THE LAW OFFICES OF
NORTON TOOBY

Crimes & Immigration
Newsletter

March, 2015

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

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RECENT DEVELOPMENTS

Articles

CONVICTION – NOT GUILTY BY REASON OF INSANITY
Whether an plea of "not guilty by reason of insanity" plea is a "conviction" for immigration purposes is still unsettled. In an insanity case, the actual plea is not "guilty except for ..." It is "not guilty by reason of insanity." That is because insanity negates an essential element of the offense: the intent. Therefore, a "not guilty by reason of insanity" finding is arguably not a conviction. Unfortunately, in California and other states, you first have to enter an actual guilty plea prior to being found not guilty by reason of insanity.
One could argue that the ultimate finding of not guilty was equivalent to post-conviction relief based on a substantive flaw in the proceedings. Namely, the lack of intent, and therefore, lack of guilt. Another available argument would be based upon *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. Jan. 7, 2010), on the theory that no criminal sentence/fine can be imposed following a guilty plea, in some states like Oregon, and the (civil) commitment that can follow is not a punishment/penalty/restraint under INA § 101(a)(48)(A)(ii). *In Corpuz v. Holder*, 697 F.3d 807 (9th Cir. Aug. 31, 2012), the court, in dictum found otherwise, without explanation, but then whittled off enough time through "constructive good time credits" to

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*.

enable a respondent to qualify for 212(c) relief with 4 years and 10½ months imprisonment, crediting most of the time in civil lock up. Thanks to Jon Garde, Lisa Brodyaga, and Joseph Justin Rollin
CD4:8.60;AF:6.31

Practice Advisories

PRACTICE ADVISORY – CONTROLLED SUBSTANCES OFFENSES – FEDERAL FIRST OFFENDER ACT DISMISSALS ELIMINATE ALL IMMIGRATION CONSEQUENCES OF QUALIFYING CONVICTIONS EVEN THOUGH A STATE PROBATIONARY PERIOD LONGER THAN THE FFOA ONE-YEAR TERM WAS IMPOSED

The DHS sometimes argues that a state probation grant longer than the one-year probation period called for under the Federal First Offender Act, 18 U.S.C. § 3706(a), disqualifies a conviction for treatment under *Lujan-Armendariz v. INS*, 222 F.3d 728, 749 (9th Cir. 2000), prospectively overruled by *Nunez-Reyes v. Holder*, 646 F.3d 684, 688 (9th Cir. 2011) (en banc). The court of appeals has jurisdiction to review the underlying legal error of the BIA in adopting this argument. See *Singh v. Holder,* 771 F.3d 647, 650 (9th Cir. 2014). Lujan-Armendariz itself extended Federal First Offender Act treatment to a noncitizen who successfully served five years of probation for a simple drug offense. See 222 F.3d at 733. Similarly, in *Rice v. Holder*, 597 F.3d 952, 954 (9th Cir. 2010), overruled on other grounds by Nunez-Reyes, 646 F.3d at 695, the Ninth Circuit held that a controlled substance offense was eligible for FFOA treatment even though the petitioner had been sentenced to three years' probation, of which he had served approximately 19 months. See id.
CD4:11.19;SH:4.27;PCN:8.5;CMT3:10.11;AF:6.14

PRACTICE ADVISORY – AGGRAVATED FELONY – CONSPIRACY – TARGET OFFENSE IS NOT AN ELEMENT UNDER CALIFORNIA LAW SO CONSPIRACY OFFENSE IS NOT DIVISIBLE WITH RESPECT TO THE TARGET OFFENSE

In jurisdictions in which the target offense is an element of conspiracy, then that offense would be an aggravated felony if the target offense is an aggravated felony. In California, however, the target offense of a conspiracy not an element of the offense, since the jury need not unanimously agree on the identity of the target offense. The California conspiracy offense is therefore indivisible with respect to the target offense, and the modified categorical analysis does not apply. The immigration authorities are precluded from examining the record of conviction to discern the identity of the target offense. A California conspiracy conviction may therefore never constitute an aggravated felony conviction or a conviction of a crime of moral turpitude or be considered in determining whether the conspiracy conviction triggers any other conviction-based ground of removal or bar to relief. While no court has yet held to this effect, the Ninth Circuit adopted this exact reasoning in concluding that because the target offense is not an element of a California burglary offense, burglary can never be an aggravated felony. *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. Aug. 22, 2014). This conclusion on conspiracy offenses is no more in tension with 8 USC § 1101(a)(43)(U), than the fact that California burglary is indivisible with 8 USC § 1101(a)(43)(G), as Rendon held. This interpretation of the aggravated felony definition would not be underinclusive because other states would be covered, wherever the target offense is an element. Counsel should be conservative, however, and if possible wait to adopt this plea strategy until the immigration or federal courts agree or there is no better argument available. This strategy would not be successful for controlled substance trafficking

because the underlying conduct may give the government reason to believe the defendant was an illicit trafficker. If the defendant actually committed the target offense, there would also be exposure for controlled substance or moral turpitude inadmissibility because an immigration factfinder could seek to cause the noncitizen to admit to the commission of the target offense, which, if successful, would make the noncitizen inadmissible. Immigration counsel, however, could freely use this argument in immigration court where there is no downside. Caution: If the jury in a federal conspiracy case is not required unanimously to agree on the target offense, the government could argue that this interpretation would render 8 U.S.C. § 1101(a)(43)(U) meaningless. Thanks to Dan Kesselbrenner.
CD4:19.32;SH:7.39;AF:5.12

US Supreme Court

POST CON RELIEF – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – DENIAL OF COUNSEL
Woods v. Donald, ___U.S. ___, ___ S.Ct. ___, 2015 WL 1400852 (Mar. 30, 2015) (state court's determination that trial counsel was not per se ineffective in being absent from the courtroom for ten minutes during testimony concerning other defendants, was not contrary to the Supreme Court's *Cronic* decision); citing *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).
PCN:6.18

BIA

RELIEF – GOOD MORAL CHARACTER – STATUTORY BARS – ACTUAL CONFINEMENT OVER 180 DAYS –
Matter of Valdovinos, 18 I&N Dec. 343, 344 (BIA 1982) (incarceration in a minimal security area with work furlough counts towards the 180 days for the statutory bar to showing Good Moral Character, under INA § 101(f)(7), 8 U.S.C. § 1101(f)(7)). Thanks to Kathy Brady.
http://www.justice.gov/eoir/vll/intdec/vol18/2929.pdf
CD4:15.6;AF:2.14;CMT3:3.14

Fourth Circuit

POST CON RELIEF – VIRGINIA – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO GIVE CORRECT IMMIGRATION ADVICE – PREJUDICE STANDARD – VIRGINIA – STANDARD APPLIES REGARDLESS OF STRENGTH OF CRIMINAL CASE
Zemene v. Clarke, ___ Va. ___, No. 140719, slip op. (Va. 2015) (immigrants are prejudiced when their criminal defense attorneys fail to provide advice that would objectively lead them to turn down a plea offer, whether or not the evidence of guilt is strong).
PCN:6.18

POST CON RELIEF – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL
Zemene v. Clarke, ___ Va. ___, No. 140719, slip op. (Va. 2015) (immigrants received ineffective assistance of counsel after the client told the attorney that he was not a United States citizen, when the attorney failed to investigate the potential immigration consequences of a conviction, feiled to raise the issue in plea negotiations with the prosecutor, and failed to discuss this with the client).
PCN:6.18

Fifth Circuit

POST CON RELIEF – CONVICTION – EFFECTIVE ORDER VACATING CONVICTION
Gaona-Romero v. Gonzales, 497 F.3d 694, 649 (5th Cir. 2007) (after Disipio was decided, "[t]he government undertook a policy review to determine how removal cases arising in the Fifth Circuit that involve vacated convictions should be treated. The government concluded

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that it would not seek that removal decisions be upheld pursuant to Renteria, but rather would request remand to the BIA so that the government could take action in accord with Pickering."); citing *Discipio v. Ashcroft*, 417 F.3d 448 (5th Cir. 2005) (remanding case in which criminal conviction had been vacated on a ground of legal invalidity to the Board of Immigration Appeals to allow for dismissal of removal proceedings in accordance with *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (convictions vacated for "procedural or substantive defects" will not be considered a valid convictions for immigration purposes)). Note: Since Gaona, the BIA has not issued a published opinion on the issue, but has consistently applied Pickering to cases arising in the Fifth Circuit, holding that a vacated conviction may not be used as conviction under the INA so long as the vacatur is unrelated to immigration or rehabilitative reasons. See In Re Alexis Ruiz Alvarez, A205 653 283 - CLE, 2013 WL 3200544 (BIA June 4, 2013) ("the United States Government, through the Department of Justice's Office of Immigration Litigation, has advised the Fifth Circuit that it would not seek to uphold removal orders premised upon an application of Renteria-Gonzalez… As such, this Board evaluates the effect of a vacatur under the rubric set forth in *Matter of Pickering*."); see also In Re Son Hoang Nguyen, A097 683 305 - DAL, 2013 WL 2608424 (BIA May 16, 2013); In Re Francisco Flores Alcala A.K.A. Francisco Flores A.K.A. Francisco Alcala Flores, : A200 762 691 - DAL, 2013 WL 2610047 (BIA May 9, 2013); In Re Sergio Gustavo Rangel-Juarez, A038 829 107 - EL, 2012 WL 3276562 (BIA July 16, 2012); In Re Daniel Sierra, : A074 026 895 - LOS, 2011 WL 2470936 (BIA June 1, 2011) ("we conclude that the respondent's motion should be adjudicated in accordance with this Board's decisions in *Matter of Pickering*."); In Re Hugo Angel Robles A.K.A. Hugo Gonzalez Robles, A087 021 860 - HOU, 2011 WL 400460 (BIA Jan. 19, 2011). Regarding its consistent application of Pickering over Renteria-Gonzalez in the Fifth Circuit, the BIA has explained, "We observe that, in certain circumstances, a federal court may defer to an agency's interpretation of a statute which is within the agency's jurisdiction to administer even if the agency's interpretation is inconsistent with the jurisprudence of that court." In Re: Francisco Flores Alcala A.K.A. Francisco Flores A.K.A. Francisco Alcala Flores, A200 762 691 - DAL, 2013 WL 2610047 (BIA May 9, 2013) (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005)). Thanks to Amber L. Weeks.
CD4:11.17;PCN:8.1;SH:4.27;AF:6.11;CMT3:10.11

Ninth Circuit

SENTENCE – PSYCHIATRIC PRE-TRIAL CIVIL CONFINEMENT PENDING COMPETENCE TO STAND TRIAL DETERMINATION
Corpuz v. Holder, 697 F.3d 807 (9th Cir. Aug. 31, 2012) (BIA improperly considered as the "term of imprisonment" the entire period noncitizen spent in psychiatric pre-trial civil confinement pending a determination of his competence to stand trial, to find noncitizen barred from relief under former INA § 212(c)).
CD4:10.63;AF:3.62;SH:7.25;PCN:7.3;CMT3:4.7

CONVICTION – RECORD OF CONVICTION – FACTUAL BASIS - AGGRAVATED FELONY – CRIME OF VIOLENCE – AGGRAVATED ASSAULT
United States v. Marcia-Acosta, ___ F.3d ___ (9th Cir. Mar. 24, 2015) (Arizona conviction of aggravated assault, in violation of Arizona Revised Statutes §§ 13-1203 and 13-1204, was not a "crime of violence" for illegal re-entry sentencing purposes; district court erred in relying solely upon a statement by defense counsel during plea colloquy in determining

elements to which the defendant entered his plea, since a sentencing court may not rely on an extraneous factual-basis statement details, standing alone, to supply the narrowing for purposes of the modified categorical approach). CD4:16.33;AF:4.32;CMT3:7.12

POST CON RELIEF – HABEAS CORPUS – EXHAUSTION OF CLAIM
Kyzar v. Ryan, ___ F.3d ___, ___, 2015 WL 1061892 (9th Cir. Mar. 12, 2015) (habeas petitioner's pro se filings before the Arizona trial court and the Arizona Court of Appeals fairly presented his sufficiency of the evidence claim, which was sufficient to exhaust his state remedies and avoid a procedural default: "Although Kyzar did not cite In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), or Jackson for the proposition that the Due Process Clause of the Fourteenth Amendment protects him from being convicted unless the State proves every element of the charged offense beyond a reasonable doubt, the substance of Kyzar's claim was apparent from his attempt to articulate the legal elements for the crime of conviction and his explicit reference to due process. Indeed, Kyzar's citation to an Arizona Supreme Court case was entirely consistent with fair presentation of a Jackson claim, which necessarily turns on how crimes are defined under state law. [Citation omitted.] . . . Kyzar's pro se filing in the Arizona trial court plainly did enough to "alert[ ] that court to the federal nature of [his] claim." *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004).").
The court stated:
"In order to 'fairly present' an issue to a state court, a [habeas] petitioner must 'present the substance of his claim to the state courts, including a reference to a federal constitutional guarantee and a statement of facts that entitle the petitioner to relief.' " *Gulbrandson v. Ryan*, 738 F.3d 976, 992 (9th Cir.2013) (quoting *Scott v. Schriro*, 567 F.3d 573, 582 (9th Cir.2009)). "[F]or the purposes of exhaustion, pro se petitions are held to a more lenient standard than counseled petitions." *Sanders v. Ryder*, 342 F.3d 991, 999 (9th Cir.2003) (citing *Peterson v. Lampert*, 319 F.3d 1153, 1159 (9th Cir.2003) (en banc)); see also *Slack v. McDaniel*, 529 U.S. 473, 487, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) ("[T]he complete exhaustion rule is not to 'trap the unwary pro se prisoner.' " (quoting *Rose v. Lundy*, 455 U.S. 509, 520, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982))).

Tenth Circuit

POST CON RELIEF – COLORADO – POST CON RELIEF POSSIBLE AFTER EXPUNGEMENT IF CONVICTION STILL TRIGGERS IMMIGRATION CONSEQUENCES
People v. Corrales-Castro, ___ P.3d ___, ___ (Mar. 26, 2015) ("[W]e hold that, when, as here, a defendant shows that his or her guilty plea may have serious legal consequences under federal immigration law notwithstanding its withdrawal pursuant to section 18-1.3-102(2), the defendant may challenge the constitutionality of the plea under Crim. P. 32(d).").
CPCN:10.52

Eleventh Circuit

POST CON RELIEF – MOTION TO VACATE SENTENCE
Hernandez v. United States, 778 F.3d 1230 (11th Cir. Mar. 2, 2015) (reversing district court denial of an evidentiary hearing on a motion to vacate sentence under 28 U.S.C. § 2255 based on ineffective assistance of counsel, since the motion alleged facts that, if true, would entitle the defendant to relief, but a district court need not hold an evidentiary hearing if the allegations are patently frivolous, based upon unsupported generalizations, or affirmatively contradicted by the record).
PCN:7.55

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