THE LAW OFFICES OF
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Crimes & Immigration Newsletter

January, 2016

This Newsletter contains selected recent developments in criminal immigration law occurring during January, 2016. 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

Sixth Circuit

AGGRAVATED FELONY – SEXUAL ABUSE OFA MINOR – UNLAWFUL SEXUAL INTERCOURSE WITH A MINOR

Esquivel-Quintana v. Lynch, 810 F.3d 1019, 1025 (6th Cir. Jan. 15, 2016) (California conviction under Penal Code § 261.5(c), for unlawful sexual intercourse with a minor, categorically qualified as a sexual abuse of a minor aggravated felony, under INA § 1101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A), giving *Chevron* deference to the BIA precedent decision in this case, and declining to apply the rule of lenity: "Faced with this ambiguity, the Board has interpreted "sexual abuse" by referring to the definition of the term in 18 U.S.C. § 3509(a)(8). *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991, 995–96 (BIA1999). That provision defines "sexual abuse" as "the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." Furthermore, the Board draws its

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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.

definition of "minor" from 18 U.S.C. § 3509(a)(2), which defines a "child" as a person under eighteen. *In re V-F-D-*, 23 I. & N. Dec. 859, 862 (BIA 2006).").

CD4:19.87;AF:5.70, A.38, B.73;SH:7.69

Seventh Circuit

RELIEF – CANCELLATION OF REMOVAL FOR LPRS – CONTINUOUS RESIDENCE

Isunza v. Lynch, 809 F.3d 791 (7th Cir. Jan. 11, 2016) (Illinois conviction of possession of 0.1 grams of cocaine, under 720 ILCS 570/410, constituted a controlled substances conviction, stopped the accrual of continuous residence to determine eligibility for LPR cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a), rejecting the argument that respondent's departure and return to the United States in 2000 restarted the clock to determine eligibility for cancellation of removal under INA § 240A(a), 8 U.S.C. § 1229b(a): "The Board reasonably construed the statute, 8 U.S.C. § 1229b, to find that commission of a qualifying drug crime permanently terminated the accrual of time toward continuous residency. In *Matter of Nelson*, 25 I. & N. Dec. 410, 413 (BIA 2011), the Board held that commission of a specified crime was a terminating event 'after which continuous physical presence or continuous residence could no longer accrue.'").

CD4:24.4;AF:2.4;CMT3:3.4

Eighth Circuit

IMMIGRATION OFFENSES – FALSE CLAIM OF US CITIZENSHIP

REMOVAL PROCEEDINGS – INADMISSIBILITY -- FALSE CLAIM OF US CITIZENSHIP

Godfrey v. Lynch, 811 F.3d 1013 (8th Cir. Jan. 22, 2016) (noncitizen made false claim of U.S. citizenship on Form I-9, barring adjustment of status without waiver; DHS submitted a copy of the I-9 in removal proceedings, and respondent testified that he did not understand what a "U.S. National" was, but rather intended for him employer to believe he was a U.S. citizen).

CD4:18.10

Ninth Circuit

CAL POST CON – VEHICLES – NEW PENAL CODE § 1203.43 – RESOURCES

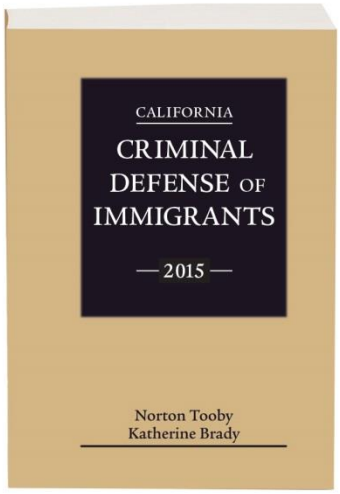
As you know, as of Jan. 1, 2016, we have a new form of California post-conviction relief to benefit immigrants, Penal Code § 1203.43, withdrawal of plea after DEJ dismissal of charges. We want to discuss materials available to help you obtain this relief for defendants, and discuss monitoring implementation of the new law.

As background, a successfully completed DEJ is not a conviction for any California purpose, but is a very damaging drug conviction for immigration purposes -- even after charges have been dismissed under Penal Code § 1000.3. Section 1203.43 is a simple

Publication Announcement

California Criminal Defense of Immigrants (CEB 2016)

By Norton Tooby & Katherine Brady



ORDER NOW

Details

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.

procedure that should eliminate this "conviction" for immigration purposes. It is simple because a judge can grant 1203.43 on the papers without a hearing, since the only required showing is that the court in fact dismissed the defendant's charges under Penal Code 1000.3. (If court records are no longer available, §1203.43(b) provides that a declaration plus DOJ record can suffice.) While counties must devise procedure, we hope that §1203.43 relief will be as simple as a §1203.4 dismissal.

Section 1203.43 eliminates the conviction for immigration purposes because the basis of the plea withdrawal is legal error: the finding that Penal Code §1000 misadvised defendants, including all non-citizen defendants, as to the actual consequences of DEJ when it said that DEJ would not result in the loss of any legal benefit. Therefore, the defendant's DEJ guilty plea is legally invalid. The statute explicitly sets out these findings at 1203.43(a), so a judge need not independently make or evaluate the findings.

Resources for defenders and immigration advocates

Three resources appear at www.ilrc.org/resources/New_California_Drug_Law_1203.43

1) § 1203.43 Practice Advisory for use in criminal and immigration proceedings

2) Model motion and proposed order. Pending completion of state forms for § 1203.43 -- which might take a year or more -- we urge counsel to submit their own motion. Many thanks to Graciela Martinez of the Los Angeles County Public Defender office for creating a sample motion and order, which is posted here in fillable PDF.

3) One-page Fact Sheet, and copy of the text of § 1203.43. This may be useful in educating others.

In addition, go to http://www.ilrc.org/resources/chart-immigration-effect-of-post-conviction-relief to see a chart that outlines the immigration effect of various forms of state post-conviction relief, including new § 1203.43.

Implementing and monitoring implementation of § 1203.43. Some of this may be old news, but we want to suggest three priorities.

1. Share information about implementation. This is a new law and a new type of law. We can work together to address local problems in implementation -- judges who demand more than is required, prosecutors who object, problems in obtaining contact information for past DEJ recipients. ILRC and others hope to do outreach to courts and prosecutors about this, and we appreciate suggestions and contacts. The one-page fact sheet might be useful.

We also can share best practices. Especially now as the parties first react to § 1203.43, it would be great to get in now to answer questions and establish good practice. One best practice: at least one Santa Clara County judge plans to routinely schedule signing the

1203.43 order immediately after dismissing charges for a completed DEJ.

If sharing implementation news with the group is a problem for any reason, feel free to just contact me.

2. Identify past DEJ non-citizen recipients and notify them about the new relief. Almost (see below) every non-citizen who completed DEJ successfully has a deportable drug conviction, whether they know it or not. It is a great service to find them so they can fix that.

Many offices are having the Prop 47 team work on this. A "best practice" tip: In Santa Clara County the probation department provided defenders with information on the 9,000 persons (citizen and noncitizen) who have successfully completed DEJ since its 1997 inception.

For defendants who didn't complete DEJ or show up for their hearing -- could they come in from the cold and ask to continue with DEJ? If so, they ultimately could benefit from § 1203.43. It has no bar based upon initial failures or passage of time.

***3. Consider the change to DEJ as you advise regarding current drug charges*.** DEJ still is not a great plea option for a noncitizen who has a first-time possessory drug charge. A noncitizen who has no drug priors wants to fight for a better alternative disposition, hopefully a non-drug offense, in light of the fact that they don't have any drug priors and a drug conviction is so very damaging to immigrants. For alternate pleas or strategies, see the practice advisory cited above, and see the defender article *Note: Drug Charges,* updated November 2015, at http://www.ilrc.org/files/documents/8.pdf

Even with Penal Code § 1203.43, DEJ presents two dangers to immigrant defendants. First, as always the defendant could fail to complete DEJ requirements and end up with a drug conviction. Second, even a successful noncitizen defendant may be vulnerable to removal proceedings during the 18 to 36-month DEJ period. In other words, DEJ likely will be treated as a conviction until the day that § 1203.43 relief is granted. A few exceptions are described below.

But if the only alternative is a straight drug conviction, DEJ is by far the better option due to § 1203.43. If the person can get through the DEJ period with successful performance and without being removed, they can get § 1203.43 relief and they will have no conviction for immigration purposes, backdated to the original guilty plea. Immigration counsel will argue that any removal proceedings should be continued to give the person a chance to complete DEJ (see Practice Advisory), altho unfortunately many immigrants have no counsel in removal proceedings.

Finally, several offenses other than simple possession are eligible for DEJ treatment; see Penal Code § 1000. These include in some circumstances Health & Safety Code §§ 11358 and 11368, which are aggravated felonies for immigration purposes. If a plea to these offenses can't be avoided, DEJ offers a tremendous possible benefit.

Best practice for pleading to DEJ:

If possible, get an unconditionally suspended fine or fee, and/or in the case of a permanent resident or refugee who is not yet deportable, plead to an unspecified "controlled substance." See further discussion at "Exceptions" below.

In all cases: Try to obtain an 18 rather than 36-month DEJ period. Advise the defendant that it is crucial to complete the program, stay out of trouble, not travel outside the U.S., and generally avoid immigration authorities until the period is over and they have received the § 1203.43 order. Say you will file for the order. Advise the defendant to contact an immigration attorney and get them on retainer just in case the person is ever detained or put in removal proceedings during this period. There are strong arguments that immigration court should continue the removal proceedings to give the person a chance to finish DEJ, but the defendant probably will need an immigration lawyer to make those arguments, since this law is new to immigration judges as well. Advice on these arguments for immigration lawyers is in the Practice Advisory cited above.

Exceptions to DEJ as a Conviction. There are a few circumstances in which DEJ is not a dangerous drug conviction for immigration purposes.

1. A permanent resident (green card-holder) who is not already deportable for a conviction, and who pleads in DEJ (or regular proceedings) to Health & Safety Code § 11377 that involves an unspecified "controlled substance" is not deportable for immigration purposes and is not at risk during the DEJ period. This is because immigration authorities cannot prove that the conviction involved a federally-defined controlled substance for deportability purposes. Counsel must carefully ensure that the specific substance is not mentioned anywhere in the reviewable record; see *Note: Drug Charges,* cited above.

Unfortunately, under current law this does not work for a defendant who is undocumented person or an already-deportable permanent resident, unless the record specifies that khat or chorionic gonadoptrin was involved in 11377. See *Note: Drug Charges.*

2. DEJ is not a "conviction" for immigration purposes if the only penalty imposed is an unconditionally suspended fee or fine. See *Retuta v. Holder*, 594 F.3d 1181 (9th Cir. 2010). This is because, for a conviction to exist for immigration, there must be a penalty. 8 USC § 1101(a)(48)(A). It appears from *Retuta* that the education program, N/A attendance, or other DEJ requirements are not a penalty for this purpose, and the only penalty in DEJ is the fee or fine. If it is not possible to get the fine unconditionally suspended, another protection would be to ask the judge not to order payment of any fine or fee until later in the DEJ period, if such a thing is possible. Arguably, until the fine is ordered, there is no conviction because there is no penalty.

3. In the Ninth Circuit alone, a DEJ from before July 15, 2011 is not a conviction for immigration purposes if it meets these

California Criminal Defense of Immigrants Newsletter

(CEB 2016)
By Norton Tooby

Continuing Education of the Bar began publishing our *California Criminal Defense of Immigrants E-Newsletter*. This newsletter covers 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 are 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 for 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 continues 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 your particular issue, ensuring you are aware of the most recent legal authorities on each topic.

While this office no longer publishes the *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 newsletter covers 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 the most common California convictions, which are especially useful in establishing ineffective assistance of counsel grounds for relief.

conditions: it was for simple possession or possession of paraphernalia (but not use); the person had no drug priors and no prior pretrial drug diversion; and the person did not violate probation or DEJ conditions. In fact, any "rehabilitative relief" such as Prop 36 dismissal, Penal Code § 1203.4 dismissal, etc. will have the same benefit if it meets the above requirements.

Thanks to Katherine Brady.

CCDOI 20.37A

CD4:24.6;AF:2.6;CMT3:3.6

Tenth Circuit

RELIEF – CANCELLATION OF REMOVAL FOR NON-LPRS – CONTINUOUS PHYSICAL PRESENCE REQUIREMENT

Gutierrez-Orozco v. Lynch, 810 F.3d 1243 (10th Cir. Jan. 21, 2016) (noncitizen did not have ten years continuous physical presence, as required to be eligible for cancellation of removal for non-Lawful Permanent Residents, under INA § 240A(b), 8 U.S.C. § 1229b(b), even though the IJ found the noncitizen's testimony was credible; "credibility alone is not determinative under the guidelines governing an IJ's evaluation of an applicant's testimony in a removal proceeding: '[T]he immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof,' weighing 'the credible testimony along with other evidence of record.' 8 U.S.C. § 1229a(c)(4)(B) . . . .").