TO SIJ FINDING FROM JUVENILE COURT

Eddie E. v. Superior Court, ___ Cal.App.4th ___, ___ Cal.Rptr.3d ___, 2015 WL 545984 (4th Dist. Feb. 11, 2015) (court of appeals ordered juvenile court to make favorable findings under 8 U.S.C. § 1101(a)(27)(J)), which are a prerequisite to petitioner applying for special immigrant juvenile status, SIJ status cannot be granted unless a state court finds, among other things, that petitioner cannot reunify with one or both of his parents due to abuse, neglect, or abandonment, and that it would not be in petitioner's best interest to return to his home country, and petitioner satisfied this standard).

Fifth Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – MANSLAUGHTER

United States v. Garcia-Perez, ___ F.3d ___, 2015 WL 753759 (5th Cir. Feb. 23, 2015)

THE LAW OFFICES OF

NORTON
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 to download the Intake Form.

(Florida conviction of manslaughter, in violation of Florida Statute § 782.07, did not qualify as a “crime of violence” under United States Sentencing Guideline § 2L1.2(b)(1)(A), because Florida manslaughter conviction does not require proof of force, and may be committed with negligent intent).
CD4:19.40;SH:7.49, 8.14;AF:5.22, A.14, B.13

Sixth Circuit

POST-CONVICTION RELIEF – FEDERAL – HABEAS CORPUS – CUSTODY

Pola v. United States, ___ F.3d ___, 2015 WL 690312 (6th Cir. Feb. 19, 2015) (“A petitioner who has served the full term of his sentence still satisfies the in-custody requirement of § 2255 provided he filed the motion while incarcerated and shows that he “is suffering, and will continue to suffer, serious disabilities”—collateral consequences—as a result of the conviction. *Carafas v. LaVallee*, 391 U.S. 234, 238–39, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).”).
PCN:5.35

POST-CONVICTION RELIEF – FEDERAL – HABEAS CORPUS – STANDING – PRESUMPTION OF LASTING COLLATERAL CONSEQUENCES

Pola v. United States, ___ F.3d ___, ___, 2015 WL 690312 (6th Cir. Feb. 19, 2015) (“When a petitioner challenges the constitutionality of his conviction, [footnote omitted] we presume he will experience lasting collateral consequences. See *Spencer*, 523 U.S. at 12 (“In the context of criminal conviction, the presumption of significant collateral consequences is likely to comport with reality.”); *Sibron v. New York*, 392 U.S. 40, 55–57, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968) (“[A] criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.”). Accordingly, we may presume that *Pola* has satisfied the case-or-controversy requirement because he challenges the constitutionality of

his criminal conviction and therefore continues to suffer the burdens of that conviction.”); see *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (“This means that, throughout the litigation, the [petitioner] must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.” *Id.* (internal quotation marks omitted); see also *Pollard v. United States*, 352 U.S. 354, 358, 77 S.Ct. 481, 1 L.Ed.2d 393 (1957) (holding that petitions for certiorari are “allowed only where [the Court's] judgment will have some material effect.”).
PCN:5.28

POST CON RELIEF – REVIEW – CREDIBILITY DETERMINATION REMOVAL PROCEEDINGS – EVIDENCE

Pola v. United States, ___ F.3d ___, 2015 WL 690312 (6th Cir. Feb. 19, 2015) (fact that court characterizes petitioner’s affidavit as “self-serving” – standing alone – is an insufficient basis on which to sustain an adverse credibility determination).

The court stated:

But an affidavit is not incredible just because the asserted facts favor the affiant. See, e.g., *Valentine*, 488 F.3d at 334 (holding that the district court abused its discretion by denying the petitioner an evidentiary hearing when the petitioner had provided a factual narrative of events that was not blatantly incredible); *Smith v. United States*, 348 F.3d 545, 551, 554 (6th Cir. 2004) (finding that the district court abused its discretion when it denied the petitioner an evidentiary hearing because he had only submitted “self-serving testimony” that he would have pleaded guilty had his attorney advised him of the sentencing exposure).
(*Id.* at ___.)

PCN:6.8;CD4:15.26

Ninth Circuit

CRIMES OF MORAL TURPITUDE – FELONY COMMITTED TO BENEFIT A STREET GANG

Hernandez-Gonzalez v. Holder, ___ F.3d ___, ___, 2015 WL 618776 (9th Cir. Feb. 13, 2015) (California conviction for a violation of Penal Code § 12020(a)(1) for possession of a billy club, with a sentence enhancement under Penal Code § 186.22(b)(1), for “a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members,” does not categorically constitute a crime involving moral turpitude, since the predicate felony conviction does not constitute a crime of moral turpitude, and the gang enhancement does not add turpitude to this offense).

Note: The gang enhancement, under Penal Code § 186.22(b)(1), states that an additional term of punishment may be imposed if (1) an individual is convicted of a felony “committed for the benefit of, at the direction of, or in association with any criminal street gang,” and (2) if that felony was committed “with the specific intent to promote, further, or assist in any criminal conduct by gang members.” The requisite intent “applies to any criminal conduct, without a further requirement that the conduct be ‘apart from’ the criminal conduct underlying the offense of conviction sought to be enhanced.” Emery v. Clark, 643 F.3d 1210, 1215 (9th Cir. 2011) (quoting People v. Albillar, 51 Cal.4th 47, 66 (2010)) (internal citations and quotation marks omitted). Additionally, the specific intent need not be to “promote, further, or assist a gang-related crime” but only to “promote, further, or assist criminal conduct by gang members.” Id. at 1215 n.3 (quoting Albillar, 51 Cal.4th at 67 (internal quotation marks omitted)).

The court in Hernandez-Gonzalez also found “much more than a ‘realistic probability’

that the gang enhancement would be applied to conduct that does not involve moral turpitude.” Id. at ___ (“§ 186.22(b)(1) is regularly applied to weapons possession convictions involving non-turpitudinous conduct. . . . The gang enhancement does not provide a sufficient “evil intent” to transform an otherwise non-turpitudinous crime into one involving moral turpitude. Stated differently, the specific intent required under the statute to further criminal conduct by gang members does not necessarily establish the evil intent required to make the offense turpitudinous.”).

CD4:20.23;SH:7.120;CMT3:8.23

Tenth Circuit

JUDICIAL REVIEW – CHOICE OF LAW WHERE IMMIGRATION JUDGE IS LOCATED IN DIFFERENT CIRCUIT THAN THE IMMIGRANT

Medina-Rosales v. Holder, ___ F.3d ___, ___, 2015 WL 756345 (10th Cir. Feb. 24, 2015) (where the immigrant and counsel are located in a circuit different from that in which the immigration judge conducts the hearing, the governing law is that of the circuit in which the immigration judge is located: “The charging document establishes the hearing location, regardless of the location of the IJ and the holding of a video conference hearing.”).

CD4:15.37, 15.25;AF:2.19;CMT3:3.18

RELIEF – WAIVERS – INA 212(h) WAIVER – AGGRAVATED FELONY BAR

Medina-Rosales v. Holder, ___ F.3d ___, 2015 WL 756345 (10th Cir. Feb. 24, 2015) (the aggravated felony bar to eligibility for a waiver of inadmissibility under INA § 212(h), applies only to those persons with an aggravated felony conviction who became LPRs at the time that they lawfully entered the United States); but see Matter of Koljenovic, 25 I&N Dec. 219 (2010).

CD4:24.29;AF:2.45;CMT3:3.44

Eleventh Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – THROWING A DEADLY MISSILE AT AN OCCUPIED VEHICLE
United States v. Estrada, ___ F.3d ___, 2015 WL 479969 (11th Cir. Feb. 6, 2015) (per curiam) (Florida conviction for throwing a deadly missile, a violation of Florida Statute § 790.19, was not categorically a conviction for a crime of violence, for illegal reentry sentencing purposes, because “We concluded that Estrella could be deemed to have been convicted of a crime of violence if his conviction was for wanton conduct, because Florida law defines “wanton” to mean that one has acted intentionally or with reckless indifference to the consequences and with knowledge that damage is likely to be done to some person. Id. at 1253. But if instead Estrella had been convicted of only malicious conduct, the latter was satisfied by knowledge that injury or damage would be done to a person or to property and, in that case, Estrella would not be deemed to have been convicted of a crime of violence.”), following United States v. Estrella, 758 F.3d 1239 (11th Cir. 2014).

CD4:19.40;SH:7.49, 8.54;AF:5.22, A.14, B.51

Upcoming Seminars

Pre-AILA Immigration Law and Crimes CLE Seminar



June 17, 2015

Washington, D.C.

9am - 5pm

Law Offices of Norton Tooby

Publication & Subscription Order Form

____ Ship
____ Pick Up

Name _____ Date ____/____/____ Type of Law Practiced _____

Firm _____ Phone (____) _____

Email (Required if purchasing a subscription, online edition, or PDF) _____

Shipping Address _____

City/State/Zip _____

Payment method: Check (*Payable to: Law Offices of Norton Tooby*) Visa MasterCard American Express

Card # _____ Exp. ____/____ Code: _____ Signature _____

Billing Address (if different from Shipping) _____

City/State/Zip _____

How did you hear about us? Exhibit Online Mailing Word of Mouth Email

Practice Manuals (updated online monthly, unless published by CEB)	Print	Online	Both	Quantity	Total
Aggravated Felonies (2006)	<input type="checkbox"/> \$285	<input type="checkbox"/> \$175	<input type="checkbox"/> \$285		
California Criminal Defense of Immigrants (CEB, 2014)	<input type="checkbox"/> \$195				
California Post-Conviction Relief for Immigrants (2009)	<input type="checkbox"/> \$285	<input type="checkbox"/> \$135	<input type="checkbox"/> \$285		
Criminal Defense of Immigrants (Volumes I, II, III) (2012)	<input type="checkbox"/> \$485	<input type="checkbox"/> \$335	<input type="checkbox"/> \$485		
Criminal Defense of Immigrants (Volume III) (2012 Update)	<input type="checkbox"/> \$245				
Post-Conviction Relief for Immigrants (2004)	<input type="checkbox"/> \$245	<input type="checkbox"/> \$135	<input type="checkbox"/> \$245		
Safe Havens: How to Identify & Construct Non-Deportable Convictions (2005)	<input type="checkbox"/> \$285	<input type="checkbox"/> \$175	<input type="checkbox"/> \$285		
Tooby's Crimes of Moral Turpitude (2008)	<input type="checkbox"/> \$245	<input type="checkbox"/> \$135	<input type="checkbox"/> \$245		
Other Publications	Print	PDF	Both		
Winning <i>Padilla</i> Claims (2012)	<input type="checkbox"/> \$245	<input type="checkbox"/> \$195	<input type="checkbox"/> \$245		
Tooby's Categorical Analysis Tool Kit (2009)	<input type="checkbox"/> \$245	<input type="checkbox"/> \$135	<input type="checkbox"/> \$245		
Tooby's Checklists on Criminal Immigration Law (2010)	<input type="checkbox"/> \$245	<input type="checkbox"/> \$135	<input type="checkbox"/> \$245		
Tooby's Guide to Criminal Immigration Law (2008)	<input type="checkbox"/> \$45	FREE	<input type="checkbox"/> \$45		
Subscriptions	Price				
Premium Resources Membership	<input type="checkbox"/> \$19.95/month				
<p>Publications may be returned in their original condition within 30 days of purchase for a full refund. Please include a copy of the invoice and a reason for the return. Shipping and handling fees are nonrefundable.</p> <p>Please note that shipping rates shown are only valid for the continental United States. For shipping outside the continental United States or to foreign countries, please call (510) 601-1300.</p>				Subtotal	
				15% Premium Resources Deduction	
				TOTAL SALE	
				CA residents, add 8.75% sales tax	
				\$10 shipping & handling per volume	
GRAND TOTAL					

To Place Your Order, Please Visit www.NortonTooby.com

By Mail: Send this form to Law Office of Norton Tooby, 2831 Telegraph Ave., Oakland, CA 94609, Attn: Publications

Fax: (510) 595-6772 Email: pubs@nortontooby.com Questions? Call: (510) 601-1300

Practice Manuals
(updated monthly online)

CALIFORNIA CRIMINAL DEFENSE OF IMMIGRANTS

600 pages (2014, CEB) By N. Tooby & K. Brady
Print: \$195 – Online version available from CEB

- Use the only California-specific book on this topic.
- Protect you client's immigration interests in both misdemeanor and felony cases.
- Learn the best practices for research, investigation, negotiation, and resolution.
- Identify alternative acceptable pleas and avenues to post-conviction relief.
- Includes charts, checklists, diagnostic questionnaires, scripts, and additional resources.

AGGRAVATED FELONIES

1000 pages (2006 Ed.) By N. Tooby & J. Rollin
Print/Both: \$285, Online Edition: \$175

- Summaries of all cases from all courts defining what is and is not an aggravated felony and sentence
- Fully indexed, with a table of cases and other useful aids to save hours of research

CALIFORNIA POST-CONVICTION RELIEF FOR IMMIGRANTS

780 pages (Second Edition, 2009) By N. Tooby
Print/Both: \$285, Online Edition: \$135

- State-of-the-art after *People v. Kim*
- All forms of relief (including new ones)
- All grounds of legal invalidity
- What relief is effective in immigration court
- Cutting-edge immigration court arguments

CRIMINAL DEFENSE OF IMMIGRANTS

Three Volumes, 3000 pages (2012, 4th Ed. with update)

By N. Tooby and J. Rollin

Print/Both: \$485, Online Edition: \$335

Volume III Update: Print Only: \$245

- How to defend immigrants in criminal court, including avoiding immigration consequences
- Detailed treatment of immigration consequences of criminal convictions
- Useful for both immigration and criminal counsel
- Chapter on Interpreters
- Volume III contains all updates from 2007 to 2012

POST-CONVICTION RELIEF FOR IMMIGRANTS

700 pages (2004 Ed.) By N. Tooby

Print/Both: \$245, Online Edition: \$135

- Detailed information on how to obtain post-conviction relief to reduce or eliminate adverse immigration consequences of convictions
- 40 constitutional and other federal grounds to vacate convictions

- Federal procedures for obtaining relief, such as motions to vacate, habeas corpus and coram nobis

TOOBY'S CRIMES OF MORAL TURPITUDE

800 pages (2008 Ed.)

Print/Both: \$245

Online Edition \$135

By N. Tooby, J. Rollin, and J. Foster

- Updated through 3/1/08
- Includes all immigration decisions defining CMTs
- Useful in all jurisdictions
- Comprehensive and fully indexed

Other Publications

WINNING PADILLA CLAIMS

405 pages (2012 Ed.) Edited by N. Tooby

Print/Both: \$245, PDF: \$195

- Includes 4-hour audio package of Norton Tooby's seminar
- How to comply with *Padilla* and obtain post-conviction relief
- Useful in any jurisdiction nationwide
- Current state of criminal and immigration law after *Padilla*
- Valuable information on evaluating the chances of post-conviction relief success

TOOBY'S CATEGORICAL ANALYSIS TOOL KIT

545 pages (Second Edition, 2009)

Edited by Norton Tooby

Print/Both: \$245, PDF: \$135

- New, revised and expanded
- Totally re-written after *Nijhawan* decision
- Current state of the law on categorical analysis
- Appendix specifying type of analysis for each ground of removal. Save a great deal of time in research!

TOOBY'S CHECKLISTS ON CRIMINAL IMMIGRATION LAW

616 pages (2010 Ed.) By N. Tooby

Print/Both: \$245, PDF: \$135

- Best checklists from all our previous books
- Updated for accuracy
- Conviction-based grounds of deportation and inadmissibility
- Aggravated felony checklists
- Famous crimes of moral turpitude table
- Quickly focus on relevant grounds

TOOBY'S GUIDE TO CRIMINAL IMMIGRATION LAW

200 pages (2008 Ed.) By N. Tooby

Print/Both: \$45, PDF: FREE

- Short, simple, easy to understand
- How we can protect defendants' immigration status, stage by stage in a criminal case
- Summary of CRIMINAL DEFENSE OF IMMIGRANTS