THE LAW OFFICES OF
NORTON TOOBY

Crimes & Immigration Newsletter

October, 2016

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

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RECENT DEVELOPMENTS

Articles

POST-CONVICTION RELIEF – PREJUDICE -- ARTICLE

Prejudice

From 2016 Pre-AILA Powerpoint

prejudice, i.e., a reasonable chance of a better outcome absent counsel's error. *Strickland v. Washington*, 466 U.S. 668 (1984).

Classic IAC Prejudice: reasonable probability (less than a preponderance but enough to undermine confidence in outcome) of a better result absent counsel's error. *Rodriguez-Vega v. Lynch*, 797 F.3d 781, 788 (9th Cir 2015); see *Hill v. Lockhart*, 474 U.S. 52 (1985); *Glover v. U.S.*, 531 U.S. 198 (2001)(one day longer sentence = prejudice from IAC).

Padilla defined prejudice from ineffective assistance of counsel during plea negotiations as when "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010), citing *Roe v. Flores-Ortega,* 528 U.S. 470, 480, 486, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

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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.

For claims of IAC in plea bargaining, there are two types of prejudice:

Reject Plea and Choose *Trial*

Reject Plea and *Negotiate Better Plea*

US v. Rodriguez-Vega, 797 F.3d 781, 787 (9th Cir 2015).

Failure to negotiate effectively is a variation of the failure to defend IAC ground. See *Missouri v. Frye*, U.S. , 132 S. Ct. 1399, 1406 (2012); *Lafler v. Cooper*, U.S., 132 S. Ct. 1376, 1384 (2012). These cases establish that prejudice includes failure to negotiate a better plea bargain, not merely failure to take a case to trial with a better result.

Failure to give correct advice that the plea was virtually certain to cause removal prejudiced D by depriving him of the opportunity to negotiate an immigration-neutral disposition. *Rodriguez-Vega v. Lynch*, 797 F.3d at 787-788 (9th Cir. 2015); citing *Padilla,* 559 U.S. at 373; *Vartelas v. Holder*, ___ U.S. ___, 132 S.Ct. 1479, 1492 n. 10, 182 L.Ed.2d 473 (2012) (defendants might endeavor to negotiate a plea to a nonexcludable offense).

Another formulation is that D was deprived of the opportunity for a reasonable decisionmaker to exercise discretion in his or her favor. *US v. Kwan*, 407 F.3d 1005, 1017-1018 (9th Cir. 2005); see *Janvier v. US,* 793 F.2d 449 (2d Cir. 1986)(reversible IAC to fail to make a motion for a JRAD (i.e., a non-deportable sentence), but no need to show the motion would have been granted).

Prosecution proof the specific prosecutor would not have offered a better disposition is irrelevant: "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2068 (1984).

Prejudice does not depend on the idiosyncracies of a particular decisionmaker; a rational decisionmaker is assumed. *Strickland*, *supra*, 466 U.S. at 694-695; *accord*, *Hill v. Lockhart* (1985) 474 U.S. 52, 59-60.

"If an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen." *Commonwealth v. DeJesus*, 468 Mass. 174, 184 (2014).

Question is whether a reasonable person **in the defendant's circumstances** would have rejected the plea had she received competent advice regarding the immigration consequences. *Commonwealth v. Lavrinenko,* 473 Mass. 42, 63 (2015).

Refugee/asylee status entitled to particularly substantial weight – a "special" special circumstance: a desire to stay alive!

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Resources

IMMIGRATION CONSEQUENCES OF CONVICTIONS – NEW YORK UPDATED CHART

The Immigrant Defense Project's *New York Quick Reference Chart* has been fully revised and is now available with updates here.

For more information and to subscribe, visit our website at: http://www.immdefense.org/july-2016-updated-new-york-quick-reference-chart-now-available/

Practice Advisories

POST CON RELIEF – PREJUDICE – PROOF OF PREJUDICE

"It is often reasonable for a non-citizen facing nearly automatic removal to turn down a plea and go to trial risking a longer prison term, rather than to plead guilty to an offense rendering her removal virtually certain." *Rodriguez-Vega v. Lynch*, 797 F.3d at 789.

Courts of appeals split on whether it is rational for D to take a case to trial if evidence of guilt is overwhelming and D would face same adverse consequences on conviction. See *Lee v. United States*, 2016 WL 3190079 (6th Cir. June 8, 2016)(reviewing cases).

Reasonable D *would* risk penal benefits of "great" plea by choosing trial. "A young lawful permanent resident may rationally risk a far greater sentence [than 10-16 months in custody] for an opportunity to avoid lifetime separation from her family and the country in which they reside." *Rodriguez-Vega* at 790.

"Mr. Orocio was only 27 years old at the time he entered the plea agreement, and he rationally could have been more concerned about a near-certainty of multiple decades of banishment from the United States than the possibility of a single decade in prison." *US v Orocio,* 645 F.3d 630, 645 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States,* ___U.S. ___, 133 S.Ct. 1103, 185 L.Ed.2d 149 (2013).

"[S]imply irrelevant": "The government's performance in including provisions in the plea agreement, and the court's performance at the plea colloquy, are simply irrelevant to the question whether *counsel's* performance fell below an objective standard of reasonableness." *US v Rodriguez-Vega*, 797 F.3d 781, 787 (9th Cir 2015)(original emphasis)(citations omitted).

Cases holding general warning of possible immigration consequences undercuts prejudice or deficient performance. *US v Batamula*, 788 F.3d 166 (5th Cir. 2015)(en banc); *US v Fazio*, 795 F.3d 421 (3d Cir. 2015).

PCN:6.8

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US Supreme Court

JUDICIAL REVIEW – STATUTORY INTERPRETATION – AVOIDANCE OF REDUNDANCY

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.").”).

CD4:15.37;AF:2.19;CMT3:3.18

BIA

JUDICIAL REVIEW – BOARD OF IMMIGRATION APPEALS – BIA HAS NO AUTHORITY TO ADJUDICATE THE LEGAL VALIDITY OF A CRIMINAL CONVICTION

Matter of Cuellar, 25 I&N Dec. 850, 854-55 (BIA 2012) (BIA has no authority to review the legal validity of criminal convictions).

CD4:15.37;AF:2.19;CMT3:3.18

CAL POST CON RELIEF – DEFERRED ENTRY OF JUDGMENT – CONVICTION VACATED UNDER PENAL CODE § 1203.43 ELIMINATES IMMIGRATION CONSEQUENCES

In an unpublished decision, in Oct. 2016, the BIA held that an order dismissing a California Deferred Entry of Judgment controlled substances conviction, under Penal Code § 1203.43, effectively eliminated the conviction since it was based on a ground of legal invalidity. *Matter of Soria-Alcazar*, A077 595 788 (BIA Sept. 7, 2016). The court reasoned:

We conclude that 28 U.S.C. § 1738 obliges immigration adjudicators to extend full faith and credit to a California court order vacating a guilty plea and dismissing a drug charge under section 1203.43 of the California Penal Code. See *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1379-80 (BIA 2000). Under this Board's precedents, a "conviction" ceases to be effective for immigration purposes if it is vacated because of a substantive or procedural defect in the underlying criminal proceedings, see *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006), but a conviction remains effective if it is vacated solely for rehabilitative purposes or to alleviate immigration hardships. See Matter of Roldan, 22 I&N Dec. 512 (BIA 1999) (rehabilitation); *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003) (immigration hardships). In section 1203.43, the California Legislature has determined that California law systematically "misinform[s]" alien defendants about the possible "adverse immigration consequences" of their guilty pleas to first-time minor drug offenses, thereby necessitating vacatur of those pleas and dismissal of the charges to which those pleas were entered. This "misinformation" qualifies as a "substantive" defect in the criminal proceedings, notwithstanding its connection to the consequences of immigration enforcement. Accord *Matter of Adamiak*, *supra* (holding that an Ohio conviction was no longer effective for immigration purposes where it was vacated based on a failure to properly inform the defendant that his plea could have adverse immigration consequences).

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First Circuit

POST CON RELIEF – GROUNDS – INEFFECTIVE ASSISTANCE OF COUNSEL – AFFIRMATIVE MISADVICE

United States v. Castro-Taveras, 841 F.3d 34 (1st Cir. Oct. 31, 2016) (reversing denial of coram nobis petition; claim of ineffective assistance of counsel for giving affirmative misadvice regarding deportation was not barred by retroactivity doctrine, since this affirmative misadvice Sixth Amendment claim is not governed by *Padilla*; *Padilla* announced a new rule only as to an attorney's failure to advise, rather than affirmative misadvice).

PCN:6.18

Third Circuit

AGGRAVATED FELONY – DRUG TRAFFICKING OFFENSE – FEDERALLY LISTED SUBSTANCE

Singh v. Attorney General, ___ F.3d ___, 2016 WL 5845692 (3d Cir. Oct. 6, 2016) (Pennsylvania conviction, for manufacturing, delivering, or possessing a controlled substance or counterfeit controlled substance with intent to manufacture or deliver, under 35 P.S. § 780-113(a)(30), was not a drug-trafficking aggravated felony under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B); the specific identity of the drug is an element of the Pennsylvania offense; where the record of conviction specified "a controlled substance under Pennsylvania law, not federal" the record is clear that the substance the defendant pleaded guilty to was not included in the federal schedule, despite several documents, including the charging document, listing a federally listed substance).

NOTE: This is a great case to review to determine how to craft a safe plea for immigration purposes.

CD4:19.60;AF:5.42, A.18, B.4;SH:7.67, 8.5

Fourth Circuit

DETENTION – IMMIGRATION DETENTION -- MANDATORY DETENTION

Haughton v. Crawford, 2016 WL 5899285 (E.D. VA Oct. 7, 2016) ("After reviewing the relevant Supreme Court precedent, this Court reaches the same conclusion as all six courts of appeals to confront this question, holding that 'to avoid constitutional concerns, § 1226(c)'s mandatory language must be construed to contain an implicit reasonable time limitation, the application of which is subject to federal-court review.' *Rodriguez v. Robbins*, 715 F.3d 1127, 1137–38 (9th Cir. 2013).").

CD4:6.37;AF:2.11;CMT3:3.11

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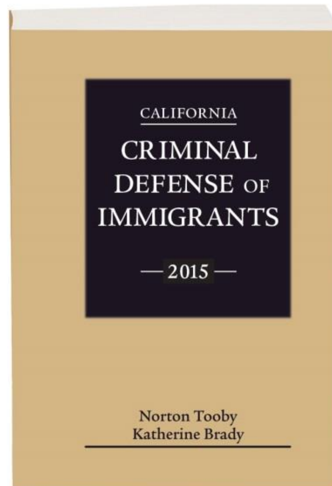
Publication Announcement

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.

Fifth Circuit

POST CON RELIEF – VEHICLES – DIRECT APPEAL – MOOTNESS – DEPORTATION

United States v. Ramirez-Gonzalez, ___ F.3d ___, 2016 WL 6276050 (5th Cir. Oct. 26, 2016) (appeal not moot for defendant that has completed his sentence and has been deported to Mexico; allegedly erroneous PSR Report affects the defendant's substantial rights going forward, and could mistakenly cause an immigration official to conclude he was convicted of an aggravated felony); see *United States v. Mackay*, 757 F.3d 195, 198, 200 (5th Cir. 2014) (a clerical error in the PSR was "not harmless because it affects [the defendant's] substantial rights," and that "[l]ike a judgment, the PSR determines the rights and obligations of the defendant going forward."); *United States v. Villanueva–Diaz*, 634 F.3d 844, 848–49 (5th Cir. 2011) (deportation does not moot a challenge to an underlying *judgment*—as compared to a sentence standing alone—because of the continuing adverse collateral consequences stemming from a judgment); see *Alwan v. Ashcroft*, 388 F.3d 507, 511 & n. 3 (5th Cir. 2004) (risk of causing adverse immigration consequences).

PCN:5.20

IMMIGRATION OFFENSES – ILLEGAL REENTRY – SENTENCE

United States v. Ramirez-Gonzalez, ___ F.3d ___, 2016 WL 6276050 (5th Cir. Oct. 26, 2016) (district court did not err by failing to alter a recommendation in the Presentence Investigation Report ("PSR") that defendant be subject to an eight-level enhancement for having committed an "aggravated felony", since it appended a Statement of Reasons attached to the judgment reflecting its finding of no aggravated felony).

CD4:CHAPT13

Seventh Circuit

DETENTION – IMMIGRATION DETENTION – IMMIGRATION DETAINERS

Jimenez Moreno et al v. Napolitano, 2016 WL 5720465 (N.D. Ill. 10/03/16) (the issuance of immigration detainers against persons in law enforcement custody exceeds the Government's limited authority for warrantless arrest under immigration law).

CD4:6.10

Ninth Circuit

CAL POST CON – PROPOSITION 47 UPDATE – VALUE OF STOLEN PROPERTY

People v. Pak, ___ CA4th ___, 2016 WL 5800024 (2d Dist Oct. 5, 2016) (in applying Penal Code § 1170.18, one uses the value of the property taken if the defendant is successful in completing the burglary, not the value of the property sought to be taken; for a person who entered a pawn shop with the intent to sell stolen property, the value used is that of the money obtained from the pawn shop, not the value of the stolen property).

CCDOI20.64

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PRACTICE ADVISORY – CALIFORNIA – PLEA NEED NOT IDENTIFY SPECIFIC CONTROLLED SUBSTANCE TO BE VALID

The court need not identify the specific controlled substance in order for a guilty plea to be valid. The charge need only establish that the plea is to "a controlled substance prohibited by" the appropriate statute. It is otherwise well-established that the identity of the substance is not an essential element of these offenses. *People v. Guy* (1980) 107 Cal.App.3d 593, 601, 165 Cal.Rptr. 463 (knowledge of the character of a controlled substance means that the defendant knew it was a controlled substance, but s/he need not have known its precise chemical composition); *People v. Garringer* (1975) 48 Cal.App.3d 827 [121 Cal.Rptr. 922] (knowledge for the purpose of conviction under Health and Safety Code § 11377, is knowledge of the controlled nature of the substance and not its precise chemical composition); CALCRIM 2300, p. 204 (Spring 2008) ("The People do not need to prove that the defendant knew which specific controlled substance (he/she) (sold/ furnished/ administered/ gave away/ transported/ imported), only that (he/she) was aware of the substance's presence and that it was a controlled substance.").

CD4:21.34;SH:7.143

AGGRAVATED FELONY – SEXUAL ABUSE OF A MINOR – SEX WITH A MINOR – CERT GRANTED

In *Esquivel-Quintana v. Lynch*, cert. granted Oct. 28, 2016, the justices will determine whether Cal. Penal Code § 261.5(c) (sexual intercourse with a minor under 18 with the age difference of more than three years) is an aggravated felony under INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A). More generally, it will determine the generic definition of "sexual abuse of a minor" in the aggravated felony definition.

CD4:19.87;AF:5.70

POST CON RELIEF – GROUNDS – INSUFFICIENT EVIDENCE – PREJUDICE – GUILT BY ASSOCIATION – MERE PRESENCE IS INSUFFICIENT EVIDENCE TO CONVICT

Legally speaking, guilt by association is not permitted under our system of government. Mere presence at the scene of a crime is insufficient to establish guilt of its commission. *People v. Boyd*, 222 Cal.App.3d 541, 557 n.14 (1990) (if there is evidence that the defendant was merely present at the scene, or had knowledge that a crime was being committed, the court must instruct the jury that the fact that the defendant was present at the scene of the crime or fails to prevent it is not, by itself, sufficient evidence of guilt). *In re Michael T.*, 84 Cal.App.3d 907, 911 (1978).

CD4:19.20;AF:3.54;SH:7.13; CPCR:7.27, 7.38

CCDOI20.50

RELIEF – WAIVERS – NON-LPR CANCELLATION OF REMOVAL – HARDSHIP

Mendez-Garcia v. Lynch, ___ F.3d ___, 2016 WL 6122777 (9th Cir. Oct. 20, 2016) (noncitizen was required to establish hardship to a qualifying relative as of the time the immigration judge adjudicates the

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application for cancellation of removal for non-LPRs, under INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D); children no longer qualified since they had turned 21 by the time of adjudication).

CD4:24.5;AF:2.5;CMT3:3.5

RELIEF -- GOOD MORAL CHARACTER – STATUTORY BAR -- HABITUAL DRUNKARD

Court scheduled to rehear en banc *Ledezma-Cosino v. Lynch*, 819 F.3d 1070 (2015) (habitual drunkard as disqualification for "good moral character" violates equal protection)

https://cdn.ca9.uscourts.gov/datastore/opinions/2016/10/12/12-73289.pdf.

CD4:15.6;AF:2.14;CMT3:3.14

REINSTATEMENT OF REMOVAL – EXPEDITED REMOVAL IS REMOVAL

Tellez v. Lynch, 839 F.3d 1175 (9th Cir. Oct. 24, 2016) (an expedited removal under 8 U.S.C. § 1225(b)(1) is a removal for purposes of reinstatement of removal under 8 U.S.C. § 1231(a)(5)).

CD4:15.40;AF:2.35;CMT3:3.34

REINSTATEMENT OF REMOVAL – QUILANTAN

Tellez v. Lynch, 839 F.3d 1175 (9th Cir. Oct. 24, 2016) (noncitizen who was waived through at a border checkpoint, after an earlier removal, may be subject to reinstatement of removal).

CD4:15.40;AF:2.35;CMT3:3.34

Tenth Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – ASSAULT WITH DEADLY WEAPON

United States v. Maldonado-Palma, ___ F.3d ___, 2016 WL 6211803 (10th Cir. Oct. 25, 2016) (New Mexico conviction for aggravated assault with a deadly weapon, under N.M. Stat. Ann. § 30–3–2(A) [assaulting or striking at another with a deadly weapon], is categorically a "crime of violence" for illegal re-entry purposes, under USSG § 2L1.2(b)(1)(A)(ii)).

CD4:19.37;AF:5.19, A.14, B.9

Eleventh Circuit

AGGRAVATED FELONY – THEFT OFFENSES – DEFINITION – LACK OF CONSENT REQUIRED

Vassell v. U.S. Attorney General, ___ F.3d ___, 2016 WL 6134832 (11th Cir. Oct. 21, 2016) (Georgia conviction of theft by taking, in violation of O.C.G.A. § 16–8–2, did not meet federal generic definition of theft because it did not require property to be taken without consent, and thus the conviction of theft by taking was not a theft offense aggravated felony, under INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G), that rendered lawful permanent resident deportable).

CD4:19.94;AF:5.78, A.42, B.43;SH:7.103, 8.46

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<u>California Criminal Defense of Immigrants Newsletter</u>

(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 <u>Criminal Defense of Immigrants</u>, 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.

INADMISSIBILITY – REASON TO BELIEVE DRUG TRAFFICKING – SUFFICIENCY OF EVIDENCE – UNCORROBORATED POLICE REPORTS

POST CON RELIEF – IMMIGRATION CONSEQUENCES – EFFECTIVE ORDER

Garces v. Attorney General, 611 F.3d 1337 (11th Cir. July 27, 2010) (vacated conviction for possession of six grams of cocaine insufficient to find "reason to believe" that noncitizen had been an illicit trafficker; uncorroborated police reports found not to be reasonable, substantial, probative evidence needed for a reason to believe finding).
CD4:21.6

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