THE LAW OFFICES OF
NORTON
TOOBY

Crimes & Immigration
Newsletter

September, 2016

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

Resources

RELIEF – CONSULAR PROCESSING – PROVISIONAL WAIVER PROGRAM

On July 29, 2016, USCIS published in the Federal Register the final version of a rule expanding the provisional waiver program, effective August 29, 2016. Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 81 Fed. Reg. 50,244. This rule expands the 2013 program that allows for a prospective consular processing applicant to file an I-601A waiver of the 3 and 10 year bars prior to departing the United States.

CD4:24.2;AF:2.2;CMT3:3.3

Practice Advisories

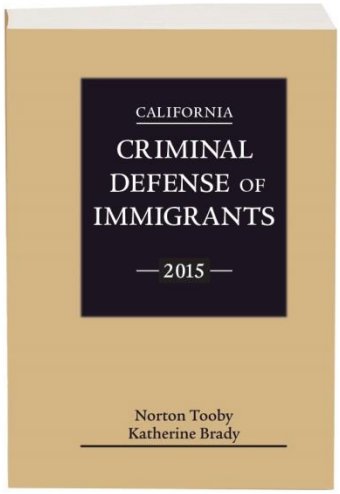
REMOVAL PROCEEDINGS – MOTION TO REOPEN – POST-CONVICTION RELIEF – REINSTATEMENT – PRACTICE ADVISORY

Immigration courts and the Board of Immigration Appeals routinely reopen proceedings after a criminal court vacates a conviction that formed the basis for a removal order due to substantive or

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.

procedural defects. *See*, *e.g.*, *Cruz v. AG*, 452 F.3d 240, 246 & n.3 (3d Cir. 2006) ("A motion to reopen is the proper means for [a noncitizen] who has been ordered removed due to a conviction to challenge his removal after that conviction is vacated.") (listing cases); *Toledo-Hernandez v. Mukasey*, 521 F.3d 332, 335 n.2 (5th Cir. 2008) (same); *see also* Othmane Idy, A096-41- 986, 2012 Immig. Rptr. LEXIS 6015 (BIA, Sept. 28, 2012); *Basilio Estevez*, A044-921-877, *2012 Immig. Rptr. LEXIS 27* (BIA, Jan. 18, 2012); *Cesar Gomez-Rivas*, A041-830-317 (BIA Sept. 27, 2011); *Jacinto Moises Carbonell-Desliz*, A074-054-226, 2014 WL 347664 (BIA Jan. 13, 2014).

As a general rule, if the BIA or IJ reopens the prior proceeding, the reinstatement order should collapse. The Ninth Circuit provided support for this position, albeit in the illegal reentry context. *United States v. Arias-Ordonez*, 597 F.3d 972, 978 (9th Cir. Mar. 10, 2010)(valid reinstatements of invalid removal order provide no independent basis for removal order). In addition, note that the Supreme Court and the lower courts have indicated or held explicitly, that reopening vacates the underlying removal order. *Nken v. Holder*, 129 S. Ct. 1749, 1759 (2009) ("[A] determination that the BIA should have granted Nken's motion to reopen would necessarily extinguish the finality of the removal order). If the order underlying the reinstatement order no longer exists, it follows that the reinstatement order similarly can no longer exist. It is uncertain, however, whether reopening *automatically* extinguishes the reinstatement order.

If a motion to reopen is filed and person is subject to reinstatement, there always is some risk. If DHS does reinstate, one would want to challenge the reinstatement order and try to collaterally attack the underlying order. Arguments and obstacles vary depending on the circuit law.

If a motion is filed, there is also a risk that EOIR will find that it cannot adjudicate the motion because the reinstatement order provides that the prior order "shall not be reopened or reviewed." If the motion to reopen is filed before DHS issues the reinstatement order, one could argue that the bar to review cannot apply because the motion was filed before the bar was triggered. In addition, in the Ninth Circuit, one could use the en banc decision in Morales-Izquierdo to argue that the reopening bar applies only "during the reinstatement stage" such that motions filed before or after reinstatement proceedings are not barred. There are also arguments that the right to pursue a motion to reopen in INA 240c7 trumps the bar to reopening in INA 241a5. Note that there is bad law on this issue in the Seventh Circuit.

Thanks to Trina Realmuto, Litigation Director, National Immigration Project of the National Lawyers Guild

CD4:15.34, 15.40;AF:6.30, 2.35;CMT3:10.31, 3.34;PCN:10.15

REMOVAL PROCEEDINGS – RIGHT TO COUNSEL

The American Immigration Council released ***Access to Counsel in Immigration Court***, a report based on the first national study on access to counsel in immigration courts. The report analyzes 1.2 million individual removal cases in immigration court between fiscal years 2007 and 2012 and concludes that access to legal counsel is scarce and uneven across geographic locations and nationalities. It also finds that immigrants who are represented by an attorney are more likely to be released from detention, apply for relief, and obtain the relief they seek.

In fact, without an attorney, *only two percent* of those who applied for relief from deportation succeeded. These alarming findings need to guide us toward creating an immigration system that is true to our country's commitment to justice and due process. Thanks to the report's authors, Ingrid Eagly, Esq. and Steven Shafer, Esq., for bringing attention to the inequities in access to counsel and the crucial role that counsel can play in the immigration process.

Access to Counsel in Immigration Court

CD4:15.23

PRACTICE ADVISORY – AGGRAVATED FELONY – FRAUD OR DECEIT OFFENSES – DEFENSES AGAINST AGGRAVATED FELONY CONSEQUENCES

A crime of fraud *or deceit* is an aggravated felony if the loss to the victim exceeds $10,000. INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(M)(i). There are two strategies when facing a removal charge that qualifies as a fraud or deceit offense under the categorical analysis, and the loss to the victim(s) exceeds $10k.

The first relates to theft. A crime of theft is an aggravated felony only if a sentence of a year or more is imposed. INA § 101(a)(43)(G), 8 USC 1101(a)(43)(G). Where possible, the defendant should plead to a theft rather than a fraud offense, e.g., to theft under California Penal Code § 484, with a sentence imposed of less than one year, because the $10k loss does not convert the theft conviction into a theft aggravated felony.

If that is not possible, a second option is to take the conviction, argue it is not for a fraud or deceit crime, and work to neutralize the $10k loss element of the aggravated felony definition. First, take a very conservative look at the offense to see if it involves deceit under the categorical analysis. The Supreme Court implied that even if fraud or deceit is not literally an element of the offense, if the conduct described by the statute necessarily involves deceit, qualifies as a fraud or deceit offense.

The $10k loss factor is a factual matter judged under the circumstance-specific standard, not the categorical approach.

Nijhawan v. Holder, 557 U.S. 29 (2009). To be considered as loss to the victim(s) from a conviction, the loss must be "tethered" to the count of conviction. The defendant can plead specifically to a count for which the loss to the victim(s) is $10k or less, and agree to restitution of that amount from the count of conviction, but agree that the court can impose restitution for the entire criminal activity in a greater amount, and make a specific statement at sentence and plea that the restitution order includes restitution not only for the specific count of conviction, but also for uncharged conduct or dropped charges. *Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002).

This strategy may not work as well with California welfare fraud, because there the restitution has been held to equal the loss.

Thanks to Kathy Brady, Senior Staff Attorney, Immigrant Legal Resource Center
CD4:19.74;AF:5.57;SH:7.82

US Supreme Court

AGGRAVATED FELONY – CRIME OF VIOLENCE – 18 U.S.C. § 16(b) HELD UNCONSTITUTIONAL BY NINTH CIRCUIT – CERT GRANTED IN *DIMAYA V. LYNCH*

The United States Supreme Court granted certiorari on the question "Whether 18 U.S.C. 16(b), as incorporated into the Immigration and Nationality Act's provisions governing an alien's removal from the United States, is unconstitutionally vague" in *Dimaya v. Lynch.*

https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-1498.htm

http://www.scotusblog.com/

CD4:19.41;AF:5.23

BIA

AGGRAVATED FELONY – CRIME OF VIOLENCE

Matter of Chairez, 26 I&N Dec. 819 (BIA 2016) (Utah Code § 76-10-508.1 was not shown to be divisible with respect to the *mens rea* necessary for the offense to qualify as a crime of violence under 18 U.S.C. § 16(a)(2012), based on the Supreme Court's decisions in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 133 S. Ct. 2276 (2013)); clarifying *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014), and *Matter of Chairez*, 26 I&N Dec. 478 (BIA 2015).

CD4:19.41;AF:5.23, A.14, B.9

AGGRAVATED FELONY – CRIME OF VIOLENCE – 18 U.S.C. § 16(a) – POISON

Matter of Guzman-Polanco, 26 I&N Dec. 806 (BIA 2016) (Puerto Rico conviction of aggravated battery, in violation of the Puerto Rico Penal Code is not categorically a crime of violence under 18 U.S.C. § 16(a), but controlling circuit court law should be followed regarding the question whether conduct such as the use or threatened use of poison to injure another person involves sufficient "force" to constitute a crime of

violence); clarifying *Matter of Guzman-Polanco*, 26 I&N Dec. 713 (BIA 2016).

CD4:19.39;AF:5.20, A.14, B.9; SH:7.47, 8.10

CRIMES OF MORAL TURPITUDE – CRIMINAL COPYRIGHT INFRINGEMENT

Matter of Zaragoza-Vaquero, 26 I. & N. Dec. 814 (BIA 2016) (federal conviction of criminal copyright infringement, in violation of 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2319(b)(1), is a crime involving moral turpitude, since that offense involves a willful act committed for commercial or private financial gain).

CD4:20.5;CMT3:8.5, CHART

First Circuit

AGGRAVATED FELONY – FRAUD OFFENSES – HEALTH CARE FRAUD

AGGRAVATED FELONY – FRAUD OFFENSES – LOSS TO THE VICTIM

POST CON RELIEF – POST-CONVICTION CHANGES TO RESTITUTION ORDER MAY NOT BE CONTROLLING FOR PURPOSES OF DETERMINING THE LOSS TO THE VICTIM(S) FOR A FRAUD AGGRAVATED FELONY

Nanje v. Chaves, 836 F.3d 131, ___ (1st Cir. Sept. 9, 2016) (Massachusetts conviction for filing false health care claim, in violation of Mass. Gen. Laws ch. 175H, § 2, with a loss to victim exceeding $10,000, is an aggravated felony fraud offense for removal purposes, INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i); loss over $10,000 was circumstance-specific element of fraud aggravated felony, which could be proven by evidence outside the record of conviction, despite state court order declaring loss under that level: "The appellant cites no authority—and we are aware of none—for the proposition that the Full Faith and Credit Clause compels a federal court (or a federal agency, for that matter) to give non-essential findings of fact in state court proceedings conclusive weight."); see *Conteh v. Gonzales*, 461 F.3d 45, 61-62 (1st Cir. 2006) ("[W]hen a restitution award has been artificially manipulated for the sole purpose of influencing an alien's immigration status, that award is not controlling with respect to the amount of loss.").

The court stated:

"[G]iving dispositive weight to nunc pro tunc orders entered by state courts years after the fact—orders that do not fairly address the issues in the state case—would afford state courts carte blanche to shield defendants from federal immigration laws with the stroke of a pen. That is not the law. Cf. *Fierro v. Reno*, 217 F.3d 1, 6 (1st Cir. 2000) (noting that "Congress' rules for naturalization must be applied as they are written, and a state court has no more power to modify them on equitable grounds than does a federal court or agency").

CD4:19.74;AF:5.57, B.26, A.24;SH:7.82

Fifth Circuit

AGGRAVATED FELONY – FIREARM OFFENSES – FELON IN POSSESSION OF A FIREARM

United States v. Castillo-Rivera, ___ F.3d ___, 2016 WL 4597301 (5th Cir. Sept. 2, 2016) (Texas conviction for possession of a firearm by a felon, in violation of Tex. Penal Code Ann. § 46.04, was an aggravated felony under INA § 101(a)(43)(E)(ii), 8 U.S.C. § 1101(a)(43)(E)(ii), since that definition includes an offense described in 18 U.S.C. § 922(g)(1), the federal statute prohibiting possession of a firearm by a felon); following *Nieto Hernandez v. Holder*, 592 F.3d 681, 686 (5th Cir. 2009).

Note: The Fifth Circuit failed to reach the arguments that Texas Penal Code § 46.04 is substantively broader than 18 U.S.C. § 922(g)(1) because Texas's definition of a felony offense differs from [that contained in] the U.S. Code, and that Texas's definition of a firearm differs from the U.S. Code."

CD4:19.70;AF:5.52, A.21, B.51

Eighth Circuit

JUDICIAL REVIEW – STATUTORY INTERPRETATION – AVOIDANCE OF UNNECESSARY CONSTITUTIONAL ADJUDICATION

Xiong v. Lynch, 836 F.3d 948 (8th Cir. Sept. 8, 2016) ("'A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988). 'This rule must bind not only the courts, but also the administrative agencies which they review, for if it did not, such agencies, "by unnecessarily deciding constitutional issues, would compel the courts to resolve such issues as well."'" *Gutierrez v. INS*, 745 F.2d 548, 550 (9th Cir. 1984) (Kennedy, J.) (quoting *Tung Chi Jen v. INS*, 566 F.2d 1095, 1096 (9th Cir. 1977)).").

CD4:15.37;AF:2.18;CMT3:3.19

Ninth Circuit

POST-CONVICTION RELIEF – LEGISLATION – CALIFORNIA – NEW POST-CONVICTION RELIEF MOTION TO VACATE FOR IMMIGRANTS – NEW PENAL CODE § 1473.7

Assembly Bill No. 813, chap. 739, an act to add Section 1473.7 to the Penal Code, relating to criminal procedure, was approved by Governor Brown on Sept. 28, 2016, and filed with the Secretary of State the same day. The Legislative Counsel's Digest states:

Under existing law, although persons not presently restrained of liberty may seek certain types of relief from the disabilities of a conviction, the writ of habeas corpus is generally not available to them. Existing law creates an explicit right for a person no longer unlawfully imprisoned or restrained to prosecute a motion to vacate a judgment based on newly obtained evidence of fraud

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.

THE LAW OFFICES OF
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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.

or misconduct by a government official, as specified.

This bill would create an explicit right for a person no longer imprisoned or restrained to prosecute a motion to vacate a conviction or sentence based on a prejudicial error damaging the moving party's ability to meaningfully understand, defend against, or knowingly accept the actual or potential adverse immigration consequences of a plea of guilty or nolo contendere, or based on newly discovered evidence of actual innocence, as specified. The bill would require a court to grant the motion if the moving party establishes a ground for relief, by a preponderance of the evidence. The bill would require a court granting or denying the motion to specify the basis for its conclusion.

CCDOI20.37B

DETENTION – IMMIGRATION DETENTION – GOVERNOR BROWN SIGNS TRUTH ACT – NOTICE TO DETAINEE OF DETAINER AND RELEASE DATES

The Truth Act requires service of ICE detainers on the individual, so the detainer itself should always be obtainable and everyone should know if ICE has placed any detainer request, including 247N or 247X. The provision requiring consent before ICE interviews mostly helps people who do not have any immigration history accessible in DHS databases. However, even with database records, ICE is instructed by policy to interview inmates before issuing a detainer or arresting them. Also such interviews could arguably be required for obtaining satisfactory probable cause to detain in some cases. The law also requires that if a local jail notifies ICE about release dates, they also need to provide that notice in writing to the inmate's counsel.

https://www.gov.ca.gov/docs/AB_2792_Signing_Message.pdf

Thanks to Lena Graber, Staff Attorney, Immigrant Legal Resource Center

CCDOI4.2

CONTROLLED SUBSTANCES – CALIFORNIA – MARIJUANA LEGALIZATION VIA PROP 64 – IMMIGRATION EFFECTS

The Immigrant Legal Resource Center has issued a report on the immigration effects of the possible passage of Proposition 64, legalizing marijuana in the state.

The report finds **key positive immigration outcomes** that could result from this marijuana reform initiative:

- By decriminalizing marijuana offenses for persons age 21 and older, Prop. 64 would help some noncitizens avoid losing their lawful status or being barred from applying for future lawful status.
- By reducing minor marijuana offenses to infractions for persons 18 to 20 years of age, Prop. 64 would reduce the number of young persons from being barred from key forms of immigration relief.
- By providing post-conviction relief, Prop. 64 would both reduce the number of people subject to deportation for marijuana-related conduct and open up

opportunities for noncitizens with past marijuana convictions.

- Prop. 64 would also ensure access to some humanitarian programs for immigrants, such as Deferred Action for Childhood Arrivals (DACA).

CCDOI8.1

Tenth Circuit

REMOVAL PROCEEDINGS – EXPEDITED REMOVAL – NO IMMIGRATION JUDGE REQUIRED

Osuna-Gutierrez v. Johnson, ___ F.3d ___, 2016 WL 5266614 (10th Cir. Sept. 22, 2016) (an immigration judge was not required in expedited removal proceeding, and thus DHS officer was authorized to make determination that alien had committed aggravated felony supporting his removal).

CD4:15.22;CMT:3.12;AF:2.12

Eleventh Circuit

AGGRAVATED FELONY – CRIME OF VIOLENCE – FELONY BATTERY

DOMESTIC VIOLENCE – CRIME OF VIOLENCE – FELONY BATTERY

United States v. Bail-Bailon, ___ F.3d ___, 2016 WL 5403582 (11th Cir. Sept. 28, 2016) (Florida conviction for felony battery, under Fla. Stat. § 784.041(1)(a) ("(a) [a]ctually and intentionally touches or strikes another person against the will of the other; and (b) [c]auses great bodily harm, permanent disability, or permanent disfigurement."), did not qualify as crime of violence for illegal re-entry sentencing purposes, under USSG § 2L1.2, because the statute is divisible since one alternative does not require violent force, the record of conviction documents fail to establish which offense was committed); see *Johnson v. United States*, 559 U.S. 133, 136–37 (2010) (two of the three ways that the prosecution can prove a violation of Fla. Stat. § 784.03(1)(a)(1), which includes the same language as Fla. Stat. § 784.041(1)(a), include by showing that a defendant "intentionally str[uck]" the victim or that he merely "[a]ctually and intentionally touche[d]" the victim).

CD4:19.39;AF:5.20, A.14, B.9; SH:7.47, 8.10

CRIMES OF MORAL TURPITUDE – ABUSE OF ELDERLY OR DISABLED ADULT

Gelin v. U.S. Attorney General, 838 F.3d 1030 (11th Cir. Sept. 22, 2016) (Florida conviction for abuse of elderly person or disabled adult, under Florida Statute § 825.102(1) ("knowingly or willfully abuses an elderly person or disabled adult without causing great bodily harm, permanent disability, or permanent disfigurement to the elderly person or disabled adult"), categorically qualified as "crime of moral turpitude" that disqualified him for cancellation of removal for non-lawful permanent residents, because the least culpable act—§ 825.102(1)(c) (active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an elderly person or disabled adult) categorically constitutes a

CIMT, because of (1) the culpable state of mind required by the statute, since a knowing or willful act of "active encouragement" requires more than culpable negligence, and (2) the particularly vulnerable nature of the victims).

CD4:20.7;CMT3:8.7, CHART