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THE PRESSURE IS ON—CRIMINAL DEFENSE COUNSEL STRATEGIES AFTER *PADILLA V. KENTUCKY*

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ABSTRACT

The Supreme Court's message to criminal defense attorneys in *Padilla v. Kentucky* was clear: W when there is a risk of deportation, defense counsel has a constitutional duty to inform an immigrant defendant of the potential for deportation or adverse immigration consequences prior to pleading guilty. In my view, this constitutional duty places tremendous pressure on defense counsel to do more than advise, because once advised, the client very naturally may want to know what options are available other than going to trial. Rather than simply focusing on how to minimize the time of incarceration for the client under a particular plea agreement, competent counsel has to figure out how to minimize the immigration ramifications. As I discuss in this Article, the efforts range from determining whether the client might actually be a citizen, to seeking a sentence that would fall outside the realm of an aggravated felony, to seeking a plea to an alternative charge that does not involve moral turpitude or firearms, to making sure that the sentencing plea or colloquy is silent about certain facts.

These efforts are demanding. They entail resourceful, intricate knowledge of the relevant criminal codes. They also require resourceful, intricate knowledge of the criminal grounds of removal and up-to-date research on what classifications of convictions can or cannot lead to removal.

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INTRODUCTION

In *Padilla v. Kentucky*,[1] the Supreme Court made clear that criminal defense attorneys have a constitutional duty to inform immigrant defendants of the potential for deportation prior to pleading guilty. When a particular plea "may carry a risk" of deportation, the defense attorney must at the very least advise a "noncitizen client that pending criminal charges" might lead to "adverse immigration consequences."[2] "[W]hen the deportation consequence is truly clear . . . the duty to give correct advice" is clear.[3]

In *Padilla*, Jose Padilla was indicted by a Kentucky grand jury on counts of trafficking in marijuana, possession of marijuana, possession of drug paraphernalia, and operating a tractor trailer without a weight and distance-tax number.[4] On advice from his lawyer, he entered a guilty plea with respect to the three drug charges in exchange for dismissal on the final charge.[5] He subsequently filed for post-conviction relief arguing that he was misadvised about the potential for deportation as a consequence of his guilty plea.[6] Mr. Padilla claimed that his counsel "not only failed to advise him of this consequence prior to his entering the plea, but also told him that he 'did not have to worry about immigration status since he had been in the country so long.'"[7] Mr. Padilla had been a lawful permanent resident of the United States for more than forty years.[8] Relying on this erroneous advice, he pleaded guilty to the drug charges, making his deportation "virtually mandatory."[9] But for this bad advice,

1. 559 U.S. 356 (2010).
2. *Id.* at 369.
3. *Id.*
4. Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd*, Padilla v. Kentucky, 559 U.S. 356 (2010).
5. *See Padilla*, 559 U.S. at 359.
6. *Id.*
7. *Id.* (quoting Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008)).
8. *Id.*
9. *Id.*

Mr. Padilla alleged that he would have gone to trial instead of pleading guilty.[10]

In reaching its decision, the Supreme Court recognized that after amendments to the immigration laws in 1996, "removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses."[11] As such,

> [t]hese changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.[12]

The *Padilla* case thus underscores the absolute duty that criminal defense attorneys have to advise their noncitizen clients of the potential collateral immigration consequences. However, once that duty has been discharged, then what? Mr. Padilla alleged that had he known about the potential deportation consequences of his guilty plea, he would have gone to trial. That option is clear, but was that his only option? A trial could have resulted in a similar outcome, namely, a conviction of the three drug charges. Or the outcome could have been worse. He could have received a greater sentence on the drug charges than what he had plea bargained for, or he could have been convicted of additional charges. Any of those outcomes also would have led to deportation.

What if Mr. Padilla's counsel had actually informed Mr. Padilla, "If you plead guilty to these three charges, you will be subject to deportation," and Mr. Padilla responded, "What are my options to avoid deportation; or what can you do to help me avoid deportation?" Yes, a trial for Mr. Padilla could have resulted in an acquittal thus avoiding the deportation consequence. However, the holding in the *Padilla* case is not simply about giving the informed, noncitizen criminal defendant the opportunity to go to trial. In my view, the pressure is on. The holding in *Padilla* invites competent counsel to engage in, or at least consider, a potential panoply of strategies and options to avoid collateral immigration consequences for the noncitizen client. Thus, the goal is not simply about minimizing time in jail—the standard strategy that defense counsel might otherwise be focused on.

In this Article, I discuss a list of options and approaches that competent criminal defense attorneys might consider in cases where their

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10. *Id.*
11. *Id.* at 363–64.
12. *Id.* at 364 (footnote omitted).

noncitizen clients are charged with crimes that could render the clients removable. This could mean working with an immigration law specialist because "[i]mmigration law can be complex, and . . . a legal specialty of its own";[13] its provisions are notoriously complicated and continually changing—comparable to the "labyrinth" of the Internal Revenue Code.[14] It could mean working on a plea deal that involves pleading to a crime that is not a deportable offense. Or it could also mean looking for flexible avenues within the criminal justice system, such as seeking diversion or a restorative justice approach that might result in charges being dismissed. In light of *Padilla v Kentucky*, defense counsel bears a great responsibility to the noncitizen defendant.

The primary concern of this Article is on the representation of noncitizen, lawful, permanent residents or refugees who would face removal if they were found guilty of pending charges. The focus is not on undocumented immigrants or nonimmigrants—e.g., tourists or foreign students—who could be removed or found inadmissible for future entry if found guilty of the charges. Many of the strategies discussed here might be helpful to the latter groups as well, however, undocumented immigrants and nonimmigrants might face removal on other grounds, such as overstaying their nonimmigrant visas, working without authorization, or crossing the border without inspection.

I. BACKGROUND ON CRIMINAL GROUNDS OF REMOVAL

The criminal grounds of removal have continued to grow through the years as Congress increasingly relies on deportation to punish those who acquire criminal records after admission. Most of these require a conviction. The criminal deportability grounds apply to crimes involving moral turpitude, multiple criminal convictions, aggravated felonies, high-speed flight, sex offender convictions, controlled substance and firearms convictions, and domestic violence convictions.

A. Crimes Involving Moral Turpitude

A noncitizen convicted of a crime involving moral turpitude (CIMT) that was committed within five years after the date of admission is deportable if the crime is one for which a sentence of one year or longer may be imposed.[15] A similar provision makes a noncitizen inadmissible, although the deportability ground is more stringent; it focuses on the possible sentence rather than the actual sentence in determining a noncit-

13. *Id.* at 369.

14. Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1987).

15. Immigration and Nationality Act § 237, 8 U.S.C. § 1227(a)(2)(A)(i) (2015). The statute states that for those who obtained permanent residence through S visas, a CIMT conviction will trigger deportation if committed ten years after admission. *Id.*

izen's deportability.[16] Even if a noncitizen is actually sentenced to less than one year, the noncitizen is still deportable under this provision for a crime involving moral turpitude if the offense carries a possible term of one year or more.[17]

The CIMT provision states that the crime must have been committed within five years after the date of admission.[18] The Ninth Circuit recognized admission under INA § 101(a)(13)(A) for the purposes of a crime of moral turpitude as the prior "lawful entry of the alien into the United States after inspection and authorization by an immigration officer."[19] Admission, therefore, is a key factor in determining the relevant time period for deportability.

The term "moral turpitude" has never been legislatively defined. The Supreme Court held that the term was not unconstitutionally vague in a case involving the deportation of a noncitizen for criminal convictions involving fraud. In *Jordan v. De George*,[20] the Court was asked to decide whether the term moral turpitude was unconstitutionally vague in a case involving the crime of conspiracy to defraud the United States of taxes on distilled spirits.[21] That particular crime, the Court held, was squarely within the definition of a crime involving moral turpitude, "[w]hatever else the phrase 'crime involving moral turpitude' may mean in peripheral cases."[22] Since then, courts have consistently defined moral turpitude as "an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."[23] Extensive case law has been developed around what constitutes a crime of moral turpitude. Crimes that have been held to involve moral turpitude include murder, voluntary manslaughter, kidnapping, aggravated assault, rape, fraud, forgery, robbery, petty theft, grand theft, burglary, perjury, counterfeiting, bribery, willful tax evasion, and extortion.[24] In one case, the Board of Immigration Appeals (BIA) found that the noncitizen's involuntary manslaughter conviction for reck-

16. *See id.* § 1227(a)(2)(A)(i)(II) ("[An alien who] is convicted of a crime for which a sentence of one year or longer may be imposed[] is deportable.").

17. *Id.*

18. *Id.* § 1227(a)(2)(A)(i)(I).

19. Shivaraman v. Aschcroft, 360 F.3d 1142, 1146 (9th Cir. 2004) (quoting Immigration and Nationality Act § 103(a)(13)(A)).

20. 341 U.S. 223 (1951).

21. *Id.* at 226.

22. *Id.* at 232.

23. *E.g.*, Sosa-Martinez v. U.S. Attorney Gen., 420 F.3d 1338, 1341 (11th Cir. 2005) (quoting United States v. Smith, 420 F.2d 428, 431 (5th Cir. 1970)) (internal quotation marks omitted); Marciano v. INS, 450 F.2d 1022, 1025 (8th Cir. 1971) (quoting *In re* Henry, 99 P. 1054, 1055 (Idaho 1909)) (internal quotation marks omitted); *see also* Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1068 (9th Cir. 2007).

24. *See, e.g.*, 6 CHARLES GORDON, STANLEY MAILMAN, STEPHEN YALE-LOEHR & RONALD Y. WADA, IMMIGRATION LAW AND PROCEDURE §71.05 (1988); NORTON TOOBY, J.J. ROLLIN & J. FOSTER, CRIMES OF MORAL TURPITUDE (2008).

lessly causing the death of her child involved moral turpitude because the criminal statute required conscious disregard of a substantial and unjustifiable risk to the life or safety of others.[25] Just as importantly, of course, the list of offenses that have been held not to involve moral turpitude is vital, such as simple assault, joy riding, possession of burglary tools, and breaking and entering without intent to commit a moral turpitude offense.[26] Vandalism generally is not regarded as a crime involving moral turpitude.[27]

Under INA § 237(a)(2)(A)(ii), a noncitizen who, any time after admission, commits two or more crimes involving moral turpitude is deportable.[28] There is an exception for multiple offenses arising out of a single scheme of criminal misconduct. The BIA has interpreted the single-scheme provision to cover separate and distinct crimes performed in furtherance of a single criminal episode, lesser included offenses, and instances where two crimes flow from and are the natural consequence of a single act of criminal misconduct.[29] The Ninth Circuit has rejected this approach, noting that the statute refers to a single "scheme" rather than a single act.[30] In the Ninth Circuit, a single scheme includes two or more crimes that "were planned at the same time and executed in accordance with that plan."[31]

B. Aggravated Felonies

In 1988, the Anti-Drug Abuse Act (Drug Kingpin Act) created a new deportation category for a conviction of a single "aggravated felony" that included murder, drug trafficking, and firearms trafficking.[32] Now, aliens—including longtime, lawful permanent residents—convicted of a single aggravated felony at any time after admission are deportable.[33] The new aggravated felony ground for deportation overlapped with other grounds of deportation. For example, drug convictions that were now aggravated felonies remained independent grounds for deportation under the provision pertaining to drug crimes.[34] Similarly, any person who was convicted of two crimes involving moral turpitude

25. Franklin v. INS, 72 F.3d 571, 572–73 (8th Cir. 1995).

26. *What Constitutes "Crime Involving Moral Turpitude" Within Meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. § 1182(a)(9), 1251(a)(4)), and Similar Predecessor Statutes Providing for Exclusion or Deportation of Aliens Convicted of Such Crime*, 23 A.L.R. FED. 480, §§ 2(a), 11(b) (1975).

27. *See infra* note 128 and accompanying text.

28. Immigration and Nationality Act § 237, 8 U.S.C. § 1227(a)(2)(A)(iii) (2015).

29. Adetiba, 20 I. & N. Dec. 506, 509 (B.I.A. 1992).

30. Gonzalez-Sandoval v. INS, 910 F.2d 614, 615–16 (9th Cir. 1990).

31. *Id.* at 616.

32. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7344(a), 102 Stat. 4181, 4470–71 (1988).

33. 8 U.S.C. § 1227(a)(2)(A)(iii); *see id.* § 1101(a)(3) (defining the term "alien").

34. INA §§ 101(a)(43); 237(a)(2)(A)(iii), 237(a)(2)(B).

was still deportable, irrespective of whether one or both crimes were aggravated felonies.[35]

The major effect of the introduction of the aggravated felony ground of deportation was that now a person with a single, non-drug conviction was deportable, irrespective of time of entry—just as had been true of single drug convictions prior to 1988.[36] For example, a person convicted of murder committed more than five years after entering the country was now deportable as an aggravated felon. That was not possible prior to 1988. The problem is that the list of aggravated felonies for deportation purposes includes much more than murder.

The list of aggravated felonies, expanded several times since 1988,[37] is so broad that the current president of the National Association of Immigration Judges considers the category a "misnomer that includes many offenses that are neither aggravated nor felonies."[38] Today, the term includes murder, rape, and illicit trafficking of a controlled substance.[39] But theft offenses, when the term of imprisonment is at least one year, also are included.[40] So what one might regard as minor crimes—for example, selling $10 worth of marijuana or "smuggling" a baby sister across the border illegally—are aggravated felonies for deportation purposes.[41]

A crime classified as a misdemeanor under state law might be regarded as an aggravated felony under the Immigration and Nationality Act. For example, several offenses are classified as aggravated felonies once a one-year sentence is imposed. These include theft, burglary, perjury, and obstruction of justice, even though the state criminal court may

35. INA §§ 101(a)(43); 237(a)(2)(A)(ii), (iii).

36. INA § 237(a)(2)(A)(iii).

37. *See infra* note 39.

38. Dana Leigh Marks, *Let Immigration Judges be Judges*, THE HILL (May 9, 2013, 8:03 PM), http://thehill.com/blogs/congress-blog/judicial/298875-let-immigration-judges-be-judges.

39. Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(43) (2015). Aggravated felonies include sexual abuse of a minor, any illicit trafficking in any controlled substance (including possession for sale of marijuana, firearms, or destructive devices), money laundering, or any crime of violence (except for purely political offenses) for which the term of imprisonment imposed is at least one year. *Id.* The definition also includes treason; child pornography; operation of a prostitution business; fraud or deceit in which the loss to the victim or victims exceeds $10,000; tax evasion in which the loss to the U.S. government exceeds $10,000; crimes relating to the Racketeer Influenced and Corrupt Organizations (RICO) Act, if the term of imprisonment imposed is at least one year; alien smuggling, except in the case of a first offense involving the assisting, abetting, or aiding of the alien's spouse, child, or parent and no other individual; document trafficking, if the term of imprisonment imposed is at least one year; failure to appear to serve a sentence, if the underlying offense is punishable by imprisonment for a term of five years; and bribery, counterfeiting, or forgery for which the term of imprisonment is at least one year. *Id.* An attempt or conspiracy to commit any of these crimes also is included. *Id.*

40. *Id.*

41. *See id.*

classify the crime as a misdemeanor.[42] Misdemeanor statutory rape, consensual sex where one person is under the age of eighteen, also will be treated as an aggravated felony.[43] Similarly, a misdemeanor conviction can be an aggravated felony for deportation under the "rape" or "sexual abuse of a minor" categories.[44]

In spite of the creation of the aggravated felony ground of deportation in 1988 and the subsequent expansion of the term, until 1996, a long-term, lawful permanent resident convicted of an aggravated felony remained eligible to apply for discretionary Section 212(c) relief.[45] The deportation respondent's ability to introduce evidence of remorse, rehabilitation, hardship to family, work ethic, and community engagement before the immigration court remained constant.[46]

The introduction of the aggravated felony concept in 1988 signaled a major shift in focusing on criminal immigrants. The Immigration Act of 1990 foreclosed criminal sentencing judges from making a Judicial Recommendation Against Deportation.[47] The Violent Crime and Law Enforcement Act of 1994 and Immigration and Nationality Technical Corrections Act of 1994 added to the list of aggravated felonies and created "administrative" deportation with no hearing before an immigration judge, while the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996 required mandatory detention of certain criminal aliens and barred relief for aggravated felons, drug offenders, and double moral turpitude defendants.[48]

While deporting criminals might be viewed simply as an effort to rid the country of immigrants who pose public safety concerns; in fact, an important purpose of the strengthened penalties was over allocation of resources in the prison system.[49] One-fourth of federal detainees in 1995 were aliens who were taking up precious and costly prison space.[50] But

42. *See, e.g.*, United States v. Campbell, 167 F.3d 94, 98 (2d Cir. 1999); American Immigration Council, *Aggravated Felonies: An Overview*, available at: http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview

43. William J. Johnson, Note, *When Misdemeanors Are Felonies: The Aggravated Felony of Sexual Abuse of a Minor*, 52 N.Y.L. SCH. L. REV. 419, 434–38 (2008).

44. *See, e.g.*, Small, 23 I. & N. Dec. 448, 449 (B.I.A. 2002).

45. INS v. St. Cyr, 533 U.S. 289 (2001).

46. *Id.;* C-V-T-, 22 I. & N. Dec. 7 (B.I.A. 1998).

47. Lisa R. Fine, *Preventing Miscarriages of Justice: Reinstating the Use of "Judicial Recommendations Against Deportation,"* 12 GEO. IMMIGR. L.J. 491, 506–07 (1998); *see also* Carl Shusterman, Padilla - *Bring Back the JRAD?*, NATION OF IMMIGRANTS (Apr. 18, 2010), http://shusterman.typepad.com/nation-of-immigrants/2010/04/padilla-bring-back-the-jrad.html.

48. Katherine Brady, *Recent Developments in the Immigration Consequences of Crimes, in* OUR STATE OUR ISSUES: AN OVERVIEW OF IMMIGRATION LAW ISSUES 129 n.1 (Bill Ong Hing ed., 1996); Nancy Morawetz, *Rethinking Retroactive Deportation Laws and the Due Process Clause*, 73 N.Y.U. L. REV. 97, 114 (1998).

49. Fine, *supra* note 45, at 492.

50. *Id.* at 492–93.

without a doubt, clamping down on criminal aliens was about removing aliens who were perceived as undeserving of residence.[51]

Within months of the passage of AEDPA, Congress considered further enforcement-focused immigration legislation. Proponents of the Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA) continued to voice concern over resource allocations.[52] Fresh on the heels of the 1996 welfare reform act—the Personal Responsibility and Work Opportunity Reconciliation Act—that placed limitations on public assistance for immigrants,[53] IIRIRA contained further limits on such benefits.[54] "As a consequence of these laws, with limited exceptions, undocumented migrants became ineligible for all federal public benefits, including loans, licenses, food and housing assistance, and post-secondary education."[55]

However, the IIRIRA debates focused heavily on the idea of immigrant criminality by increasing categories of deportation and "streamlining the removal process."[56] Prominent Republican Senator Orrin Hatch (R-UT) argued, "We can no longer afford to allow our borders to be just overrun by illegal aliens. . . . Frankly, a lot of our criminality in this country today happens to be coming from criminal, illegal aliens who are ripping our country apart. A lot of the drugs are coming from these people."[57] This conflation of "illegal alien" with pervasive crime was sufficient to affect the treatment of all criminal aliens—even those who were in fact long-term, lawful permanent residents—leading to restrictions on deportation relief for aggravated felons regardless of immigration status.[58]

As a result, IIRIRA eliminated Section 212(c)'s second-chance relief as it had been applied for twenty years. In its place, a cancellation of removal provision was added that precluded the possibility of relief for many who had been able to seek discretionary relief from an immigration judge under the prior provision.[59] The new provision, INA § 240A(a), permits the Attorney General to "cancel removal" only for certain aliens who commit crimes if the alien (1) has been a lawful permanent resident for at least five years, "(2) has resided in the United States continuously

51. *Id.* at 493.

52. Fine, *supra* note 45, at 492–93.

53. *See generally* Bill Ong Hing, *Don't Give Me Your Tired, Your Poor: Conflicted Immigrant Stories and Welfare Reform*, 33 HARV. C.R.-C.L. L. REV. 159 (1998).

54. Jennifer M. Chacón, Commentary, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1842 (2007).

55. *Id.* (footnote omitted).

56. *Id.* at 1843.

57. *Id.* (alteration in original) (quoting 142 CONG. REC. S11,505 (daily ed. Sept. 27, 1996)) (internal quotation marks omitted) (statement of Sen. Hatch).

58. *See id.* at 1839.

59. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187, *repealed by* Illegal Immigrant Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-597 (1996); *see also* Brady, *supra* note 48, at 129–30.

for seven years after having been admitted in any status," and, most significantly, "(3) has *not* been convicted of any aggravated felony."[60] The aggravated felony bar, thus, eliminated relief for many lawful resident aliens who would have been eligible for Section 212(c) relief.[61] The aggravated felony category, that began as additional grounds for crime-based deportation, became a convenient marker for who should not be eligible for discretionary relief.

The effect of eliminating Section 212(c) relief for a long-time, lawful permanent resident who has been convicted of an aggravated felony is evident. The weighing and balancing of equities against the seriousness of the crime does not take place in the removal proceeding because the immigration judge does not have discretion to grant relief. Hardship to the respondent and to his or her family is rendered irrelevant, as is any evidence of rehabilitation, remorse, or atonement on the part of the respondent. In essence, a single bad act that may have taken "fifteen minutes" to commit can control the outcome, while the rest of the person's life that could be exemplary and crime free is ignored.[62]

C. Controlled Substances, Firearms, Domestic Violence, and Other Crimes

In addition to the general CIMT and aggravated felony provisions, the statute names specific crimes that make a noncitizen deportable.[63] These provisions are far-reaching in their scope and effect, and they reflect a congressional purpose to regulate the activities of noncitizens even after admission.

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60. Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b(a) (2015) (emphasis added).

61. The 1996 amendments also expanded the list of crimes included as aggravated felonies. *See* Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208, § 321(a), 110 Stat. 3009-546, 3009-627 (1996); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277–78. For example, a crime of theft for which the person received a one-year sentence was now an aggravated felony. 8 U.S.C. § 1101(a)(43)(G). Previously, a theft crime was only classified as an "aggravated felony" if the individual received a sentence of five or more years. *See* Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a), 108 Stat. 4305, 4321 (amended 1996). Although such a crime would have been considered a "crime involving moral turpitude," it would not have been grounds for instituting deportation unless it was committed within the first five years or was accompanied by a second crime of moral turpitude. Brady, *supra* note 48, at 144-45. Once the immigrant is classified as an aggravated felon, other harsh immigration consequences follow. An aggravated felon is ineligible for release on bond and asylum (although the person might be eligible for "restriction of removal" or the protections of the Convention Against Torture). BILL ONG HING, DEPORTING OUR SOULS: VALUES, MORALITY, AND IMMIGRATION POLICY 58 (2006). An aggravated felon who is not a lawful permanent resident can be deported without a hearing before an immigration judge and is not eligible for a waiver for moral turpitude offenses upon admission. *Aggravated Felonies: An Overview*, AMERICAN IMMIGRATION COUNCIL (Mar. 16, 2012), http://www.immigrationpolicy.org/just-facts/aggravated-felonies-overview. To make matters worse, a deported aggravated felon who returns to the United States illegally can be sentenced up to twenty years in federal prison. 8 U.S.C. § 1326(b)(2).

62. CITY & CNTY OF S.F. IMMIGRANT RIGHTS COMM'N, A CITY AND NATION OF IMMIGRANTS: 2013 RECOMMENDATIONS ON COMPREHENSIVE IMMIGRATION REFORM 78 (2013) (testimony of Anoop Prasad, staff attorney) (on file with author).

63. 8 U.S.C. § 1101(a)(43).

A noncitizen who at any time after admission has been convicted of any state, federal, or foreign country law related to controlled substances, other than possession for personal use of thirty grams or less of marijuana, is deportable.[64] The statute covers convictions for conspiracy or attempt as well as direct convictions.[65] The statute also makes a noncitizen who at any time after admission becomes a drug abuser or addict deportable.[66] This provision is triggered simply by behavior rather than a conviction.

Just as broad in its application is the provision that makes conviction of a firearms offense after admission a deportable offense. The statute states that "[a]ny alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying . . . any weapon, part, or accessory which is a firearm . . . in violation of any law is deportable."[67] This provision also covers conspiracy and attempt offenses.[68]

Probably the most far-reaching criminal deportability ground is the domestic violence ground. A noncitizen convicted of any domestic violence offense at any time after admission is deportable.[69] Domestic violence offenses include domestic violence, stalking, and child abuse—neglect or abandonment.[70] Moreover, the statute makes anyone deportable who violates a protection order, whether civil or criminal, when involving threats of violence.[71]

The statute enumerates several other offenses for which conviction makes a noncitizen deportable, including failure to register as a sex offender;[72] high-speed flight from an immigration checkpoint;[73] crimes related to espionage, treason, and sedition;[74] and certain violations of the Trading with the Enemy Act or the Military Selective Service Act.[75]

Note that some grounds of removal that are criminal-related do not require convictions. A drug abuser or addict is deportable even without a conviction.[76] A noncitizen who has aided, assisted, or encouraged noncitizens to cross the border illegally is deportable.[77] A noncitizen is deportable who is found by a civil or criminal judge to have violated portions

64. *Id.* § 1227(a)(2)(B)(i).
65. *Id.*
66. *Id.* § 1227(a)(2)(B)(ii).
67. *Id.* § 1227(a)(2)(C).
68. *Id.*
69. *Id.* § 1227(a)(2)(E)(i).
70. *Id.*
71. *Id.* § 1227(a)(2)(E)(ii).
72. *Id.* § 1227(a)(2)(A)(v).
73. *Id.* § 1227(a)(2)(A)(iv).
74. *Id.* § 1227(a)(2)(D)(i).
75. *Id.* § 1227(a)(2)(D)(iii).
76. *Id.* § 1227(a)(2)(B)(ii).
77. *Id.* § 1227(a)(1)(E)(i).

of a domestic violence protective order relating to threat, violence, or repeated harassment.[78]

II. CLIENTS WHO ARE UNAWARE OF THEIR U.S. CITIZENSHIP

Before proceeding to criminal justice system defense strategies, a preliminary step needs to occur. At some point early in the representation of a noncitizen in the criminal phase and certainly in the deportation phase, counsel needs to verify that for sure the client is in fact a noncitizen. Removal laws only apply to aliens. Thus, U.S. citizenship can be regarded as a "complete bar to removal" from the United States.[79] As unbelievable as it may seem, some individuals may be unaware of the fact that they have derived U.S. citizenship from a parent. Consider this example:

> Douglas Centeno, 31, was released from an immigration jail in April after a Chronicle story attracted fresh attention from immigration officials to his case. Now the government has abandoned its efforts to deport Centeno, accepting the evidence that he is, in fact, a U.S. citizen.
>
> . . . .
>
> Centeno's case is the latest example of an increasingly common problem, legal experts say: People wind up in immigration detention for months, or years, trying to assemble evidence to show that they don't belong there in the first place.
>
> . . . .
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> Citizenship is one of the most complex areas of law . . . . Some people born abroad inherit U.S. citizenship from a parent or grandparent; others gain it as children if their parents naturalize. Sometimes that citizenship is difficult to trace or document.
>
> That was what happened for Centeno, according to his attorney, Sin Yen Ling of San Francisco's Asian Law Caucus. Born in Nicaragua, Centeno arrived in the United States legally as a 2-year-old. When he was 16, his father became a naturalized U.S. citizen, and Centeno automatically derived citizenship as well, though he never obtained a naturalization certificate to prove it.
>
> Legal immigrants who have been convicted of certain crimes face deportation; citizens do not. And in recent years, local law enforcement agencies have increased their cooperation with immigration officials, handing over potentially deportable aliens.

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78. *Id.* § 1227(a)(2)(E)(ii).

79. IMMIGRANT LEGAL RES. CTR., IMMIGRATION RELIEF TOOLKIT FOR CRIMINAL DEFENDERS 8 (2014), *available at* http://www.ilrc.org/files/documents/natl_relief_toolkit_jan_2014_final_0.pdf.

> Centeno landed in the custody of Immigration and Customs Enforcement agents in December after serving time for assaulting an officer.
>
> Centeno, who suffers from schizophrenia and bipolar disorder, was walking down the street talking to himself when police stopped him . . . . Centeno asked police to take him to a mental health center, and when he was refused, he had a psychotic episode and struck [an officer].
>
> "Unfortunately, it snowballed into him being put in deportation proceedings," said Ling. "It was a huge mishandling of someone with mental health problems."
>
> Centeno was locked up for four months. . . .
>
> . . . [Immigration] Judge Lawrence DiCostanzo ended the deportation case, noting that the evidence appears to show that Centeno is a citizen.
>
> "It's a great ending for Douglas," said Ling. "But the consequence of this broken system is that it wrongfully deports U.S. citizens."[80]

One might think that federal immigration officials would screen for whether someone they have taken into custody is actually a U.S. citizen. However, that would be wrong. "If it's not clear whether you are an immigrant or a citizen, the system is set up to detain you. . . . The default is, you are an alien, and then from a remote detention facility you have the burden . . . ."[81] Even when the person in custody asserts citizenship and Immigration and Customs Enforcement (ICE) officials could have confirmed citizenship with reasonable efforts, deportation might still occur.

> Nearly three months after U.S. immigration officials dumped Luis Alberto Delgado in Mexico despite his insistence that he is a U.S. citizen, the 19-year-old was permitted to re-enter the country last weekend with the U.S. government's blessing.
>
> Delgado said U.S. Customs and Border Protection agents cleared him to return to the United States on Friday, roughly 85 days after he was detained by immigration officials and pressured to sign papers that cleared the way for his removal to Mexico.
>
> Steven Cribby, a spokesman for U.S. Customs and Border Protection, declined to comment on Delgado's case.

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80. Tyche Hendricks, *Modesto Man Won't Be Deported, Citizenship OKd*, HOUS. CHRONICLE (May 21, 2009, 6:00 AM), http://www.chron.com/news/article/Modesto-man-won-t-be-deported-citizenship-OKd-3232299.php.

81. *Id.* (quoting Holly Cooper, a professor at the UC Davis School of Law) (internal quotation marks omitted).

On Monday in Houston, Delgado said he was pondering a lawsuit against the U.S. government, calling his case "an injustice."

U.S. Border Patrol agents detained Delgado after a traffic stop in South Texas on June 17 and held him for eight hours, questioning him about his citizenship.

Delgado said he gave immigration agents a copy of his birth certificate showing he was born at Houston's Ben Taub Hospital, a state of Texas identification card and a Social Security card.

But Delgado, who was raised in Mexico after his parents divorced, said immigration agents were suspicious of him because he did not speak English well, and insisted the paperwork he carried belonged to someone else.

Delgado said he eventually signed paperwork that resulted in his removal to Mexico because he wanted to be released from immigration custody, and thought he could fight his case from Houston.

"I believe (the agents) discriminated against me because I didn't speak English," he said. "If you don't speak very well, I think they just assume you're Mexican."

Isaias Torres, a Houston immigration attorney who took Delgado's case pro bono, said he believes the U.S. government was "at best, very negligent" in its handling of the case.

U.S. immigration officials have faced scrutiny in recent years over allegations that they have deported U.S. citizens, including a high-profile case of a mentally disabled Los Angeles man who was lost for months in Mexico in 2007.

Estimates of the number of U.S. citizens deported from the U.S. vary widely, and such statistics are not officially tracked by U.S. immigration officials, who recently adopted guidelines designed to prevent such deportations.

Torres said the government should not tolerate discrimination against U.S. citizens and legal immigrants who do not speak English fluently.

"I don't believe this is an isolated incident," Torres said.

He said such cases will become increasingly common because the U.S. government is deporting parents with U.S.-born children. . . . Between 1998 and 2007, the United States removed 108,434 illegal immigrants with U.S. citizen children, according to a 2009 Department of Homeland Security report.

Delgado said he does not speak English well because he and his brother moved to Mexico with their mother after she divorced their

> father, who lived in Dallas. Delgado moved back to Houston about three years ago.[82]

Given the phenomenon of real and potential wrongful deportation of U.S. citizens, competent counsel must determine when the perceived "noncitizen" criminal defendant actually is not a citizen. First, the client's place of birth needs to be determined. Birth in the United States, with rare exception—e.g., child of foreign diplomat—confers U.S. citizenship on the person.[83] Second, if the client was born outside the United States, but a parent or grandparent was born in the United States, under certain circumstances, the client may have acquired U.S. citizenship at birth. For example, a child born abroad to two U.S. citizen parents acquires citizenship at birth as long as one of the parents had a residence in the United States prior to the child's birth.[84] A child born abroad to one U.S. citizen parent and one alien parent acquires citizenship at birth provided the U.S. citizen parent was physically present in the United States at the time of the child's birth.[85]

A third way of becoming a U.S. citizen is through derivation, as in the Douglas Centeno story. Different rules can apply depending on the person's date of birth. However, a person born on or after February 28, 1983, automatically becomes a citizen prior to his or her eighteenth birthday if the following events occur: (a) at least one parent who has legal and physical custody of the child is a U.S. citizen by birth or naturalization, and (b) the child is a lawful permanent resident.[86] Similarly, an adopted child becomes a U.S. citizen through adoptive parents if the child was born on or after February 28, 1983and (a) was legally adopted by a U.S. citizen before age sixteen, and (b) became a lawful permanent resident and resided in the legal custody of the citizen parent for two years before age 18.[87]

If the client is in fact a noncitizen, then *Padilla v. Kentucky* obligations apply. Going to trial is one option. However, a host of other strategies need to be considered as well.

III. ARGUING THAT THE CRIME IS NOT A REMOVABLE OFFENSE

Occasionally, a conviction can be challenged on the ground that the crime is not a moral turpitude crime, not an aggravated felony, and not a

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82. Susan Carroll, *Man Born at Ben Taub Returns after He's Wrongly Deported*, HOUS. CHRONICLE (Sept. 14, 2010, 5:30 AM), http://www.chron.com/news/houston-texas/article/Man-born-at-Ben-Taub-returns-after-he-s-wrongly-1694617.php.

83. Birth in Puerto Rico, Guam, and U.S. Virgin Islands also confers U.S. citizenship at birth. 8 U.S.C. §§ 1401, 1402, 1406, 1407.*See also* United States v. Wong Kim Ark, 169 U.S. 649 (1898) (child born to parents in the United States who were not eligible for citizenship is a citizen nonetheless under the Fourteenth Amendment).

84. *Id.* § 1401(c).

85. *Id.* § 1401(g).

86. 8 U.S.C. § 1431(a); Hughes v. Ashcroft, 255 F.3d 752, 758–60 (9th Cir. 2001).

87. 8 U.S.C. § 1431(b).

narcotics crime—in essence, that the crime is not a removable offense. A noncitizen generally is not subject to removal based on a criminal conviction unless the conviction fits categorically within one of the criminal removal grounds. This "categorical approach" requires adjudicators to determine whether all of the conduct covered under the statute of conviction fits within the alleged criminal removal classification.[88] If it does not, the person does not fit within the removal classification. Importantly, the immigration judge may not delve into the particular conduct underlying the person's conviction.[89]

The Supreme Court in unequivocal terms has reaffirmed the traditional categorical approach for determining whether a conviction falls within a removal classification. In *Moncrieffe v. Holder*,[90] the Court held that a Georgia conviction for marijuana possession with intent to distribute may not be deemed a drug trafficking aggravated felony for removal purposes.[91] The statute of conviction covered some conduct—social sharing of marijuana—falling outside the aggravated felony drug trafficking definition.[92] Under the categorical approach, the court does not assess the person's actual conduct; instead the court focuses on the text of the statute under which the person was convicted.[93] If the statute would criminalize conduct that is not within the federal standard for an aggravated felony, then the categorical approach is not satisfied and a conviction under the statute does not render the person an aggravated felon.[94]

In *Descamps v. United States*,[95] the Supreme Court again emphasized the application of the categorical approach where the elements set forth in the criminal statute must be compared to the immigration law removal ground.[96] The facts in the criminal case are irrelevant. All that matters are the elements of the statute of conviction. The rationale for an elements-centric approach, as the Court explained in *Descamps*, is multifold: it comports with the text and history of the statutes it was created to apply, it avoids Sixth Amendment concerns that would arise from sentencing courts making factual findings that belong to juries, and it averts the practical difficulties and potential unfairness of a factual approach.[97] *Descamps* makes clear that deviation from the categorical approach—i.e., application of a modified categorical approach—is permitted in only one scenario: where the relevant criminal statute expressly defines more

88. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684–85 (2013).
89. *Id.* at 1684.
90. *Id.* at 1678.
91. *Id.* at 1693–94.
92. *Id.* at 1684–85.
93. *Id.*
94. *See id.* at 1686–87.
95. 133 S. Ct. 2276 (2013).
96. *Id.* at 2281.
97. *Id.* at 2287.

than one offense.[98] In cases involving these statutes—called "divisible" statutes because they set out one or more of the elements of the offense in the alternative, e.g., burglary involving entry into a building or an automobile—courts may consult a limited universe of extra-statutory documents for the purpose of ascertaining which elements of the statute the defendant was convicted of.[99]

The lesson for criminal defense counsel is that as long as a client can plead guilty to a crime under a nondivisible statute that makes criminal some conduct that does not fit within the removal classification, that option is a good one from an immigration perspective. In some circumstances, that likely requires very sophisticated knowledge of the applicable criminal statutes. However, defense counsel's effort to reach that level of understanding is well worth the effort for noncitizen clients.

However, when a divisible statute is involved, knowledgeable defense counsel has an additional set of considerations to make. The Supreme Court has recognized a "narrow range of cases" in which sentencing courts or immigration judges—applying what has come to be known as the modified categorical approach—may look beyond the statutory elements to "charging paper and jury instructions" used in a case.[100] When a statute with alternative elements, such as a burglary statute that prohibits entry of an automobile as well as a building, the court permits a limited review of facts specific to the case.[101]

For example, if the burglary of a building constitutes a deportable offense but burglary of an automobile does not, the court permits this modified categorical approach. Because the statute is "divisible,"—i.e., comprises multiple, alternative versions of the crime—a court cannot tell, without reviewing something more, if the person's conviction was for the building or automobile form of burglary. So a sentencing or immigration court is authorized to scrutinize a restricted set of materials, such as "the terms of a plea agreement or transcript of colloquy between judge and defendant," to determine if the person had pleaded guilty to entering a building or a car.[102] Thus, in the divisible statute situation, defense counsel representing a noncitizen client have a particular burden to steer the plea agreement or colloquy transcript in a direction away from the deportable division of the criminal statute if possible.

Odd language in the federal generic statute can also provide a basis for an immigration court to look at the circumstances surrounding the commission of the crime. In *Nijhawan v. Holder*,[103] the government al-

98. *Id.* at 2292–93.
99. *Id.* at 2281.
100. Taylor v. United States, 495 U.S. 575, 602 (1990).
101. *Id.*
102. Shepard v. United States, 544 U.S. 13, 26 (2005).
103. 557 U.S. 29 (2009).

leged that Mr. Nijhawan's convictions for conspiring to commit mail fraud, wire fraud, and money laundering constituted aggravated felonies.[104] In defining "aggravated felony," the Immigration and Nationality Act includes "an offense that . . . involves fraud or deceit *in which the loss to the victim or victims exceeds $10,000.*"[105] Mr. Nijhawan argued that since criminal statutes under which he was convicted did not require a finding of any particular amount of victim loss, his convictions did not constitute aggravated felonies.[106] However, the Supreme Court ruled that the italicized language does not refer to an element of the fraud or deceit, but rather to the particular circumstances in which an offender committed a fraud or deceit crime on a particular occasion.[107] As such, the immigration court could look to the facts and circumstances underlying the conviction.[108] At his sentencing, Mr. Nijhawan stipulated that the victim loss exceeded $100 million and, therefore, his convictions fell within the definition of aggravated felony.[109] Again, the *Nijhawan* holding admonishes defense counsel to be aware of the particular circumstances that fall into the classification for removal offenses and use language in sentencing-related records that avoids removable classifications.[110]

IV. AVOIDING A CONVICTION

Criminal grounds of removal require a "conviction." So avoiding a conviction averts deportation on those grounds. Whether a legal disposition constitutes a conviction for immigration law purposes is determined under federal standards.[111] However, some efforts that are commonly known to defense attorneys can result in a non-conviction and should be considered.

A conviction occurs for immigration purposes only if there is an admission or finding of guilt and the judge imposes some form of punishment or restraint such as jail, probation, restitution, or fines.[112] A disposition that contains these two elements is a conviction for immigration purposes, even if the state does not consider the outcome to be a conviction.[113] Because most criminal courts impose requirements or restrictions on a defendant, the second prong—imposition of punishment or re-

104. *Id.* at 32–33.

105. Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(43)(M)(i) (2015) (emphasis added).

106. *Nijhawan*, 557 U.S. at 35–36.

107. *Id.* at 32.

108. *Id.* at 41–43.

109. *Id.* at 32–33.

110. *Id.* at 42–43.

111. *See, e.g.*, Paredes-Urrestarazu v. INS, 22 F.3d 909 (9th Cir. 1994), *withdrawn and superseded on denial of reh'g*, 36 F.3d 801 (9th Cir. 1994); Ozkok, 19 I. & N. Dec. 546, 546, 548 (B.I.A. 1988), *superseded by statute as recognized in* Mejia Rodriguez v. U.S. Dep't of Homeland Sec., 629 F.3d 1223 (11th Cir. 2011); Grullon, 20 I. & N. Dec. 12, 12 (B.I.A. 1989).

112. *See, e.g.*, Immigration and Nationality Act § 101, 8 U.S.C. § 1101(a)(48)(A); Cabrera, 24 I. & N. Dec. 459 (B.I.A. 2008).

113. *See, e.g.*, Murillo-Espinoza v. INS, 261 F.3d 771 (9th Cir. 2001).

straint—will only rarely be avoided. However, many dispositions avoid the first prong of the conviction definition—admission or finding of guilt. Some dispositions that avoid a conviction for immigration purposes include acquittal, deferred prosecution, deferred verdict, deferred sentence, and dismissal before conviction under a pre-plea diversion scheme.

A. Deferred Prosecution or Sentence

Criminal defense attorneys can bargain for an informal deferred prosecution in which the plea hearing is postponed and the defendant agrees to meet several conditions during postponement. This must be done with the understanding that the prosecution may drop or reduce the charges based on the defendant's good performance. This disposition is not a conviction because no guilty plea is taken. In the alternative, there is no conviction if a plea is taken but no sentence is ever imposed.

B. Pre-Plea Drug Court

Some states provide the option of a pre-trial drug court program, which may not involve a guilty plea. For example, California Penal Code § 1000.5 provides for a "pre-guilty plea drug court program."[114] Under this program, criminal proceedings are suspended without a plea of guilty.[115] Consequently, successful completion of the program should not constitute a conviction for immigration purposes.

Unfortunately, some pre-trial drug court programs may require an admission of drug abuse or addiction. A drug abuser or addict is deportable even without a conviction.[116] In some cases, therefore, a first conviction of simple possession or less may be preferable to being labeled an abuser or addict. For example, elimination of a conviction under a state rehabilitative relief provision eliminates the crime for immigration purposes in the Ninth Circuit, as long as it was a first conviction for simple possession of a controlled substance.[117]

C. Other Pre-Plea Diversion Programs

Many states have special pre-plea diversion programs or courts for such things as misdemeanors, first-time offenders, and domestic violence. For example, California provides for pretrial diversion without a guilty plea for some individuals who are charged with misdemeanor offenses or who have mental retardation.[118] Because these dispositions do

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114. CAL. PENAL CODE § 1000.5 (West 2015).
115. *Id.* § 1000.5(a).
116. 8 U.S.C. § 1227(a)(2)(B)(ii).
117. Lujan-Armendariz v. INS, 222 F.3d 728, 749–50 (9th Cir. 2000), *overruled on other grounds by* Nunez-Reyes v. Holder, 646 F.3d 684 (9th Cir. 2011).
118. CAL. PENAL CODE § 1001; People v. Weatherhill 215 Cal. App. 3d 1571, 1586 (2d Cir. 1989)

not involve a guilty plea or finding of facts sufficient to support guilt, they are not regarded as convictions for immigration purposes.

D. Deferred Entry of Judgment, Expungements, and Other Rehabilitative Schemes Following a Plea

Many states have some form of rehabilitative program for underage or first-time offenders, which the state may or may not characterize as a conviction.[119] The state may provide that after a person pleads guilty, as long as probation or other requirements are satisfied, the court will withdraw the plea, charges are dropped, and for many state law purposes the conviction will cease to exist.[120] Generally, withdrawal of plea under these kinds of rehabilitative relief has no effect for immigration purposes.[121] The only exception is for a first conviction for certain minor drug offenses in the Ninth Circuit.[122]

Unfortunately, convictions that result in alternative placements or treatments are still convictions for immigration purposes. For example, many states have enacted laws that require or give discretion to a judge to sentence an underage or first-time drug offender to treatment rather than incarceration.[123] A person might be placed in a state mental hospital or treatment facility following a finding of guilt. Minors who are tried and convicted as adults might be committed to a youth facility. However, these dispositions do not ameliorate the immigration effect as long as there has been an admission or finding of guilt that led to a conviction.[124]

V. VACATION OF JUDGMENT FOR CAUSE

With the exception of the Fifth Circuit, when a court acting within its jurisdiction vacates a judgment of conviction, the conviction no longer constitutes a valid basis for removal.[125] Immigration authorities give

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119. For example, in Georgia, O.C.G.A. § 42-8-60 reads: "upon a verdict or plea of guilty or nolo contendere, but before an adjudication of guilt, the court may, in the case of a defendant who has not been previously convicted of a felony, without entering a judgment of guilt and with the consent of the defendant, defer further proceeding and place the defendant on probation as a first offender." First Offender does not mean that the incident is wiped away or expunged, but it does mean that it should not appear as a conviction on the defendant's criminal history. *See* Breakfield and Associates, Georgia First Offender Act and Treatment of a 1st Offense, Feb. 12, 2011, available at http://www.gainesvillegalawyer.com/georgia-first-offender-act-and-treatment-of-a-1st-offense/

120. *See, e.g.*, In re Luviano–Rodriguez, 21 I & N Dec. 235, 237–38 (BIA 1996).

121. *See, e.g.*, Murillo-Espinoza v. INS, 261 F.3d 771, 773–74 (9th Cir. 2001).

122. *See Lujan-Armendariz*, 222 F.3d at 749–50. *But cf.* Salazar-Regino, 23 I. & N. Dec. 223, 224, 227–29 (B.I.A. 2002) (discussing the agency's disagreement with the Ninth Circuit rule).

123. *See* Caren Chesler, *New Jersey's Drug Court Program: Making the Sentence Fit the Crime*, NJSPOTLIGHt, Oct. 22, 2013, available at http://www.njspotlight.com/stories/13/10/22/new-jersey-s-drug-court-program-making-the-sentence-fit-the-crime/?p=all

124. *See, e.g.*, United States v. Arellano-Torres, 303 F.3d 1173 (9th Cir. 2002) (finding that a defendant's drug possession, where he was sentenced to probation instead of prison, did not stop him from being deported); United States v. Robles-Rodriguez, 281 F.3d 900 (9th Cir. 2002); L-R-, 8 I. & N. Dec. 269 (B.I.A. 1959), *overruled in part by* Ozkok, 19 I. & N. Dec. 546 (B.I.A. 1988). *Cf.* Chavez-Perez v. Ashcroft, 386 F.3d 1284 (9th Cir. 2004).

125. Marroquin-Garcia, 23 I. & N. Dec. 705 (U.S. Att'y Gen. 2005); *see also* Garcia-Maldonado v. Gonzales, 491 F.3d 284, 291 (5th Cir. 2007) ("[T]he BIA held that convictions vacat-

"full faith and credit" to the state court action, not questioning the validity of vacations of judgment under state law.[126] Thus, when there has been a conviction, it makes sense for criminal defense counsel to consider whether the judgment can be vacated.

The conviction must have been vacated for cause, not merely for hardship or rehabilitation. A conviction is not eliminated for immigration purposes if the court vacates the judgment for reasons "solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings."[127] Except in the Sixth Circuit, the immigrant has the burden to show that the conviction was vacated for procedural or substantive, rather than rehabilitative, reasons.[128]

VI. PARDON

Seeking a gubernatorial or presidential pardon can eliminate some convictions for deportation purposes. A "full and unconditional pardon" by the President of the United States or the governor of the state will prevent removal for a conviction involving moral turpitude, an aggravated felony, or high-speed flight near a border.[129] A pardon is ineffective for other grounds, for example the domestic violence or firearms grounds of deportation, even if the conviction also is a crime involving moral turpitude or aggravated felony.[130]

VII. PLEA BARGAINING TO AVOID DEPORTABLE OFFENSES

Given the basic framework for criminal deportation classifications of moral turpitude, drug offenses, firearms, and aggravated felonies, competent criminal defense attorneys can avert the possibility of removal at the plea bargain stage. If the prosecutor is willing to accept a guilty plea for a charge that does not result in a deportable offense, the client has been provided a great service. The informed client may even be willing to accept more incarceration time in order to avoid conviction of a removable offense.

Seeking a deal at the plea bargaining stage to avoid a deportable offense requires defense counsel to be aware of the viable non-removable

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ed on the basis of procedural and substantive defects were not valid for purposes of immigration, while those vacated because of post-conviction events such as rehabilitation were to be given effect in immigration proceedings. This may be the stance of our sister circuits, but is not the law in this circuit.") (citation omitted); Renteria-Gonzalez v. INS, 322 F.3d 804, 811 (5th Cir. 2002).

126. *See* Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1380 (B.I.A. 2000).

127. Pickering, 23 I. & N. Dec. 621, 621 (B.I.A. 2003), *rev'd*, Pickering v. Gonzales, 465 F.3d 263 (6th Cir. 2006).

128. *See Pickering*, 465 F.3d at 269 (holding that the government must show, by clear and convincing evidence, that the petitioner's conviction was "vacated solely for immigration reasons" in order for him to still be deportable).

129. Immigration and Nationality Act § 237, 8 U.S.C. § 1227(a)(2)(A)(vi) (2015).

130. Suh, 23 I. & N. Dec. 626, 627 (B.I.A. 2003).

options to a removable charge. For example, if the client is charged with a serious property crime that is a crime involving moral turpitude, an alternate charge of vandalism might be considered. But even then, counsel needs to be aware of how vandalism is regarded in the particular jurisdiction. Katherine Brady, a highly regarded criminal immigration expert offers this admonition on vandalism:

> Although the better and most commonly-held view is that [California] PC 594 is not a CIMT, we don't have [a] specific case on that, so it is possible that the conviction could be held a CIMT. One conservative immigration judge in San Francisco held that it is.
>
> The Ninth Circuit held that vandalism is not a CIMT under a Washington statute that has similar elements to PC 594 except that the amount of damage had to exceed $250. The court reasoned that since the minimum damage could be as low as $250, [vandalism] was not a CIMT because it could essentially be a prank. See Rodriguez-Herrera v. INS, 52 F.3d 238 (9th Cir. 1995) ("In contrast to the bulk of other non-fraud crimes necessarily involving moral turpitude, malicious mischief is a relatively minor offense. Indeed, one can be convicted of malicious mischief for destroying as little as $250.00 of another's property with an evil wish to annoy.") The difference between $250 and $400 ought not to bring it into moral turpitude.
>
> The BIA found that felony PC 594 with a gang enhancement pursuant to PC 186.22(d), is a CIMT. This is based on the fact that the gang enhancement elements, which must be proved beyond a reasonable doubt, are included in the elements of the offense and they require an intent greater than to "annoy." Matter of Hernandez, 26 I&N Dec. 397 (BIA 2014) ("The California Legislature required that the underlying crime be committed with the specific intent to promote, further, or assist the criminal conduct of a street gang to make it "clear that a criminal offense is subject to increased punishment under the STEP Act only if the crime is 'gang related,'" given that not all crimes committed by gang members are related to a gang. People v. Albillar, 244 P.3d at 1071 (quoting People v. Gardeley, 927 P.2d 713, 724 (Cal. 1996)) (internal quotation marks omitted). It is only when a defendant's intentional acts are "combined with his knowledge that those acts would assist crimes by fellow gang members" that there is sufficient evidence of the requisite specific intent to support a gang enhancement. People v. Morales, 5 Cal. Rptr. 3d 615, 633 (Cal. Ct. App. 2003). Thus, to be convicted of felony vandalism with a gang enhancement, the offender must have been found beyond a reasonable doubt to have had a malicious or evil intent in committing vandalism for the benefit of a criminal street gang and to

> have done so with the specific intent to promote criminal activity by gang members.").[131]

This relatively simple example underscores the pressure on criminal defense counsel to be up on the immigration effects of certain crimes.

A. Plea Bargaining and Sentencing

Sentencing is an area in which criminal defense counsel can exert significant control over immigration consequences. Often, the immigration question focuses on the amount of sentence imposed.[132] For instance, obtaining a sentence of less than one year imprisonment can prevent many offenses from being classified as aggravated felonies.[133] A sentence of not more than six months imposed for a first misdemeanor conviction of an offense involving moral turpitude will qualify the noncitizen for the petty offense exception to the inadmissibility ground.[134]

For immigration purposes, a sentence is "deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."[135] For example, when the imposition of sentence is suspended, and custody—i.e., jail time—is ordered as a condition of probation, the sentence is the amount of custody time ordered, regardless of the fact that technically no sentence was "imposed."[136] When the sentence is imposed and all or part of the execution of the sentence is suspended, the entire sentence imposed is the sentence for immigration purposes, regardless of the fact that the defendant will not serve all or part of the sentence.[137] Probation alone is never a sentence to confinement, although if the judge orders the noncitizen to spend time in jail as a condition of probation, the time ordered is a sentence.[138]

The sentencing issue should be kept in mind in the post-conviction context as well. Counsel pursuing post-conviction relief may find it easier to persuade authorities to vacate or reduce a sentence than to vacate the entire conviction. After that, the judge can impose a new sentence that can avert the immigration consequence. Implicit in this and other situations discussed in this section is the requirement that defense coun-

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131. E-mail from Katherine Brady, Senior Staff Attorney, Immigrant Legal Res. Ctr., to author (Feb. 8, 2015) (on file with author).

132. 8 U.S.C. § 1101(a)(48)(B).

133. *E.g. id.* § 1101(a)(43)(G) (defining theft and burglary as an aggravated felony only if "the term of imprisonment [is] at least one year").

134. *Petty Offense Exception*, LAW OFFICES OF NORTON TOOBY, http://nortontooby.com/topics/petty_offense_exception (last visited Sept. 20, 2015).

135. 8 U.S.C. § 1101(a)(48)(B).

136. United States v. Alvarez-Hernandez, 478 F.3d 1060, 1062–63 (9th Cir. 2007).

137. *See* Velez-Lozano v. INS, 463 F.2d 1305, 1307 (D.C. Cir. 1972) (per curiam).

138. *See, e.g.*, De La Cruz, 15 I. & N. Dec. 616 (B.I.A. 1976); Matter of F, 1 I. & N. Dec. 343 (B.I.A. 1942).

sel becomes very familiar with the range of related criminal charges and associated sentencing possibilities.

A sentencing deal can make a difference in a misdemeanor situation as well. Noncitizens are deportable for one conviction of a moral turpitude offense committed within five years of admission if the offense has a maximum possible sentence of one year or more.[139] So a conviction of a misdemeanor with a potential sentence of a year can cause deportability under this ground because the offense carries a maximum possible sentence of a year.[140] Defense counsel should attempt to plead to a nonturpitudinous offense in any situation, for example, by taking an increased time in jail, waiving credit for time served, or waiving good-time credits. However, if the client is facing the first possible conviction for a crime involving moral turpitude, then counsel should try to plea to a crime where the maximum possible sentence is less than one year.

Several offenses are regarded as aggravated felonies only if a sentence of a year or more was imposed for the conviction.[141] These include convictions for such things as crimes of violence, theft, burglary, bribery, document fraud, counterfeiting, forgery, obstruction of justice, and perjury.[142] Avoiding the aggravated felony bar to potential discretionary relief is important for lawful permanent residents, even if the conviction is regarded as a moral turpitude crime.[143]

When a criminal court judge modifies a sentence, the modification can avert immigration consequences.[144] This is true even if the basis for the sentence motion is not legal error but merely a need to avoid immigration consequences.[145] This contrasts with the vacation of judgment situation.[146] Similarly, during probation a court can modify the terms of probation for any reason, including reducing custody imposed as a condition of probation to less than 365 days due to immigration concerns and affect the immigration outcome.[147]

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139. 8 U.S.C. § 1227(a)(2)(A).

140. In California, for example, this could arise in a "wobbler" situation when an offense could be treated as either a felony or misdemeanor and the prosecutor offers to reduce the crime to a misdemeanor. *See* CAL. PENAL CODE § 17(b) (West 2011) (stating that the same type of offense may be prosecuted as a felony or a misdemeanor); People v. Statum, 50 P.3d 355, 356–57 (Cal. 2002) (describing an example of a "wobbler" crime).

141. *See* 8 U.S.C. § 1101(a)(43).

142. *Id.* § 101(a)(43)(F), (G), (P), (R), (S).

143. A person who has been a lawful permanent resident for at least five years, has resided continuously in the United States for seven years, and has not been convicted of an aggravated felony can apply for discretionary cancellation of removal before an immigration judge. *Id.* § 1229b(a).

144. *See* Cota-Vargas, 23 I. & N. Dec. 849, 852–53 (B.I.A. 2005).

145. *See id.* at 850. In this case, a judge granted a motion to reduce a sentence to 364 days in response to counsel's argument that this would prevent the conviction from being an aggravated felony, enabling the lawful permanent resident defendant to apply for cancellation of removal. *Id.*

146. *See supra* notes 122–25 and accompanying text.

147. *See Cota-Vargas*, 23 I. & N. Dec. at 850–51; *see also* People v. Segura, 188 P.3d 649 (Cal. 2008) (trial court's statutory authority to modify conditions of probation in the exercise of its

B. Firearms Cases

The firearms offense ground of deportation provides a good example of the importance of considering potential alternate pleas to avoid removal. The law provides a broad firearms ground of deportation. A noncitizen is deportable "who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying . . . any . . . firearm or destructive device . . . in violation of any law."[148] This removal ground includes convictions of pure firearms offenses as well as firearms offenses committed in connection with other crimes.[149]

Given the breadth of this ground of deportation, defense counsel might be wise to consider these options on behalf of clients facing firearms charges.

Solicitation. A conviction for solicitation to commit a firearms crime arguably is not a trigger to deportation under the firearms ground. Since the deportation ground does not mention solicitation, which is a distinct offense, solicitation to commit a firearms crime should be fine.[150]

Accessory after the fact. An accessory after the fact is one who, knowing that a felony has been committed, "harbors, conceals, or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment."[151] The offense can be punished as a misdemeanor or felony, but the offense does not take on the character of the principal offense.[152] The accessory after the fact to a firearms offense will not be held to have committed a deportable firearms offense.[153] The BIA, however, has found that accessory after the fact is obstruction of justice and can be regarded as an aggravated felony if a sentence of a year or more is imposed.[154]

Divisible statutes. If a statute is divisible containing firearms and non-firearms offenses, then counsel should make every effort to keep the record of conviction clear of information that a firearm was used. Some statutes target possession of a weapon with subdivisions indicating whether the weapon is a gun, knife, machete, or something else.[155] Those

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jurisdiction over a probationer did not, however, extend to modifying a material term of a plea agreement that bestowed the privilege of probation subject to defendant's service of a specified jail term).

148. 8 U.S.C. § 1227(a)(2)(C).

149. *See, e.g.*, Valerio-Ochoa v. INS, 241 F.3d 1092, 1096 (9th Cir. 2001).

150. *Cf.* Coronado-Durazo v. INS, 123 F.3d 1322, 1325 (9th Cir. 1997) (holding that solicitation of a controlled substance is distinct and not on the list of deportable offenses).

151. CAL. PENAL CODE § 32 (West 2015).

152. *See* People v. Mouton, 19 Cal. Rptr. 2d 423, 429–431 (Cal. Ct. App. 1993).

153. *See* Navarro-Lopez v. Gonzales, 503 F.3d 1063, 1072 (9th Cir. 2007) (en banc), *overruled on other grounds by* United States v. Aguila-Montes de Oca, 655 F.3d 915 (9th Cir. 2011).

154. Batista-Hernandez, 21 I. & N. Dec. 955, 961 (B.I.A. 1997).

155. *See, e.g.*, Calif. P.C. §§ 245, 12020(a); Pichardo-Sufren, 21 I. & N. Dec. 330 (B.I.A. 1996).

statutes would be regarded as divisible, and an immigration judge can use a modified categorical analysis in order to determine whether the specific offense involved firearms.[156] The judge can look beyond the statute in that situation to certain documents in the record of conviction, including the indictment, plea, judgment or verdict, sentence, and transcript from court proceedings.[157] However, the police report, pre-trial reports, and the noncitizen's own statements outside of the criminal court hearing cannot be reviewed.[158]

Sporting, recreational, or cultural purposes. The federal definition of a destructive device that is used in the firearms deportation ground and aggravated felony categories does not include "a rifle which the owner intends to use solely for sporting, recreational or cultural purposes."[159] This definition invites defense counsel to push these limits. The outcome of such efforts has been mixed. Counsel have not been successful in the Eighth Circuit in arguing that the cultural exception should apply to general firearms charges, even if the exception precludes the weapon from being classified as a destructive device.[160] However, the Seventh Circuit has held that the definition of destructive device includes firearms, and a general cultural purpose exception for rifles exists.[161]

CLOSING

The Supreme Court's message to criminal defense attorneys in *Padilla v. Kentucky* was clear: When there is a risk of deportation, defense counsel has a constitutional duty to inform an immigrant defendant of the potential for deportation or adverse immigration consequences prior to pleading guilty. In my view, this constitutional duty places tremendous pressure on defense counsel to do more than advise, because once advised, the client very naturally may want to know what options are available other than going to trial. Rather than simply focusing on how to minimize the time of incarceration for the client under a particular plea agreement, counsel has to figure out how to minimize the immigration ramifications. As I have outlined, the competent efforts range from determining whether the client might actually be a citizen, to seeking a sentence that would fall outside the realm of an aggravated felony, to seeking a plea to an alternative charge that does not involve moral turpitude, to making sure that the sentencing plea or colloquy is silent about certain facts.

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156. *See supra* notes 95–99 and accompanying text.

157. Matter of Teixeira, 21 I. & N. Dec. 316 (B.I.A. 1996); *see* Taylor v. United States, 495 U.S. 575, 602 (1990).

158. *See, e.g.*, Madrigal-Calvo, 21 I. & N. Dec. 323 (B.I.A. 1996).

159. 18 U.S.C. § 921(a)(4) (2015).

160. Awad v. Gonzales, 494 F.3d 723, 727 (8th Cir. 2007). *Cf.* Valerio-Ochoa v. INS, 241 F.3d 1092 (9th Cir. 2001).

161. Lemus-Rodriguez v. Ashcroft, 350 F.3d 652, 655 (7th Cir. 2003).

These efforts discussed are demanding. They entail resourceful, intricate knowledge of the relevant criminal codes. They also require resourceful, intricate knowledge of the criminal grounds of removal and up-to-date research on what classifications of convictions can or cannot lead to removal. In short, this could very well mean that competent defense counsel needs to partner with a competent immigration specialist.

Since *Padilla v. Kentucky* was decided in 2010, some public defenders' offices across the country have responded with a clear understanding of the burden that criminal defense counsel now face. In the San Francisco Bay Area, the public defender offices in San Francisco, Alameda, and Contra Costa counties have brought on full-time immigration specialists on their staff. Soon after *Padilla*, the Brooklyn, New York public defender office did the same. Some public defender offices contract with immigration experts like the Immigrant Legal Resource Center for consultations.[162] That all makes sense.

However, at the same time, after reading the *Padilla* case, one of my students who interned at a different public defender office in California during the summer of 2014 sent me this troubling reflection:

> While working in one of the poorest Public Defender's offices in the state of California I realized how under-served the immigrant population was. The poor public defenders had a caseload of about 300 cases a day which they had to somehow get through. They often did not have the time to further inquire about a person's immigration status before pleading them into a deal that will later hurt their immigration process. Only one attorney actually took his time to inquire about the immigration status of some of his clients but he often got in trouble for not finishing his caseload for that day. And when he asked for better deals because of his clients' immigration status the D.A. would often not be at all reluctant to give better deals.
>
> But many public defenders pleaded their clients to deals that will later hurt their immigration process because they were crimes of moral turpitude. The public defender did not know because he/she didn't inquire about the client's immigration status and the client didn't know because he/she didn't know the law. And admitting to a law enforcement official, including a public defender, a person's immigration status is often not the easiest thing to do.
>
> But aside from lowering the caseload in poor counties . . . I think that it is imperative that the public defenders serving such a big immigrant population be trained in spotting possible immigration issues. The public defenders in [this county] currently get paid about

162. For example, Vic Eriksen, Felony Team Supervising Attorney in San Diego, said, "I consider the consulting agreement with the ILRC as one of the best resources available for attorneys and their clients. I have no idea how we managed without it! Thanks so much." *What Our Clients Say*, IMMIGRANT LEGAL RES. CTR., http://www.ilrc.org/legal-assistance/satisfied-clients (last visited Apr. 5, 2015) (internal quotation marks omitted).

> [$]40,000 a year and are worked to the ground. I don't really know what will be better to hire an immigration attorney or just give all of them training on immigration issues especially on crimes involving moral turpitude but something should be done.[163]

Something should be done indeed. Because the Constitution requires it. Because deportation "may result . . . in [the] loss of . . . all that makes life worth living."[164] And thus the fate of countless immigrants facing criminal charges is at stake.

163. E-mail from [2L law student], to author (Feb. 5, 2015) (on file with author).
164. Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).