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**RECENT DEVELOPMENTS**

This Newsletter contains selected recent developments in criminal immigration law occurring during July, 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](http://NortonTooby.com).

Andrew J. Phillips, Esq.  
*Editor*

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**Articles**

IMMIGRATION OFFENSES – ALIEN  
SMUGGLING – SENTENCE

IMMIGRATION OFFENSES – ILLEGAL  
REENTRY – SENTENCE

Immigration-Related Sentencing Guideline  
Amendments Sent to Congress

USA Jul. 7 2016

The U.S. Sentencing Commission recently submitted amendments to the U.S. Sentencing Guidelines to Congress. Among the changes that will become effective November 1, 2016 are:

changes to the alien smuggling guideline, § 2L1.1 and

significant revisions to the illegal re-entry guideline, § 2L1.2. This multi-part amendment is a result of the Commission’s multi-year study of immigration offenses and related guidelines.

**Alien Smuggling:**

Unaccompanied Minors

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](http://www.NortonTooby.com) to download the Intake Form.

The specific offense characteristic at § 2L1.1(b)(4) provides an enhancement "[i]f the defendant smuggled, transported or harbored a minor who was unaccompanied by the minor's parent or grandparent." This enhancement has changed.

First, the amendment increases the enhancement at § 2L1.1(b)(4) from two levels to four levels and broadens its scope to offense-based rather than defendant-based. Second, the amendment narrows the scope of the enhancement at § 2L1.1(b)(4) by revising the meaning of an "unaccompanied" minor. The amendment narrows the class of offenders who would receive the enhancement by specifying that the enhancement does not apply if the minor was accompanied by the minor's "parent, adult relative, or legal guardian."

Third, the amendment expands the definition of "minor" in the guideline, as it relates to the enhancement in § 2L1.1(b)(4), to include any individual younger than 18. The guideline currently defines "minor" to include only individuals younger than 16.

### Sexual Abuse of Aliens

The amendment to § 2L1.1 also addresses offenses in which an alien (whether or not a minor) is sexually abused. A "serious bodily injury" enhancement of four levels will apply in such a case. The commentary to § 2L1.1 has been changed to clarify that the term "serious bodily injury" included in § 2L1.1(b)(7)(B) has the meaning given that term in the commentary to U.S.S.G. § 1B1.1, which states that "serious bodily injury" is deemed to have occurred if the offense

involved conduct constituting criminal sexual abuse under 18 USCA §§ 2241 or 2242 or any similar offense under state law.

### **Illegal Re-Entry:**

Instead of using the categorical approach, the amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. The level of the sentencing enhancement for a prior conviction generally will be determined by the length of the sentence imposed for the prior offense, not by the type of offense for which the defendant had been convicted. The definition of "sentence imposed" is the same definition that appears in Chapter Four of the Guidelines Manual.

Next, the Commission modified guidelines to account for prior criminal conduct in a broader and more proportionate manner. The amendment reduces somewhat the level of enhancements for criminal conduct occurring before the defendant's first order of deportation and adds a new enhancement for criminal conduct occurring after the defendant's first order of deportation. It also responds to concerns that prior convictions for illegal re-entry offenses may not be adequately accounted for in the existing guideline by adding an enhancement for prior illegal reentry and multiple prior illegal entry convictions.

### Accounting for Prior Illegal Re-entry Offenses

The amendment at § 2L1.2(b)(1) provides a new tiered enhancement based on prior convictions for illegal re-entry offenses under 8 USCA § 1253, § 1325(a), or § 1326. A

defendant who has one or more felony illegal re-entry convictions will receive an increase of 4 levels. "Illegal re-entry offense" includes all convictions under 8 USCA § 1253 (failure to depart after an order of removal) and § 1326 (illegal re-entry), as well as second or subsequent illegal entry conviction under § 1325(a). A defendant who has two or more misdemeanor illegal entry convictions under 8 USCA § 1325(a) will receive an increase of two levels. For a defendant with a conviction under § 1326, or a felony conviction under § 1325(a), the four-level enhancement in the new § 2L1.2(b)(1)(A) is identical in magnitude to the enhancement the defendant would receive under existing § 2L1.2(b)(1)(D).

#### Accounting for Other Prior Convictions

The Commission amended U.S.S.G. § 2L1.2(b)(2) and § 2L1.2(b)(3) to account for convictions (other than illegal entry or re-entry convictions) primarily through a sentence-imposed approach, which is similar to how Chapter Four of the Sentencing Guidelines Manual determines a defendant's criminal history score based on his or her prior convictions. The specific offense characteristics at subsections (b)(2) and (b)(3) each contain a parallel set of enhancements of:

10 levels for a prior felony conviction that received a sentence of imprisonment of five years or more

8 levels for a prior felony conviction that received a sentence of two years or more

6 levels for a prior felony conviction that received a sentence exceeding one year and one month

4 levels for any other prior felony conviction

2 levels for three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses

The (b)(2) and (b)(3) specific offense characteristics are to be calculated separately, but within each specific offense characteristic, a defendant may receive only the single greatest applicable increase.

#### Departure Provision

The amendment adds a new departure provision, at Application Note 5, applicable to situations where "an enhancement in § 2L1.2 subsection (b)(2) or (b)(3) substantially understates or overstates the seriousness of the conduct underlying the prior offense."

#### Excluding Stale Convictions

For all three specific offense characteristics, the amendment considers prior convictions only if the convictions receive criminal history points under the rules in the Guidelines' Chapter Four.

#### Application of the "Single Sentence Rule"

The amendment also contains an application note addressing the situation when a defendant was simultaneously sentenced for an illegal re-entry offense and another federal felony offense. It clarifies that, in such a case, the illegal re-entry offense counts

toward § 2L1.2(b)(1), while the other felony offense counts toward § 2L1.2(b)(3).

### **Definition of "Crime of Violence":**

The amendment continues to use the term "crime of violence," although now solely in reference to the 2-level enhancement for three or more misdemeanor convictions at subsections § 2L1.2(b)(2)(E) and § 2L1.2(b)(3)(E). The amendment conforms the definition of "crime of violence" in Application Note 2 to that adopted for use in the career offender guideline effective August 1, 2016.

CD4:CHAPT13

### **Resources**

POST-CONVICTION RELIEF – PARDON –  
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CD4:11.22;AF:6.16;CMT3:10.21;PCN:8.38

### **Practice Advisories**

DETENTION – IMMIGRATION DETENTION --  
INDEFINITE DETENTION – COUNTRIES TO  
WHICH IT IS DIFFICULT TO EFFECTUATE  
REMOVAL

Here is the quote from the NYT article, regarding ICE difficulties in removal to certain countries: "According to documents from Immigration and Customs Enforcement, 23 countries are considered largely uncooperative in taking back their citizens. The countries include China and important allies like India and Afghanistan, as well as several African countries with close ties to the United States, among them Ghana, Liberia and Sierra Leone."

<http://www.nytimes.com/2016/07/02/us/homeland-security-immigrants-criminal-conviction.html>

CD4:6.42;AF:2.11;CMT3:3.11

### **US Supreme Court**

JUDICIAL REVIEW – PETITION FOR REVIEW  
– UNEXPLAINED INCONSISTENCY WITH  
PRIOR PRECEDENT IS A GROUND FOR  
REVERSAL

*Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981, 125 S.Ct. 2688, 162 L.Ed.2d 820 (2005) ("Unexplained inconsistency is ... a reason for holding an interpretation to be arbitrary and capricious

change from agency practice under the Administrative Procedure Act.”); see also *Motor Veh. Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (“[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.”); *Morales-Izquierdo v. Gonzales*, 486 F.3d 484, 493 (9th Cir.2007) (en banc) (“This rule ... is reserved for rare instances,” however, “such as when an agency provides no explanation at all for a change in policy, or when its explanation is so unclear or contradictory that we are left in doubt as to the reason for the change in direction.”); see *Robles-Urrea v. Holder*, 678 F.3d 702, 709 n.6 (9th Cir. 2012).

CD4:15.37;AF:2.19;CMT3:3.18

## **BIA**

### **INADMISSIBILITY – FALSE CLAIM TO CITIZENSHIP**

*Matter of Richmond*, 26 I&N Dec. 779 (BIA 2016) (a false claim to United States citizenship under INA § 212(a)(6)(C)(ii)(I), 8 U.S.C. § 1182(a)(6)(C)(ii)(I), may be shown by direct or circumstantial evidence; the claim must be presented in a context where United States citizenship is actually material for the benefit sought; there is a distinction between achieving a "purpose" and obtaining a "benefit"; avoiding removal proceedings qualifies as a "purpose," i.e., avoiding a negative legal consequence).

CD4:18.10

## **First Circuit**

### **CITIZENSHIP – DERIVATIVE CITIZENSHIP – PERMANENT RESIDENCE PERIOD**

*Thomas v. Lynch*, \_\_\_ F.3d \_\_\_, 2016 WL 3606943 (1<sup>st</sup> Cir. Jul. 5, 2016) (noncitizen did not “begin to reside permanently” in the United States upon his mother's naturalization, as required for him to obtain derivative U.S. citizenship).

CD4:3.17

## **Second Circuit**

### **DETENTION – IMMIGRATION DETENTION – BOND HEARING**

### **RELIEF – WITHHOLDING OF REMOVAL**

*Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. Jul. 29, 2016) (noncitizen’s detention during withholding-only proceedings related to actual removal, rather than removability, and thus noncitizen was entitled to bond hearing; the applicable detention statute for a noncitizen in withholding removal proceedings is 8 U.S.C. § 1226(a), not § 1231(a)).

CD4:6.44, 24.31;AF:2.47;CMT3:3.46

### **Third Circuit**

#### RELIEF – CITIZENSHIP -- NATURALIZATION

*Koszelnik v. DHS*, \_\_ F.3d \_\_ (3d Cir. Jul. 8, 2016) (naturalization application properly denied for failure to disclose prior removal order; lapse of statute of limitations to revoke improperly granted LPR status does not validate the LPR grant, and so does not allow for naturalization).

CD4:24.13;AF:2.24;CMT3:3.23

### **Fourth Circuit**

#### AGGRAVATED FELONY – FORGERY – FORGING A PUBLIC RECORD

*Alvarez v. Lynch*, \_\_ F.3d \_\_, 2016 WL 3632613 (4<sup>th</sup> Cir. Jul. 7, 2016) (Virginia conviction for forging a public record, pursuant to Virginia Code Ann. § 18.2-168, was an aggravated felony forgery offense under INA § 101(a)(43)(R), 8 U.S.C. § 1101(a)(43)(R), because it is a categorical match with the federal generic definition of forgery).

CD4:19.71;AF:5.53, A.23, B.48

### **Fifth Circuit**

#### CRIMES OF MORAL TURPITUDE – SIMPLE ASSAULT

#### CATEGORICAL ANALYSIS – MEANS V. ELEMENTS

*Gomez-Perez v. Lynch*, 829 F.3d 323 (5<sup>th</sup> Cir. Jul. 11, 2016) (Texas conviction of misdemeanor assault, under Texas Penal Code § 22.01(a)(1) (intentionally, knowingly, or recklessly causes bodily injury to another person), was not for a crime involving moral turpitude, since the three different intent requirements are merely alternative factual means of committing the offense); applying *Mathis v. United States*, 136 S. Ct. 2243 (2016).

CD4:20.7, 16.5;CMT3:8.7, 4.4, CHART;AF:4.3

### **Sixth Circuit**

#### AGGRAVATED FELONY – CRIME OF VIOLENCE – 18 U.S.C. § 16(b) HELD UNCONSTITUTIONALLY VAGUE

*Shuti v. Lynch*, 828 F.3d 440, 2016 WL 3632539 (6<sup>th</sup> Cir. Jul. 7, 2016) (INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F), aggravated felony crime of violence definition, which incorporated criminal statute defining “crime of violence,” 18 U.S.C. §

16(b), was vague in violation of due process); following *Johnson v. United States*, 135 S. Ct. 2551 (2015) (the Armed Career Criminal Act's residual definition of “violent felony,” under 18 U.S.C. § 924(e)(2)(B)(ii), held void for vagueness).

CD4:19.41;AF:5.23;SH:7.51

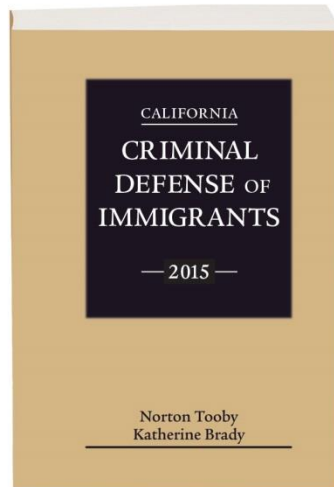
#### DETENTION – CRIMINAL DETENTION -- EXTRADITION



## *Publication Announcement*

### **California Criminal Defense of Immigrants (CEB 2016)**

**By Norton Tooby & Katherine Brady**



[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.



## Seventh Circuit

POST-CONVICTION RELIEF – GROUNDS –  
INEFFECTIVE ASSISTANCE OF COUNSEL –  
FAILURE TO OFFER CORRECT  
IMMIGRATION ADVICE -- *PADILLA*

*United States v. Chezan*, \_\_\_ F.3d \_\_\_, 2016 WL 3913440 (7<sup>th</sup> Cir. Jul. 20, 2016) (counsel did not fail to provide accurate advice before plea on the actual immigration consequences of the plea to aiding and abetting marriage fraud, in violation of 18 U.S.C. § 1546(a), with a sentence to three years in prison, since the defendant was informed it was extremely likely the conviction would be considered an aggravated felony under 8 U.S.C. § 1101(a)(43)(P), and the nature of the weak argument that it would not).

Note: The court stated:

The defendant argues that Burton should have warned him that if he pleaded guilty to marriage fraud he would have “no chance” of avoiding deportation. Actually “no chance” was incorrect because *Gourche v. Holder* had not yet been decided. Moreover, not all aliens convicted of aggravated felonies are deported. Some are overlooked by overworked immigration authorities and others released by court order pursuant to *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001), which holds that immigrants admitted to the United States and subsequently ordered removed can't be detained for an indefinite period of time. And some of them successfully plead deferral or withholding of removal because there is a serious risk of their being tortured or killed if returned to their country of origin.

Our defendant has sought to elude deportation despite his plea of guilty and subsequent conviction and sentence by failing to report to the Bureau of Prisons by June 8, the surrender date set by the district judge. He currently is a fugitive.

*Id.* at \_\_\_. Despite some theoretical doubt concerning whether the defendant would suffer actual deportation, the conviction absolutely caused deportability, and the defendant had a right to be informed of this concrete consequence.

PCN:6.18

## Eighth Circuit

REMOVAL PROCEEDINGS --  
REINSTATEMENT OF REMOVAL –  
VOLUNTARY DEPARTURE

RELIEF – VOLUNTARY DEPARTRE –  
REINSTATEMENT OF REMOVAL

*Perez Garcia v. Lynch*, \_\_\_ F.3d \_\_ (8<sup>th</sup> Cir. Jul. 19, 2016) (where noncitizen failed to provide sufficient evidence of compliance with voluntary departure grant, and alternative order of removal became effective, it was proper for DHS to subject noncitizen to reinstatement, rather than new removal proceedings).

CD4:24.27, 15.40;AF:2.39, 2.35;CMT3:3.38,  
3.34

## Ninth Circuit

### AGGRAVATED FELONY – FRAUD OFFENSE – TRAFFICKING IN GOODS AND SERVICES

#### CATEGORICAL ANALYSIS – DISJUNCTIVE STATUTE

*Wang v. Rodriguez*, \_\_ F.3d \_\_, 2016 WL 4011189 (9<sup>th</sup> Cir. Jul. 27, 2016) (federal conviction for trafficking in counterfeit goods and services, under 18 U.S.C.A. § 2320(a) [intentionally trafficked in goods or services and knowingly using a counterfeit mark], is not a categorical aggravated felony fraud offense, under INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(I); statute does not necessarily involve fraud or deceit because a defendant can be convicted of trafficking in counterfeit goods for conduct that is merely likely to cause “mistake” or “confusion”; “Used together in a disjunctive list, the terms “confusion,” “mistake,” and “deceive” each must be read to have a distinct meaning. See *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 574 (1995) (“[T]he Court will avoid a reading [of a statute] which renders some words altogether redundant.”)).

CD4:16.16, 19.73;AF:4.11, 5.55, A.24,  
B.48;CMT3:7.4

### CAL CRIM DEF – POST CON RELIEF – STATE REHABILITATIVE RELIEF – DEFERRED ENTRY OF JUDGMENT DISMISSAL

The DHS has filed a brief claiming that dismissal of a DEJ controlled substances conviction under Penal Code 1203.43 is rehabilitative in nature, because it is done solely to avoid immigration consequences. Its brief, however, appears to focus on the

claim that 1203.43 is rehabilitative relief -- as if that is the dispositive issue. Just because the relief may be “rehabilitative” (just like any PCR would be) does not mean that the underlying conviction was not also legally defective. That is, the relief can be rehabilitative, and the relief can also be based on legal invalidity. *Pickering* held that only where PCR was based “solely” on rehabilitative or other reasons that arose after the conviction occurred was it ineffective to eliminate the immigration consequences. *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), vacated by *Pickering v. Gonzales*, 465 F.3d 263 (6<sup>th</sup> Cir. 2006).

### DETENTION – IMMIGRATION DETENTION -- FAMILY DETENTION

*Flores v. Lynch*, \_\_ F.3d \_\_ (9<sup>th</sup> Cir. Jul. 6, 2016) (*Flores* settlement agreement applies to both accompanied and unaccompanied minors; district court correctly refused to amend settlement to accommodate family detention).

CD4:6.36

### JUDICIAL REVIEW – SUA SPONTE MOTION TO REOPEN

*Bonilla v. Lynch*, \_\_ F.3d \_\_ (9<sup>th</sup> Cir. Jul. 12, 2016) (joining Second, Third and Tenth Circuits to find court has jurisdiction to review denial of *sua sponte* motion to reopen).

CD4:15.34;PCN:10.15;AF:6.30;CMT3:10.31



## **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.

MOTION TO REOPEN – SUA SPONTE –  
EFFECT OF GRANT

*Bonilla v. Lynch*, \_\_ F.3d \_\_, \_\_ (9<sup>th</sup> Cir. Jul. 12, 2016) (effect of granting a *sua sponte* motion to reopen to a lawful permanent resident is to restore noncitizen to status prior to final order of removal: “Here, were the Board to grant Bonilla's motion to reopen sua sponte, his previous deportation proceedings would be reinstated and he would be restored to his prior status as a lawful permanent resident, unless and until the new proceedings result in a removal order.”).

CD4:15.34;PCN:10.15;AF:6.30;CMT3:10.31

**Eleventh Circuit**

MOTION TO REOPEN – SUA SPONTE –  
JUDICIAL REVIEW

JUDICIAL REVIEW -- MOTION TO REOPEN –  
SUA SPONTE – JUDICIAL REVIEW

*Butka v. Att’y Gen.*, \_\_ F.3d \_\_ (11<sup>th</sup> Cir. Jul. 5, 2016) (circuit court lacks jurisdiction to review denial of *sua sponte* motion to reopen).

CD4:15.34;PCN:10.15;AF:6.30;CMT3:10.31