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Spring 2013

May 23, 2013

Immigration Consequences of Criminal Convictions

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PRACTICE ADVISORY[1]
May 2, 2013

MONCRIEFFE V. HOLDER: IMPLICATIONS FOR DRUG CHARGES AND OTHER ISSUES INVOLVING THE CATEGORICAL APPROACH

INTRODUCTION

Under the immigration laws as long interpreted by the courts, a noncitizen generally is not subject to removal or other negative immigration consequences based on a criminal conviction unless the conviction fits categorically within one of the criminal removal grounds. The "categorical approach" requires adjudicators to determine whether *all* of the conduct covered under the statute of conviction (or, under the "modified categorical approach," the conduct covered under a divisible sub-portion of the statute) fits within the alleged criminal removal classification. If it does not, the person does not fit within the removal classification. Importantly, adjudicators may not consider the particular conduct underlying the defendant's conviction. Application of the categorical approach follows upon Congress' choice to require a conviction and thus to rely on the criminal process to determine immigration consequences of criminal conduct.

In recent years, however, in response to federal government efforts to cut back on the categorical approach, the Board of Immigration Appeals (BIA), the Attorney General and some federal courts have issued rulings that have chipped away at it. Examples include the following:

- The BIA and some federal courts decided that a noncitizen convicted under a state statute that covers non-deportable conduct may nevertheless be deemed deportable as long as the statute's "elements" match up with those of the federal statute cross-referenced in the relevant deportation provision. *See, e.g.*, *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008); *Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011).
- The BIA and some federal courts found that a noncitizen seeking relief from removal may be deemed convicted of a relief-barring offense if the record of conviction is inconclusive, based on the noncitizen's statutory burden of proof in the relief eligibility context. *See, e.g.*, *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc).
- The BIA held that a criminal statute may be deemed divisible allowing application of a modified categorical approach (where the adjudicator reviews the record of

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[1] This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client's case.

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conviction to determine under which portion of the statute a person was convicted) even where the different means of committing a violation are not enumerated in the statute as separate alternatives. *See Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).

- Former Attorney General Mukasey ruled that the government may, in some cases, go beyond the categorical and modified categorical approach to look at evidence outside the record of conviction in order to determine removability under the crime involving moral turpitude ground. *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

On April 23, in *Moncrieffe v. Holder*, the Supreme Court, in unequivocal language, reaffirmed the traditional categorical approach for determining whether a conviction falls within a removal classification. Specifically, the Court held that a Georgia marijuana possession with intent to distribute conviction may not be deemed a drug trafficking aggravated felony for removability purposes when the statute of conviction covers some conduct (social sharing of marijuana) falling outside the aggravated felony drug trafficking definition at issue. The Court thus explicitly rejected *Matter of Aruna*'s deviation from the traditional categorical approach. The Court's analysis also significantly undermined the reasoning behind the other above-listed retreats from the categorical approach. *See Moncrieffe v. Holder*, No. 11-702, 569 U.S. ___, 2013 U.S. LEXIS 3313, 2013 WL 1729220 (April 23, 2013).

This practice advisory covers: (1) the holding in *Moncrieffe*; (2) the decision's potential broader implications; (3) strategies for noncitizen criminal defendants; and (4) steps that lawyers (or immigrants themselves) should take immediately in pending or already concluded removal proceedings affected by *Moncrieffe*.

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TABLE OF CONTENTS

I. THE SUPREME COURT'S SPECIFIC HOLDING IN *MONCRIEFFE* AND IMPLICATIONS FOR OTHER STATES' MARIJUANA STATUTES.

A. The *Moncrieffe* Holding

Adrian Moncrieffe, a long time permanent resident, pleaded guilty in 2007 to the Georgia offense of possession of marijuana with intent to distribute. The case arose when the police found 1.3 grams of marijuana in his car. The federal government sought to deport him for the conviction, arguing that it was punishable as a felony under the Controlled Substances Act (CSA) and thereby automatically an aggravated felony for drug trafficking under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). Adopting the government's argument, the immigration judge ordered Mr. Moncrieffe removed. Both the BIA and the Court of Appeals for the Fifth Circuit affirmed, rejecting Mr. Moncrieffe's reliance upon 21 U.S.C. § 841(b)(4), which makes distribution of a small amount of marijuana without remuneration punishable only as a misdemeanor. The Fifth Circuit's decision accorded with prior decisions from the Sixth and First Circuits, but conflicted with decisions from the Second and Third Circuits.[2] The U.S. Supreme Court granted certiorari to resolve the circuit split.

In a 7-2 decision, the Court reversed the Fifth Circuit. It held that when mere social sharing of marijuana is punishable under a state statute as "possession with intent to distribute," no convictions under such a statute would constitute an aggravated felony. Op. at 1.[3] In doing so, the Court unequivocally endorsed the categorical approach, reaffirmed that any exceptions to the approach are limited, and then found no such exceptions applicable here.

The Court began its analysis by affirming the strict application of the categorical approach to aggravated felony determinations:

> Under this approach we look "not to the facts of the particular prior case," but instead to whether "the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony. [*Gonzales v. Duenas-Alvarez*, 549 U.S.183, 186 (2007)] (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). . . . [A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion) . . . .

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2 Compare 662 F.3d 387 (5th Cir. 2011) (case below), *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011) (is an aggravated felony), and *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008) (same), with *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008) (is not an aggravated felony), and *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2003) (same).

3 The citations to *Moncrieffe* used throughout this practice advisory (Op. at __) refer to the slip opinion, available at http://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf.

> Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense. *Johnson v. United States,* 559 U.S. 133, 137 (2010). . . .
>
> The aggravated felony at issue here, "illicit trafficking in a controlled substance," is a "generic crim[e]." *Nijhawan*, 557 U.S., at 37. So the categorical approach applies. *Ibid.*

Op. at 5-6.

Citing to *Lopez v. Gonzalez*, 549 U.S. 47 (2006), the Court explained that to qualify as an aggravated felony under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), a state drug conviction "must meet two conditions. First, it must 'necessarily' proscribe conduct that is an offense under the CSA; and second, the CSA must 'necessarily' prescribe felony punishment for that conduct." Op. at 6. The Court found that the Georgia offense satisfied the first condition, but not the second. Specifically, the Court observed that while the federal crime of possession with intent to distribute a controlled substance under 21 U.S.C. § 841(a)(1) may be punished as a felony, it also may be also be punished as a misdemeanor under § 841(b)(4) if only a small amount of marijuana is distributed for no remuneration. The Court concluded that because the conviction did not establish that it involved either remuneration or more than a small amount of marijuana, it did not qualify as an aggravated felony:

> In Georgia, the statute of conviction does not reveal whether either remuneration or more than a small amount of marijuana was involved. It is possible neither was; we know that Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana, *see, e.g., Taylor v. State,* 260 Ga. App. 890, 581 S.E.2d 386, 388 (2003) (6.6 grams), and that "distribution" does not require remuneration, *see, e.g., Hadden v. State*, 181 Ga. App. 628, 628–629, 353 S.E.2d 532, 533–534 (1987). So Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.

Op. at 9.

Significantly, the Court flatly rejected the Board and Fifth Circuit's conclusion that any marijuana distribution conviction is presumptively a felony because, *in practice*, "that is how federal criminal prosecutions for marijuana distribution operate." Op. at 11-12. Rather, the Court reversed the presumption, reasoning "that ambiguity in criminal statutes referenced by the immigration statute must be construed in the noncitizen's favor," even if the result is that some offenders avoid aggravated felony status. Op. at 20-21. The Court also rebuffed the government's reliance on *Nijhawan v. Holder*, 557 U.S. 29 (2009), in suggesting "the § 841(b)(4) factors are like the monetary threshold" at issue in that case and "thus similarly

amenable to the circumstance-specific inquiry" employed there. Op. at 17. The Court unequivocally clarified that drug trafficking is a generic removal ground to which the categorical approach applies, not a circumstance-specific one, so that there is no place for the government-proposed (and Board-endorsed) "minitrials," in which noncitizens must demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana.

The Court overruled the contrary precedent in the Fifth, First, and Sixth Circuits, *see, e.g.*, *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011); *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008), as well as the Board's decisions in *Matter of Castro-Rodriguez*, 25 I&N Dec. 698 (BIA 2012) and *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008).

B. Implications for Other States' Marijuana Statutes

The Court's holding in *Moncrieffe* means that many convictions for distribution of marijuana will no longer constitute an aggravated felony for drug trafficking under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). (Note, however, that such convictions will continue to qualify as controlled substance offenses, which render a person removable under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) and/or inadmissible under INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).) Specific implications include:

- In states similar to Georgia, where the statute does not require remuneration or any minimum quantity of marijuana and where there is no separate offense for social sharing of marijuana, a conviction for marijuana distribution should not constitute an aggravated felony (though it may be necessary or at least helpful to point to state case law that makes clear that the statute would cover small amounts of marijuana and the exchange of drugs without remuneration). *See* op. at 6 (explaining "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'") (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). This is the case even for noncitizens whose underlying conduct may have consisted of transfer for remuneration, or a large amount of marijuana. Roughly half the states employ broad statutes that do not require remuneration or any minimum quantity of marijuana. Op. at 19.

- In other states, there may be a series of separate offenses, only one of which specifically covers social sharing of marijuana. *See, e.g.*, N.Y. Penal Law Ann. § 221.35 (West 2008) ("A person is guilty of criminal sale of marihuana in the fifth degree when he knowingly and unlawfully sells, without consideration, [marihuana] of an aggregate weight of two grams or less; or one cigarette containing marihuana."). A conviction under such a statute would not constitute an aggravated felony. Thirteen states have similar statutes. Op. at 18 n.10. Whether a conviction under *another* marijuana distribution statute in one of these states is an aggravated felony would depend on whether or not the other statute also may cover distribution of a small amount of marijuana without remuneration. *See, e.g.*, N.Y. Penal Law Ann. § 221.40 (West 2008) (which covers distribution without remuneration of 2 to 25 grams of marijuana).

- Convictions under statutes that include an element of "selling" would seem to establish remuneration (unless case law specified otherwise) and would thus constitute an aggravated felony.

- Convictions under statutes that proscribe the distribution of more than a small amount of marijuana also would qualify as an aggravated felony. Neither the CSA nor *Moncrieffe* defines "small amount," but the Court noted the Board's suggestion of 30 grams as a "useful guidepost," based on the exception in INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). Op. at 8 n.7 (citing *Matter of Castro Rodriguez*, 25 I&N Dec. 698, 703 (2012)).

Section III provides additional discussion of arguments that certain distribution offenses may not qualify as aggravated felonies.

II. THE DECISION'S POTENTIAL BROADER IMPLICATIONS.

The Supreme Court's decision in *Moncrieffe* also has important broader implications for various challenges to government deviations from the categorical approach. This section presents a preliminary analysis of some of the potential implications and arguments.

A. Burden of Proof for Relief

***Moncrieffe* supports the argument that the immigrant's burden of proof in the relief eligibility context does not affect the legal determination of whether a particular conviction does or does not fall within a criminal bar category** – *use in challenges to Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009)

When a noncitizen applies for relief from removal, he or she has the burden of proof to demonstrate eligibility for that relief. *See* INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A). For many forms of relief, a person is not eligible if he or she has been convicted of specified crimes. For example, lawful permanent residents are ineligible for cancellation of removal if they have been convicted of an aggravated felony. *See* INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). Likewise, individuals convicted of aggravated felonies are ineligible for asylum and naturalization.[4] The BIA and several courts have interpreted the burden of proof provision to

[4] *See* INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (making a particularly serious crime a bar to asylum eligibility); INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (deeming an aggravated felony conviction to be a particularly serious crime); INA § 316(a)(3), 8 U.S.C. § 1427(a)(3) (requiring good moral character for naturalization); INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (deeming individuals convicted of an aggravated felony as not having good moral character). The good moral character bar to naturalization applies to murder convictions at any time and to other aggravated felony convictions on or after November 29, 1990. *Matter of Reyes*, 20 I&N Dec. 789 (BIA 1994).

mean that a noncitizen with a past conviction is ineligible for relief when the record of conviction is inconclusive as to whether the conviction falls within the criminal bar category. *See, e.g., Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009). *But see Thomas v. Att'y Gen. of U.S.*, 625 F.3d 134 (3d Cir. 2010) (holding that inconclusive record is sufficient to establish that aggravated felony bar does not apply); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008)(same). *See also Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006).

The *Moncrieffe* Court's analysis rejects the notion that a criminal bar classification, such as the aggravated felony inquiry at issue in the case, may be treated as a factual question to which a burden of proof provision would be relevant.[5] Throughout the decision, the Court treats the adjudication of whether a past conviction falls within the aggravated felony definition not as a factual question, but instead as a legal determination that looks at the language of the statute of conviction and then determines from the statutory language what the conviction "necessarily" involved. Thus, the Court states: "Under this approach we look 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." Op. at 5.

The Court then explains: "Because we examine what the state conviction necessarily involves, not the facts underlying the case, we must *presume* that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, ..." Op. at 5 (emphasis added). Nothing in the Court's discussion suggests that this legal determination/presumption would change based on a burden of proof provision. In fact, the government's regulations provide that the immigrant's "preponderance of the evidence" burden with respect to an application for relief from removal is not even triggered unless the evidence indicates that a ground for denial may apply. *See* 8 C.F.R. § 1240.8(d). In any event, such a "preponderance of the evidence" burden is relevant to questions of a factual nature (e.g., other relief eligibility questions such as length of residence in the United States)[6] and not to the strict categorical approach legal inquiry the Supreme Court applies to a criminal classification question.

The following portions of the Court's decision in *Moncrieffe* provide further support for challenging the government's reliance on the noncitizen's burden of proof in the relief eligibility context:

- The Supreme Court expressly states that the analysis of whether a noncitizen is "convicted" of an aggravated felony in the relief eligibility context – the context of its

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In addition, DHS can terminate asylum status if the person is convicted of an aggravated felony. INA § 208(c)(2), 8 U.S.C. § 1158(c)(2); 8 C.F.R. § 1208.24.

[5] In fact, on April 30, 2013, the Ninth Circuit ordered the parties in *Almanza-Arenas v. Holder*, No. 09-71415, to submit supplemental briefs addressing whether *Moncrieffe* overrules *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012).

[6] *See* 2 McCormick on Evidence § 339, at 484 (a "preponderance of the evidence" standard applies to factual questions).

earlier decision in *Carachuri-Rosendo v. Holder*, 560 U.S. __ (2010) (concerning eligibility for cancellation of removal) – is "the same" as the analysis in the deportability context in which the issue arises in *Moncrieffe*. Op. at 6 n.4.

- The Court confirms this by pointedly observing that once an individual's conviction is found not to be an aggravated felony for deportability purposes, the person will be eligible for relief: "At that point, having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the other eligibility criteria." Op. at 19.[7]

- The Court rejects an approach that would require the submission of evidence at a post hoc minitrial in immigration court to determine whether a conviction fits within a criminal offense category, op. at 15-16, as would presumably be required if the crime classification question is treated as a case-specific factual question subject to a burden of proof provision.

- Further, the Court notes that the post hoc minitrial can result in different determinations relating to convictions of the same offense. As the Court explains, "two noncitizens, each 'convicted of' the same offense, might obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge." Op. at 16. The categorical approach was designed to avoid the potential unfairness of such an outcome. *Id.* These kinds of disparities are an inevitable result of a rule that an inconclusive record of conviction cannot show relief eligibility, because noncitizens convicted of the same offense will be found eligible, or not, depending on what facts happen to appear in the record of conviction, or what the government happens to introduce in the case of a detained immigrant who cannot access criminal records herself. *See Young*, 697 F.3d at 992 (Fletcher, J., dissenting in part). The Court also observes that it is no answer to say that defense counsel in the criminal case could build an appropriate record when the facts are fresh because "there is no reason to believe that state courts will regularly or uniformly admit evidence going to facts . . . that are irrelevant to the offense charged." Op. at 18.

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[7] The conclusory fashion in which the Court finds that there is no bar to relief echoes the Second Circuit's incredulity in *Martinez v. Mukasey* that the government even made the argument that the noncitizen had to prove that he or she was not convicted of an aggravated felony. *See Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) (Calabresi, J.) ("The Government makes one additional and rather startling argument ... This argument flies in the face of the categorical approach insofar as it requires any alien seeking cancellation of removal to prove the facts of his crime to the BIA.").

B. What Constitutes a Divisible Statute

***Moncrieffe* supports the understanding that a statute may only be deemed divisible and subject to the modified categorical approach when it describes different crimes separately** – *use in challenges to Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012); *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc).

The courts have stated that, when a statute of conviction is "divisible," i.e., has at least one portion of the statute covering only conduct falling within the criminal classification at issue, the adjudicator may go beyond the statutory text to look at the record of conviction in order to determine if an individual's conviction falls within that portion of the statute. There is a dispute, however, about what constitutes a divisible statute. Arguably, the alternative means of committing a violation must be separately described in the statute, such as by use of subsections, in order for the statute to be deemed divisible. The BIA has taken a broader view, finding divisibility in "all statutes of conviction, regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct." *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).

Moncrieffe implicitly rejects the BIA's broader view of divisibility. In describing when it has allowed a court to look beyond the language of the statute to the record of conviction, the Court speaks of "state statutes that contain several different crimes, each described separately . . . ." Op. at 5. Then, in analyzing the Georgia statute of conviction at issue in *Moncrieffe*, the Court applies such a view of divisibility to determine which of the following crimes, listed in the statute in the disjunctive, Mr. Moncrieffe was convicted of – "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." After looking to the record of conviction (the plea agreement) to find that Mr. Moncrieffe was convicted of the crime of possession with intent to distribute marijuana, op. at 7, the Court then goes on to consider whether this offense was "necessarily" an aggravated felony. Significantly, in doing so, the Court looked only at the statute of conviction without looking again at the record of conviction. Op. at 9. Thus, the Court indicated it did not consider the "possession with intent" prong further divisible as to the critical factors of amount of marijuana or the presence of remuneration – even though there is a broad range of conduct that may result in this conviction – given that the statute does not describe different crimes based on such factors. Op. at 9.

Practitioners should be aware that the Court has pending a criminal sentencing case that squarely raises the question of when a criminal statute may be deemed divisible. *Descamps v. U.S.*, No. 11-9540, argued on January 7, 2013. The Court's upcoming decision in *Descamps* may provide further and more detailed guidance on when a criminal statute may be deemed divisible for immigration purposes.[8]

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[8] For further guidance on the possible significance of *Descamps* to immigration cases, see K. Brady & I. Wheeler, *Waiting for* Descamps: *How the Supreme Court Might Save Your Crim-Imm Case* (Feb. 2013), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2013/02/Descamps-advisory-final.pdf.

C. Challenging *Matter of Silva-Trevino*

***Moncrieffe* reaffirms the principle that the categorical approach looks only to the statute of conviction (and, where the statute is divisible, the record of conviction) and not extrinsic evidence** – *use in challenges to Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008)

In *Matter of Silva-Trevino*, former Attorney General Mukasey ruled that the government may go beyond the categorical and modified categorical approach to look at facts and extrinsic evidence outside the record of conviction to determine removability under the crime involving moral turpitude ("CIMT") ground. 24 I&N Dec. 687 (AG 2008).

Moncrieffe provides many arguments to challenge *Silva-Trevino*. First, the decision refutes one of the government's main arguments in defense of *Silva-Trevino*. The government argued in *Moncrieffe*, as it has in CIMT context, that the statute at issue requires a "circumstance-specific approach," as was applied in *Nijhawan v. Holder*, 557 U.S. 29 (2009). In *Nijhawan*, the Court considered INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) -- "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" – and determined that the $10,000 loss requirement was a case-specific circumstance to which the categorical approach does not apply.

But the Supreme Court in *Moncrieffe* found that applicability of the *Nijhawan* circumstance-specific approach was a rare exception to the general applicability of the categorical approach. It found that the circumstance-specific approach applies only when the "circumstance" itself is written into the immigration statute by a qualifying phrase, such as "in which," describing a subset of offenses to which the removal ground applies. Op. at 17 (noting that the monetary threshold language at issue in *Nijhawan* triggered the circumstance-specific examination). By contrast, the provision at issue in *Moncrieffe* was a generic offense to which the categorical approach applies because the immigration statute prescribes no circumstantial limitations. Op. at 17; *see also id.* at 15 ("[N]o statutory authority for . . . case-specific factfinding in immigration court . . . is apparent in the INA."). *Moncrieffe* thus supports the conclusion reached by several courts that the CIMT removal grounds do not permit "circumstance-specific" treatment under *Nijhawan* because they include no express directive to examine underlying conduct. *See Prudencio v. Holder*, 669 F.3d 472, 483 (4th Cir. 2012); *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1310 n.7 (11th Cir. 2011); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 477 (3d Cir. 2009).

Further, *Moncrieffe* provides the following additional support for challenging *Matter of Silva-Trevino*:

- *Moncrieffe* cites with approval the long history of applying the categorical approach in immigration cases specifically addressing the CIMT removal grounds. The Court observes that the categorical approach "has a long pedigree in our Nation's immigration law," citing a scholarly article examining cases applying that approach as early as 1913 to the exclusion ground for CIMTs. Op. at 6 (citing Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U.L. Rev. 1669 (2011)). The Court repeatedly cites those

early CIMT cases for the proposition that the immigration statute generally requires an analysis of the conduct necessary to offend the criminal statute, rather than the underlying facts of a particular case. Op. at 5, 6, 16.

- *Moncrieffe* holds that, "*post hoc* investigation into the facts of predicate offenses" conducted in "minitrials conducted long after the fact" yields arbitrary and unfair results, especially where respondents in removal proceedings are detained and/or unrepresented and lack meaningful access to evidence. Op. at 15, 16. The Court thus rejected a rule under which removal determinations hinge on the fortuity of "what evidence remains available" years later or "how it is perceived by an individual immigration judge." Op. at 16. Further, the categorical approach ensures "that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." Op. at 20 n.11.

- *Moncrieffe* observes that the minitrials that the government proposed in that case "would be possible only if the noncitizen could locate witnesses years after the fact, notwithstanding that during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention . . . where they have little ability to collect evidence." Op. at 16. This starkly contradicts claims that the government sometimes makes in defense of *Silva-Trevino*, namely, that it, rather than a detained noncitizen, is the only party prejudiced by re-trying long-past criminal conduct in a civil removal proceeding because it (sometimes) bears the burden of proof.

- Although *Moncrieffe* acknowledges that Sixth Amendment concerns about judicial fact-finding "do not apply in th[e] context" of removal proceedings, op. at 13, the Court reaffirms that the analytical limits imposed by Court decisions in the criminal context, such as in *Taylor v. U.S.*, 495 U.S. 575 (1990), and *Shepard v. U.S.*, 544 U.S. 13 (2005), still apply with full force in the immigration context. Op. at 5, 7, 16, 22. This undermines *Silva-Trevino*'s contention that the lack of Sixth Amendment concerns in removal proceedings justify the abandonment of the categorical approach. *See Silva-Trevino*, 24 I&N Dec. at 700-01.

D. Minimum Conduct Approach

***Moncrieffe* reaffirms the general principle that one must look to the minimum conduct covered under the statute of conviction** – *use in challenges to agency decisions that disregard or overlook non-removable conduct covered by the statute of conviction*

Moncrieffe reaffirms the general principle that, under the categorical approach, the adjudicator must look to the minimum conduct covered under the statute of conviction. The Court states: "Because we examine what the state conviction necessarily involves, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." Op. at 5.

The Court dismissed government concerns that application of such a minimum conduct test would lead to noncitizens escaping aggravated felony treatment. The Court stated: "[Some] offenders may avoid aggravated felony status by operation of the categorical approach. But the Government's objection to that underinclusive result is little more than an attack on the categorical approach itself. We prefer this degree of imperfection to the heavy burden of relitigating old prosecutions." Op. at 20.

The Court's strong reaffirmation of the minimum conduct test will provide additional support for challenges to agency decisions that disregard or overlook that a statute of conviction covers conduct falling outside the removal ground. *See, e.g.*, agency decisions at issue in *Pascual v. Holder*, 707 F.3d 403 (2d Cir. 2013), *petition for rehearing pending* (agency found New York drug "sale" conviction to be drug trafficking aggravated felony even though the offense covers offer to sell conduct not covered under the federal "drug trafficking crime" definition referenced in the aggravated felony definition); *Rojas v. Attorney General*, No. 12-1227 (3d Cir.), *sua sponte rehearing en banc pending* (agency found Pennsylvania drug paraphernalia conviction to be controlled substance offense even though Pennsylvania defines "drug" more broadly than federal definition of "controlled substance"); *Matter of Mendez-Orellana*, 25 I&N Dec. 254, 255-56 (BIA 2010) (BIA treated a conviction under a firearm statute that included antique firearms as presumptively deportable even though the federal firearm statute referenced in the deportation statute excludes antique guns as an affirmative defense).

The Court, however, does identify two limitations on the minimum conduct test. First, the Court describes what has been called the modified categorical approach. It indicates that where the statute of conviction is divisible (such that it identifies at least one sub-crime whose minimal conduct does fall within the removal ground), the adjudicator may look to the record of conviction to "determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or 'some comparable judicial record of the factual basis for the plea.'" Op. at 5 (quoting *Nijhawan*, 557 U.S. at 35 (quoting *Shepard*, 544 U.S. at 26)).

Second, the Court states: "our focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be a 'realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" Op. at 5-6 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Later, the Court addresses the aggravated felony conviction under INA § 101(a)(43)(C), which refers to a federal firearms statute with an exception for antique firearms. *See* INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C) (referencing 18 U.S.C. § 921, which includes the exception at § 921(a)(3)). The Court states in dictum that, in order to establish that a conviction under a state firearms law that does not have an antique firearms exception is an aggravated felony, the "realistic probability" standard must be met, i.e., "a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." Op. at 21.

One way a person may show that the state actually prosecutes the relevant offense is to is to cite state case law. Op. at 9 (citing Georgia court cases to show that Georgia does prosecute

the marijuana offense at issue in *Moncrieffe*). The realistic probability standard also may be satisfied, however, where the criminal statute expressly covers the conduct falling outside the removal category. *See Ramos v. U.S. Atty Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013) (finding that "realistic probability" is created where the statute's language expressly demonstrates "that it will punish crimes that do qualify as theft offenses and crimes that do not."); *U.S. v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (finding that because Oregon burglary statute explicitly covers vehicles and boats "that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of" burglary). *See also Kawashima v. Holder*, 132 S. Ct. 1166, 1175 (2012) (Court accepted the government's argument that a federal tax evasion conviction was not categorically a "fraud or deceit" aggravated felony because the tax evasion provision covered certain non-deceitful conduct without citing a case that actually involved prosecution for such conduct and despite government concession at oral argument that such cases would be rare).

➢ Practice Tip

A practitioner should examine closely the notice to appear to determine if the statute of conviction necessarily satisfies the generic ground of deportability charged in the notice to appear. As discussed above, *Moncrieffe* highlighted the firearm aggravated felony definition as one such situation where a conviction may not satisfy the generic ground because the federal criminal statute (18 U.S.C. § 921) contains an exception for antique firearms. Op. at 21. This means that a person cannot be convicted for a federal firearm offense for having an antique gun or a gun that used antique ammunition.

The California Penal Code, unlike 18 U.S.C. § 921(a)(3), makes it crime to possess an antique firearm. P.C. § 25400(a); *see Gil v. Holder*, 651 F.3d 1000, 1005 (9th Cir. 2011) (holding that conviction under predecessor California statute met federal gun definition even though former statute included conviction for an antique firearm). Despite the fact that convictions under the California statute would seem to necessarily fail the categorical inquiry, the noncitizen convicted under this provision still must show a realistic probability that California would prosecute a defendant for having an antique weapon. *See* op. at 21 and discussion above regarding ways to meet the "reasonable probability" standard.

E. Rule of Lenity

***Moncrieffe* reaffirms the applicability of the criminal rule of lenity in immigration cases involving interpretation of terms also used in criminal statutes** – *use in challenges to government interpretations of terms such as "drug trafficking crime," "crime of violence," "aggravated felony," and "conviction."*

In *Moncrieffe*, the Supreme Court reaffirms the applicability of the criminal rule of lenity in immigration cases that involve interpretation of terms contained in criminal statutes. The Court states: "[We] err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizens' favor." Op. at 20-21 (citing *Carachuri-Rosendo v. Holder*, 560 U.S. __, __ (slip op. at 17) (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 11, n.8 (2004)). Thus, practitioners should cite the criminal rule of lenity in support of

arguments relating to interpretation of criminal statutes cross-referenced in the Immigration and Nationality Act. *See, e.g.*, federal criminal code "drug trafficking crime" and "crime of violence" definitions referenced in INA §§ 101(a)(43)(B)&(F); 8 U.S.C. §§ 1101(a)(43)(B)&(F). Practitioners also should consider citing the criminal rule of lenity in support of arguments relating to the reach of terms in the immigration statute itself that have criminal law applications. *See, e.g.*, "aggravated felony" and "conviction" terms referenced in INA § 276(b), 8 U.S.C. § 1326(b) (INA criminal illegal reentry statute where these terms are used as defined in INA §§ 101(a)(43) and 101(a)(48)(A)).

F. No Deference to the Agency

> ***Moncrieffe* represents yet another criminal removal case where the Court does not discuss or even mention *Chevron* deference to the agency when determining how the categorical approach is applied** – *use in any challenges where the government seeks* Chevron *deference to its interpretation of how the categorical approach is applied*

Moncrieffe represents yet another criminal removal case where the Court rejects the immigration agency's deviation from the categorical approach without considering or even mentioning deference to the agency under *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See also Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). This supports the notion that the categorical approach has been effectively incorporated into the statute as a result of its "long pedigree in our Nation's immigration laws," as recognized by the Court in *Moncrieffe*. Op. at 6 (citing Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N.Y.U.L. Rev. 1669, 1668-1702, 1749-1752 (2011) (tracing judicial decisions back to 1913)). Practitioners should point to the Supreme Court's history of not applying *Chevron* when the government seeks deference to its decisions cutting back on the categorical approach in immigration cases.

III. ANALYZING CRIMINAL STATUTES AND STRATEGIES FOR CRIMINAL DEFENDANTS.

For criminal defendants, the *Moncrieffe* decision provides a possible roadmap for avoiding adverse immigration consequences. It is true that the prosecuting authorities control the scope and extent of charge bargaining and that no defendant has the right to any specific plea bargain. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012). Nevertheless, 94% of state criminal convictions are the result of plea bargains. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Moreover, effective plea bargaining is one approach to avoid adverse immigration consequences. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

* * *

A. State Court Strategies

1. Controlled Substances

The Court recognized fourteen states that had statutes which specifically proscribe § 841(b) conduct (i.e., distribution of a small amount of marijuana for no remuneration).[9] Thus, in at least every one of those states, criminal defense counsel can plead a client to a charge that would not be an aggravated felony. In some states, like Georgia, the statute defines a range of crimes. Op. at 7, 9. In others, like New York, the only crime defined under the statutory subsection involves distribution without remuneration. Op. at 14 (discussing N. Y. Penal Law Ann. §221.35(West 2008)). In Texas, there is a specific crime for distributing a quarter ounce or less of marijuana for no remuneration. V.T.C.A., Health & Safety Code § 481.120(b)(1). It is important to note, however, that § 841(b) only applies to marijuana and does not include other federally controlled substances. 21 U.S.C. § 841(b)(4). Distribution of other federally controlled substances is a felony regardless of whether there was remuneration. *See* 21 U.S.C. §§ 841-843 (providing that distribution of virtually any controlled substance other than marijuana is a felony under federal law without exception).

Furthermore, as the Court noted, with the exception of a single offense for simple possession for personal use of 30 grams or less of marijuana, a person with a conviction under one of these fourteen state statutes still will be deportable under the controlled substance ground of deportability. Op. at 19; INA § 237(a)(2)(B)(i), 8 U.S.C. §1227(a)(2)(B)(i).

➢ Practice Tip

Moncrieffe may preclude the government from establishing that certain controlled substance distribution offenses are convictions for an aggravated felony even when a noncitizen has a conviction that does not specifically fall under a state's counterpart to 21 U.S.C. § 841(b)(4). Florida's controlled substance law presents one such situation.

The Controlled Substances Act (CSA) definition of the term "marihuana" includes "the resin extracted from any part of the plant." 21 U.S.C. § 802(16)(d) (governing § 841(b)(4), the CSA misdemeanor marijuana distribution provision at issue in *Moncrieffe*). Unlike federal law, the Florida drug offense that is specific to non-remunerative transfer of marijuana does "not include the resin extracted from the plants of the genus Cannabis." *Compare* Fla. Stat. § 893.13(2)(b)(3) (2010) *with* 21 U.S.C. § 802(d)(16). This means that a person with a Florida

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[9] *See* Cal. Health & Safety Code Ann. §11360(b) (West Supp. 2013); Colo. Rev. Stat. Ann. §18–18–406(5)(2012); Fla. Stat. §893.13(2)(b)(3) (2010); Ill. Comp. Stat., ch. 20, §§550/3,550/4, 550/6 (West 2010); Iowa Code §124.410 (2009); Minn. Stat.§152.027(4)(a) (2010); N.M. Stat. Ann. §30–31–22(E) (Supp. 2011); N.Y. Penal Law Ann. §221.35(West 2008) Ohio Rev. Code Ann. §2925.03(C)(3)(h) (Lexis 2012 Cum. Supp.); Ore. Rev. Stat. §475.860(3) (2011); Pa. Stat. Ann., Tit. 35, §780–113(a)(31)(Purdon Supp. 2012); S.D. Codified Laws §22–42–7 (Supp. 2012); Tex.Health & Safety Code Ann. §481.120(b)(1) (West 2010); W. Va. CodeAnn. §60A–4–402(c) (Lexis 2010).

conviction for distributing cannabis resin, commonly known as "hashish," could have been guilty of giving away a small amount of hashish, but the lack of remuneration would be legally irrelevant because the Florida statute does not require proof of remuneration.

Under the Court's test in *Moncrieffe*, "not only must the state offense of conviction meet the 'elements'" of the generic federal offense defined by the INA, but the CSA must punish that offense as a felony." Op. at 5. Applying the *Moncrieffe* test to a Florida conviction for distribution of hashish reveals that the offense taken at its minimum includes the federal misdemeanor offense of giving away a small quantity of marijuana, including the resin (hashish). That Florida treats hashish distribution more seriously than the United States Code does not change the applicability of the categorical approach. As a result, anyone with a Florida conviction for distributing hashish should not have an aggravated felony conviction under the Court's test because DHS will not be able to prove that the conviction was not for an offense punishable as a misdemeanor under federal law. The defendant's alleged actual conduct is not part of the calculation because *Moncrieffe's* central holding is that a factfinder must focus on the statute of conviction rather than the defendant's conduct. *See* op. at 5-6.

Similarly, a conviction for distribution of a small amount of any unnamed controlled substance under Florida law should not be deemed an aggravated felony because the conviction could have been for distribution of a small amount of cannabis resin.

The Florida structure may exist in many other states. Practitioners should examine carefully any controlled substance aggravated felony charge to determine whether the statute of conviction taken at a minimum would necessarily result in a felony conviction under the federal controlled substance laws.

➢ Practice Tip

If a defendant is charged under a statute that covers marijuana and other controlled substances and the charging document is silent about the identity of the controlled substance, a defendant, if possible should not allocute to any other drug. *See Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965) (holding that the government fails to meet its burden where the record of conviction fails to identify the substance). A plea of nolo contendere to a charging document that does not identify the controlled substance should protect the defendant from the harsh consequences of an aggravated felony charge because the Department of Homeland Security will not have evidence to prove conclusively that the offense would be punishable as a felony under federal law.

B. Federal Court Strategies

1. Reentry Prosecutions

A noncitizen charged with violating INA § 276, 8 U.S.C. § 1326, for illegally reentering the United States after having been deported faces both statutory and Guideline sentencing enhancements. INA § 276(b)(2), 8 U.S.C. § 1326(b)(2) (interpreted by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998) (holding that § 1326(b)(2) created an enhancement));

U.S.S.G §2L1.2(b)(1)(C). For example, a noncitizen convicted for illegal reentry can get an eight-level increase under the United States Sentencing Guidelines for having an aggravated felony conviction. *Id.* Federal criminal defense practitioners in pending cases should ensure that a defendant's sentence does not include an enhancement for a conviction that is not an aggravated felony under *Moncrieffe*.

A federal criminal defendant can raise a collateral challenge to the lawfulness of a prior removal order in certain circumstances. *United States v. Mendoza-Lopez*, 481 U.S. 828, 839-40 (1987) (holding due process requires judicial review of underlying deportation proceedings); INA § 276(d), 8 U.S.C. § 1326(d) (setting out requirements for raising collateral challenges).

2. Controlled Substances

The Court noted that any federal marijuana distribution conviction will be a deportable offense under the controlled substance ground of deportability. Op. at 19. Nevertheless, it may be possible that a noncitizen defendant pleading guilty to an offense under 21 U.S.C. § 841(b)(4) could be eligible to expunge the offense so that she or he would not have any conviction for immigration purposes. This seemingly counterintuitive scenario is possible because the language in 21 U.S.C. § 841(b)(4) provides that a person be treated in accordance with 21 U.S.C. § 844 and 18 U.S.C. § 3607. Section 3607 of Title 18, in turn, provides a mechanism for a defendant to receive a disposition that is not a conviction for any purpose whatsoever.[10]

Although there may be some tension between the language in 18 U.S.C. § 3607 unequivocally stating that ameliorative treatment under the statute "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime" and INA § 101(a)(48), 8 U.S.C. § 1101(a)(48), which defines a conviction for immigration purposes, the explicit command of 18 U.S.C. § 3607 would arguably include the consequence of having a conviction for immigration purposes. There is not a single published case since the law changed in 1996 interpreting whether a disposition expunged under 18 U.S.C. § 3607 is a conviction under 8 U.S.C. § 1101(a)(48). Nevertheless, the holding in *Moncrieffe* and the statutory text of 18 U.S.C. § 3607 suggest that any defendant with some leverage with the prosecutors might consider seeking to come under its ameliorative terms.[11]

IV. SUGGESTED STRATEGIES FOR NONCITIZENS WITH REMOVAL CASES AFFECTED BY *MONCRIEFFE*.

This section offers strategies to consider for noncitizens whose removal cases are affected by *Moncrieffe*. Keep in mind, most individuals directly affected by *Moncrieffe* still are removable from the United States under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), for a

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[10] A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose. 18 U.S.C. § 3607(a) & (c).

[11] A defendant who is providing substantial assistance to a federal prosecution might be an example of someone who might have sufficient leverage to obtain such a favorable plea bargain.

controlled substance offense and, thus, likely only will pursue these strategies if they are eligible for a form of relief from removal.

For sample motions and other documents to help implement these strategies, please see *Sample* Carachuri-Rosendo *Motions* (June 21, 2010), at http://www.nationalimmigrationproject.org/legalresources/practice_advisories/CARACHURI-ROSENDO.pdf and Vartelas v. Holder: *Implications for LPRs Who Take Brief Trips Abroad and Other Potential Favorable Impacts* (April 5, 2012) (beginning on page 15) at http://www.legalactioncenter.org/sites/default/files/vartelas_practice_advisory_fin.pdf. Although these samples address different substantive law, they nonetheless may provide helpful guidance.

A. Noncitizens with Pending Removal Cases

Individuals who are in removal proceedings before the immigration court or on appeal at the BIA should bring *Moncrieffe* to the attention of the IJ or the BIA. If the aggravated felony charge was the only ground of removability on the Notice to Appear (NTA), he or she may file a motion to terminate. In this situation, DHS likely will seek to amend the charges on the NTA. *See* 8 C.F.R. § 1240.10(e); *Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976). If the case is on appeal at the BIA, the individual may file a motion to terminate and/or remand to the Immigration Court for a hearing on relief from removal. By filing a remand motion *before* the BIA rules on the appeal, a person preserves his or her statutory right to file *one* motion to reconsider and reopen.

Individuals who are in administrative removal proceedings under INA § 238(b) should bring *Moncrieffe* to the attention of DHS. DHS has discretion to initiate administrative removal proceedings only against non-LPRs and individuals with conditional permanent residency who are convicted of an aggravated felony. Individuals in § 238(b) proceedings have the opportunity to rebut the charges of removability, INA § 238(b)(4)(C), 8 C.F.R. § 238.1, and should argue that DHS improperly initiated § 238(b) proceedings because they were not convicted of an aggravated felony. If the noncitizen has not been convicted of an aggravated felony, DHS must terminate proceedings. At this point, DHS may initiate removal proceedings under INA § 240 by issuing an NTA. 8 C.F.R. § 238.1(e).

B. Noncitizens with Final Orders

A person who filed a petition for review challenging a final order should consider pursuing *both* the suggested strategy for court of appeals cases and an administrative motion.

Pending Petition for Review. Individuals with pending petitions for review should consider filing a motion to remand the case to the BIA under *Moncrieffe*; the motion should explain the impact of *Moncrieffe* on removability and the person's prospects for relief. The Department of Justice attorney may consent to such a motion. If briefing is ongoing, the opening brief and/or the reply brief should address *Moncrieffe*. If briefing is complete, the petitioner may file a letter under Federal Rule of Appellate Procedure 28(j) ("28(j) Letter") informing the court of *Moncrieffe* and its relevance to the case.

Denied Petition for Review. If the court of appeals already denied a petition for review, and the court has not issued the mandate, a person may file a motion to stay the mandate. If the court has issued the mandate, the person may file a motion to recall (withdraw) the mandate. Through the motion, the person should ask the court to reconsider its prior decision in light of *Moncrieffe* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). The petition should request the Court grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Moncrieffe*.

Administrative Motion to Reconsider or Reopen. Regardless whether an individual sought judicial review, she or he may file a motion to reconsider or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case) or with DHS if the person was in administrative removal proceedings under INA § 238(b).[12] As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. *See* INA §§ 240(c)(6)(B) and 240(c)(7)(C)(i); *see also* 8 C.F.R. § 103.5 (for individuals in administrative removal proceedings, providing 30 days for filing a motion to reopen or reconsider a DHS decision).[13] If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Moncrieffe*, i.e., by May 23, 2013 or by July 22, 2013, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Moncrieffe* and argue that the filing deadline was equitably tolled until the Supreme Court issued its decision or until some later date. If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel may also wish to request *sua sponte* reopening in the alternative.[14]

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[12] There are strong arguments that fundamental changes in the law warrant reconsideration because they are "errors of law" in the prior decision. *See* INA § 240(c)(6)(C).

[13] One court suggested that a person may file a petition for review if DHS denies the motion. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004). *But see Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen under 8 C.F.R. § 103.5 for lack of jurisdiction).

[14] Note, however, that courts of appeals have held that they lack jurisdiction to judicially review the BIA's denial of a *sua sponte* motion. *See Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

C. Noncitizens Who Are Outside the United States

An individual's physical location outside the United States arguably should not present an obstacle to returning to the United States if the court of appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." *See Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, if the court of appeals grants a petition for review or grants a motion to stay or recall the mandate and then grants a petition for review, DHS should facilitate the petitioner's return to the United States.[15]

Noncitizens outside the United States who are considering filing administrative motions should consider whether the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b), will pose an additional obstacle to obtaining relief. Although the BIA interprets these regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions, *see Matter of Armendarez*, 24 I&N Dec. 646 (BIA 2008), the courts of appeals (except the First and Eighth Circuit, which have not decided the issue) have invalidated the bar. *See Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012). If filing a motion to reconsider or reopen in the First or Eighth Circuits, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation have done so by considering whether the regulation is unlawful in light of the motion to reopen or reconsider statute or impermissibly contracts the BIA's jurisdiction. Thus, it advisable to make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., is timely filed or the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Thus, for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening because the departure bar litigation has not been as successful in the *sua sponte* context. *See, e.g., Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, 617 F.3d. 650 (2d Cir. 2010); *Desai v. AG of the United States*, 695 F.3d 267 (3d Cir. 2012). In addition, as stated above, some courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.[16]

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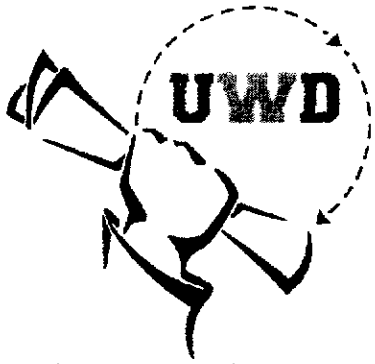
[15] For more information about returning to the United States after prevailing in court or on an administrative motion, see the practice advisory, *Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider* (December 21, 2012) at http://www.legalactioncenter.org/sites/default/files/return_to_the_united_states_after_prevailing_on_a_petition_for_review_or_motion_to_reopen_or_reconsider.pdf.

[16] For additional information on the departure bar regulations, see the practice advisory, *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues*

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA's decision in *Matter of Armendarez*, please contact Trina Realmuto at trina@nationalimmigrationproject.org or Beth Werlin at bwerlin@immcouncil.org.

(March 14, 2012) at http://www.legalactioncenter.org/sites/default/files/departure_bar_practice_advisory.pdf.



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Practice Advisory for Criminal Defenders:[1]
Certain Criminal Offenses May Bar Persons from Applying for the New Deferred Action Status Program Announced by President Obama

On June 15, 2012, the Obama Administration announced that it would not deport certain undocumented persons who entered the U.S. as children. The Department of Homeland Security (DHS) has offered guidance on the type of criminal offenses that will make a person ineligible for this program called **Deferred Action for Childhood Arrivals (DACA)**. Deferred action means that, even though the individual is undocumented and subject to deportation, the government agrees to "defer" any actions to remove them. So, in essence, even though deferred action does not provide a pathway to getting lawful permanent resident status (a green card) or citizenship, it will allow young people to remain in the U.S. and apply for a work authorization document from the government that entitles them to legally work in the U.S.

This advisory for criminal defense counsel outlines defense strategies to preserve a client's possible eligibility for deferred action.

Identifying Eligible Clients: Basic Eligibility Requirements & Crime-Related Bars

Under *Padilla v. Kentucky*, the U.S. Supreme Court made clear that it is part of defense counsel's Sixth Amendment duties to advise a client of the consequences that a criminal disposition can have on the client's eligibility to maintain or obtain lawful immigration status and/or seek relief from deportation. As such, defenders should screen any client who is 30 years old or younger to determine if she is eligible to seek deferred action. Where she is, it is important to let her know this (you may be her only source of this information) and to attempt to resolve her criminal proceedings to preserve her eligibility to apply.

To qualify for deferred action, the individual must:
(1) be 30 years old or younger as of June 15, 2012;
(2) have entered the U.S. when she or he was under age 16;
(3) have been physically present in the U.S. on June 15, 2012 and continuously resided in the U.S. during the preceding five years (except for brief, casual, and innocent absences);

[1] The Immigrant Legal Resource Center (www.ilrc.org) is a partner organization of the Defending Immigrants Partnership, a national collaborative to assist criminal defense counsel effectively represent noncitizen defendants (www.defendingimmigrants.org). Thanks to Ann Benson, Dan Kesselbrenner, Mike Mehr, Graciela Martinez, Raha Jorjani, and Sejal Zota for their insightful comments.

(4) be currently in school or have graduated from high school or obtained a GED, or are honorably discharged from coast guard or armed forces; and
(5) **have not been *convicted of* a felony, a significant misdemeanor, or three or more non-significant misdemeanors**, and **not pose a threat to public safety or national security.**

A broad array of criminal offenses will bar eligibility unless a person can show "exceptional circumstances" including:

- A conviction for a **felony.** A felony is a federal, state or local offense that carries a potential sentence of more than one year.
- A conviction for a "**significant misdemeanor.**" A "significant misdemeanor" is a federal, state, or local criminal offense punishable by imprisonment of one year or less, but more than five days and is an offense of:
    - Domestic violence;
    - Sexual abuse or exploitation;
    - Unlawful possession or use of a firearm;
    - Drug sales (distribution or trafficking);
    - Burglary;
    - Driving under the influence of alcohol or drugs; or
    - Any other misdemeanor not listed above for which the person received a jail sentence of more than 90 days. The person must be ordered to spend more than a 90 day sentence in jail, but does not necessarily have to spend all of that time in jail.[2]
- Convictions for "**multiple misdemeanors.**" This is defined as three or more non-significant misdemeanors not occurring on the same day and not arising from the same act or scheme of misconduct. A misdemeanor for this purpose is a federal, state, or local criminal offense punishable by imprisonment of one year or less, but more than five days. Minor traffic offenses, such as driving without a license, will not be considered a non-significant misdemeanor for purposes of deferred action.

Defenders should be aware that the definition of felony and misdemeanor for purposes of DACA ignore a state's classification scheme. This means that an offense that is a misdemeanor for state purposes may be a felony under DACA or vice versa.

- **Offenses that Do Not Lead to Automatic Disqualification:**
    - Juvenile adjudications are not considered disqualifying misdemeanors or felonies. Juvenile defenders, however, should also screen youth clients for eligibility for other forms of relief as youth may be eligible to obtain lawful status in a number of ways. See *Summary Checklist for Defense of Noncitizen Juveniles* available at www.defendingimmigrants.org.
    - Expunged convictions are not considered disqualifying misdemeanors or felonies.

[2] Take, for example, the following: Juan is admitted to probation, imposition of sentence is suspended, and as a condition of probation he is ordered to serve 91 days in jail. Juan is ineligible for DACA, although with credits he only serves two-thirds of his sentence. But if Juan is admitted to probation, is given a one year suspended sentence with no condition to serve any time in jail, Juan is eligible.

- Immigration-related offenses characterized as either felonies or misdemeanors by state immigration laws will not be treated as disqualifying felonies or misdemeanors for deferred action. An example of an immigration-related offense is an offense that has immigration status as an element as seen in many Arizona copycat anti-immigration state laws.

WARNING! Although these offenses do not trigger the "automatic" criminal bars listed above, DHS can consider them under the discretionary **totality of circumstances** and/or **threat to public safety analysis**, described below and still deny an application.

- **Any Criminal Conviction or Criminal History Will Be Considered in the Totality of Circumstances and as a Public Safety Threat:**
  - Even if a crime does not rise to the level of a "significant misdemeanor," and is an expunged conviction or juvenile adjudication, DHS has said that it retains the discretion to determine that an individual does not warrant a grant of deferred action on the basis of a single criminal offense by considering the "totality of circumstances" of the individual's case.
  - All criminal history, even without a conviction, including arrests and dismissed charges, may be taken into consideration in determining whether a person should be granted deferred action to determine whether the person poses a **"public safety" threat**. Examples that fall into this category are **gang membership** and **participation in criminal activities**.

Defense Strategies in Light of DACA[3]

- **Informally defer the plea.** Ask the prosecution to agree to defer the plea hearing so that the defendant can voluntarily meet specified goals, e.g., perform community service, and then make an alternative plea or no plea after goals are completed.
- **Seek a deferred adjudication disposition where a plea of guilty is not required.** If the offense at issue will — or could — be characterized as a "significant misdemeanor," or a non-significant misdemeanor offer is not on the table, pursue negotiations to resolve the case through a deferred adjudication process (e.g. stipulated order of continuance, diversion) that does not require the defendant to admit guilt or admit to facts sufficient to warrant a finding of guilt. If a plea of guilty is entered, even if the case is later dismissed, it will not be "immigration safe."
- **Plead to a non-identified significant misdemeanor offense category and obtain a jail sentence of less than 90 days.** For example: If the defendant is charged with simple possession of a controlled substance, the strategy to preserve eligibility for deferred action should be (1) if possible, to plead to a lesser (misdemeanor) charge and preferably a non-controlled substance offense and (2) if not, plead to simple possession only if it is a misdemeanor and carries a jail sentence of less than 90 days.[4]
- **Plead to a non-significant misdemeanor offense if the person does not already have two misdemeanors on their record.**
- **Plead to an offense that does not constitute a non-significant misdemeanor offense or to an infraction.** Routine traffic violations are safe. If a case can be reduced to a minor traffic offense, even as a misdemeanor, this should be pursued. A DUI case should be pled to another traffic offense,

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[3] The criminal bars to deferred action are defined such that the defense strategy of carefully crafting the record of conviction to avoid a deportable or inadmissible offense may not be sufficient to protect your client. Furthermore, it is unclear at this time what kinds of evidence may be considered to determine if the offense falls within one of the criminal bars.

[4] But, in this example, if the defendant pled to simple possession or other controlled substance offense he would be ineligible to obtain a green card in the future through a family or business visa because a controlled substance conviction is a ground of *inadmissibility* unless it is for possession of 30 grams or less of marijuana and waiver is applied for and received.

if possible, since DUIs constitute significant misdemeanors. Defense counsel can consider offering, in exchange for a reduced charge, a more severe non-jail sentence such as additional hours of community service, counseling, or work release as long as the jail sentence does not exceed 90 days.

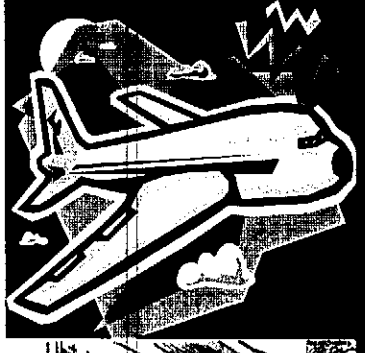
- **Explore vacating a recent plea on the basis of legal error.** For example, in California, under Calif. P.C. § 1018, a court may allow a defendant to withdraw his or her plea "for good cause" before judgment is entered or within six months after the defendant is placed on probation if imposition of sentence is suspended. Another option is to work with the prosecutor to withdraw the plea and substitute another, safer plea.
- **Explore post-conviction relief.** Investigate possibilities of vacating the plea based on ineffective assistance of counsel or failure of the court to administer a statutory advisal on the immigration consequences. This is a possibility if at the time of plea the offense already was likely to have adverse immigration consequences. Individuals should seek expungements. Although expungements generally do not eliminate convictions under immigration law, for purposes of deferred action, an expunged conviction **will not** automatically disqualify an applicant; DHS will only consider expunged convictions as a matter of discretion.
- **Consider taking the case to trial.** If deferred action is the only way your client will have security against deportation, she may be want to take her case to trial if a plea will clearly make her ineligible for deferred action. The biggest risk of losing at trial would be an increased likelihood of actually spending time in jail (as opposed to a plea that would avoid this). If she spends time in jail, she may be apprehended by ICE.

Defenders should note that some of the strategies described above will only protect a noncitizen defendant's potential eligibility for DACA and not for other immigration benefits. Defenders should continue to flag other forms of relief for clients and defend the case accordingly. A relief questionnaire is at www.defendingimmigrants.org

Immigration Enforcement & Advising Your Client of His/Her Rights

- Qualifying persons in criminal custody with ICE detainers/holds may contact ICE directly at: the Law Enforcement Support Center's hotline at (855) 448-6903 (24 hrs, 7 days/wk), ICE Public Advocate on its hotline at (888) 351-4024 (M-F, 9am-5pm) or by email at EROPublicAdvocate@ice.dhs.gov.
- For persons already in ICE custody, DHS will conduct a criminal background check and may interview them. If the person qualifies for the program, the person should be released from immigration custody.
- For undocumented persons who are ineligible for the program, the defense priority may be to try to avoid contact with ICE by staying out of jail. However, counsel should be careful to advise this group of clients not to hastily accept a plea that would eliminate their options for lawful status without understanding the long-term consequences. Although a person may not be eligible for deferred action, try to plead to an offense that would not bar them from getting legal status in the future and is a low enforcement priority to preserve their eligibility for prosecutorial discretion.
- Warn your client not to apply for deferred action without getting their complete criminal history (including any juvenile history) reviewed first by an immigration lawyer.

For more information on defending noncitizens in criminal proceedings visit www.defendingimmigrants.org (membership required).



Josh Epstein
Immigrant Defense Project

- *Padilla v. Kentucky*
- How to integrate immigration consequences into your practice
- Introduction to immigration consequences of criminal conduct
- Crafting plea agreements
- ICE in the Criminal Justice System
- Resources

Who was Jose Padilla?

- Lawful permanent resident for 40 years
- Vietnam War veteran
- Charged with marijuana possession and trafficking for having marijuana in his commercial truck
- Pled guilty for marijuana trafficking after defense attorney told him he did not have to worry about deportation because he had lived in US for so long

- Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea
- Absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.

- The Sixth Amendment requires affirmative, competent advice regarding immigration consequences.
- Non-advice (silence) is insufficient (ineffective).

People v. Ford, 86 N.Y.2d 397 (1995), *abrogated*.

- Every noncitizen client must be advised as specifically as the law allows of the immigration consequences of pleading guilty.
- "Lack of clarity in the law . . . does not obviate the need to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice." 130 S. Ct. at 1483 n.10.

- The Court endorsed "informed consideration" of deportation consequences by both defense and the prosecution during plea-bargaining" 130 S. Ct. at 1486.

STOP
STOP
United States Border Crossing

1) Intake: Gather Information

2) Use Intake to Make Immigration Analysis

3) Identify Client's Priorities and Advise Client

4) Defend Case According to Client's Priorities

IMMIGRANT DEFENSE PROJECT

IMMIGRATION CONSULTATION HOTLINE for PUBLIC DEFENDERS

(212) 725-6422

For free plea consultations concerning the immigration consequences of your clients' charges, our hotline hours are Tuesdays and Thursdays from 1:30pm - 4:30pm. However, we try to return calls from defense attorneys every day, so leave a message if you don't reach us.

To facilitate consultations, please have the following information when you call, along with a record of all prior charges from all states/countries and information about the current criminal case.

Client's Name: _____ Date of Birth: _____

Nationality	
When did the client enter U.S.?	
How did the client enter U.S.? (examples at right)	Lawful permanent resident (LPR)/ Green card Temporary visa (e.g., tourist, student, business) Cross border without documents Refugee Other (_____)
What is the client's current status? (examples at right)	Lawful permanent resident (LPR)/ Green card (date client became LPR _____) Temporary visa (in status) Undocumented (visa overstay/expired) Undocumented (crossed border, never got status) Asylee/Refugee Temporary Protected Status (TPS) Other (_____)
Has the client ever been ordered deported/ removed?	
Immigration status of family members: - spouse - parents - children	

3 West 29th Street, Suite 803, New York, NY 10001
Tel: 212.725.6422 • Fax: 800.391.5713
www.ImmigrantDefenseProject.org

- Routinize: "Where were you born?"
- Be sensitive:
  - From the client's perspective you are part of the system.
  - Establish trust and explain why you're asking.
- Avoid asking for legal conclusions:
  - Ask "Where were you born," not "Are you a citizen?"
  - Ask "Do you have a green card," not "Are you legal?"
- Never assume status from rap sheet, name, appearance, language, accent or anything else

- U.S. Citizen
  - Birth; Naturalization; Automatic Derivation/Acquisition
- Lawful Permanent Resident ("green card")
- Nonimmigrant Visa (tourist, student, business professional, seasonal worker)
- Asylee/refugee
- Temporary Protected Status
- Visa Overstay
- Entered Without Inspection ("EWI")

- For all clients, obtain:
  - Date of first entry into U.S.
  - First lawful admission in any status
  - How the client entered the U.S.
  - Immediate family members' status
  - Complete prior criminal history
- For LPRs:
  - Date received LPR status

Investigation + crim history + goal = advisal

- Develop expertise yourself (assistance from resources) or consult with criminal immigration experts

<u>And</u>

- Advise on both clear and unclear consequences of the charge, the offer and any alternate plea dispositions that may be attainable in the case

- Mandatory removal from the U.S.
- Inability to return to the U.S.
- "Good moral character" bar to naturalization (INA §101(f))
- Denial of LPR status
- Bar to asylum/withholding of removal
- Inability to renew green card or travel
- Mandatory detention

- Client may need to choose whether immigration consequences or criminal sentence concerns are most important

- Give client immigration analysis regardless of their stated desire to fight deportation, give the client the basic information as to what might happen next

If immigration consequences are client's priority, conduct defense with this in mind: *Padilla,* 130 S. Ct. at 1484

a) If current offer fits client goals with most favorable immigration outcome = take offer

b) If offer doesn't fit client goals, maybe:

- Negotiate plea offer to particular section of statute
- Litigate case towards motions hearing and trial if risk outweighs immigration consequences of the plea
- If applicable, negotiate sentencing concession
- Remember *Padilla*'s instruction on prosecutor's duty

STOP
STOP
United States Border Crossing

INA § 212, 8 U.S.C. § 1182

INA § 237, 8 U.S.C. § 1227

INADMISSIBILITY	DEPORTABILITY
•Applies to noncitizens seeking lawful admission (or readmission) to the US	•Applies to noncitizens lawfully "admitted" into the US
•Non-LPRs (including refugees, asylees, and undocumented people) should focus on avoiding inadmissibility	•LPRs in the US should focus primarily on deportability
•LPRs traveling outside the US may also need to focus on inadmissibility	

- Federal – not state – definitions apply.

  E.g., "conviction," "felony," "misdemeanor"
- Conviction can trigger more than one deportability ground
- Violations are convictions for immigration purposes
- Categorical approach:

  Look at elements of criminal statute to see if the conviction falls under a ground of removability. Don't look at "what happened on the street."

Immigration Consequences of Crimes Summary Checklist *

Immigrant Defense Project

CRIMINAL INADMISSIBILITY GROUNDS

– Will or may prevent a noncitizen from being able to obtain lawful status in the U.S. May also prevent a noncitizen who already has lawful status from being able to return to the U.S. from a trip abroad in the future.

Conviction or admitted commission of a Controlled Substance Offense, or DHS reason to believe that the individual is a drug trafficker

Conviction or admitted commission of a Crime Involving Moral Turpitude (CIMT), which category includes a broad range of crimes, including:

- Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- Most sex offenses

Petty Offense Exception – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.

Prostitution and Commercialized Vice

Conviction of two or more offenses of any type + aggregate prison sentence of 5 yrs.

CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY based on extreme hardship to USC or LPR spouse, parent, son or daughter

- **Conviction or admitted commission of a Controlled Substance Offense other than a single offense of simple possession of 30 g or less of marijuana**
- **Conviction or admitted commission of a violent or dangerous crime will presumptively bar 212(h) relief**
- **In the case of an LPR, conviction of an Aggravated Felony [see Criminal Deportation Gds], or any Criminal Inadmissibility if removal proceedings initiated before 7 yrs of lawful residence in U.S.**

CRIMINAL BARS ON ASYLUM based on well-founded fear of persecution in country of removal OR WITHHOLDING OF REMOVAL based on threat to life or freedom in country of removal

Conviction of a "Particularly Serious Crime" (PSC), including the following:

- **Aggravated Felony [see Criminal Deportation Gds]**
  - **All aggravated felonies will bar asylum**
  - **Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding**
  - **Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding of removal**
- **Violent or dangerous crime will presumptively bar asylum**
- **Other PSCs** – no statutory definition; see case law

CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY based on humanitarian purposes, family unity, or public interest (only for persons who have asylum or refugee status)

- **DHS reason to believe that the individual is a drug trafficker**
- **Conviction or commission of a violent or dangerous crime will presumptively bar 209(c) relief**

CRIMINAL DEPORTATION GROUNDS

– Will or may result in deportation of a noncitizen who already has lawful status, such as a lawful permanent resident (LPR) green card holder.

Conviction of a Controlled Substance Offense EXCEPT a single offense of simple possession of 30g or less of marijuana

Conviction of a Crime Involving Moral Turpitude (CIMT) [see Criminal Inadmissibility Gds]

- **One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed**
- **Two CIMTs committed at any time "not arising out of a single scheme"**

Conviction of a Firearm or Destructive Device Offense

Conviction of a Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order (criminal or civil)

Conviction of an Aggravated Felony

- ***Consequences***, in addition to deportability:
  - **Ineligibility for most waivers of removal**
  - **Permanent inadmissibility after removal**
  - **Enhanced prison sentence for illegal reentry**
- ***Crimes included***, probably even if not a felony:
  - **Murder**
  - **Rape**
  - **Sexual Abuse of a Minor**
  - **Drug Trafficking** (including most sale or intent to sell offenses, but also including possession of more than 5 grams of crack or any amount of flunitrazepam and possibly including certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)
  - **Firearm Trafficking**
  - **Crime of Violence + at least 1 year prison sentence ****
  - **Theft or Burglary + at least 1 year prison sentence ****
  - **Fraud or tax evasion + loss to victim(s) >10, 000**
  - **Prostitution business offenses**
  - **Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence ****
  - **Obstruction of justice or perjury + at least 1 year prison sentence ****
  - **Various federal offenses and possibly state analogues** (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)
  - **Other offenses listed at 8 USC 1101(a)(43)**
  - **Attempt or conspiracy to commit any of the above**

CRIMINAL BARS ON LPR CANCELLATION OF REMOVAL based on LPR status of 5 yrs or more and continuous residence in U.S. for 7 yrs after admission (only for persons who have LPR status)

- **Conviction of an Aggravated Felony**
- **Offense triggering removability referred to in Criminal Inadmissibility Grounds if committed before 7 yrs of continuous residence in U.S.**

CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP

– Will prevent an LPR from being able to obtain U.S. citizenship.

Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years:

- **Controlled Substance Offense (unless single offense of simple possession of 30g or less of marijuana)**
- **Crime Involving Moral Turpitude (unless single CIMT and the offense in not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)**
- **2 or more offenses of any type + aggregate prison sentence of 5 years**
- **2 gambling offenses**
- **Confinement to a jail for an aggregate period of 180 days**

Conviction of an Aggravated Felony on or after Nov. 29, 1990 (and conviction of murder at any time) *permanently* bars the finding of moral character required for citizenship

"CONVICTION" as defined for immigration purposes

A formal judgment of guilt of the noncitizen entered by a court,
OR, if adjudication of guilt has been withheld, where:

(i) A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
(ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed

THUS:

- **A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)**
- **A deferred adjudication without a guilty plea IS NOT a conviction**
- **NOTE: A youthful offender adjudication IS NOT a conviction if analogous to a federal juvenile delinquency adjudication**

*For more comprehensive legal resources, visit IDP at www.immigrantdefenseproject.org or call 212-725-6422 for individual case support.

** The "at least 1 year" prison sentence requirement includes a suspended prison sentence of 1 year or more.

INA § 212(a)(2)

Does not always require conviction

- Crime involving moral turpitude (CIMT)- conviction or admitted commission
  - CIMT: intent to steal or defraud; bodily harm by intentional act; serious bodily harm by reckless act; most sex offenses
  - *Petty Offense Exception:* single CIMT if max. possible penalty is not greater than 1yr and actual penalty ≤ 6mos.
- Controlled Substance Offense- conviction or admitted commission (substance enumerated in federal CSA)
  - **NO** marijuana exception
- Multiple convictions w/ aggregate sentence ≥ 5 years
- Reason to Believe Drug Trafficker- no conviction required
- Prostitution & Commercialized Vice- no conviction required

INA § 237, 8 U.S.C. § 1227

- Controlled substance conviction (substance enumerated in federal CSA)
  - Or drug abuser or addict
- CIMT conviction
  - CIMT: intent to steal or defraud; bodily harm by intentional act; serious bodily harm by reckless act; most sex offenses
  - 1 within 5 years of admission + potential sentence of 1 year or more
  - 2 CIMTs after admission "not arising out of a single scheme"
- Firearm or destructive device conviction
- Domestic violence
  - Crime of domestic violence
  - Stalking conviction
  - Child abuse, neglect, or abandonment
  - Violation of order of protection (civil or criminal finding)
- Aggravated felony conviction

- Compare elements of criminal statute to elements of removal ground.

  If the minimum conduct necessary to violate the criminal statute doesn't fit within the removal ground, the conviction can't be a basis for removal.

  Removal ground based on the "generic" definition

  If the minimum conduct necessary to violate the criminal statute does fit within the removal ground, the conviction is a basis for removal.

- Divisible statutes: statute covers both removable and non-removal offenses → modified categorical approach

Matter of Silva-Trevino:

3-part analysis:

- "Realistic probability" that criminal statute would be applied to conduct that did not involve moral turpitude
- Modified categorical approach (look at record of conviction)
- Any additional evidence

Silva overruled in 4th and 11th circuits; affirmed in 7th circuit

- Actual Silva-Trevino case is being appealed at the 5th circuit

- No statutory definition
- CIMT = "inherently base, vile or depraved" *and* involves "corrupt scienter" (caselaw)
- Turpitude inheres in the intent
  - Negligent or SL crimes should never CIMTs
  - Reckless crimes may be CIMTs
  - Most specific intent crimes are CIMTs
- Hallmarks of CIMT:
  - Intent to defraud
  - Intent *permanently* to deprive
  - Specific intent to injure/ threaten/damage property
  - Reckless act causing serious injury
  - Lewd intent
- *Attempt* irrelevant to analysis (except w/r/t recklessness)

CIMTs:

- All felony assaults: Article 120
- Misdemeanor assault: 120.00(1)
- Grand and petit larceny: Article 155
- Criminal possession of a weapon 4th degree: (intent to use) 265.01(2)
- Sex offenses: Article 130
- CD/DVD sales: 165.71

CIMTs:

- Assault 3rd degree: 120.00(2)
- CD/DVD sales: 275.35
- CPSP: Article 165
- Aggravated unlicensed driving: VTL 511(3)(a)(i)

- One CIMT makes someone deportable only if:
  - The offense has a potential sentence of one year or more, and
  - The offense was committed within five years of "admission"

- What "admission" starts the 5 years:

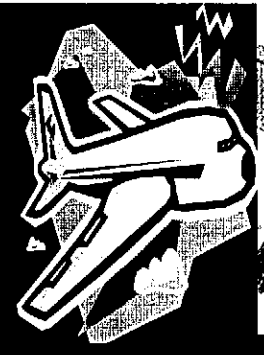
  If someone was admitted in any status (i.e. nonimmigrant visa) and then adjusted to LPR, the original admission date starts the 5 years - The client gets more time!

  If someone EWI'ed and then adjusted to LPR, the adjustment date starts the 5 years

  If someone was admitted in any status (i.e. nonimmigrant visa) and then went back to the country of origin to consular process to receive LPR, the date of admission as an LPR will start the 5 years

  Unclear: an LPR travels for 6 months or more and is allowed to reenter with the same green card

  Matter of Alyazji, 25 I&N Dec. 397 (BIA 2011)



- Someone is deportable for convictions for two or more CIMTs since admission
- Single Scheme Exception:

  If the CIMTs occurred in the same criminal incident

- Conviction relating to a controlled substance
  - Substance enumerated in federal CSA
  - Or drug abuser or addict
- Includes paraphernalia offenses
- Exception:
  - Single offense, simple possession of 30 grams or less of marijuana
- Timing of the offense is irrelevant

- Aggravated Felonies – see INA 101(a)(43)
  - Crimes included, even if they're not felonies
    - Drug Trafficking:
      - Carachuri-Rosendo v. Holder, 130 S.Ct. 2577: any second or subsequent possession offense where the record of conviction contains *no* finding of the fact of the prior conviction may not be deemed an aggravated felony.
    - Murder, Rape, Sexual abuse of a minor
    - Firearm trafficking
    - Prostitution business offenses
    - Crime of violence + 1 year sentence
    - Theft or burglary + 1 year sentence

Crimes included, even if they are not felonies (continued):

- Fraud or tax evasion with >$10,000 loss to victim
- Commercial bribery, counterfeiting, forgery + 1yr sentence
- Obstruction of justice + 1yr sentence
- Certain gambling offenses
- Attempt or conspiracy to commit any of above

Consequences:

- Ineligibility for most waivers
- Mandatory detention
- Ineligibility for voluntary departure
- Permanent inadmissibility after removal
- Up to 20 years sentence for illegal reentry after removal

- 260.10(1) where c/w is a minor: unsettled issue
- Criminal sale of a controlled substance; possession with intent to sell (220.16(1))

  maybe not criminal sale of marijuana, 221.40

  Argument that "sale" is overbroad in NY
- Criminal possession of a weapon w/ intent to use w/ 1 yr sentence
- Burglary 1st degree w/ 1 yr sentence

  Possible AF: 2nd and 3rd degrees
- Grand or petit larceny w/ 1 yr sentence
- Bail jumping 1st and 2nd degree:

  Possible AF: 3rd degree if underlying crime is a felony

- Possession of a firearm, with or without intent to use
- Other offense "involving" a firearm
  - May not include possession of ammunition
- Level and timing of offense irrelevant

- "Crime of violence":
  - Offense an element of which is the use, attempted use or threatened use of force, or a involving a substantial risk that force will be used
- "Domestic": c/w must be current or former spouse, baby mama, "cohabitant as spouse," or person "protected under the domestic or family violence laws" of the j/d: 15 V.S.A. § 1101(2)

- Violates that portion of an OOP "involving protection against threats of harm, stalking, or repeated harassment"
- Includes violation of "no-contact" provision of an Order of Protection *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011)
- Probably includes family court adjudications ("court has found")

- Crime of "child abuse, child neglect, or child abandonment"

  "[A]ny offense involving an

  . . . . At a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse . . . as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes." *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008)

- Minority of c/w must be an element of the offense

United States Border Crossing
STOP
STOP

- Deportability usually requires "conviction"
  INA § 101(a)(48); 8 U.S.C. § 1101(a)(48)
- A conviction is:
  A formal judgment of guilt entered by a court

  Where adjudication of guilt has been withheld,
  Δ admits facts sufficient to warrant a finding of guilt

  Court has ordered some form of punishment, penalty, or restraint on liberty.
- Caselaw: "conviction" requires more than proof by preponderance

- YO: no
- JD: no
- JO: yes
- Family court offense: no
- ATI/diversionary plea (post-plea):
- Pre-plea diversion: no
- Violations:
- ACD: no (unless subsequent conviction)

- In addition to seeking to negotiate non- removable plea/sentence, strategies may include:
  - Avoiding sentencing trigger (e.g. 364 days, 179 days)
  - Pre-plea diversion
  - Control allocution of potentially removable offense:
    - Avoid admissions of any conduct beyond bare elements of offense (esp. for potential CIMTs)
    - Sanitize record
    - Loss amount strategies

- Negotiate prosecutor's sponsorship of S or U visa for cooperators/cross-complainants
- Avoid ICE contact via jail or probation
- File appeal
- Seek post-conviction relief
- Avoid sex offender registry

- Arrest to arraignment
- Criminal custody facilities
- Green card renewal
- Other applications: Adjustment of Status, citizenship
- Return from travel abroad
- Sex offenders

- ICE's primary enforcement program, which has existed since the 1980s.
- ICE agents identify and screen inmates in jails and prisons and either initiate removal proceedings while people are still in criminal custody OR transfer people directly from jail or prison to ICE custody for removal proceedings.

  ICE receives booking information from DOC to identify immigrants
- CAP agents rely on informal relationships with jails and prisons to gain access to and conduct interviews with noncitizens in criminal custody. These interviews can occur before or after a detainer (or hold) has been issued to facilitate transfer to the detention and deportation system.

- A **detainer** (or "**hold**") happens when ICE asks a jail to contact them before the jail releases the subject. This allows ICE to transfer the person directly from jail to immigration custody.
- The jail can hold someone for an additional 48 hours (not including weekends and holidays) to let ICE take custody.
- If ICE does not pick the person up within 48 hours, the jail should release this person. If the jail does not let this person go, he/she can:

  Ask the criminal lawyer to contact the jail's legal department.

  Ask the housing area officer and counseling services staff to contact the jail's general office.

- Provides ICE with a technological advantage as compared to the CAP
- This program requires that a person's fingerprints are checked against both immigration and criminal databases at the time of arrest. If a person is matched to a record indicating some immigration history, ICE and the arresting officer are automatically notified.
- ICE then decides what enforcement action will be taken, including whether a detainer will be issued. The process from fingerprint submission to issuance of a detainer can take under an hour.

- Undocumented people
  - Entered the country without authorization
  - Overstayed a visa
- Lawful permanent residents (green card holders) who have convictions that make them deportable
- People with outstanding orders of removal from the US

- Collect data on intake form (included)
- Have complaint & rap sheet available
- : (212) 725-6422

  Tues. & Thurs., 1PM to 6PM

- Immigrant Defense Project
  www.immigrantdefenseproject.org

- Defending Immigrants Partnership
  www.defendingimmigrants.org

- National Immigration Project, NLG
  www.nationalimmigrationproject.org

- M. Vargas, Representing Immigrant Defendants in New York State (4th ed.) (5th edition coming soon!)
- M. Vargas, "Tips on How to Work With an Immigration Lawyer to Best protect Your Noncitizen Defendant Client" (handout materials)
- N. Tooby, Tooby's Guide to Criminal Immigration Law (2008)
- N. Tooby, Criminal Defense of Immigrants (4th ed.)
- N. Tooby, Safe Havens (2005)

NYC's Detainer Law

- Current Law effective until July 2013:
  - DOC will not honor ICE detainers if:
    - No pending misdemeanor or felony charges
      - Current case is dismissed, resolved in a not guilty verdict, resolved with a NYS violation, ACD, YO, or JD adjudication
    - No prior misdemeanor or felony convictions
    - No outstanding criminal warrants from any jurisdiction
    - No order of removal or deportation
    - Not on a gang or terrorist watch list
  - This law only applied to people in DOC custody (did not apply to people in NYPD custody

NYC's New Detainer Law Effective July 2013

- DOC and NYPD will NOT honor ICE detainers if:
  - Client has NO Felony or Misdemeanor Convictions except:
    - NYPL 230.00: prostitution
    - NYPL 240.37: loitering for the purposes of prostitution
      - NOTE: if the conviction relates to "patronizing a prostitute" – DOC/NYPD will honor the detainer
    - VTL 511(1): aggravated unlicensed driving in the 3rd
    - VTL 511(2)(a)(i): aggravated unlicensed driving in the 2nd when relating to a previous conviction in the proceeding 18 months
    - VTL 511(2)(a)(iv): aggravated unlicensed driving in the 2nd when relating to 3 or more suspensions
  - Client has old misdemeanor convictions: more than 10 years prior to the instant arrest

NYC's New Detainer Law (cont.) Effective July 2013

- DOC and NYPD will NOT honor ICE detainers if:
  - Your client has NO pending felony charges
  - Your client has one pending misdemeanor charge EXCEPT NYPD/DOC will honor if charged with:
    - NYPL 265.01 – when relating to a firearm, rifle, shotgun, bullet or ammunition
    - NYPL 215.50 – criminal contempt
    - NYPL 120.00 – assault in the 3rd degree
      - NOTE: detainer will NOT be honored if the defendant has been released pursuant to NYCPL 170.70
    - NYPL Article 130 – sex offenses
    - VTL Article 31 – alcohol and drug related offenses

NYC's New Detainer Law (cont.) Effective July 2013

NYPD/DOC will honor a detainer if your client does has more than one pending misdemeanor charge in separate cases

EXCEPT DOC/NYPD will NOT honor a detainer if charged with:

- NYPL 230.00: prostitution
- NYPL 240.37: loitering for the purposes of prostitution
  - NOTE: if the charge relates to "patronizing a prostitute" – DOC/NYPD will honor the detainer
- VTL 511(1): aggravated unlicensed driving in the 3rd
- VTL 511(2)(a)(i): aggravated unlicensed driving in the 2nd when relating to a previous conviction in the proceeding 18 months
- VTL 511(2)(a)(iv): aggravated unlicensed driving in the 2nd when relating to 3 or more suspensions

NYPD/DOC will honor a detainer if your client:

- Has an outstanding criminal warrants from any jurisdiction
- Has an order of removal or deportation
- Is on a gang or terrorist watch list

ICE's Detainer Guidance Policy

- Initiated in December 2012
- ICE should only be issuing detainers against clients with:
  - Prior felony convictions or pending felony charges
  - Three or more misdemeanor charges in distinct cases or 3 or more prior misdemeanor convictions
- ICE should NOT be issuing detainers against clients with only 1 or 2 misdemeanor convictions or pending misdemeanor charges
  - EXCEPT if the charges or convictions are:
    - Offense of violence, threats, assaults
    - Sex abuse or exploitation
    - DUI
    - Unlawful flight from scene of an accident
    - Unlawful possession of deadly weapon (firearm or otherwise)
    - Distribution or trafficking of controlled substance
    - Other threat to public safety

- NOTE: ICE's "misdemeanor" definition most likely includes NYS violations

IMMIGRANT DEFENSE PROJECT

Suggested Approaches for Representing a Noncitizen in a Criminal Case

(References are to sections of IDP's manual, *Representing Immigrant Defendants in New York*, 5th ed., 2011)

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Immigrant Defendants in New York* (5th ed., 2011).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- Drug offense (§5.4)
- Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- Property offense, including theft, burglary or fraud offense (§5.6)
- Firearm offense (§5.7)

If your client is a LAWFUL PERMANENT RESIDENT:

- First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)
- Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).
- If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

If your client is a REFUGEE or PERSON GRANTED ASYLUM:

- For a refugee, first and foremost, try to avoid a disposition that triggers deportability (see Matter of D-K, 25 I&N Dec. 761 (BIA 2012))
- For an asylee or a refugee, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for the so-called 209(c) waiver of inadmissibility for refugees and asylees (§3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

If your client is ANY OTHER NONCITIZEN who might be eligible now or in the future for LPR status, asylum, or other relief:

IF your client has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and(4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

IF your client has a fear of persecution in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).
- In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

See reverse ➡

Immigration Consequences of Crimes Summary Checklist

For more comprehensive legal resources, visit the Immigrant Defense Project website at **www.immigrantdefenseproject.org** or call **212-725-6422** for individual case support.

CRIMINAL INADMISSIBILITY GROUNDS

Will or may prevent a noncitizen from being able to obtain lawful admission status in the U.S. May also prevent a noncitizen who already has lawful admission status from being able to return to the U.S. from a future trip abroad.

Conviction or admission of a **Controlled Substance Offense**, or DHS reason to believe that the individual is a drug trafficker

Conviction or admission of a **Crime Involving Moral Turpitude** (CIMT), which category includes a broad range of crimes, including:

- Crimes with an *intent to steal or defraud* as an element (e.g., theft, forgery)
- Crimes in which *bodily harm* is caused or threatened by an intentional act, or *serious bodily harm* is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)
- Most sex offenses
- *Petty Offense Exception* – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.

Prostitution (e.g., conviction, admission, or intent to engage in U.S.) and other unlawful **Commercialized Vice**

Conviction of **two or more offenses** of any type + **aggregate prison sentence of 5 yrs.**

CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY

based on extreme hardship to USC or LPR spouse, parent, son or daughter

- Conviction or admission of a **Controlled Substance Offense** other than a single offense of simple possession of 30 g or less of marijuana
- Conviction or admission of a **violent or dangerous crime** is a presumptive bar.
- In the case of an LPR, conviction of an **Aggravated Felony** [see Criminal Deportability Gds], or any **Criminal Inadmissibility** if removal proceedings initiated before 7 yrs of lawful residence in U.S.

CRIMINAL BARS ON ASYLUM based on well-founded fear of persecution in country of removal OR WITHHOLDING OF REMOVAL based on threat to life or freedom in country of removal

Conviction of a "**Particularly Serious Crime**" (PSC), including the following:

- **Aggravated Felony** [see Criminal Deportability Gds]
  - All aggravated felonies will bar asylum
  - Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding, & aggravated felonies involving unlawful trafficking in controlled substances are a presumptive bar to withholding of removal
- **Violent or dangerous crime** will presumptively bar asylum
- **Other PSCs** – no statutory definition; see case law

CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY based on humanitarian purposes, family unity, or public interest (only for persons who have asylum or refugee status)

- DHS reason to believe that the individual is a **drug trafficker**
- **Violent or dangerous crime** is a presumptive bar

CRIMINAL BARS ON NON-LPR CANCELLATION OF REMOVAL based on continuous physical presence in U.S. for 10+ years; and "exceptional and extremely unusual" hardship to USC or LPR spouse, parent or child

- Conviction of type of offense listed in criminal inadmissibility or deportability grounds, maybe whether or not the ground applies to the person, e.g., one CIMT with a potential sentence of 1 year or longer [see Criminal Deportability Gds] even if the offense was not w/n five years of an admission to the US
- Conviction or admission of crimes barring required finding of good moral character during 10 year period [see Criminal Bars on Obtaining U.S. Citizenship]

CRIMINAL DEPORTABILITY GROUNDS

Will or may result in deportation of a noncitizen who already has lawful admission status, such as a lawful permanent resident (LPR) green card holder or a refugee.

Conviction of a **Controlled Substance Offense**
EXCEPT a single offense of simple possession of 30g or less of marijuana

Conviction of a **Crime Involving Moral Turpitude** (CIMT) [see Criminal Inadmissibility Gds]

- One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed
- Two CIMTs committed at any time after admission and "not arising out of a single scheme"

Conviction of a **Firearm or Destructive Device Offense**

Conviction of a **Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order** (criminal or civil)

Conviction of an **Aggravated Felony**

- *Consequences*, in addition to deportability:
  - Ineligibility for most waivers of removal
  - Permanent inadmissibility after removal
  - Enhanced prison sentence for illegal reentry
- *Crimes included*, probably even if not a felony:
  - **Murder**
  - **Rape**
  - **Sexual Abuse of a Minor**
  - **Drug Trafficking** (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)
  - **Firearm Trafficking**
  - **Crime of Violence + at least 1 year prison sentence***
  - **Theft or Burglary + at least 1 year prison sentence***
  - **Fraud or tax evasion + loss to victim(s) >10, 000**
  - **Prostitution business offenses**
  - **Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence***
  - **Obstruction of justice or perjury + at least 1 year prison sentence***
  - **Various federal offenses** and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, etc.)
  - **Other offenses listed at 8 USC 1101(a)(43)**
  - **Attempt or conspiracy** to commit any of the above

* The "at least 1 year" prison sentence requirement includes a suspended prison sentence of 1 year or more.

CRIMINAL BARS ON LPR CANCELLATION OF REMOVAL based on LPR status of 5 yrs or more and continuous residence in U.S. for 7 yrs after admission (only for persons who have LPR status)

- Conviction of an **Aggravated Felony**
- **Offense** triggering removability referred to in **Criminal Inadmissibility Grounds if committed before 7 yrs of continuous residence in U.S.**

CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP – Will prevent an LPR from being able to obtain U.S. citizenship.

Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years:

- **Controlled Substance Offense** (unless single offense of simple possession of 30g or less of marijuana)
- **Crime Involving Moral Turpitude** (unless single CIMT and the offense in not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)
- 2 or more offenses of any type + aggregate prison sentence of 5 years
- 2 gambling offenses
- **Confinement** to a jail for an aggregate period of 180 days

Conviction of an **Aggravated Felony** on or after Nov. 29, 1990 (and conviction of murder at any time) permanently bars the finding of moral character required for citizenship

"CONVICTION" as defined for immigration purposes

A formal judgment of guilt of the noncitizen entered by a court, **OR**, if adjudication of guilt has been withheld, where:

(i) A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or *nolo contedere* or has admitted sufficient facts to warrant a finding of guilt, and

(ii) The judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed

THUS:

- A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)
- A deferred adjudication without a guilty plea **IS NOT** a conviction
- **NOTE:** A youthful offender adjudication **IS NOT** a conviction if analogous to a federal juvenile delinquency adjudication

IDP IMMIGRANT DEFENSE PROJECT