THE LAW OFFICES OF
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Crimes & Immigration
Newsletter

November, 2014

This Newsletter contains selected recent developments in criminal immigration law occurring during November, 2014.

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

RELIEF – DEFERRED ACTION – DEFERRED ACTION FOR CHILDHOOD ARRIVALS EXPANDED – DEFERRED ACTION FOR PARENT ACCOUNTABILITY ANNOUNCED

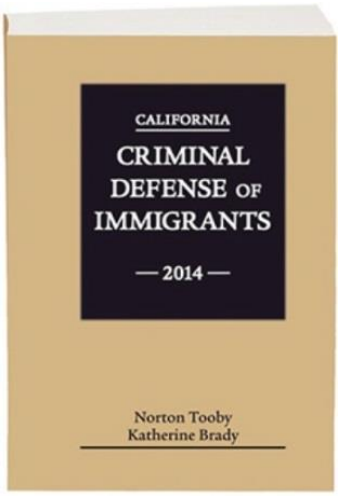
On Nov. 20, 2014, President Obama announced that he will provide immediate relief for many of those impacted by our broken immigration system, and he is offering Congress an architecture for permanent reforms to the immigration laws.
http://www.dhs.gov/immigration-action

Under the new policies, the DHS will augment the successful Deferred Action for Childhood Arrivals (DACA) program by providing temporary relief for the parents of U.S. Citizens and lawful permanent residents. The new program, to be called Deferred Action for Parent Accountability (DAPA), will ensure that millions of U.S. Citizen and lawful permanent resident children will remain unified with their parents. The President also announced new enforcement policies and steps to improve the adjudication of business and family visas.
http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf

Publication Announcement

California Criminal Defense of Immigrants (CEB 2014)

By Norton Tooby & Katherine Brady



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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.

The criminal requirements for these new programs, under Priority 1, include two relevant subsections. First, the benefits of this Executive Action are not available to "(d) aliens convicted of an offense classified as a felony in the convicting jurisdiction, other than a state or local offense for which an essential element was the alien's immigration status…" Second, the new programs exclude "(e) aliens convicted of an "aggravated felony," as that term is defined in section 101(a)(43) of the Immigration and Nationality Act at the time of the conviction."

The programs exclude those convicted of an "offense classified as a felony in the convicting jurisdiction…" This is a broad definition, and depends on the state law definition of "felony." Certain states like Maryland and Pennsylvania classify as a misdemeanor offenses for which the punishment is more than a year. Under federal law, any offense punishable by more than a year is a felony. The Executive Action defines "misdemeanor" under the law of the jurisdiction of conviction, which can include offenses with maxima greater than one year if state law so provides. It does not use the federal definition of misdemeanor, which provides that a misdemeanor cannot be punished by a sentence greater than one year. For example, under DACA and DAPA, a conviction for a Pennsylvania misdemeanor punishable by a two-year sentence is a misdemeanor for DACA and DAPA purposes even though it would be a felony under the definition of "felony" that applies in federal criminal cases. The exception to the general rule for state and local offenses for which immigration status is an element of the offense maintains eligibility for people in Arizona convicted of state felony offenses that targeted immigrants unfairly and, in Sheriff Joe's case, among others, unlawfully.

The felony bar is not triggered by felony convictions for "a state or local offense for which an essential element was the alien's immigration status…" In the original DACA context, advocates argued that false document felonies should count as immigration-related offenses and not counted against the immigrant. This argument was rejected. This interpretation will probably also apply in the context of the Nov. 20, 2014 Revised Enforcement Priorities.

Requiring immigration status to be an "essential element" means that it is a fact that must be established in order to obtain a conviction under the criminal statute. Under the categorical analysis as outlined in the Supreme Court's decisions in Moncrieffe and Descamps, this means that a jury could not convict someone of this crime without the prosecutor proving it beyond a reasonable doubt. See Moncrieffe v Holder (2013) ___US ___, 133 S Ct 1678; Descamps v United States (2013) ___ US ___, 133 S Ct 2276.

An element of a crime is distinct from the "means" by which a crime can be committed. For example, there are numerous means by which someone may commit the crime of identity theft, one of which could be using someone else's greencard. Just because the offense was committed by using documents that implicated immigration status – or were for a purpose involving immigration status – does not mean that it is an essential element. The key is not what the person did, or the means by which they committed the crime. The key is in the specific essential elements of the criminal offense that are that are required for conviction under the law of the jurisdiction. Two good sources to determine elements, as opposed to means, in addition to the express language of the statute are to look at jury instructions and to see if your state supreme court has addressed the issue of the definition of elements (as to which the jury must unanimously agree to conviction) as opposed to the means by which the offense was committed (as to which they do not need to do so). See the National Immigration Project's advisory on Descamps, which discusses this in greater detail. See also

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For Mr. Tooby's biography click here.

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analysis provided by the Immigrant Legal Resource Center on this issue.

The criminal bars for DACA and the definitions of felony, significant misdemeanor and misdemeanor appear to be unchanged by the new memos issued on Nov. 20 and these definitions now also apply to DAPA. Therefore, under the new Executive Action, a misdemeanor still requires a potential sentence of more than 5 days. Note, however, that the bars of the second and third priorities (including the misdemeanor bars) are not absolute. There is a provision allowing CIS/ICE to waive them under proper circumstances. Even the first priority bar can be waived, but the standard is much higher.
CD4:24.25;AF:2.37;CMT3:3.36

PRACTICE ADVISORY – CALIFORNIA – LEGISLATION CHANGING MAXIMUM CUSTODY FOR MISDEMEANOR TO 364 DAYS AND PROPOSITION 47 CHANGING CERTAIN NONVIOLENT FELONIES TO MISDEMEANORS
The Immigrant Legal Resource Center has issued a Practice Advisory on the effect on immigrants of new California Penal Code § 18.5, which reduces the maximum possible sentence for misdemeanors to 364 days in custody, and new Proposition 47, reducing certain nonviolent felonies to misdemeanors.
http://www.ilrc.org/files/documents/ilrc_advisory_prop_47_s_1310_pdf.pdf
Cal Crim Def 5.26, 5.29, 20.64
Cal Post Con 8:14, 9:16, 9:28

US Supreme Court

CATEGORICAL ANALYSIS – MINIMUM CONDUCT – REALISTIC PROBABILITY
AILA Amicus Brief on Controlled Substances Convictions
http://www.aila.org/content/default.aspx?docid=50585
AILA amicus brief filed with the Supreme Court urging the Court to reject improper application of the realistic probability test in controlled substances context.
CD4:16.8;AF:4.7;CMT3:6.6

BIA

REMOVAL PROCEEDINGS – IMMIGRANT'S RIGHT TO BE INFORMED OF ELIGIBILITY FOR RELIEF
8 C.F.R. 1240.11(a)(2) ("The immigration judge shall inform the alien of his or her apparent eligibility to apply for any of the benefits enumerated in this chapter and shall afford the alien an opportunity to make application during the hearing ....").
CD4:15.25

MOTION TO REOPEN – NONCITIZEN WITH FINAL ORDER MAY MOVE TO REOPEN TO PURSUE ADJUSTMENT OF STATUS
Singh v. Holder, __ F.3d __ (9th Cir. Nov. 13, 2014) (BIA has jurisdiction to reopen removal proceedings to allow noncitizen to pursue adjustment of status under 8 C.F.R. § 1003.2(a)), declining to follow Matter of Yauri, 25 I. & N. Dec. 103 (BIA 2009).
CD4:15.34;AF:6.30;CMT3:10.31;PCN:10.15

Fourth Circuit

WAIVERS – CANCELLATION OF REMOVAL – STOP-TIME RULE
Jaghoori v. Holder, 772 F.3d 764 (4th Cir. Nov. 18, 2014) (stop-time rule for cancellation of removal does not apply retroactively against convictions where offense and guilty plea occurred before April 1, 1997, the effective date of the legislation by which Congress promulgated the rule in INA § 240A(d)(1)(B), 8

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*.

U.S.C. § 1229b(d)(1)(B), because considerations of fair notice, reasonable reliance, and settled expectations militate against retroactivity here, so the "traditional presumption" against retroactivity applies).

NOTE: Noncitizen in this case would have been eligible for cancellation on April 1, 1997, but for the stop-time rule. See Sinotes-Cruz v. Gonzales, 468 F.3d 1190, 1201 (9th Cir. 2006).
CD4:24.6;AF:2.6;CMT3:3.6

Seventh Circuit

REMOVAL PROCEEDINGS – EVIDENCE – BURDEN OF PROOF
RELIEF – CANCELLATION OF REMOVAL – CONTINUOUS PRESENCE REQUIREMENT
Lopez-Esparza v. Holder, __ F.3d __ (7th Cir. Oct. 23, 2014) (noncitizen need only establish continuous presence for purposes of relief by a preponderance of the evidence; exact recollection of travel dates not required).
CD4:15.26,24.6

Ninth Circuit

CRIMES OF MORAL TURPITUDE – CORPORAL INJURY OF A SPOUSE
Cervantes v. Holder, ___ F.3d ___, ___, 2014 WL 6463031 (9th Cir. Nov. 19, 2014) (California conviction for corporal injury of a spouse, in violation of Penal Code § 273.5(a) ["[a]ny person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b) is guilty of a felony."], is not categorically a crime of moral turpitude: "Our precedents make clear that although § 273.5(a) is not categorically a CIMT, it is a divisible statute for which a conviction under one portion of the statute (corporal injury against a spouse) will qualify as a CIMT, while conviction under other subsections (for example, corporal injury against a cohabitant) will not."); compare Grageda v. INS, 12 F.3d 919, 922 (9th Cir. 1993) (holding that "spousal abuse under section 273.5(a) is a crime of moral turpitude" (emphasis added)), with Morales–Garcia v. Holder, 567 F.3d 1058 (9th Cir. 2009) (holding that corporal injury against a cohabitant under § 273.5(a) is not a crime involving moral turpitude).
CD4:20.7;CMT3:8.7, 9.15, CHART

CONVICTION – NATURE OF CONVICTION – RECORD OF CONVICTION –TESTIMONY BEFORE IMMIGRATION JUDGE
Cervantes v. Holder, ___ F.3d ___, ___, 2014 WL 6463031 (9th Cir. Nov. 19, 2014) ("an alien's description of his crimes is not an acceptable source of evidence under the modified categorical approach."); see Sandoval–Lua v. Gonzales, 499 F.3d 1121, 1129 n. 7 (9th Cir. 2007) ("[U]nder the modified categorical approach we may not consider ... testimony" about the alien's criminal conduct.), abrogated on other grounds by Young v. Holder, 697 F.3d 976, 979 (9th Cir.2012) (en banc).
CD4:16.33;AF:4.32;CMT3:7.12

CRIMES OF MORAL TURPITUDE – UNAUTHORIZED DRIVING A VEHICLE
Almanza-Arenas v. Holder, ___ F.3d ___ (9th Cir. Nov. 10, 2014) (California conviction of violating Vehicle Code § 10851(a), a statute that criminalizes both conduct that would constitute a crime of moral turpitude – taking a vehicle with intent permanently to deprive the owner, and conduct that does not amount to a crime of moral turpitude – taking with intent temporarily to deprive the owner – was not categorically a crime of moral turpitude and does not render respondent ineligible for non-LPR cancellation of removal under 8 U.S.C. § 1229b(b) in the context of removal proceedings for inadmissibility); see Castillo-Cruz v. Holder, 581 F.3d 1154, 1159 (9th Cir. 2009) ("a

theft offense is not categorically a crime of moral turpitude if the statute of conviction is broad enough to criminalize a taking with intent to deprive the owner of his property only temporarily.").
CD4:20.5;SH:7.121, 8.46;CMT3:8.5, 9.62, CHART

LEGISLATION – PROP 47 – CERTAIN MINOR NONVIOLENT FELONIES ARE NOW MISDEMEANORS

On Nov. 5, 2014, California Proposition 47 became effective, reducing certain minor non-violent felonies to misdemeanors. There are certain disqualifying factors that make the offense reduction to misdemeanor inapplicable.

Offenses Reduced to Misdemeanors. Crimes that can no longer be charged as felonies include the following:

Penal Code § 459, commercial burglary during business hours where the value of the property stolen is $950 or less (now to be charged under new Penal Code § 459.5. Commercial burglary can now be charged as a felony only if it was committed while the business was closed, or if the defendant has a Disqualifying Factor described below.

Penal Code § 470, forgery. This also includes violations of Penal Code §§ 471, 472, 475, 476, 484f, and 484i(b). This applies if the item forged is check, cashier's check, traveler's check or money order, and the amount does not exceed $950, it is prosecuted as a misdemeanor violation of PC 473. If the forgery also involves identity theft under Penal Code §, the forgery can be charged as a felony. This benefit is not available if the defendant has a Disqualifying Factor as described below.

Penal Code § 476a(a), insufficient funds checks. If the total amount of all NSF checks does not exceed $950, it is a misdemeanor unless the defendant has three or more prior convictions for violating Penal Code §§ 470, 475, or 476, or has a Disqualifying Factor as described below.

Penal Code § 487, Grand Theft. This includes violations of Penal Code §§ 484e(a), 484e(b), 484e(d), 484g, 484h, 487, 487a, 487b, 487d, 487e, 487h, 487i, 487j and 489. If the value of the item taken does not exceed $950, it is a misdemeanor violation of PC 490.2, petty theft, regardless of the nature of the item stolen and regardless of
whether the item was taken from the person. These offenses can only be charged as a felony if the defendant has a Disqualifying Factor as described below.

Penal Code § 496(a), Possession of Stolen Property. If the value of the property involved does not exceed $950, it is a misdemeanor unless the defendant has a Disqualifying Factor as described below.

Penal Code § 666/484(a), Petty Theft With Prior Convictions. The prosecution can no longer charge this offense unless the defendant has a Disqualifying Factor as described below, or has a prior conviction for violating Penal Code § 368(d) or 368(e). If so, the prosecution can charge the offense as a misdemeanor or felony. If not, it is a violation of PC 484(a) only.

Health & Safety Code § 11350(a), Possession of Listed Controlled Substances, such as heroin, or cocaine. These offenses are misdemeanors unless the defendant has a Disqualifying Factor as described below.

Health & Safety Code § 11357(a), Possession of Concentrated Cannabis. These offenses are misdemeanors unless the defendant has a Disqualifying Factor as described below.

Health & Safety Code § 11377(a), Possession of Restricted Dangerous Drugs, such as methamphetamines, mushrooms, or PCP. These

offenses are misdemeanors unless the defendant has a Disqualifying Factor as described below.

Disqualifying Factors. Excluded from the benefits of this new legislation are defendants who are currently required to register under Penal Code 290, or who have suffered a prior conviction listed in Penal Code § 667(e)(2)(C)(iv). These disqualifying offenses ("super strikes") are convictions listed as sexually violent offenses per Welfare & Institutions Code § 6600(b) [specified offenses that only apply as priors if the defendant was found not guilty by reason of insanity]; convictions of certain sexual offenses under Penal Code §§ 288, 288a, 286, 289; 288; murder or manslaughter under Penal Code § 187 or 191.5 (including attempts); solicitation to commit murder under Penal Code § 653f; assault on peace officer or firefighter with a machine gun under Penal Code § 245(d)(3); possession of a weapon of mass destruction, under Penal Code § 11418(a)(1); and any serious or violent felony punishable by life in prison or death.
Cal Post Con 8:14, 9:16, 9:28

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