CONTINUING LEGAL EDUCATION
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Representing Immigrant Defendants: Padilla v Kentucky and the Duty of Immigration Advisal

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APPELLATE DIVISION, FIRST AND SECOND JUDICIAL DEPARTMENTS
IN CONJUNCTION WITH THE ASSIGNED COUNSEL PLAN OF THE CITY OF NEW YORK

Representing Immigrant Defendants: *Padilla v. Kentucky* and the Duty of Immigration Advisal

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Immigrant Defense Project
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The myth of "civil" immigration consequences

- "Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If [the] respondent were a citizen, his aggregate sentences . . . would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens. This is a savage penalty . . . ." *Jordan v. De George*, 341 U.S. 223, 243 (1951) (Jackson, J., dissenting).

INS v. St. Cyr

- "Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (internal quotation omitted).

Padilla v. Kentucky

- "[I]mmigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The 'drastic measure' of deportation or removal . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."

  130 S. Ct 1473, 1478 (2010).
- "The collateral vs. direct distinction is . . . ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation." *Id.* at 1482.

Why Defense Counsel Need to Pay Attention to Immigration

- **Someone who never spent a day in jail for their criminal offense may spend months or years in immigration detention fighting their case**
- **Within days of being picked up by ICE in New York, a detainee may find him/herself in NJ, TX or NM, unable to call family or a lawyer**
- **No right to appointed counsel in removal proceedings.**
  - **Over 50% of all respondents are unrepresented.**
  - **Almost 90% of detained respondents are unrepresented.**

Expansion of Criminal Removal

- In 1982, the U.S. deported 413 noncitizens based on criminal conduct
- In FY 2008, the US deported over 72,000 noncitizens based on criminal conviction(s)
- In FY 2008, ICE began removal proceedings against 221,805 it identified in jails and prisons

Training Goals

- Ethical and professional responsibilities of defense counsel representing immigrant clients
- How to integrate immigration consequences into your practice
- How to determine your client's immigration status
- Basic introduction to immigration consequences of criminal conduct
- Resources for case-specific advice

Duty of Criminal Defense Counsel to Advise of Immigration Consequences of Conviction

- *Padilla v.* Kentucky, 599 U.S. ___, 130 S. Ct. 1473 (2010)

  "[D]eportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants . . . ." 130 S. Ct. at 1480.

Padilla v. Kentucky: Facts

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

Padilla v. Kentucky: Holding

- 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.
- To show prejudice, must show that if properly advised, would not have pleaded guilty

Padilla Key Points -- 1

- Deportation is a "particularly severe penalty" that is "intimately related" to the criminal process. Advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.

Padilla Key Points – 1, cont'd

- "Preserving the client's right to remain in the U.S. may be more important to the client than any potential jail sentence." 130 S. Ct. at 1483.
- "The collateral vs. direct distinction is . . . ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation." *Id.* at 1482.

Padilla Key Points -- 2

- Professional standards, such as ABA pleas of guilty standards and NLADA guidelines for defense lawyers, provide the guiding principles for what constitutes *effective assistance* of counsel. 130 S. Ct. at 1482.

Padilla, Key Points – 2, cont'd

- "[I]t may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." *ABA Standards for Criminal Justice Pleas of Guilty* (3d ed.), commentaty to Std. 14-3.2(f)

Padilla Key Points – 2, cont'd

- ABA Responsibilities of Defense Counsel, Standard 14-3.2(f):

  To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

Padilla, Key Points – 2, cont'd

- Commentary: "This Standard . . . strives to set an appropriately high standard, providing that defense counsel should be familiar with, and advise defendants of, all of the possible effects of conviction. In this role, defense counsel should be active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant, who will frequently have little appreciation of the full range of consequences that may follow from a guilty, nolo or Alford plea. Further, counsel should interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces.

Padilla Key Points -- 3

- 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*.

Padilla Key Points – 3, cont'd

- "Silence [regarding immigration consequences] would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement." 130 S. Ct. at 1484.

Padilla Key Points – 3, cont'd

- This advice includes not just the effect of a plea on a noncitizen's deportability but also the effect of the plea on his or her eligibility for relief from removal. 130 S. Ct. at 1483.

Padilla Key Points -- 4

- "There will . . . be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." 130 S. Ct. at 1483.
- This affects the **specificity** of the advice that must be given, but not the **duty to investigate and advise**.

Padilla Key Points – 4, cont'd

- It is impossible to determine whether deportation consequences are "clear" or "unclear" without investigating your client's status and the applicable law.
- 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.

Padilla Key Points -- 5

- "Informed consideration of possible deportation can only benefit *both the State* and noncitizen defendants during the plea-bargaining process." 130 S. Ct. at 1486.

Padilla Key Points – 5, cont'd

- This language and the characterization of deportation as an "integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty," 130 S. Ct. at 1480, suggest that a prosecutor may not refuse to consider immigration consequences in plea negotiations

Integrating Immigration Advisal

Steps to Effective Representation After *Padilla*

1) Determine Your Client's Status
2) Collect Relevant Information and Determine Your Client's Goals
   2.a) Preserve the status quo
3) Determine Immigration Consequences of Conviction/Contemplated Disposition
4) Explore Alternative Dispositions
5) Mitigate Immigration-Negative Aspects of the Record and Disposition

Step 1: Determine Client's Status

Step 1: Best Practices

- 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, or anything else

Types of immigration status

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

Work authorization

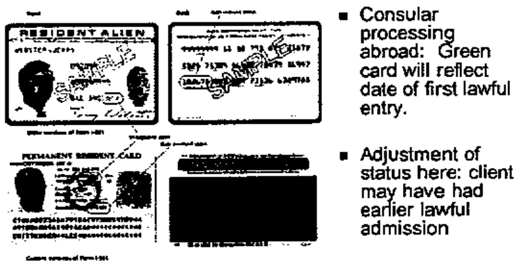
- Work authorization ("permiso") is <u>not</u> an immigration status
- Usually evidence of pending application or deferred action
- The category code reflects the reason it was issued. See 8 C.F.R. § 274a.12.

Step 2: Determine Client's Goals

Step 2: Determine Client's Goals

- Obtain Critical Information for Assessing Goals
  - Everyone:
    - Date and manner of entry; immediate family members' status
    - Past or pending applications to USCIS; Travel Habits and Plans
    - Priors (all jurisdictions)
  - LPRs: Date of LPR & of first lawful admission in any status

Step 2: Determining First Lawful Admission



- Consular processing abroad: Green card will reflect date of first lawful entry.
- Adjustment of status here: client may have had earlier lawful admission

Step 2: Nonimmigrants and Expiration of Authorized Stay

742832036 01
SAMPLE
SEP 13 1991
B-2
July 10, 1993
DOE
JOHN
U.K.

- A visa permits the holder to board a flight to the U.S. to seek admission
- On arrival, BCP decides whether to admit and issues an I-94 authorizing stay
- Do not confuse **visa** expiration date with end of authorized period of stay

Step 2: Determine Client's Goals

- Determine if client is already subject to negative immigration consequences
  - Evaluate immigration consequences of prior convictions
  - Ask about prior deportation orders or pending removal case
    - In absentia orders

Step 2: Determine Client's Goals

- Freeze the Status Quo
  - Advise client:
    - Do not travel abroad
    - Do not submit or take further action on USCIS application until full immigration advisal
    - Do not apply to renew green card
    - If client presently deportable, avoid ICE contact
    - Get in clients out

Deportability v. Inadmissibility

INA § 237, 8 U.S.C. § 1227 INA § 212, 8 U.S.C. § 1182

- *Technically*:
  - deportability applies to those lawfully admitted (LPRs, NIVs, refugees)
  - inadmissibility applies to those seeking lawful admission
- *Practically*:
  - each set of rules, or both, may apply to the same person in various situations
  - LPR can be inadmissible but not deportable, or vice versa

Step 3: Determine Immigration Consequences

Step 3: Deportability

- 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
    or
  - Where adjudication of guilt has been withheld,
    - Δ admits facts sufficient to warrant a finding of guilt ***and***
    - Court has ordered some form of punishment, penalty, or restraint on liberty.
- Caselaw: "conviction" requires more than proof by preponderance

Definition of "Conviction": NY

- YO: no
- JD: no
- JO: yes
- Family court offense: no
- ATI/diversionary plea: **yes**
- Pre-plea diversion: no
- Violations: **yes**
- ACD: no

Criminal grounds of deportability

INA § 237(a)(2)
8 U.S.C. § 1227(a)(2)

Crimes Involving Moral Turpitude

INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A)

- No statutory definition
- CIMT = "inherently base, vile or depraved" *and* involves "corrupt scienter" (caselaw)
- Turpitude inheres in the intent
  - Negligent or SL crimes are 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)

CIMT Deportability

INA § 237(a)(2)(A), 8 U.S.C. § 1227(a)(2)(A)

- One CIMT if:
  - committed w/in 5 years of a lawful admission
  - punishable by 1 year or more, regardless of sentence imposed
- IJ may consider actual conduct (*Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008))
- Two CIMTs
  - at any time
  - of any grade
  - unless part of a "single scheme of criminal misconduct"
    - Caution: very narrow standard for what constitutes "single scheme"

Examples of NY offenses that are or may be a CIMT

Probable/definite CIMTs:
- Felony assault
- 120.00(1) (assault 3)
- Grand and petit larceny
- CPW 4, subsection (2) (intent to use)
- Article 130 sex offenses
- 165.71 (CD/DVD sales)

Possible CIMTs:
- 120.00(2) (assault 3)
- 275.35 (CD/DVD sales)
- CPSP (all degrees)
- VTL 511(3)(a)(i)

Controlled Substance Offenses

INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B)

- *Any* drug crime except single possessory marijuana offense ≤ 30g
- Being a "drug abuser or addict" (rarely enforced)
- Unlike CIMTs, level of offense and timing relative to admission are irrelevant to deportability (but may be relevant to relief)

Firearms offenses

INA § 237(a)(2)(D), 8 U.S.C. § 1227(a)(2)(D)

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

Crimes of domestic violence (CODV)

INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E)

- "Crime of violence":
  - Offense an element of which is the use, attempted use or threatened use of force, or a felony 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)

CODV, II: Protective Orders

- Violates that portion of an OOP "involving protection against threats of harm, stalking, or repeated harassment"
- May or may not include violation of stay-away order
- Probably includes family court adjudications ("court has found")

Crimes Against Children (CAC)

INA § 237(a)(2)(E), 8 U.S.C. § 1227(a)(2)(E)

- Crime of "child abuse, child neglect, or child abandonment"
- "[A]ny offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being .... 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

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

CODV & CAC II

- Like drugs and firearms, level and timing of offense irrelevant
- NB many of these offenses are <u>also</u> CIMTs
- Generic offenses probably are CODVs but are not CACs

Aggravated Felonies
INA § 101(a)(43)/8 U.S.C. § 1101(a)(43)

- Worst category of removable offense: cuts off most relief
- Murder, rape, kidnapping
- "Drug trafficking crime" (hypothetical federal felony)
  - Simple poss. Flunitrazepam
  - Recidivist possession
- "Crime of violence" ≥ 1 yr sent.
- Theft/burglary ≥ 1 yr
- Forgery/counterfeiting ≥ 1 yr
- Fraud > $10,000

- Need not be felony, nor aggravated
- Sexual Abuse of a Minor (possibly misdemeanors not requiring sexual conduct)
- Bail jumping on a felony
- Certain firearms offenses, esp. for undocumented immigrants
- Obstruction/perjury ≥ 1 yr
- Certain gambling offenses

Examples of NY offenses that are or may be aggravated felonies

- Burglary ↑ w/ 1 yr sentence; burg 2 and 3 may be
- Grand or petit larceny w/ 1 year sentence
- Criminal sale of a controlled substance; possession with intent to sell (220.16(1))
  - *But* maybe not criminal sale of marijuana, 221.40
  - Argument that "sale" is overbroad in NY
- Bail jumping 1 and 2 (3 if underlying crime a felony - probably)
- 260.10(1) where c/w is a minor: unsettled issue
- CPW with intent to use w/ 1 yr sentence

Criminal grounds of inadmissibility

- Does **not** always require conviction
- CIMT
  - *Except* a single CIMT if max. possible penalty is not greater than 1 yr and actual penalty ≤ 6 mos.: "Petty offense exception"
- CSO (not subject to marijuana exception)
- 2 convictions w/ aggregate sentence ≥ 5 years
- Reason to Believe Drug Trafficker
- Prostitution & Commercialized Vice

Other Consequences of Criminal Convictions

- "Good moral character" bar to naturalization
- Discretionary denial of LPR status
- Bar to Temporary Protected Status
- Bar to asylum/withholding of removal
- Inability to renew green card or travel
- Mandatory detention

Step 4: Explore Alternatives

Priorities for LPRs

- Avoid deportation grounds ("237" grounds)
- Avoid inadmissibility ("212" grounds) to preserve right to travel
- Preserve eligibility for relief
  - No AF
  - No "tolling" 212 offense within 7 years of lawful admission
  - For admissibility, no CSO
- Avoid ICE detection if already deportable
- Maintain Good Moral Character for naturalization

Priorities for non-LPRs

- Avoid deportability if currently in status
- Preserve future admissibility
- Maintain eligibility for admissibility waivers
  - No CSO
- Maintain eligibility for persecution-based relief if applicable
- Avoid ICE detection if out of status

Step 5: Mitigation of Consequences

Step 5: Mitigation Strategies

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 (CPL Article 216)
- Control allocution of potentially removable offense:
  - Avoid admissions of any conduct beyond bare elements of offense (esp. for potential CIMTs)
  - Sanitize police record
  - Loss amount strategies

Mitigation Strategies (2)

- Make a record of reliance on immigration advice at allocution (in-status clients)
- Negotiate prosecutor's sponsorship of S or U visa for cooperators/cross-complainants
- Avoid ICE detection via jail or probation
- File appeal
- Seek post-conviction relief (CPL 440)
- Avoid sex offender registry

ICE Detection of Clients

- Arrest to arraignment
- Rikers/Boat/Tombs
- Green card renewal
- Other applications: AOS, citizenship
- Return from travel abroad
- Sex offenders

Detainers

- Only <u>currently deportable</u> noncitizens are subject to detainer
  - Plead to deportable offense <u>after</u> jail time accrued, not before
- Detainer does not prevent release from DOC custody, but does mean client will be held for pickup by ICE
- Client has right to refuse ICE interview in DOC custody (Form 144)
- Never lie to ICE about citizenship

RESOURCES: Consultation

- Collect basic data
- Advise client not to travel abroad, warrant, or contact USCIS
- Have complaint & rap sheet available
- Call IDP Hotline: (212) 725-6422
  - Tues. & Thurs., 1PM to 6PM

RESOURCES: Web

- Immigrant Defense Project
  - www.immigrantdefenseproject.org
- Defending Immigrants Partnership
  - http://defendingimmigrants.org/
- National Immigration Project, NLG
  - http://www.nationalimmigrationproject.org/

RESOURCES: Print

- M. Vargas, Representing Immigrant Defendants in New York State (4th ed.)
- 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)
  - free download @ www.criminalandimmigrationlaw.com
- N. Tooby, Criminal Defense of Immigrants (4th ed.)
- N. Tooby, Safe Havens (2005)

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 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

*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.

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Immigrant Defense Project
Suggested Approaches for Representing a Noncitizen in a Criminal Case*

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* (4th ed., 2006).

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)

1. 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)).

2. If your client is a REFUGEE or PERSON GRANTED ASYLUM:

- First and foremost, 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)).

3. 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)).

*References above are to sections of our manual, *Representing Immigrant Defendants in New York* (4th ed., 2006).

See reverse ➤

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A *Defending Immigrants Partnership* Practice Advisory*
DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY*

April 6, 2010 (revised April 9, 2010)

On March 31, the Supreme Court issued its momentous Sixth Amendment right to counsel decision in *Padilla v. Kentucky*, 599 U.S. __ (2010). The Court held that, in light of the severity of deportation and the reality that immigration consequences of criminal convictions are inextricably linked to the criminal proceedings, **the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.**

Some Key *Padilla* Take-Away Points for Criminal Defense Lawyers

- **The Court found that deportation is a "particularly severe penalty" that is "intimately related" to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.**
- **Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.** In support of its decision, the Court relied on professional standards that generally require counsel to **determine citizenship/immigration status** of their clients and to **investigate and advise** a noncitizen client about the immigration consequences of alternative dispositions of the criminal case.
- **The Sixth Amendment requires affirmative, competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).** In reaching its holding, the Court expressly rejected limiting immigration-related IAC claims to cases involving misadvice. It thus made clear that a defense lawyer's silence regarding immigration consequences of a guilty plea constitutes IAC. Even where the deportation consequences of a particular plea are unclear or uncertain, a criminal defense attorney must still advise a noncitizen client regarding the possibility of adverse immigration consequences.
- **The Court endorsed "informed consideration" of deportation consequences by both the defense and the prosecution during plea-bargaining.** The Court specifically highlighted the benefits and appropriateness of the defense and the prosecution factoring immigration consequences into plea negotiations in order to craft a conviction and sentence that reduce the likelihood of deportation while promoting the interests of justice.

What is Covered in this Practice Advisory

This advisory provides initial guidance on the duty of criminal defense counsel representing an immigrant defendant after *Padilla*. The Defending Immigrants Partnership will later provide guidance on issues not covered here, including the ability to attack a *past* conviction based on ineffective assistance under *Padilla*.

I. **Summary & Key Points of the *Padilla* Decision for Defense Lawyers** (pp. 2-4)
II. **Brief Review of Select Defense Lawyer Professional Standards Cited by the Court** (pp. 4-6)
- Duty to inquire about citizenship/immigration status at initial interview stage
- Duty to investigate and advise about immigration consequences of plea alternatives
- Duty to investigate and advise about immigration consequences of sentencing alternatives

Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)
Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources)

I. Summary & Key Points of the *Padilla* Decision for Defense Lawyers

A. Summary

Background. In *Padilla v. Kentucky*, the petitioner was a lawful permanent resident immigrant who faced deportation after pleading guilty in a Kentucky court to the transportation of a large amount of marijuana in his tractor-trailer. In a post-conviction proceeding, Mr. Padilla claimed that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "did not have to worry about immigration status since he had been in the country so long." Mr. Padilla stated that he relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory.

The Kentucky Supreme Court's Ruling. The Kentucky Supreme Court denied Mr. Padilla post-conviction relief based on a holding that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction.[1]

The U.S. Supreme Court's Response. The U.S. Supreme Court disagreed with the Kentucky Supreme Court and agreed with Mr. Padilla that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Padilla*, slip op. at 2. The Court observed that "[t]he landscape of federal immigration law has changed dramatically over the last 90 years." *Id.* at 2. The Court stated:

> While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.

Id. at 2 (citations omitted).

Based on these changes, the Court concluded that "accurate legal advice for noncitizens accused of crimes has never been more important" and that "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Id.* at 6.

In Mr. Padilla's case, the Court found that the removal consequences for his conviction were clear, and that he had sufficiently alleged constitutional deficiency to satisfy the first prong of the *Strickland* test – that his representation had fallen below an "objective standard of reasonableness."[2]

The Supreme Court's Holding in *Padilla*: Sixth Amendment Requires Immigration Advice. The Court held that, for Sixth Amendment purposes, defense counsel must inform a noncitizen client whether his or her plea carries a risk of deportation. The Court stated: "Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less." *Id.* at 17.

B. Key Points For Defense Lawyers

1. **The Court found that deportation is a "particularly severe penalty" that is "intimately related" to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.**

With respect to the distinction drawn by the Kentucky Supreme Court between direct and collateral consequences of a criminal conviction, the Court noted that it has never applied such a distinction to define the

scope of the constitutionally "reasonable professional assistance" required under *Strickland v. Washington*, 466 U.S. 668 (1984). *Padilla*, slip op. at 8. It found, however, that it need not decide whether the direct/collateral distinction is appropriate in general because of the unique nature of deportation, which it classified as a "particularly severe penalty" that is "intimately related" to the criminal process. *Id.* The Court stated:

> Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. . . . Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. . . . Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.

Id. (citations omitted).

2. Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.

In assessing whether the counsel's representation in the *Padilla* case fell below the familiar *Strickland* "objective standard of reasonableness," the Court relied on prevailing professional norms, which it stated supported the view that defense counsel must advise noncitizen clients regarding the risk of deportation:

> We long have recognized that that "[p]revailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable . . . ." . . . [T]hese standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law. . . . Authorities of every stripe—including the American Bar Association, criminal defense and public defender organization, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients.

Padilla at 9-10 (citations omitted).

3. The Sixth Amendment requires affirmative and competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).

Finding that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation," *id.* at 9, the Court concluded that counsel's misadvice in the *Padilla* case fell below the familiar *Strickland* "objective standard of reasonableness." The Court further noted that "'[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence.'" *Id.* at 10 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).

The Court, though, did not stop there: it found that the Sixth Amendment requires affirmative advice regarding immigration consequences. It made this clear by rejecting the position of amicus United States that *Strickland* only applies to claims of misadvice, stating that "there is no relevant difference 'between an act of commission and an act of omission' in this context." *Id.* at 13 (citing *Strickland*, 466 U.S. at 690). The Court explained:

> A holding limited to affirmative misadvice . . . would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." . . . When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.

Id. (citations omitted).

The Court acknowledged that immigration law can be complex, and that there will be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The Court stated that, when the deportation consequences of a particular plea are unclear or uncertain, "a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 11-12. But the Court then went on to say that "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* at 12. Whether or not the consequences are clear or unclear, however, the Court made clear that the governing test is the *Strickland* test of whether counsel's representation "fell below an objective standard of reasonableness," and that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 9 (quoting *Strickland*, 466 U.S. at 688). Under those norms, "[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Id.* at 14 (citation omitted).

4. The Court endorsed "informed consideration" of deportation consequences by both the defense and the prosecution during plea-bargaining.

The Court recognized that "informed consideration" of immigration consequences are a legitimate part of the plea-bargaining process, both on the part of the defense and the prosecution. The Court stated:

> [I]nformed consideration of possible deportation can only benefit both the State and the noncitizen defendants during the plea bargaining process. . . . By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. . . . Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation . . . . At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty . . . .

Id. at 16.

II. Brief Review of Select Defense Lawyer Professional Standards Cited by the Court

In support of its holding that defense counsel's failure to inform a noncitizen client that his or her plea carries a risk of deportation constitutes ineffective assistance of counsel for Sixth Amendment purposes, the Court cited professional standards that it described as "valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Padilla*, slip op. at 9. The Court cited, among such standards, the National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Representation (1995) (hereinafter, "NLADA Guidelines"), and the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) (hereinafter, "ABA Pleas of Guilty Standards").

In order to assist defense counsel seeking guidance on how to comply with their legal and ethical duties to noncitizen defendants, this section of the Practice Advisory will highlight some of the NLADA and ABA standards recognized by the Supreme Court as reflecting the prevailing professional norms for defense lawyer representation of noncitizen clients. While these standards provide that competent defense counsel must take immigration consequences into account at all stages of the process, this section will focus in particular on defense lawyer responsibilities at the plea bargaining stage, the stage of representation at issue in the *Padilla* case.

Duty to inquire about citizenship/immigration status at initial interview stage:

Defense lawyer professional standards generally recognize that proper representation begins with a firm understanding of the client's individual situation and overall objectives, including with respect to immigration status. For example, the ABA Pleas of Guilty Standards commentary urges counsel to "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces." *Id.* cmt. at 127. It then notes that "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." *Id.*

In order to comply with a defense lawyer's professional responsibilities, counsel should determine the immigration status of *every* client at the *initial* interview. *See* NLADA Guideline 2.2(b)(2)(A). Without knowledge that the client is a noncitizen, the lawyer obviously cannot fulfill his or her responsibilities—recognized by the Supreme Court and these professional standards (see "Duty to investigate and advise about immigration consequences of plea alternatives" and "Duty to investigate and advise about immigration consequences of sentencing alternatives" below)—to advise about immigration consequences. Moreover, merely knowing that your client is a noncitizen may not be enough: while the degree of certainty of the advice may vary depending on how settled the consequences are under immigration law, it is often not possible to know whether the consequences will be certain or uncertain without knowing a client's *specific* immigration status. Thus, it is necessary to identify a client's specific status (whether lawful permanent resident, refugee or asylee, temporary visitor, undocumented, etc.) in order to ensure the ability to provide correct advice later about the immigration consequences of a particular plea/sentence. *See State v. Paredez*, 136 N.M. 533, 539 (2004) ("criminal defense attorneys are obligated to determine the immigration status of their clients").

Duty to investigate and advise about immigration consequences of plea alternatives:

At the plea bargaining stage, NLADA Guideline 6.2(a) specifies that as part of an "overall negotiation plan" prior to plea discussions, counsel should make sure the client is fully aware of not only the maximum term of imprisonment but also a number of additional possible consequences of conviction, including "deportation"; Guideline 6.3(a) requires that counsel explain to the client "the full content" of any "agreement," including "the advantages and disadvantages and potential consequences"; and Guideline 6:4(a) requires that prior to entry of the plea, counsel make certain the client "fully and completely" understands "the maximum punishment, sanctions, and other consequences" of the plea. Again, while the advice may vary depending on the certainty of the consequences, investigation based on the client's specific immigration status is necessary in order to be able to provide correct advice about the certainty of the immigration consequences of a plea.

The ABA Standards set forth similar responsibilities. ABA Pleas of Guilty Standard 14-3.2(f) provides: "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." With respect specifically to immigration consequences, the ABA emphasizes that "counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." *Id.* cmt. at 127. The commentary urges counsel to be "active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." *Id.* cmt. at 126-27.

The fact that many states[3] require court advisals regarding potential immigration consequences of a guilty plea does not obviate the need for defense counsel to investigate and advise the defendant. The ABA's commentary to ABA Pleas of Guilty Standard 14-3.2 states that the court's "inquiry is not, of course, any substitute for advice by counsel," because:

> The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

Id. See also ABA Pleas of Guilty Standard 14-3.2(f) cmt. at 126 ("[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.").

Defense counsel should be aware that prosecutors also have a responsibility to consider deportation and other so-called "collateral" consequences in plea negotiations. Prosecutors are not charged merely with the obligation to seek the maximum punishment in all cases, but with the broader obligation to "see that justice is accomplished." National District Attorneys Association, *National Prosecution Standards* § 1.1 (2d ed. 1991). Prosecutors are thus trained to take these collateral consequences into account during the course of plea bargaining. *E.g.* U.S. Dep't of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997) (in determining whether to enter into a plea agreement, "the attorney for the government should weigh *all relevant considerations*, including . . . [t]he probable sentence *or other consequences* if the defendant is convicted") (emphasis added). These prosecutor responsibilities can be cited whenever a prosecutor claims that he or she cannot consider immigration consequences because to do so would give an unfair advantage to noncitizen defendants.

<u>Duty to investigate and advise about immigration consequences of sentencing alternatives:</u>

At the sentencing stage, NLADA Guideline 8.2(b) requires that counsel be "familiar with direct and collateral consequences of the sentence and judgment, including . . . deportation"; and *id.* 8.3(a) requires the client be informed of "the likely and possible consequences of sentencing alternatives." For example, some immigration consequences are triggered by the length of any prison sentence. In some cases, a variation in prison sentence of one day can make a huge difference in the immigration consequences triggered. *See, e.g.*, 8 U.S.C. 1101(a)(43) (prison sentence of one year for theft offense results in "aggravated felony" mandatory deportation for many noncitizens; 364-day sentence may avoid deportability or preserve relief from deportation).

For resources for defense lawyers on the immigration consequences of criminal cases, see attached Appendices:

Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)

Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources for defense lawyers)

ENDNOTES:

* This advisory was authored by Manuel D. Vargas of the Immigrant Defense Project for the Defending Immigrants Partnership with the input and collaboration of the Immigrant Legal Resource Center, the National Immigration Project of the National Lawyers Guild, and the Washington Defender Association's Immigration Project.

[1] Over the years, a number of courts have dismissed ineffective assistance of counsel claims based on failure to give advice on immigration consequences under the "collateral consequences" rule. *See, e.g., People v. Ford*, 86 N.Y.2d 397 (1995). Other courts — particularly since the harsh immigration law amendments of 1996 — have rejected this rule. *See, e.g., State v. Nunez-Valdez*, 200 N.J. 129, 138 (2009) ("[T]he traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here.").

[2] The Court remanded Mr. Padilla's case to the Kentucky courts for further proceedings on whether he can satisfy *Strickland*'s second prong—prejudice as a result of his constitutionally deficient counsel.

[3] Thirty jurisdictions including the District of Columbia and Puerto Rico have statutes, rules, or standard plea forms that require a defendant to receive notice of potential immigration consequences before the court will accept his guilty plea.

Appendix A

Immigrant Defense Project
Immigration Consequences of Convictions Summary Checklist*

GROUNDS OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)

Aggravated Felony Conviction

- *Consequences* (in addition to deportability):
  - Ineligibility for most waivers of removal
  - Ineligibility for voluntary departure
  - Permanent inadmissibility after removal
  - Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal
- *Crimes covered* (possibly even if not a felony):
  - Murder
  - Rape
  - Sexual Abuse of a Minor
  - Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam)
  - Firearm Trafficking
  - Crime of Violence + 1 year sentence**
  - Theft or Burglary + 1 year sentence**
  - Fraud or tax evasion + loss to victim(s) > $10,000
  - Prostitution business offenses
  - Commercial bribery, counterfeiting, or forgery + 1 year sentence**
  - Obstruction of justice or perjury + 1 year sentence**
  - Certain bail-jumping offenses
  - Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)
  - Attempt or conspiracy to commit any of the above

Controlled Substance Conviction

- EXCEPT a single offense of simple possession of 30g or less of marijuana

Crime Involving Moral Turpitude (CIMT) Conviction

- For crimes included, see Grounds of Inadmissibility
- One CIMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor)
- Two CIMTs committed at any time "not arising out of a single scheme"

Firearm or Destructive Device Conviction

Domestic Violence Conviction or other domestic offenses, including:

- Crime of Domestic Violence
- Stalking
- Child abuse, neglect or abandonment
- Violation of order of protection (criminal or civil)

GROUNDS OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)

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

- No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)

Conviction or *admitted commission* of a **Crime Involving Moral Turpitude** (CIMT)

- Crimes in this category cover 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 (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months

Prostitution and Commercialized Vice

Conviction of **2 or more offenses** of any type + **aggregate prison sentence of 5 years**

INELIGIBILITY FOR US CITIZENSHIP

Conviction or admission of the following crimes bars a finding of good moral character 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 is 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

Aggravated felony conviction on or after Nov. 29, 1990 (and murder conviction at any time) *permanently* bars a finding of moral character and thus citizenship eligibility

CONVICTION DEFINED

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 disposition without a guilty plea (e.g., NY ACD) is NOT a conviction
- A youthful offender adjudication (e.g., NY YO) is NOT a conviction

INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL

- Aggravated felony conviction
- Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States

INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL

"Particularly serious crimes" make noncitizens ineligible for asylum and withholding. They include:

- Aggravated felonies
  - All will bar asylum
  - Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding
  - Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding
- Other serious crimes—no statutory definition (for sample case law determination, see Appendix F)

*For the most up-to-date version of this checklist, please visit us at http://www.immigrantdefenseproject.org.

See reverse ➤

**The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.]

[12/06]

Immigrant Defense Project
Suggested Approaches for Representing a Noncitizen in a Criminal Case*

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 Noncitizen Criminal Defendants in New York* (4th ed., 2006).

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)

1. 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)).

2. If your client is a REFUGEE or PERSON GRANTED ASYLUM:

- ➢ First and foremost, 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 a special 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)).

3. 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 (**TPS**) 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)).

*References above are to sections of our manual.

See reverse ➤

Appendix B – Resources for Criminal Defense Lawyers

This Appendix lists and describes some of the resources available to assist defense lawyers in complying with their ethical duties to investigate and give correct advice on the immigration consequences of criminal convictions. This section will cover the following resources:

1. Protocol "how-to" guide for public defense offices seeking to develop an in-house immigrant service plan;
2. Outside expert training and consultation services available to other defense provider offices and attorneys;
3. National books and practice aids;
4. Federal system, regional, or state-specific resources.

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1. Protocol "how-to" guide for public defense offices seeking to develop an in-house immigrant service plan

Many public defender organizations have established immigrant service plans in order to comply with their professional responsibilities towards their non-citizen defendant clients. Some defender offices maintain in-house immigration expertise with attorneys on staff trained as immigration experts. For example, The Legal Aid Society of the City of New York, which oversees public defender services in four of New York City's five boroughs, has an immigration unit that counsels attorneys in the organization's criminal division. Other public defender organizations consult with outside experts. For example, several county public defender offices in California contract with the Immigrant Legal Resource Center to provide expert assistance to public defenders in their county offices. Other public defender organizations have found yet other ways to address this need.

For guidance on how a public defender office can get started implementing an immigration service plan, and how an office with limited resources can phase in such a plan under realistic financial constraints, defender offices may refer to *Protocol for the Development of a Public Defender Immigration Service Plan* (May 2009), written by Cardozo Law School Assistant Clinical Law Professor Peter L. Markowitz and published by the Immigrant Defense Project (IDP) and the New York State Defenders Association (NYSDA). (*This is available at http://www.immigrantdefenseproject.org/webPages/crimJustice.htm*).

This publication surveys the various approaches that defender organizations have taken, discusses considerations distinguishing those approaches, provides contact information for key people in each organization surveyed to consult with on the different approaches adopted, and includes the following appendices:

- Sample immigration consultation referral form
- Sample pre-plea advisal and advocacy documents
- Sample post-plea advisal and advocacy letters
- Sample criminal-immigration practice updates
- Sample follow-up immigration interview sheet
- Sample new attorney training outline
- Sample language access policy

2. Outside expert training and consultation services available to other defense provider offices and attorneys

For those criminal defense offices and individual practitioners who do not have access to in-house immigration experts, a wide array of organizations and networks has emerged in the past two decades to provide training and immigration assistance to public and private criminal defense attorneys regarding the immigration consequences of criminal convictions.

Some of the principal national immigration organizations with expertise on criminal/immigration issues (see organizations listed below) have worked together along with the National Legal Aid and Defender Association in a collaboration called the **Defending Immigrants Partnership** *(www.defendingimmigrants.org)*, which coordinates on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent non-citizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions.

In addition to its national-level coordination activities, the Partnership offers many other services. For example, the Partnership coordinates and participates in trainings at both the national and the regional levels — including, since 2002, some 220 training sessions for about 10,500 people. In addition, the Partnership provides free resources directly to criminal defense attorneys through its website at www.defendingimmigrants.org. That website contains an extensive resource library of materials, including a free national training manual for the representation of non-citizen criminal defendants, *see* Defending Immigrants Partnership, *Representing Noncitizen Defendants: A National Guide* (2008), as well as jurisdiction-specific guides for Arizona, California, Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, New Mexico, North Carolina, Oregon, Texas, Vermont, Virginia, and Washington. The website also contains various quick-reference guides, charts, and outlines, national training powerpoint presentations, several taped webcastings, a list of upcoming trainings, and relevant news items and reports. **Website: www.defendingimmigrants.org.**

- DIP partner **Immigrant Defense Project** (IDP) is a New York-based immigrant advocacy organization that provides criminal defense lawyers with training, legal support and guidance on criminal/immigration law issues, including a free nationally-available hotline. IDP also has trained dozens of in-house immigrant defense experts at local defender organizations in New York, New Jersey, Pennsylvania, and other states. In addition, IDP maintains an extensive series of publications aimed at criminal defense practitioners. For example, visitors to the IDP's online resource page can find a free two-page reference guide summarizing criminal offenses with immigration consequences (see Appendix A attached). The IDP website also contains free publications focusing on other aspects of immigration law relevant to criminal defenders, such as aggravated felony and other crime-related immigration relief bars. In addition, IDP publishes a treatise aimed specifically at New York practitioners, *Representing Immigrant Defendants in New York* (4th ed. 2006). **Telephone: 212-725-6422. Website: www.immigrantdefenseproject.org.**
- DIP partner **Immigrant Legal Resource Center** (ILRC) is a San Francisco-based immigrant advocacy organization that provides legal trainings, educational materials, and a nationwide service called "Attorney of the Day" that offers consultations on immigration law to attorneys, non-profit organizations, criminal defenders, and others assisting immigrants, including consultation on the immigration consequences of criminal convictions. ILRC's consultation services are available for a fee (reduced for public defenders), which can be in the form of an hourly rate or via an ongoing contract. ILRC provides in house trainings for California public defender offices, and many offices contract with the ILRC to answer their questions on the immigration consequences of crimes. ILRC also provides immigration technical assistance on California Public Defender Association's statewide listserve, with about 5000 members, and maintains its own list serve of over 50 in-house immigration experts in defender offices throughout California to provide ongoing support, updates, and technical assistance. In addition, ILRC provides support to in-house experts in Arizona, Nevada, and Oregon. ILRC writes criminal immigration related practice advisories and reference guides for defenders which are posted on its website and widely disseminated, and is the author of a widely-used treatise for defense attorneys, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2009). **Telephone: 415-255-9499. Website: www.ilrc.org.**

- DIP partner **National Immigration Project** of the National Lawyers Guild (NIP/NLG) is a national immigrant advocacy membership organization with offices in Boston, Massachusetts that provides many types of assistance to criminal defense practitioners, including direct technical assistance to practitioners who need advice with respect to a particular case. These services are available free of charge and may be used by practitioners anywhere in the nation. NIP/NLG also provide trainings in the form of CLE seminars for defense lawyers, and is also responsible for publishing *Immigration Law and Crimes* (2009), the leading treatise on the relationship between immigration law and the criminal justice system, which is updated twice yearly and is also available on Westlaw. **Telephone: 617-227-9727. Website: www.nationalimmigrationproject.org.**

For other organizations and networks that provide training and consultation services in specific states or regions of the country, see section (4) below entitled "Federal System, Regional, or State-Specific Resources."

3. National Books and Practice Aids

- ***Immigration Consequences of Convictions Checklist*** (Immigrant Defense Project, 2008), 2-page summary, attached to this practice advisory, that many criminal defenders find useful as an in-court quick reference guide to spot problems requiring further investigation.
- ***Representing Noncitizen Criminal Defendants: A National Guide*** (Defending Immigrants Partnership, 2008), available for free downloading at http://defendingimmigrationlaw.com.
- ***Aggravated Felonies: Instant Access to All Cases Defining Aggravated Felonies*** (2006), by Norton Tooby & Joseph J. Rollin, available for order at http://criminalandimmigrationlaw.com.
- ***Criminal Defense of Immigrants*** (4th ed., 2007, updated monthly online), by Norton Tooby & Joseph J. Rollin, available for order at http://www.criminalandimmigrationlaw.com.
- ***The Criminal Lawyer's Guide to Immigration Law: Questions and Answers*** (American Bar Association, 2001), by Robert James McWhirter, available for order at http://www.abanet.org.
- ***Immigration Consequences of Criminal Activity*** (4th ed., 2009), by Mary E. Kramer, available for order at http://www.ailapubs.org.
- ***Immigration Consequences of Criminal Convictions***, by Tova Indritz and Jorge Baron, in ***Cultural Issues in Criminal Defense*** (Linda Friedman Ramirez ed., 2d ed., 2007), available for order at http://www.jurispub.com.
- ***Immigration Law and Crimes*** (2009), by Dan Kesselbrenner and Lory Rosenberg, available for order at: http://west.thompson.com.
- ***Practice Advisory: Recent Developments on the Categorical Approach: Tips for Criminal Defense Lawyers*** (2009), by Isaac Wheeler and Heidi Altman, available for free downloading at http://www.immigrantdefenseproject.org/webPages/practiceTips.htm.
- ***Safe Havens: How to Identify and Construct Non-Deportable Offenses*** (2005), by Norton Tooby & Joseph J. Rollin, available for order at http://www.criminalandimmigrationlaw.com.
- ***Tips on How to Work With an Immigration Lawyer to Best Protect Your Non-Citizen Defendant Client*** (2004), by Manuel D. Vargas, available for free downloading at http://www.immigrantdefenseproject.org/webPages/crimJustice.htm.
- ***Tooby's Crimes of Moral Turpitude: The Complete Guide*** (2008), by Norton Tooby, Jennifer Foster, & Joseph J. Rollin, available for order at http://www.criminalandimmigrationlaw.com.
- ***Tooby's Guide to Criminal Immigration Law: How Criminal and Immigration Counsel Can Work Together to Protect Immigration Status in Criminal Cases*** (2008), by Norton Tooby, available for free downloading at http://www.criminalandimmigrationlaw.com.

4. Federal system, regional, or state-specific resources

Federal System:

- Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (National Immigration Project, 2010), available at www.defendingimmigrants.org.

Regional resources:

Ninth Circuit Court of Appeals region

- Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration)* (2009), available at www.ilrc.org.

Seventh Circuit Court of Appeals region

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.

State-Specific Resources:

Arizona

- In 2007, the Arizona Defending Immigrants Partnership was launched to provide information and written resources to Arizona criminal defense attorneys on the immigration consequences of criminal convictions. Housed at the Florence Immigrant and Refugee Rights Project (FIRRP) and funded by the Arizona Foundation for Legal Services and Education, the partnership is run by Legal Director Kara Hartzler, who provides support, individual consultations, and training to Arizona criminal defense attorneys and other key court officials in their representation of noncitizens. Telephone: (520) 868-0191.
- Kathy Brady, Kara Hartzler, *et al.*, *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (2009), available at www.ilrc.org and www.defendingimmigrants.org.
- Kara Hartzler, *Immigration Consequences of Your Client's Criminal Case* (2008), Powerpoint presentation available at www.defendingimmigrants.org.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration)* (2009), available at www.ilrc.org.

California

- The ILRC coordinates the California Defending Immigrants Partnership to provide public defenders in California with the critical resources and training they need on the immigration consequences of crimes. In particular, the ILRC provides mentorship of in-house experts in defender offices across the state, coordination and monitoring of a statewide interactive listserv of in-house defender experts, technical assistance on immigration related questions posted on California Public Defender Association's Claranet statewide listserve, ongoing training of county public defender offices, and written resources. The ILRC also provides technical assistance to several county defender offices by contract. A comprehensive list and description of these and other criminal immigration law resources for criminal defenders in California is provided at www.ilrc.org.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration)* (2009), available at www.ilrc.org.
- Katherine Brady, *Quick Reference Chart to Determining Selected Immigration Consequences to Select*

California Offenses (2010), available at www.ilrc.org.

- Katherine Brady, *Effect of Selected Drug Pleas After Lopez* v. *Gonzales*, a quick reference chart on the immigration consequences of drug pleas for criminal defenders in the Ninth Circuit (2007), available at www.ilrc.org.
- *Immigration Criminal Law Resources for California Criminal Defenders*, available at www.ilrc.org.
- *Tooby's California Post-Conviction Relief for Immigrants* (2009), available for order at http://www.criminalandimmigrationlaw.com.
- The Immigrant Rights Clinic at the University of California at Davis Law School provides limited, but free consultation to public defender offices that have limited immigration related resources. Contact Raha Jorjani at rjorjani@ucdavis.edu.
- In Los Angeles, the office of the Los Angeles Public Defender offers free consultation through Deputy Public Defender Graciela Martinez. She also regularly presents trainings on this issue to indigent defenders and works with in-house defender experts in the Southern California region. She can be reached at gmartinez@pubdef.lacounty.gov.

Colorado

- Hans Meyer, *Plea & Sentencing Strategy Sheets for Colorado Felony Offenses & Misdemeanor Offenses* (Colo. State Public Defender 2009). Contact Hans Meyer at hans@coloradoimmigrant.org.

Connecticut

- Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2007), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.
- Elisa L. Villa, *Immigration Issues in State Criminal Court: Effectively Dealing with Judges, Prosecutors, and Others* (Conn. Bar Inst., Inc., 2007).

District of Columbia

- Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Def. Serv., 2008).

Florida

- *Quick Reference Guide to the Basic Immigration Consequences of Select Florida Crimes* (Fla. Imm. Advocacy Ctr. 2003), available at www.defendingimmigrants.org.

Illinois

- The Heartland Alliance's National Immigrant Justice Center (NIJC) offers no-cost trainings and consultation to criminal defense attorneys representing non-citizens, and also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings.
- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Selected Immigration Consequences of Certain Illinois Offenses* (National Immigration Project, 2003), available at www.defendingimmigrants.org.

Indiana

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Immigration Consequences of Criminal Convictions* (Indiana Public Defender Council, 2007), available at http://www.in.gov/ipdc/general/manuals.html.

Iowa

- Tom Goodman, *Immigration Consequences of Iowa Criminal Convictions Reference Chart.*

Maryland

- *Abbreviated Chart for Criminal Defense Practitioners of the Immigration Consequences of Criminal Convictions Under Maryland State Law* (Maryland Office of the Public Defender & University of Maryland School of Law Clinical Office, 2008).

Massachusetts

- Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (National Immigration Project, 2006), available at www.defendingimmigrants.org.
- Wendy Wayne, *Five Things You Must Know When Representing Immigrant Clients* (2008).

Michigan

- David Koelsch, *Immigration Consequences of Criminal Convictions (Michigan Offenses)*, U. Det. Mercy School of Law (2008), available at http://www.michiganlegalaid.org.

Minnesota

- Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999).

Nevada

- The ILRC and University of Nevada, Las Vegas Thomas & Mack Legal Clinic, William S. Boyd School of Law (UNLV) provide written resources, training, limited consultation, and support of in-house defender experts in Nevada public defense offices.
- The ILRC and UNLV are finalizing in 2010 portions of *Immigration Consequences of Crime: A Guide to Representing Non-Citizen Criminal Defendants in Nevada*, including a practice advisory on the immigration consequences and defense arguments to pleas to Nevada sexual offenses and the immigration consequences of Nevada drug offenses. They will be posted at www.ilrc.org and www.defendingimmigrants.org.

New Jersey

- The IDP, Legal Services of New Jersey, Rutgers Law School-Camden and the Camden Center for Social Justice collaborate with the New Jersey Office of Public Defender to provide written resources, trainings and consultations to New Jersey criminal defense lawyers who represent non-citizens.
- Joanne Gottesman, *Quick Reference Chart for Determining the Immigration Consequences of Selected New Jersey Criminal Offenses* (2008), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

New Mexico

- The New Mexico Criminal Defense Lawyers Association (NMCDLA) assists defenders in that state concerning immigration issues and has presented several continuing legal education programs in various locations of the state on the immigration consequences of criminal convictions and the duty of criminal defense lawyers when the client is not a U.S. citizen. NMCDLA regularly publishes a newsletter in which one ongoing column in each issue is dedicated to immigration consequences.
- Jacqueline Cooper, *Reference Chart for Determining Immigration Consequences of Selected New Mexico Criminal Offenses*, New Mexico Criminal Defense Lawyers Association (July 2005), available at www.defendingimmigrants.org.

New York

- The IDP and the New York State Defenders Association Criminal Defense Immigration Project collaborate with New York City indigent criminal defense service providers and upstate New York public defender offices to provide written resources, trainings and consultations to New York criminal defense lawyers who represent non-citizens. Additional information on IDP's services and written resources is available at www.immigrantdefenseproject.org.
- Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4th ed. 2006), available at www.immigrantdefenseproject.org.
- *Quick Reference Chart for New York Offenses* (Immigrant Defense Project, 2006), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

North Carolina

- Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* (Office of Indigent Defense Services, 2008).

Oregon

- Steve Manning, *Wikipedia Practice Advisories on the Immigration Consequences of Oregon Criminal Offenses* (Oregon Chapter of American Immigration Lawyers Association and Oregon Criminal Defense Lawyers Association, 2009), available at http://www.ailaoregon.com.

Pennsylvania

- *A Brief Guide to Representing Noncitizen Criminal Defendants in Pennsylvania*, (Defender Association of Philadelphia, 2010), soon to be available at www.immigrantdefenseproject.org.

Tennessee

- Michael C. Holley, *Guide to the Basic Immigration Consequences of Select Tennessee Offenses* (2008).
- Michael C. Holley, *Immigration Consequences: How to Advise Your Client* (Tennessee Association of Criminal Defense Law).

Texas

- *Immigration Consequences of Selected Texas Offenses: A Quick Reference Chart* (2004-2006), available at www.defendingimmigrants.org.

Vermont

- Rebecca Turner, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Vermont* (2005)
- Rebecca Turner, *Immigration Consequences of Select Vermont Criminal Offenses Reference Chart* (2006), available at www.defendingimmigrants.org.

Virginia

- Mary Holper, *Reference Guide and Chart for Immigration Consequences of Select Virginia Criminal Offenses* (2007), available at www.defendingimmigrants.org.

Washington

- The Washington Defender Organization (WDA) Immigration Project provides written resources and offers case-by-case technical assistance and ongoing training and education to criminal defenders, prosecutors, judges and other entities within the criminal justice system. Go to: www.defensenet.org/immigration-project

- Ann Benson and Jonathan Moore, *Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses* (Washington Defender Association's Immigration Project, 2009), available at www.defendingimmigrants.org and http://www.defensenet.org/immigration-project/immigration-resources.
- *Representing Immigrant Defendants: A Quick Reference Guide to Key Concepts and Strategies* (WDA Immigration Project, 2008), available at http://www.defensenet.org/immigration-project/immigration-resources.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

Wisconsin

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- Wisconsin State Public Defender, Quick Reference Chart – Immigration Consequences of Select Wisconsin Criminal Statutes.

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PRACTICE ADVISORY:

A *Defending Immigrants Partnership* Practice Advisory:
Retroactive Applicability of *Padilla v. Kentucky*

June 24, 2010

By Dan Kesselbrenner[1]

I. Overview

In *Padilla v. Kentucky*,[2] the Supreme Court held that criminal defense counsel's failure to advise about immigration consequences falls below accepted professional norms. This practice advisory addresses whether a person who files for post-conviction relief after the Supreme Court's decision in *Padilla* can benefit from the Court's decision. The advisory concludes that *Padilla* governs petitions for post-conviction relief that were pending before the Court's decision and those filed after the Court's decision.

The advisory begins by discussing general principles regarding the retroactive applicability of Supreme Court decisions to post-conviction relief and explaining why *Padilla* does not create a new rule of criminal constitutional law. Next, it addresses how *Padilla* applies to post-conviction relief for federal convictions. Then, the advisory discusses how *Padilla* apples to post-conviction relief for state convictions. Finally, it raises certain strategic concerns and suggests arguments for addressing them.

The advisory assumes general familiarity with the Court's decision in *Padilla*. For those seeking more general information about the *Padilla* decision or a list of helpful resources, please see earlier advisories prepared by the Defending Immigrants Partnership.[3] A detailed discussion of eligibility requirements and procedural default rules governing habeas proceedings also is beyond the scope of this advisory.

II. Retroactivity Principles

A. General Rules

When deciding requests for post-conviction relief, courts generally look to the law that existed when a case became final on direct appeal because the post-conviction petition is

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[1] Dan Kesselbrenner, of the National Immigration Project of the National Lawyers Guild, wrote this advisory for the Defending Immigrants Partnership. The author thanks Nancy Morawetz, of New York University Law School, Norton Tooby, of the Law Offices of Norton Tooby, Benita Jain and Manuel D. Vargas, of the Immigrant Defense Project, and Trina Realmuto, of the National Immigration Project/NLG, for their invaluable assistance.

[2] 130 S.Ct. 1473 (2010).

[3] A *Defending Immigrants Partnership* Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant after *Padilla v. Kentucky*, April 6, 2010 (revised April 9, 2010). Please go to http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf to download a copy.

deciding whether the decision was unfair when initially rendered.[4] If a Supreme Court case creates a new criminal rule after a petitioner's case became final, then the default will be that a petitioner for post-conviction relief cannot benefit from the new rule because it was not the law when the decision became final.

Not all new Supreme Court decisions that expand legal rights of a criminal defendant create new rules, however. If a new Supreme Court case merely applies an existing rule to a different set of facts, then it does not create a new rule, but merely applies correctly the law that existed when a person's case became final.[5] *Padilla* is an example of such a case. And, a Supreme Court decision applying an old rule applies to post-conviction review <u>and</u> cases on direct appeal.[6]

B. Case Law Strongly Suggests that *Padilla* Does Not Create a New Rule

The Supreme Court defines a "new rule" as one that was not dictated by precedent that existed when the defendant's conviction became final.[7] The Supreme Court's decision in *Strickland v. Washington*[8] is the default rule for ineffective assistance of counsel claims.

In his opinion concurring in the judgment in *Wright v. West*,[9] Justice Kennedy observed:

> If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

In *Williams v. Taylor*,[10] the Court held that applying *Strickland* to a particular set of facts did not constitute a new rule because *Strickland* is the general test governing ineffectiveness assistance claims. A recent New York State decision relied on *Williams* to hold that *Padilla* could be applied retroactively.[11]

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4 *Teague v. Lane*, 489 U.S. 288 (1989).

5 *Williams v. Taylor*, 529 U.S. 362, 390-91(2000).

6 *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

7 *Whorton v. Bockting*, 549 U.S. 406, 416 (2007); *Saffle v Parks*, 494 U.S. 484, 488 (1990); *Teague v. Lane*, 489 U.S. 288, 301 (1989).

8 *Strickland v. Washington*, 466 U.S. 668 (1984).

9 *Wright v. West*, 505 U.S. 277, 301 (1992) (Kennedy, J, concurring in judgment).

10 529 U.S. 362, 390-91 (2000).

11 *People v. Bennett*, --- Misc.3d ----, 2010 WL 2089266 (Crim Ct, Bx Cty 2010).

The Supreme Court has repeatedly applied the two-part test in *Strickland* for purposes of determining what is "clearly settled" Supreme Court law for purposes of 28 U.S.C. § 2254(d)(1), which provides the standard for granting habeas review.[12]

C. The Language in *Padilla* Strongly Suggests that the Decision Does Not Create a New Criminal Rule

The Court in *Padilla* goes to great pains to advise that its decision will not "open the floodgates" to a significant number of new post-conviction petitions.[13] This extensive discussion would not make sense if *Padilla* only applied prospectively. In addition, it appears the Court is treating *Padilla* as another application of *Strickland* when it discusses "the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage."[14] Moreover, the Court's statement that "[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains" also seems to contemplate a retroactive application of the Court's decision.[15] Finally, the Court's discussion of the relationship between *Hill v. Lockhart*[16] and *Strickland* reinforces the position that the Court is not articulating a new rule in *Padilla*.[17] In following its approach in not treating applications of *Strickland* as a new rule, the *Padilla* Court does everything short of saying that the decision does not create a new rule.

D. Supreme Court Precedent Explains Why Lower Courts Must Apply *Padilla* Retroactively

The government in opposing post-conviction relief may attempt to attach significance to the *Padilla* Court's failure to make an explicit retroactivity holding. Court precedent in post-conviction cases provides a powerful rejoinder.

An explicit holding of retroactivity by the Supreme Court has specific meaning in federal habeas review of a state conviction. For example, in determining whether a petitioner can file a second or successive habeas petition under 28 U.S.C. § 2254(b)(2)(A) the Court required that for a decision to apply retroactively, it must be an express holding of retroactivity that cannot be dictum, which must happen in another person's case on collateral review.[18] Under the Court's governing test, it could not have held that the Padilla decision was retroactive. According to the Court:

> The Supreme Court does not "ma[k]e" a rule retroactive when it merely establishes principles of retroactivity and leaves the

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12 *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1419 (2009); *Schriro v. Landrigan*, 550 U.S. 465, 478 (2007).

13 *Padilla v. Kentucky*, 130 S.Ct. 1473, 1485 (2010).

14 *Ibid.*

15 *Ibid.*

16 474 U.S. 52 (1985).

17 *Padilla v. Kentucky*, 130 S.Ct. 1473, 1485 n.12 (2010),

18 *Tyler v. Cain*, 533 U.S. 656, 663 (2001). It may be that the Court in the future applies Padilla retroactively to a second or successive habeas petition, but that will have to wait for another day.

> application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court.[19]

Thus, the Court distinguishes between making an explicit holding of retroactivity that would permit a future petitioner to file a second or successive habeas petition challenging an underlying state conviction on the one hand, and articulating principles of retroactivity on the other. When, as in *Padilla*, the Court invokes language suggesting retroactivity, it is consciously avoiding an explicit determination and expressly intending for lower courts to apply those retroactivity principles.

E. If *Padilla* Creates a New Rule of Criminal Procedure, it is Arguably a Watershed Decision

The government is arguing in post-conviction cases that *Padilla* creates a new constitutional rule. The lead case governing when a new criminal constitutional rule applies retroactively is *Teague v. Lane.*[20] Under *Teague*, new constitutional rules are not retroactive unless they are substantive rules or created pursuant to a watershed decision. If *Padilla* were to create a new criminal rule, it would not apply retroactively to a collateral post-conviction challenge unless *Padilla* was a "substantive rule"[21] or it was "a watershed case."[22]

An example of a substantive rule is *Lawrence v. Texas,*[23] which held that it was unconstitutional to make same-sex lovemaking criminal.[24] There is no meaningful argument that a court would treat the *Padilla* decision as a substantive rule because the decision does not narrow what a particular criminal statute proscribes.

The test for what constitutes a "watershed decision" is high. In the course of holding that a case is not a watershed decision, the Court has identified only *Gideon v. Wainwright*[25], as an example of a "watershed case."[26] This may be a difficult argument however. If *Crawford v. Washington,*[27] which dramatically expands the right to confrontation under the Sixth

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[19] Ibid.

[20] 489 U.S. 288 (1989).

[21] A substantive rule is one that holds that a statute improperly makes conduct criminal. *Teague v. Lane*, 489 U.S. 289, 301 (1989); *United States v. Bousley,* 523 U.S. 614, 620 (1998).

[22] *See, e.g., Whorton v. Bockting*, 549 U.S. 406, 419 (2006); *Schiro v. Summerlin*, 542 U.S. 348 (2004); *Beard v. Banks*, 542 U.S. 406, 417 (2004).

[23] 539 U.S. 558 (2003).

[24] 539 U.S. 558, 578 (2003).

[25] 372 U.S. 335 (1963).

[26] *Whorton v. Bockting*, 549 U.S. 406, 419 (2006) (rejecting retroactivity of new rule set forth in *Crawford v. Washington,* 541 U. S. 36 (2004) expanding Sixth Amendment right to confront witnesses); *Schiro v. Summerlin*, 542 U.S. 348 (2004) (rejecting retroactivity of *Ring v. Arizona*, 546 U.S. 584 (2002) that prevented trial judge from imposing death penalty, which is a question for jury); *Beard v. Banks*, 542 U.S. 406, 409 (2004) (rejecting retroactivity new rule articulated in *Mills v. Maryland*, 486 U.S. 367 (1988) relating to mitigating evidence in capital case).

[27] 541 U.S. 36 (2004).

Amendment, and *Batson v. Kentucky*,[28] which protects a defendant against prosecution bias in jury selection, do not constitute watershed decisions, it may be difficult for a court to find that *Padilla* is a watershed decision as the Supreme Court uses that term. Nevertheless, given the nature of the decision, it is an alternative argument that counsel should consider. That said, *Padilla* arguably applies retroactively because it is not a <u>new</u> criminal constitutional rule.

III. Post-Conviction Relief for Federal Convictions

A. Federal Habeas Corpus

Congress confers habeas corpus jurisdiction pursuant to 28 U.S.C. § 2255 for a person to challenge the constitutionality of her or his federal conviction. Habeas relief under this section is available for one year after the conviction becomes final. A person who is still in custody, but who did not file a timely habeas petition, may still may have a coram nobis remedy under 28 U.S.C. § 1651, the All-Writs Act. A petition for a writ of coram nobis does not have a filing deadline.[29] Whether a petitioner is eligible for federal habeas corpus relief is properly the subject of a multi-volume treatise, and certainly beyond the scope of this advisory.[30] Subject to satisfying the timing and other requirements for the writ, a person in federal custody may be eligible obtain a writ of habeas corpus to challenge a federal conviction where counsel failed to advise the petitioner about immigration consequences.

B. Federal Coram Nobis

Similarly, coram nobis may be available to challenge federal convictions in the wake of the *Padilla* decision. At common law, the writ of coram nobis existed to correct errors of fact or to make technical corrections in a judgment.[31] The modern version of this writ is broader than at common law.[32] Now, the writ of coram nobis is limited to "extraordinary" cases that present compelling circumstances "to achieve justice" where no other remedies are available."[33] According to the Supreme Court, a coram nobis petition is not a new proceeding, but an extension of the original proceeding for which 28 U.S.C. § 1651, the All-Writs Act, provides jurisdiction to an Article I or Article III court to correct an earlier legal or factual error.[34] United States district courts, circuit courts of appeal, and the Supreme Court are all Article III courts.

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28 476 U.S. 79 (1989).

29 *United States v. Denedo*, 129 S.Ct. 2213 (2009);

30 *See, e.g*, Leibman and Hertz, Federal Habeas Corpus Practice and Procedure 5th Ed.

31 *United States v. Morgan*, 346 U.S. 502, 507 (1954).

32 *United States v. Denedo*, 129 S.Ct. 2213 (2009).

33 *United States v. Morgan*, 346 U.S. 502, 510-11 (1954).

34 *United States v. Morgan*, 346 U.S. 502 (1954) (recognizing Article III court jurisdiction to consider coram nobis to correct deprivation of counsel in violation of Sixth Amendment); *United States v. Denedo*, 129 S.Ct. 2213 (2009) (recognizing Article I court jurisdiction to consider coram nobis petition to correct failure to advise about immigration consequences where court assumed violation of Sixth Amendment for purposes of resolving question before it).

In *United States v. Denedo,*[35] a veteran of the U.S Armed Forces filed a coram nobis petition after DHS initiated removal proceedings against him for a court-martial conviction that had been final for eight years. At the time the petitioner sought a writ of coram nobis, he was neither still serving in the military nor in custody. The Court assumed for purposes of deciding the jurisdictional question presented that defense counsel's representation was ineffective. A practitioner seeking relief for a noncitizen ineligible under 28 U.S.C. § 2255 because custody has expired should investigate whether coram nobis relief is a possible vehicle to obtain a remedy for defense counsel's failure to advise about immigration consequences. Where the petitioner is still in actual or constructive custody (i.e., on supervised release), coram nobis is unavailable until custody has expired.[36]

IV. State Post-Conviction Remedies

States have various collateral mechanisms to allow a person to challenge a constitutionally defective plea. Eligibility for state post-conviction relief under the various state procedures is beyond the scope of this advisory. Fortunately, a resource already exists that addresses state post-conviction remedies in a variety of state jurisdictions.[37]

Habeas corpus review generally requires that the petitioner is in custody.[38] There are both court-created and statutory bars to pursuing collateral challenges. An individual who is no longer serving a sentence, and is no longer on parole or probation still may have a remedy under state law even though she or he is not in custody. This means that whether an individual noncitizen qualifies for state post-conviction relief will depend on the post-conviction law of the state of conviction. If a suitable vehicle exists, however, a practitioner can use the arguments in this advisory to obtain post conviction relief on the merits for someone who has a remedy under *Padilla.*

A state court defendant may raise a constitutional challenge to her or his conviction by filing for habeas review in state court and then in a federal district court pursuant to 28 U.S.C. § 2254. Unfortunately, Congress has provided a variety of obstacles to such federal challenges.[39] In general, a federal court will not conduct habeas review of the state offense if the petitioner did not first seek review of the issue on direct appeal.[40]

V. Strategic Concerns

A. General Standards Under *Strickland v. Washington*

In *Strickland v. Washington,* 466 U.S. 668 (1984), the Supreme Court created a two-prong test to determine whether a person could vacate a conviction for ineffective assistance of

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35 129 S.Ct. 2213 (2009).

36 *United States v. Morgan,* 346 U.S., 502, 503, 511-12 (1954).

37 See D. Wilkes, State Postconviction Remedies and Relief Handbook (2009) for a state-by-state summary of post-conviction vehicles and procedures.

38 *See, e.g., Maleng v. Cook,* 490 U.S. 488 (1989) (per curiam).

39 *See, e.g.* 28 U.S.C. § 2244 which creates complicated timing and numerical bars to such petitions.

40 *Bousley v. United States,* 523 U.S. 614 (1998).

counsel. The first prong is that the quality of the attorney's representation fell below professional norms. The second prong is that the defendant suffered prejudice as a result of the deficient performance. A petitioner seeking post-conviction relief must establish both prongs to prevail.

1. Establishing that Attorney's Representation Fell Below Professional Norms

In *Padilla*, the Supreme Court found that at a minimum "[F]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea."[41] This means that if a defendant pleaded guilty after March 1995, then criminal defense counsel had the obligation to provide advice about immigration consequences. Thus, any failure to provide such advice falls below accepted professional norms. If the conviction is older than 15 years, then a practitioner would need to show that professional norms in effect on the date of the plea required that defense counsel provide advice about immigration consequences.

2. Establishing Prejudice

A person seeking to vacate her or his plea must show that the outcome would have been different in order to satisfy the second prong in *Strickland*. Moreover, to obtain relief on this type of claim, a petitioner must convince a factfinder that a decision to reject the plea bargain would have been rational under the circumstances.[42]

A petitioner also must be aware that after vacating her or his conviction that the case does not go away, but rather starts all over again. This means that a successful petitioner faces all original charges when the conviction is set aside, even those that were dismissed under a plea bargain. There is also a chance that the petitioner might receive a greater sentence the second time around. Proper post-conviction practice requires advising the client of the possibility of a worse criminal outcome, or a worse immigration outcome, if the conviction is reopened. Before deciding to go forward with the post-conviction petition, counsel also should explore less harmful alternative pleas, the likelihood of success at trial, and the prosecution's position regarding charge bargaining after a conviction has been vacated.

B. Immigration Impact of Conviction Vacated under *Padilla*

In general, the Board of Immigration Appeals (BIA or Board) will give full faith and credit to state court orders that appear to vacate a noncitizen's criminal conviction.[43] The Board recognizes an exception to the general rule if a noncitizen obtained a vacatur "solely on the basis

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41 *Padilla v. Kentucky*, 130 S.Ct. 1473, 1485 (2010).

42 *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486 (2000).

43 *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). Under Fifth Circuit law, a vacated conviction still can be used to establish deportability because the statutory definition of conviction, 8 USC § 1101(a)(48)(A) does not include an exception for a conviction that has been vacated. *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002). The Court's decision in *Padilla* may supersede the Fifth Circuit's decision, however.

of immigration hardships or rehabilitation, rather than on the basis of a substantive or procedural defect in the underlying criminal proceedings."[44] A conviction vacated for violating a defendant's Sixth Amendment right to counsel would certainly satisfy the Board's test. That the underlying nature of the legal defect involves failure to warn about immigration consequences does not change that the court vacated the conviction because of a substantive defect.[45] Even if the state statute that confers jurisdiction provides for a vacatur in the "interest of justice" or some similar language that sounds equitable in nature, a vacated conviction should eliminate the conviction if the underlying writ is granted, even in part, on the basis of a constitutional defect. That is, if the court vacated the conviction, at least in part, on constitutional grounds, then the court did not vacate it solely for equitable reasons and, thus, the Board should give it full faith and credit.[46]

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[44] *Matter of Chavez-Martinez*, 24 I&N Dec. 272, 273 (BIA 2007). *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

[45] *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (recognizing that conviction vacated because of a violation of a state plea warning about immigration consequences was not a conviction for immigration purposes because failure to notify constituted a substantive defect in the underlying criminal proceedings).

[46] *Matter of Chavez-Martinez*, 24 I&N Dec. 272, 273 (BIA 2007). *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

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PRACTICE ADVISORY: MULTIPLE DRUG POSSESSION CASES AFTER *CARACHURI-ROSENDO V. HOLDER**

June 21, 2010

In *Carachuri-Rosendo v. Holder*, No. 09-60, 560 U.S. __ (June 14, 2010) (hereinafter *Carachuri*), **the Supreme Court unanimously rejected the government position that any second or subsequent simple possession drug offense can automatically be deemed a drug trafficking aggravated felony.** Specifically, the Court held that a second or subsequent state possession offense is not an aggravated felony as a "felony punishable" under federal law when the state conviction was not based on the fact of a prior conviction, as would be required for a federal felony recidivist possession conviction. *Id.*, slip op. at 2.

The Supreme Court's decision reversed the contrary decision of the Fifth Circuit in *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009) (relying on prior Fifth Circuit precedent in the criminal sentencing context to find that any second state possession offense is an aggravated felony because it could "hypothetically" have been punished as a recidivist felony under federal law). **It also overruled the similar contrary decision of the Seventh Circuit in *Fernandez v. Mukasey*,** 544 F.3d 862 (7th Cir. 2008).

Significantly, the Supreme Court's decision should now give nationwide effect to the analysis and rulings of the Board of Immigration Appeals (BIA) in its precedent decision in the same case in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007). In that decision, the BIA had stated that, but for the contrary Fifth Circuit case law, it would have found that a second or subsequent state possession offense does not correspond to the federal recidivist felony unless the prior drug conviction had actually been established in the criminal case in a process that, at a minimum, provided the defendant with notice and an opportunity to be heard on whether recidivist punishment was proper. *Id.* at 390-94.

This advisory is divided into the following sections:

- Background
- What the Supreme Court decided in *Carachuri*
- What *Carachuri* means for noncitizens with a second or subsequent state possession conviction where the record of conviction contains no finding of a prior conviction
- What *Carachuri* means for noncitizens with a second or subsequent state possession conviction where the record of conviction does contain some finding of a prior conviction
- Resources

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Background

In *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), the Supreme Court decided that a state simple possession drug conviction is not a "drug trafficking crime" aggravated felony unless the offense would be a felony under *federal* law. Since a first-time drug possession offense is generally not a felony under federal law,[1] this meant that many noncitizens convicted of a single state drug possession offense—although removable—would be eligible to avoid removal by seeking cancellation of removal, asylum, withholding of removal, and/or naturalization because they would not be subject to the aggravated felony bars applicable to these waivers or benefits.

After *Lopez*, however, the Department of Homeland Security (DHS) argued that noncitizens with more than one possession conviction could be deemed aggravated felons based on dicta in *Lopez* indicating that state drug possession offenses could "counterintuitively" be deemed "drug trafficking" aggravated felonies if the state offense "corresponds" to the federal "recidivism possession" felony offense at 21 U.S.C. § 844(a) (possession of a controlled substance after a prior drug conviction has become final). *See Lopez*, 127 S. Ct. at 630 n.6. Under federal law, a second or subsequent possession offense *may* be penalized as a recidivist possession felony if notice of the prior conviction has been given and an opportunity to challenge the fact, finality and validity of the prior conviction has been provided in the criminal case. *See* 21 U.S.C. § 851. Nevertheless, DHS initially took the position that *any* second state simple possession drug conviction could be transformed into a "drug trafficking" aggravated felony based on the premise that the prior conviction could have hypothetically been the basis for a federal recidivist felony prosecution.

In *Matter of Carachuri-Rosendo*, the BIA rejected such a broad interpretation and decided that, in the absence of controlling federal court authority finding otherwise, a noncitizen's state conviction for simple possession of a controlled substance "will not be considered an aggravated felony based on recidivism unless the individual's status as a recidivist drug offender was either admitted or determined by a judge or jury *in connection with a prosecution for that simple possession offense*." 24 I&N Dec. at 394 (emphasis added). The BIA did not apply this rule in the *Carachuri* case itself—a case that arose under Fifth Circuit law—because it found that it was bound by a contrary Fifth Circuit criminal sentencing decision. *Id.* at 386-88 (citing *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), *cert. denied*, 546 U.S. 1137(2006)).

In reviewing the BIA's decision, the Fifth Circuit reaffirmed its prior sentencing precedents and found that any second state possession offense is an aggravated felony because it could "hypothetically" have been punished as a recidivist felony under federal law. *See Carachuri-Rosendo v. Holder*, 570 F.3d 263, 265-268 (5th Cir. 2009) ("Under this court's approach for successive state possession convictions, a court or an immigration official characterizes the conduct proscribed in the latest conviction, by referring back to the conduct proscribed by a prior conviction as well."). The Fifth Circuit stated that the Supreme Court's decision in *Lopez* required such a "hypothetical approach" permitting the adjudicator to look

[1] The only exceptions are a conviction for possession of more than 5 grams of crack cocaine or any amount of flunitrazepam. *See* 21 U.S.C. § 844(a).

beyond the record of conviction at issue to determine if the state offense corresponds to a federal felony. *See id.* at 266-67.

<u>What the Supreme Court decided in *Carachuri*</u>

The Supreme Court reversed the Fifth Circuit decision below and rejected the Government's defense of that decision. The Court first observed that the "commonsense conception" of the "aggravated felony" and "drug trafficking" terms would not ordinarily be applied to a simple possession drug offense, and stated that "in this case the Government argues for a result that 'the English language tells us not to expect,' so we must be 'very wary of the Government's position.'" *Carachuri*, slip op. at 10 (quoting *Lopez*, 549 U.S. at 54)).

The Supreme Court then flatly rejected the "hypothetical approach" followed by the Fifth Circuit and promoted by the Government's lawyers before the Court. The Court provided five reasons for rejecting the Government's position:

- First, the Court pointed out that the Government's position ignores the text of the immigration statute, which requires that the noncitizen have been "convicted" of an aggravated felony, and thus "indicates that we are to look to the conviction itself as our starting place, not to what might have or could have been charged." *Id.* at 11-14.

- Second, the Court found that the Government's position fails to give effect to the mandatory notice and process requirements for a recidivist conviction contained in 21 U.S.C. § 851. *Id.* at 14-15.

- Third, the Court stated that the Fifth Circuit's hypothetical felony approach is based on a misreading of the Court's decision in *Lopez*, which the Court said involved a "categorical," not hypothetical, inquiry focused on the conduct actually punished by the state offense rather than "focused on facts that could have *but did not* serve as the basis for the state conviction and punishment." *Id.* at 15-16.

- Fourth, the Court observed that the Government's argument is inconsistent with common practice in the federal courts in that it is very unlikely, if not unprecedented, that a low-level simple possession offense such as Mr. Carachuri's would be prosecuted as a felony in the federal courts. *Id.* at 16-17.

- Finally, the Court referenced the rule of lenity, which provides that ambiguities in criminal statutes, including those referenced in immigration laws, should be construed in the noncitizen's favor. *Id.* at 17 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11, n.8 (2004)).

The Supreme Court thus concluded that the text and structure of the relevant statutory provisions demonstrate that the noncitizen must have been "actually convicted" of a crime that is itself punishable as a felony under federal law. The Court thus held that when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a

prior conviction, he has not been convicted of a federal felony, and therefore has not been convicted of an aggravated felony for immigration law purposes. *Id.* at 17-18.

What *Carachuri* means for noncitizens with a second or subsequent state possession conviction where the record of conviction contains no finding of a prior conviction

The Supreme Court decision in *Carachuri* clearly establishes that 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. *Id.* at 12. The Court rejected the Government's position that it is enough to show that such a finding *could have* been made in order for the offense to be deemed a felony punishable under federal law. As the Court stated, "[t]he mere possibility that the defendant's conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be "convicted of a[n] aggravated felony." *Id.* at 17-8. In short, if recidivism was not established in the record of conviction for the second or subsequent offense at issue, the offense cannot be deemed to correspond to a recidivist felony conviction under federal law.

The Supreme Court's holding affirms the similar analysis of the BIA. In the BIA's decision in the same case, the BIA similarly stated: "Without a showing of recidivism within the confines of the State prosecution, we conclude that the State offense cannot be said to proscribe conduct punishable as a felony under Federal law." *Matter of Carachuri-Rosendo*, 24 I&N at 393.

Essentially, this means that, while an individual convicted of a second or subsequent offense of possession of a controlled substance proscribed under the federal drug schedules remains deportable or inadmissible,[2] such an individual may no longer be deemed an aggravated felon where the record of conviction does not establish the fact of a prior conviction, and is therefore not barred from relief from removal such as cancellation of removal for certain lawful permanent residents,[3] asylum,[4] withholding of removal[5] and termination of removal proceedings in order to pursue naturalization.[6]

What *Carachuri* means for noncitizens with a second or subsequent state possession conviction where the record of conviction does contain some finding of a prior conviction

Even where the record of conviction does contain some finding of a prior conviction, the Supreme Court decision in *Carachuri* indicates that a second or subsequent state possession conviction may still not be an aggravated felony if the state conviction does not strictly correspond to a federal recidivist possession felony. For example, under federal law, a second or subsequent possession offense may not be penalized as a "recidivist possession" felony unless

[2] *See* INA 237(a)(2)(B)(i) (controlled substance offense deportability), 212(a)(2)(A)(i)(II) (controlled substance offense inadmissibility).
[3] Barred by aggravated felony—*see* INA 240A(a)(3)).
[4] Barred by aggravated felony—*see* INA 208(b)(2)(B)(i)).
[5] Barred by aggravated felony or felonies for which the person has been sentenced to an aggregate term of imprisonment of at least 5 years—*see* INA 241(b)(3)(B)).
[6] Barred by post-November 29, 1990 aggravated felony—*see* INA 101(f)(8).

the offense was committed after the alleged prior conviction has become final. *See* 21 U.S.C. § 844(a); *see also Smith v. Gonzales*, 468 F.3d 272 (5th Cir. 2006) (finding a state drug possession offense preceded by a prior drug conviction not to be an offense that would be a felony under federal law because later offense was committed while the individual was still within the time to seek leave to appeal the prior conviction). The Supreme Court's decision makes clear that, when analyzing a state conviction, such required components of a "drug trafficking" aggravated felony must be shown "categorically," i.e., by reference to the range of conduct covered under the state statute and not alleged facts outside the statute and record of conviction. *See Carachuri*, slip op. at 16 ("[T]he 'hypothetical approach' employed by the Court of Appeals introduces a level of conjecture at the outset of this inquiry that has no basis in *Lopez*. It ignores both the conviction (the relevant statutory hook), and the conduct actually punished by the state offense ... [and] is far removed from the more focused, categorical inquiry employed in *Lopez*."); *see also Nijhawan v. Holder*, 129 S. Ct. 2294, 2300 (2009) (listing "illicit trafficking in a controlled substance" as an example of a generic crime aggravated felony category to which the categorical approach applies).

Federal court case law in those circuits not overruled by *Carachuri* also supports applying a categorical approach to determining whether a state offense meets the required components of a "drug trafficking" aggravated felony. *See, e.g., Alsol v. Mukasey*, 548 F.3d 207, 217 (2d Cir. 2009) ("[W]hatever petitioner was convicted of under state law must correspond with the crime of recidivist possession under the CSA … ."); *Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2009) ("Provided that an individual has been *convicted* under a state's recidivism statute and that the elements of that statute include a prior drug-possession conviction that has become final at the time of the commission of the second offense, then that individual, under the categorical approach, has committed an aggravated felony . . . .").

In addition, federal law requires that the U.S. Attorney before trial, or before entry of a guilty plea, has filed an information with the court stating in writing the previous conviction(s) to be relied upon, and that the defendant has had an opportunity to challenge the fact, finality and validity of the prior conviction(s) in a hearing in which the U.S. Attorney has the burden of proof beyond a reasonable doubt on any issue of fact except those pertaining to the conviction's constitutionality. *See* 21 U.S.C. § 851. In response to Mr. Carachuri's argument that such a prosecutorial charge of recidivism and an opportunity to defend against that charge would also be required in his state conviction before he could be deemed "convicted" of a felony punishable under federal law, the Court stated that it need not reach the issue: "In the absence of any finding of recidivism, we need not, and do not, decide whether these additional procedures would be necessary." *Carachuri* at 12.

Even though the Supreme Court in *Carachuri* did not resolve whether these notice and process requirements contained in 21 U.S.C. § 851 also must have been met in the criminal case for a second or subsequent state possession conviction to be deemed the equivalent of a federal felony, the Court did point out that these requirements are mandatory under federal law, and observed that "these procedural requirements have great practical significance with respect to the conviction itself and are integral to the structure and design of our drug laws." Id. at 14.

As the Supreme Court left open the question of whether the notice and process requirements under federal law must be met for a second or subsequent state possession conviction to be deemed an aggravated felony, the analysis and rulings of the BIA and federal courts—those not overruled by *Carachuri*—that have already addressed this question should now govern. In the *Carachuri* case itself, the BIA already determined that, at a minimum, the state must have provided the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper in order for a particular crime to be considered a "recidivist" offense. *See Matter of Carachuri-Rosendo*, 24 I&N Dec. at 391.

Moreover, even where the noncitizen was provided by the state with notice and an opportunity to be heard regarding the prior conviction, the BIA indicates that there is still a question as to whether the process afforded sufficiently corresponds to the process required under federal law. The BIA did so by raising but leaving this question open:

> We do not now decide whether State criminal procedures must have afforded the alien an opportunity to challenge the *validity* of the first conviction in a manner consistent with 21 U.S.C. § 851(c). Nor are we now concerned with the timing of notice, or with the burdens and standards of proof applicable to a defendant's challenge to his status as a recidivist.

Id. at 394, n.10 (citation omitted).

Federal court case law also provides support for process requirements akin to those required under federal law before a second or subsequent possession conviction may be deemed to correspond to a federal recidivist possession felony. *See, e.g, Gerbier v. Holmes*, 280 F.3d 297, 317 (3d Cir. 2002) ("[W]e must be satisfied that the state adjudication possessed procedural safeguards equivalent to the procedural safeguards that would have accompanied the enhancement in federal court.").

Thus, an individual who has been convicted of a second or subsequent state possession conviction where the record of conviction does contain some finding of a prior conviction should compare the components of the state offense, the process afforded in his or her state criminal case and the state record of conviction to the components of the federal offense and the process required under federal law in order to determine what points can be raised to show that his or her particular state disposition does not correspond to a federal recidivist felony conviction. Some potential points of difference to look for when reviewing the state law, process and record of conviction include the following:

- State offense does not require prior conviction to have been for a drug, narcotic or chemical offense. *See* 21 U.S.C. § 844(a) and (c).
- State offense does not require prior conviction to have been final before commission of the second or subsequent offense. *See* 21 U.S.C. § 844(a).
- State criminal process does not require the prosecutor to provide notice of the previous convictions to be relied upon before trial or before entry of a plea of guilty. *See* 21 U.S.C. § 851(a).

- State criminal process does not afford the defendant an opportunity to deny the fact, finality and validity of an alleged prior drug conviction. *See* 21 U.S.C. § 851(c)(1).
- State criminal process does not require the prosecution to prove beyond a reasonable doubt any issue of fact (other than an issue of fact relating to a claim that a predicate conviction was obtained in violation of the Constitution). *See* 21 U.S.C. § 851(c)(1).
- Record of conviction does not show that the convicting state court actually enhanced punishment based on the prior drug conviction. *See Carachuri*, slip op. at 18 ("We hold that when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been 'convicted' [] of a 'felony punishable' as such 'under the Controlled Substances Act' ...") (citation omitted).

Resources

Individuals who have second or subsequent drug possession convictions, and who have already been ordered removed without a relief hearing based on unfavorable pre-*Carachuri* case law, may find guidance on how now to seek relief under *Carachuri*, including sample legal motions to file with an Immigration Judge, the BIA, or a federal court depending on where the removal case is pending or was last pending, in the following practice advisory:

- National Immigration Project, *Practice Advisory: Sample Carachuri-Rosendo Motions* (June 21, 2010), posted at: http://www.nationalimmigrationproject.org/legalresources.htm.

For guidance prepared prior to *Carachuri* on developing legal arguments to challenge drug aggravated felony charges generally, see the following practice advisory:

- Immigrant Defense Project, *Practice Advisory: Using Lopez v. Gonzales to Challenge Aggravated Felony Drug Trafficking Charges or Bars on Relief* (May 19, 2008), posted at: http://www.immigrantdefenseproject.org/webPages/LvGPressroom.htm.

For additional litigation support or to learn about later developments on the issues discussed in this advisory, please see the IDP website at www.immigrantdefenseproject.org, or contact the IDP at (212) 725-6422.

Immigrant Defense Project

PRACTICE ADVISORY

RECENT DEVELOPMENTS IN THE CATEGORICAL APPROACH:

TIPS FOR CRIMINAL DEFENSE LAWYERS REPRESENTING IMMIGRANT CLIENTS

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OVERVIEW

This practice advisory provides:

- **Introduction (see pp. 2–3)** discussing the basics of the "categorical approach" that immigration courts employ to determine whether a state or federal criminal offense falls within the criminal grounds of removal (deportation) and why it is important to criminal defense attorneys;
- **Background on recent developments in the "categorical approach" (see pp. 3–7)**; and
- **Practice tips (see pp. 8–18)** to help criminal defenders representing immigrant clients to take advantage of the categorical approach where it applies and to avoid or mitigate negative immigration consequences under these new legal developments.

What is the categorical approach and how have recent developments changed it?

- The categorical approach limits the documents that an immigration court can consult to find an individual removable on the basis of a conviction. Under the "strict" categorical approach, the court cannot look behind the bare elements of the statute of conviction when determining whether a given conviction triggers removability. Under the "modified" categorical approach, the court may also consult a limited set of court documents in the "record of conviction," including at a minimum the charging document, plea agreement, plea colloquy transcript, and verdict or judgment of conviction.
- Recent caselaw, including the Supreme Court's decision in *Nijhawan v. Holder* and the Attorney General's opinion in *Matter of Silva-Trevino*, has significantly eroded the categorical approach in some areas. The *Nijhawan* decision reaffirms, however, that the categorical approach continues to apply to many criminal grounds of deportation.
- The categorical approach continues to apply to many common "aggravated felony" deportation categories, including "drug trafficking crimes," "crimes of violence," firearms offenses, theft and burglary crimes, obstruction of justice and bail jumping offenses, and sexual abuse of a minor; and most non-aggravated felony grounds of removal including controlled substance offenses, crimes of child abuse, and firearms offenses.
- The categorical approach has been significantly modified for a few aggravated felony offenses including "fraud and deceit," tax evasion offenses, alien smuggling, and passport fraud; and possibly for the broad, non-aggravated felony deportation grounds for "crimes involving moral turpitude."

What does this mean for me as a criminal defense lawyer?

- You may be able to protect your immigrant clients by paying attention to the statutory elements necessary for conviction, comparing those elements to relevant grounds of removability, and keeping the record clear of facts other than those necessary elements.

INTRODUCTION

The "categorical approach" describes the method that immigration judges and reviewing federal courts usually employ to decide whether a given local, state or federal criminal offense triggers deportation or other immigration consequences under federal law.[1] Since at least 1914, most courts have engaged in an abstract, "categorical" analysis that compares the minimum statutory elements of the offense of conviction to the relevant deportation ground, without reference to the particular conduct that underlies the defendant's conviction. *See, e.g., United States ex rel. Mylius v. Uhl*, 210 F. 860, 862–63 (2d Cir. 1914). The Board of Immigration Appeals ("BIA"), the administrative appeals body that interprets the immigration laws on behalf of the Attorney General, has also usually used this approach, both on its own and in deference to applicable circuit law. *See, e.g., Matter of Pichardo*, 21 I. & N. Dec. 330, 335–36 (BIA 1996).

The modern version of this "categorical approach" is modeled on the analysis elaborated by the Supreme Court in a pair of federal criminal sentencing cases, *Shepard v. United States*, 544 U.S. 13 (2005), and *Taylor v. United States*, 495 U.S. 575 (1990), and recently applied in the immigration context in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). Under the "strict" version of the "*Taylor/Shepard*" categorical approach, courts simply compare the general or "generic" federal ground of removal with the minimum conduct necessary to offend the criminal statute. If every violation of the criminal statute necessarily falls within the federal removal ground, then a conviction under that criminal statute categorically triggers deportation. But if the criminal statute can be offended without engaging in conduct that falls within the generic deportation ground, the conviction will not be found to trigger removal regardless of the actual conduct that resulted in conviction.

Most courts employ some version of a "modified" *Taylor/Shepard* categorical approach. Under this modified analysis, if the statute of conviction punishes some conduct that falls within the generic deportation ground and some conduct that falls outside it, the court moves on to a second step in which it examines the "record of conviction," a set of official court documents, to determine whether the defendant was necessarily convicted of an offense falling within the deportation ground. Statutes that contain more than one offense, one or more of which does not trigger deportation, are sometimes called "divisible" statutes.[2] The "record of conviction" that a court will consult to determine what offense a defendant committed under a divisible statute consists, at a minimum, of the complaint/indictment or other charging document, any plea agreement, any plea colloquy transcript, and a verdict or judgment of conviction. *See Matter of Short*, 20 I. & N. Dec. 136, 137–38 (BIA 1989).

Both the strict and the modified categorical approaches provide criminal defense counsel with important tools to help noncitizen clients avoid or mitigate immigration consequences of conviction. In addition, understanding the categorical analysis is essential to properly advising

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[1] While immigration law technically distinguishes between grounds of "deportability" and "inadmissibility" in many contexts, *compare* 8 U.S.C. § 1182 *with* 8 U.S.C. § 1227, the terms "deportability" and "removability" are used interchangeably in this advisory to refer to any grounds to expel a noncitizen from the United States.

[2] In dicta in *Duenas-Alvarez*, 549 U.S. at 193, the Court stated that there must be a "realistic possibility" that the statute reaches conduct that falls outside of the generic deportation ground, as evidenced by reported cases (or the immigrant's own case). In light of this dictum, a farfetched hypothetical possibility that a statute could trigger prosecution for an offense falling outside the deportation ground definition may not be sufficient to show that a statute is divisible.

clients about the immigration consequences that may attach to a decision to plead guilty to a given offense or to proceed to trial.

A number of recent BIA and federal court decisions have limited or eroded the categorical approach; at the same time, the Supreme Court and the BIA have reaffirmed and clarified its use in several contexts. This practice advisory discusses these recent developments and provides concrete tips for criminal defenders to protect their noncitizen clients in light of these cases. The first part of this advisory summarizes the recent developments. The second part contains practice tips for criminal defense counsel on how to handle charges in particular criminal offense categories.

HOW HAS THE CATEGORICAL APPROACH BEEN CHANGED?

A. The BIA Has Abandoned the Categorical Approach in Making Certain "Aggravated Felony" Determinations, Distinguishing Between "Element" and "Nonelement" Requirements for Removability

In a pair of 2007 decisions, the BIA departed from precedent to limit the application of the *Taylor/Shephard* categorical approach. In *Matter of Babaisakov*, the BIA, addressing the same issue later treated by the Supreme Court in *Nijhawan v. Holder* (discussed below), found that the amount of monetary loss required for a fraud offense to be an "aggravated felony" under immigration law does not need to be an element of the statute of conviction, but may be proved by evidence outside the record of conviction. 24 I. & N. Dec. 306 (BIA 2007). In *Matter of Gertsenshteyn*, the BIA found that "any available probative evidence" could be used to determine whether a given prostitution offense was "committed for commercial advantage," making it an aggravated felony. 24 I. & N. Dec. 111 (BIA 2007), *rev'd*, 544 F.3d 137 (2d Cir. 2008).

In *Babaisakov* and *Gertsenshteyn*, the Board drew a distinction between criminal removability grounds that demand exclusive focus on the elements of the prior conviction, therefore requiring a categorical inquiry, and those grounds that include requirements "not tied to the elements of any State or Federal criminal statute"—so-called "nonelement" requirements for removability. 24 I.& N. Dec. at 309. The BIA described these "nonelement" requirements as those that do not describe a category of state or federal offenses, but rather serve as "limiting or aggravating factor[s]" meant to distinguish between more and less serious violations of statutes of the same general type. 24 I. & N. Dec. at 313–16. Such "nonelement" factors, the BIA held, can be established by evidence outside of the record of conviction. *Id.* at 318–19.

In *Matter of Velasquez-Herrera*, however, the BIA declined an invitation from the government's attorneys to extend the *Gertsenshteyn/Babaisakov* approach to the non-aggravated felony removal ground of "crime[s] of child abuse," 8 U.S.C. § 1227(a)(2)(E)(i). 24 I. & N. Dec. 503 (BIA 2008). In order to trigger this ground, the BIA held, a criminal offense must include the minority of the complaining witness as an element of the crime. *Velasquez* reaffirms that the categorical approach will continue to apply where the immigration statute does not "invite" inquiry into nonelement factors, although the opinion gives little guidance about what may constitute such an "invitation." One relevant factor is apparent from *Gertsenshteyn* and *Velasquez*: in both cases, the BIA considered whether a categorical analysis would render the relevant deportation ground significantly "underinclusive" of state offenses that involved

deportable conduct. *Velasquez*, 24 I. & N. Dec. at 515; *Gertsenshteyn*, 24 I. & N. Dec. at 114. In other words, the BIA seems more likely to deem a particular factor triggering removal to be a "nonelement" factor that can be established by evidence outside the record of conviction if that factor is generally *not* included as an element in relevant state or federal criminal statutes, because a categorical approach would result in most defendants convicted under such statutes escaping removal.

B. In *Silva-Trevino*, the Attorney General Significantly Modified the Categorical Approach With Respect to Crimes Involving Moral Turpitude

The most radical potential slippage in the categorical approach involves the broad deportation ground of "crimes involving moral turpitude" ("CIMTs").[3] In *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), former Attorney General Mukasey drastically altered the categorical approach as it is applied to determining whether a given offense constitutes a CIMT. This decision, issued just weeks before the Bush administration left office, permits immigration judges in certain cases to examine an open universe of evidence to assess whether the conduct underlying a conviction involved moral turpitude. While *Silva-Trevino* is expressly limited to the CIMT context, it contravenes the law of almost every federal circuit court, which had accepted the BIA's nearly century-old categorical CIMT analysis,[4] and is arguably inconsistent with the Supreme Court's subsequent decision in *Nijhawan* (discussed below). For now, however, defense lawyers should conservatively assume that *Silva-Trevino* will govern how their immigrant clients' convictions will be analyzed.[5]

A.G. Mukasey's decision in *Silva-Trevino* instructs immigration judges to apply the traditional categorical analysis as a first step to determine whether a given conviction constitutes a CIMT. The defendant's actual conduct is completely irrelevant at this first step; the sole question is whether the elements of the statute of conviction either *necessarily* fall within the definition of a CIMT or *never* do so.[6] If the immigration judge is unable to determine that the prohibited conduct under the statute either *always* or *never* involves turpitude, then the judge proceeds to consult the traditional "record of conviction," as a court would under the typical "modified" categorical approach. *Id.* at 704. Again, the turpitude inquiry will end if the court is able to determine, at this second step, whether or not the defendant was convicted of a CIMT. However, if this modified categorical inquiry does not resolve the question one way or the other, the *Silva-Trevino* decision provides for an unprecedented third step: the immigration judge is instructed to consider "any additional evidence the adjudicator determines is necessary or

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[3] Noncitizens may be deportable or inadmissible upon conviction of one or more "crimes involving moral turpitude," depending on their individual circumstances. *See* 8 U.S.C. §§ 1182(a)(2)(A), 1227(a)(2)(A)(i), (ii). This undefined term has been used in federal immigration statutes since 1891, *see* Act of March 3, 1891, 26 Stat. 1084, and its meaning has been the subject of decades of administrative and judicial case law. *See generally Jordan v. DeGeorge*, 341 U.S. 223 (1951) (rejecting a void-for-vagueness challenge to the term and defining it to include any offenses involving a specific intent to defraud).

[4] The Seventh Circuit was the only federal court to have rejected the categorical approach in the CIMT context. *See Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008).

[5] The Third Circuit has squarely rejected *Silva-Trevino*'s modification of the categorical approach for CIMTs and reasserted that cases arising within the Third Circuit continue to be governed by existing precedent. *Jean-Louis v. Att'y Gen.*, ___ F.3d ___, No. 07-3311, slip op. at 18-48 (3d Cir. Oct. 6, 2009). Note, however, that defendants convicted in the Third Circuit still face a significant risk of being subjected to deportation proceedings elsewhere.

[6] In making this determination, immigration judges are instructed to consider whether there is a "realistic probability" that the statute would be applied to reach conduct that does not involve moral turpitude. 24 I. & N. Dec. at 698 (citing *Duenas-Alvarez*, 549 U.S. at 193).

appropriate to resolve adequately the moral turpitude question," whether or not contained in the formal conviction record.[7] 24 I. & N. Dec. at 704.

WHAT DOES *SILVA-TREVINO* MEAN FOR CRIMINAL DEFENSE COUNSEL?

Practice tips for particular offense categories are set out in the second part of this advisory. In general, criminal defenders should keep in mind the following about offenses that might be deemed crimes involving moral turpitude ("CIMTs"):

- **Defense counsel can no longer safely rely on the divisible or broad nature of a statute to protect immigrant clients charged with a crime that sometimes might be deemed a CIMT.**
  For example, since temporary taking of property is not a CIMT, prior to *Silva-Trevino* a noncitizen who pled to a theft statute that punished both permanent and temporary takings could later argue, under the categorical approach, that the conviction was not a CIMT. If the record of conviction was completely silent as to whether the defendant intended a permanent or temporary taking, the government would be unable to establish that the offense was a CIMT. Now, where the record does not indicate whether the taking was temporary or permanent, the government might be allowed to resort to other evidence to show that the defendant intended a permanent taking. (A plea to a temporary taking, however, should still be safe even under *Silva-Trevino*.)

- **It is no longer safe to assume that a silent or indeterminate record will protect a client from a CIMT finding.**
  The Attorney General's *Silva-Trevino* opinion may result in the burden being placed on your client to prove to the immigration judge that she did *not* commit a CIMT.

- **Defense counsel should continue to seek pleas under non-CIMT statutes or divisible statutes, but in addition should do everything possible to create an affirmative record that the client has <u>not</u> been convicted of a CIMT.**
  Defense counsel should ask the prosecution to re-draft charging documents to eliminate extraneous CIMT charges or, when this is not possible, affirmatively deny guilt of CIMT charges to which the defendant is not pleading. If a defendant is charged with a CIMT offense but pleads guilty to a related divisible or non-CIMT offense in satisfaction of that charge, it is possible that an immigration judge would take note of the original charge or particular factual allegations in the police report or complaint as evidence that the defendant in fact committed a CIMT. Mere silence as to the original charges may be regarded as tacit admission of facts alleged. For instance, in the example discussed above, rather than simply trying to keep the record opaque as to whether a defendant intended a permanent or temporary taking, defense counsel should ask the prosecutor to re-draft the charging instrument to allege only a temporary taking, or allocute their clients specifically to a temporary taking[0].

- **When it is not possible to eliminate or directly contradict allegation[0]s in the charging document that constitute "turpitudinous" behavior, defense counsel at a minimum should state or have their client state on the record that the defendant admits to the offense of conviction but "no other allegations in the complaint."**

[7] The *Silva-Trevino* opinion arguably does not apply the methodology it describes, and is subject to attack on numerous grounds. *See* Norton Tooby & Dan Kesselbrenner, "Living Under *Silva-Trevino*" (Apr. 27, 2009), *available at* http://www.criminalandimmigrationlaw.com/public/eNewsletter/ Silva-Trevino.pdf. Criminal defense counsel, however, should assume that an immigration judge outside the Third Circuit will apply the methods the Attorney General describes. *See* supra note 5.

C. The Supreme Court Provided Clarity on the Categorical Approach in *Nijhawan v. Holder*

In *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), the Supreme Court considered the "fraud and deceit" aggravated felony ground of removability at 8 U.S.C. § 1101(a)(43)(M)(i), which requires a loss to the victim exceeding $10,000. Mr. Nijhawan was found guilty of fraud, had stipulated for sentencing purposes that the loss to the victim exceeded $100 million, and was ordered to pay restitution of $683 million. The Court held that it was appropriate for the immigration court to abandon the categorical approach in determining the loss amount for the purpose of the aggravated felony determination, and to look beyond the record of conviction to evidence such as stipulations at sentencing and restitution orders.

Although *Nijhawan*'s narrow holding specifically concerns the amount of loss requirement at 8 U.S.C. § 1101(a)(43)(M)(i), the decision created a framework for the more general application of the categorical approach in removal proceedings. The Court affirmed that the categorical approach as outlined in *Taylor* and *Shepard* remains appropriate when the removal statute refers to a "generic crime." It contrasted this approach with a "circumstance-specific approach" that is appropriate when the removal statute refers to "the specific way in which an offender committed the crime on a specific occasion," allowing the immigration court to investigate underlying facts, using evidence beyond the record of conviction.

In dicta, *Nijhawan* defines the following offenses as "generic" and therefore limited to the categorical approach: "murder, rape, or sexual abuse of a minor," 8 U.S.C. § 1101(a)(43)(A); "illicit trafficking in a controlled substance," 8 U.S.C. § 1101(a)(43)(B); "illicit trafficking in firearms or destructive devices," 8 U.S.C. § 1101(a)(43)(C); and aggravated felony grounds referring to an "offense described" in sections of the federal criminal code including explosive materials and firearms, ransom, child pornography, racketeering and gambling, and sabotage and treason, 8 U.S.C. §§ 1101(a)(43)(E), (H), (I), (J), and (L). *Nijhawan*, 129 S. Ct. at 2300. Although crimes of violence, 8 U.S.C. § 1101(a)(43)(F), and theft offenses, 8 U.S.C. § 1101(a)(43)(G), are not explicitly referenced as "generic" offenses in *Nijhawan*, the reasoning used by the court in categorizing other offenses as generic strongly supports their inclusion as such. *Id.* *See* the discussion of "crimes of violence" in the "assault offenses" practice tip below.

Nijhawan further states that the following grounds require "circumstance-specific" analysis: the loss requirement for the tax evasion aggravated felony ground, 8 U.S.C. § 1101(a)(43)(M)(ii); the "if committed for commercial advantage" qualifier in the aggravated felony ground relating to transportation for the purpose of prostitution, 8 U.S.C. § 1101(a)(43)(K)(ii); and the exception to the passport fraud and smuggling aggravated felony grounds for offenses committed to assist family members, 8 U.S.C. §§ 1101(a)(43)(P) and (N).[8] *Nijhawan*, 129 S. Ct. at 2301.

[8] For a comprehensive discussion of the likely impact of *Nijhawan* on each aggravated felony ground in the Immigration and Nationality Act, *see* Dan Kesselbrenner & Manuel D. Vargas, "Practice Advisory: The Impact of *Nijhawan v. Holder* on the Categorical Analysis of Aggravated Felonies" app. (June 24, 2009), *available at* http://www.immigrantdefense project.org/docs/09_Nijhawanpracticeadvisory--(6-24-09).pdf.

WHAT DOES *NIJHAWAN* MEAN FOR CRIMINAL DEFENSE COUNSEL?

Practice tips for particular offense categories are set out in the second part of this advisory. In general, the *Nijhawan* decision may be helpful to defenders representing non-citizen clients. It clarified the applicability of the categorical approach and reminded lower courts that the categorical approach still applies in immigration proceedings in all but a few circumstances. Criminal defense counsel, therefore, can represent immigrant clients with a clearer sense of what documents in the criminal record might later be used against the client in removal proceedings, depending on whether the categorical or circumstance-specific approach will be applied.

- ***Nijhawan* draws a distinction between "generic" and "circumstance-specific" grounds of removability and explicitly states that the categorical approach as outlined in *Taylor* and *Shepard* still applies to "generic" grounds.**
  Although *Nijhawan* dealt with only one specific aggravated felony ground, the Court addressed many others in dicta and its reasoning is clearly applicable to more. Furthermore, the decision limits the extra-statutory inquiry to the traditionally defined "record of conviction" for generic offenses. Generally, the *Nijhawan* Court's affirmation of the categorical analysis in "generic" crimes of removability allows defenders representing immigrant clients to focus exclusively on the statute of conviction in certain cases and the statute and record of conviction in others. *See Nijhawan*, 129 S. Ct. at 2300 (listing offenses deemed "generic").

- ***Nijhawan* provides guidance on the types of offenses that require a "circumstance-specific" approach, highlighting for defenders those types of cases that demand extra attention be paid to evidence outside of the record of conviction.**
  Generally, the Court provides that the circumstance-specific approach only be applied where the relevant aspect of the removable offense refers to the specific way in which a defendant committed a crime on a particular occasion. *See Nijhawan*, 129 S. Ct. at 2301. The tips section below provides an accounting of the most common circumstances in which documents and admissions outside of the record of conviction may be scrutinized in immigration proceedings.

- ***Nijhawan* sets some limits on the sources of evidence an immigration judge may consult for a "circumstance-specific" inquiry.**
  Although it is clear from *Nijhawan* that the "circumstance-specific" approach allows the immigration court to look beyond the statute and record of conviction, the decision does not specify the full reach of the approach. The Court set some limits based on notions of fairness that may help immigration practitioners argue that certain documents in the criminal record are too unreliable to be considered in immigration court. *See Nijhawan*, 129 S. Ct. at 2303. Perhaps most importantly, evidence in the criminal record may only be considered in immigration court if it is "tied to the specific counts covered by the conviction." *Id.* Nevertheless, at a minimum, defenders must assume that sentencing documents and admissions, including restitution orders and stipulations, may be used against immigrant defendants in immigration proceedings in certain circumstances. *Id.* Various circuit court precedents indicate that pre-sentence reports are also very likely to be considered under the circumstance-specific approach. *See, e.g., Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 178 (5th Cir. 2008) (allowing consideration of pre-sentencing report as "reasonable, substantial, and probative evidence"); *Ali*, 521 F.3d at 743.

PRACTICE TIPS

Keeping recent developments regarding the categorical approach in mind, defense counsel should consider the following practice tips when representing immigrant defendants.[9] These practice tips are divided into the following crime categories:

A. **Drug Offenses** . . . . pp. 8-10
B. **Offenses Against the Person**, including sex crimes and assault offenses . pp. 10-15
C. **Offenses Against Property** . . . . pp. 16-17
D. **Weapons Offenses** . . . . pp. 17-18

Introductory Note on what it means to "keep the record clean":

Many of the tips in this advisory urge you to protect your client by "keeping the record clean." Doing so many provide your client with a defense to removability in immigration court. Keeping the record clean means:

1. Keeping all information except for the statutory elements of the offense out of the record of conviction and other documents such as pre-sentence reports and sentencing documents.
2. Asking the prosecutor to issue a new charging document that excludes damaging allegations, if necessary.
3. Controlling the plea colloquy so that your client allocutes only to the bare statutory elements of the offense. If underlying facts pose a risk of removability, you may want to controvert those facts or, if this is not possible, state on the record that your client admits to the elements of the statute required for conviction and nothing more.

A. Drug Offenses:

Drug offenses may trigger removal for noncitizen clients under either the "drug trafficking" aggravated felony ground or the non-aggravated felony "controlled substance" grounds of removal.[10] *Nijhawan* clarified that the drug trafficking aggravated felony ground of removability is a "generic crime" demanding the categorical approach pursuant to the *Taylor/Shepard* framework. The general controlled substance grounds are also analyzed under the categorical approach. Defenders representing immigrant defendants on drug charges, therefore, should focus their attention on the statute of conviction and the traditionally defined record of conviction, as immigration judges will be limited in their inquiry to these documents.

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[9] Criminal defense attorneys should be aware that the constitutional prohibition against *ex post facto* laws does not apply in the immigration context. *See I.N.S. v. St. Cyr*, 533 U.S. 289, 316 (2001) (noting that Congress may attach new immigration consequences to past convictions within certain constitutional limits). In some circumstances where disclosure of your client's immigration status is not prejudicial, it may be advisable to make a record during allocution that your client is pleading guilty in reliance on immigration advice that you have provided. While this will not automatically shield your client from future changes in immigration law, such a record may strengthen available arguments against retroactive application.

[10] 8 U.S.C. § 1101(a)(43)(B) (aggravated felony ground); 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1182(a)(2)(C), 1227(a)(2)(B) (non-aggravated felony inadmissibility and deportability grounds).

- **Negotiate a plea to an offense without a controlled substance element in the statute of conviction.** Pursuant to the categorical approach as clarified in *Nijhawan*, allegations or evidence of drug possession or sale included in the charging document or elsewhere in the criminal record cannot be consulted in immigration proceedings unless the statute of conviction has a drug offense as a necessary element of conviction.

- **Keep the record clean of reference to the *type* of drug involved.** If it is impossible to negotiate a plea to a non-drug offense, keep the record of conviction free of any reference to the *type* of drug involved in the case. To establish deportability on controlled substance grounds, the government often has the burden of proving by clear and convincing evidence that the substance involved is included in the controlled substance schedule at 21 U.S.C. § 802.[11] *Nijhawan* supports the view that the immigration factfinder cannot look beyond the record of conviction to establish the type of drug involved. Therefore, if no record of the type of drug is included in the record and if the state law at issue punishes offenses relating to even a single substance that is not included in the federal schedules, the government cannot meet its burden in deportation proceedings and your client will have a defense to deportability.[12] (Note, however, that in some contexts your client may be required to prove that she did *not* commit a controlled substance offense. In such cases, an indeterminate record may not be sufficient to prevail).

- **Negotiate a plea to an offense without a drug trafficking element so as to avoid an aggravated felony.** If it is impossible to negotiate a plea to a non-drug offense or to keep the type of drug out of the record of conviction, a guilty plea to a drug offense will almost certainly render your client removable pursuant to the general controlled substance grounds of removability.[13] You may, however, be able to preserve your client's eligibility for immigration relief by avoiding an aggravated felony conviction.[14] A state drug felony or misdemeanor may be categorized as an aggravated felony if it involves an element of commercial dealing. Avoid a drug trafficking aggravated felony by negotiating a plea to a possession-only offense with no element of sale, distribution or intent to sell or distribute (note, however, that second or subsequent possession offenses may be aggravated felonies—see tip below—and that possession offenses involving more than five grams of crack cocaine or any amount of flunitrazepam are aggravated felonies). If this is impossible, in marijuana cases you can at the very least preserve an argument that the conviction is not a drug trafficking aggravated felony by negotiating a plea to an offense that is broad enough in its wording to include non-remunerative

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[11] *See Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965).

[12] You may want to take some time to compare the controlled substances covered in your state's penal code with the drugs scheduled at 21 U.S.C. § 802 and its accompanying regulations to determine if the former includes any substances not included in the latter (or find out if there is an immigration practitioner in the state who has already done so).

[13] There is a minor exception under the controlled substance ground of deportability for the possession of thirty grams or less of marijuana for one's own personal use. *See* 8 U.S.C. § 1227(a)(2)(B). This exception does not exist for the corresponding ground of inadmissibility.

[14] Conviction of an "aggravated felony" presents a bar to almost every type of immigration relief. *See, e.g.*, 8 U.S.C. §§ 1101(f), 1158(b)(2)(B)(i), 1229b. An individual deported on the basis of an "aggravated felony" also faces a lifetime bar to lawful return to the U.S. 8 U.S.C. § 1182(9)(A)(ii).

transfers or gifts in addition to sale. You must then keep the record of conviction clean of any reference to a sale or exchange of money.[15]

- **Beware of second or subsequent simple possession offenses, and keep the record clean of any reference to prior offenses or recidivist enhancement.** As noted above, almost every simple possession offense will render your client removable. However—as with the tip above—you may preserve your client's eligibility for immigration relief by avoiding an aggravated felony conviction. A circuit split has developed around the question of whether multiple simple possession offenses can be aggregated to constitute a drug trafficking aggravated felony. The government has argued that a second or subsequent simple possession offense, even if it is a misdemeanor, constitutes a drug trafficking aggravated felony because it could hypothetically be prosecuted federally as a recidivist felony offense. Immigration advocates have petitioned for certiorari on this issue,[16] but defenders should assume the worst for the time being and avoid a plea to a second or subsequent simple possession offense if at all possible. However, if this is not possible, you should keep the record clean of any mention of a prior drug conviction or any analog to federal recidivist prosecution under 21 U.SC. §§ 844(a) and 851.

B. Offenses Against the Person:

Offenses against the person may trigger deportation for noncitizen clients under a variety of grounds. Certain offenses for which a sentence of one year or more is imposed will trigger the aggravated felony ground for "crimes of violence."[17] Many intentional assault offenses and some reckless assault crimes will constitute "crimes involving moral turpitude" ("CIMTs").[18] Sex crimes may additionally place clients at risk of removal under the "rape" or "sexual abuse of a minor" aggravated felony grounds.[19] Offenses against spouses or household members may trigger removal under the separate "crimes of domestic violence" grounds of removability, and offenses against minors can trigger removal under another prong of this ground of removability.[20]

1. Sex Crimes

Sexual abuse of a minor

Sexual abuse of a minor ("SAM") is an aggravated felony.[21] While some federal courts had previously been hesitant to apply the categorical approach to this ground,[22] *Nijhawan* strongly supports the argument that this removal ground is a "generic" one requiring application of the categorical approach. 129 S. Ct. at 2300. Immigration advocates can argue after

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[15] *See generally* Immigrant Defense Project Practice Advisory: Using *Lopez v. Gonzales* to Challenge Aggravated Felony Drug Trafficking Charges or Bars on Relief (May 19, 2008), *available at* http://www.immigrantdefense-project.org/docs/08_Post-LopezPracticeAdvisory51908.pdf.

[16] *See Carachuri v. Holder*, No. 09-60 (petition for certiorari pending).

[17] 8 U.S.C. §§ 1101(a)(43)(F), 1227(a)(2)(A)(iii).

[18] 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i).

[19] 8 U.S.C. §§ 1101(a)(43)(A).

[20] 8 U.S.C § 1227(a)(2)(E)(i), (ii).

[21] 8 U.S.C. § 1101(a)(43)(A).

[22] *See, e.g., Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 465 (7th Cir. 2005).

Nijhawan that the categorical approach should apply such that both the "sexual abuse" requirement and the minority of the complainant must be elements of the offense or at a minimum must be established in the record of conviction.[23] Defense counsel should therefore seek pleas that do not include either sexual conduct or the minority of the victim (or both) as elements.

- **Seek a plea to a statute that lacks any element of sexual abuse.** A plea to a broad child-endangerment or false imprisonment statute that lacks the element of lewd or sexual conduct and/or intent is far less likely, after *Nijhawan*, to constitute an aggravated felony.[24]

- **Seek a plea to a statute that lacks the age of the victim as an element and keep the record clear of the complainant's minority.** As an additional defense, controvert or keep the record clear of any mention of the minority of the complainant.[25]
- **Be aware of additional grounds of removability that may apply even if the offense does not fall within the sexual abuse of a minor aggravated felony ground discussed above.** Many pleas that avoid the SAM aggravated felony ground may nonetheless trigger grounds of removal, including a CIMT or a crime of "child abuse, child neglect or child abandonment" under 8 U.S.C. § 1227(a)(2)(E)(i), a ground applicable to noncitizens who have been lawfully admitted or paroled. In some cases a CIMT plea or a plea to a "child abuse" offense will be materially better for your client than a SAM aggravated felony, but you should not advise a noncitizen that such a plea is "safe" without consulting immigration counsel. Furthermore, false imprisonment statutes may constitute "crime of violence" or "obstruction of justice" aggravated felonies when a sentence of one year or more is imposed. To avoid this risk, seek a sentence of 364 days or less.

- **Be aware that ICE has prioritized removal of sex offenders and devotes significant resources to identifying and arresting noncitizen sex offenders in the community.** When it is not possible to avoid conviction of a sex offense, particularly a sex offense involving a minor, avoid sentences that increase the likelihood of ICE detection and detention, including incarceration, probation, and sex offender registration.

Rape

"Rape" is an aggravated felony ground.[26] *Nijhawan* strongly supports the argument that the rape ground is a generic one calling for the categorical approach. 129 S. Ct. at 2300. While the immigration statute does not define the term "rape," immigration advocates can argue that the aggravated felony ground is only triggered by convictions that satisfy the federal criminal

[23] *See Garcia-Lara v. Holder*, No. 08-4023, 2009 WL 2589115, at *3 (7th Cir. Aug. 25, 2009) (noting the "categorical approach that governs the determination whether a conviction constitutes the aggravated felony of sexual abuse of a minor," citing *Nijhawan*, and questioning whether resort to a police report to determine minority of complainant was proper).
[24] *But see James v. Mukasey*, 522 F.3d 250 (2d Cir. 2008) (pre-*Nijhawan* case remanding to BIA question of whether child endangerment statute lacking sexual conduct element was "divisible" as to SAM aggravated felony).
[25] *See Singh v. Ashcroft*, 383 F.3d 144 (3d Cir. 2004); *but see Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 465 (7th Cir. 2005) (pre-*Nijhawan* case allowing resort to extrinsic evidence of complaining witness's age).
[26] 8 U.S.C. § 1101(a)(43)(A).

prohibition on "aggravated sexual abuse" at 18 U.S.C. § 2241 (which generally requires forcible compulsion), or at a minimum, convictions that contain the elements of sexual intercourse and lack of consent.[27] Defense counsel can preserve these arguments by avoiding conviction under statutes that punish forcible or compelled sexual conduct, as well as statutes that punish sexual penetration without consent.

- **Seek an alternate plea to a statute that does not include conduct satisfying the common-law definition of rape or the federal definition of "aggravated sexual abuse."** Offenses such as false imprisonment, a non-sexual assault statute, or a sexual abuse statute that penalizes sexual misconduct other than non-consensual intercourse may not be considered to fall within the rape aggravated felony ground. To avoid the risk that such a plea will nonetheless constitute a "crime of violence" aggravated felony, seek a sentence of 364 days or less.

- **Be aware that such pleas, while avoiding the rape aggravated felony ground, may nonetheless constitute CIMTs that may subject your client to removal.** In some cases a CIMT plea will be materially better for your client than an aggravated felony, but you should not advise a noncitizen client that a plea to assault or a false imprisonment statute is "safe" without consulting immigration counsel.

2. <u>Assault Offenses:</u>

A "crime of violence" for which a sentence of a year or more is imposed is an aggravated felony.[28] A "crime of violence" is defined for these purposes as a felony that, "by its nature, involves a substantial risk that physical force against the person or property of another may be used," or a misdemeanor or felony offense that has as an element the use, threatened use, or attempted use of force against the person or property of another.[29] Recent case law developments have not altered the courts' consensus that the "crime of violence" aggravated felony inquiry is a categorical one.[30] However, defense counsel should be cautious before concluding that a given felony offense does not, "by its nature," involve a possibility that force may be used or that a given offense lacks an element of the use, threatened use, or attempted use of force. The Supreme Court's *Duenas-Alvarez* decision now arguably requires a showing of a "realistic probability, not a theoretical possibility," of prosecution on facts that do not involve the substantial risk of use of force, or on facts that do not necessarily involve the use of force, before deportation may be avoided under this ground. *See Duenas-Alvarez*, 549 U.S. at 193. Such a showing may be based on the defendant's own case or on other state case law.

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[27] *See, e.g., Castro-Baez v. Reno*, 217 F.3d 1057 (9th Cir. 2000) (relying on Black's Law Dictionary definition of "rape" to hold that "rape" aggravated felony requires nonconsensual intercourse; rejecting the argument that "rape" requires forcible compulsion); *but see Silva v. Gonzales*, 455 F.3d 26 (1st Cir. 2006) (statutory rape may fall within the "rape" aggravated felony ground).

[28] 8 U.S.C. § 1101(a)(43)(F).

[29] *Id.* (incorporating by reference 18 U.S.C. § 16).

[30] Although *Nijhawan* does not explicitly list crimes of violence as a "generic" crime, "crime of violence" is defined in the Immigration and Nationality Act with reference to 18 U.S.C § 16, making it analogous to the "violent felony" analysis in the Armed Career Criminal Act at issue in *Taylor*; *Chambers v. United States*, 129 S. Ct. 687 (2009); and *James v. United States*, 550 U.S. 192 (2007), in which the Supreme Court used the categorical approach. *See also supra* n.8.

Assault offenses may also trigger the CIMT grounds of removability. In this regard, *Silva-Trevino* probably does not upset prior BIA case law drawing complex distinctions between assault statutes that are CIMTs and those that are not. Prior BIA cases provided that "simple" assault crimes, i.e., those that punish offensive touching with no specific intent to injure, are not CIMTs. *See Matter of Fualaau*, 21 I. & N. Dec. 475, 477 (BIA 1996); *Matter of Short*, 20 I. & N. Dec. 136, 139 (BIA 1989). The BIA has also stated that assault statutes punishing intentional but *de minimis* offensive contact are not CIMTs. *See In re Solon*, 24 I. & N. Dec. 239, 241 (BIA 2007). In contrast, "intentional conduct resulting in a meaningful level of harm, which must be more than mere offensive touching, may be considered morally turpitudinous." *Id.* at 242. In addition, *Silva-Trevino* arguably does not disturb existing case law requiring that reckless crimes involve some aggravating dimension to be turpitudinous. *See Solon*, 24 I. & N. Dec. at 242 ("[A]s the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required in order to find that the crime involves moral turpitude.").

- **To avoid an aggravated felony conviction, seek a plea to a felony that does not "by its nature" involve risk that force will be used, if state case law supports that argument; or seek a plea to misdemeanor that does not include as an element the use, attempted use, or threatened use of force.** "Use" of force in this context means "active employment," so negligent offenses will not be deemed "crimes of violence." *Leocal v. Ashcroft*, 534.U.S. 1, 8 (2004). By the same token, recklessness as to the risk of injury or property damage does not make an offense a crime of violence, because the "risk" required is risk that force will be actively employed. *Id.* at 10. While the Supreme Court reserved the question in *Leocal*, the Second, Third, Fourth, Seventh and Ninth Circuits have found that the reckless use of force itself is insufficient to make an offense a "crime of violence."[31]

- **If conviction of a crime of violence is unavoidable, seek a sentence of 364 days or less.**

- **To avoid a CIMT, seek a plea to a statute requiring only negligent conduct.** It remains the case after *Silva-Trevino* that negligent conduct cannot constitute a CIMT. *Silva-Trevino*, 24 I. & N. Dec. at 689 n.1; *Solon*, 24 I. & N. Dec. at 242.

- **Seek to protect against a CIMT finding by creating an affirmative record that a reckless assault offense did not include aggravating dimensions such as serious physical injury.** Reckless assault crimes with no aggravating factor such as serious injury may not be CIMTs. At the very least, however, in many jurisdictions they will not constitute "crime of violence" aggravated felonies, as noted above. Thus, where a plea to a negligent offense is not possible, a plea to a reckless offense may guard against the aggravated felony risk if not the CIMT risk. For some clients, conviction of a CIMT has less drastic consequences.

- **Protect against a CIMT finding by seeking a plea to attempted reckless assault.** Several federal courts have found that because the offense of attempted reckless assault

[31] *See Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003); *Tran v. Gonzales*, 414 F.3d 464 (3d Cir. 2005); *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006); *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006) (en banc).

lacks any logically coherent *mens rea*, it is categorically not a CIMT. *See Gill v. INS*, 420 F.3d 82 (2d Cir. 2005); *Knapik v. Ashcroft*, 384 F.3d 84 (3d Cir. 2004). As these cases illustrate, it is sometimes possible to plead guilty to a logically incoherent offense.

- **To avoid a CIMT, seek a plea to a "simple" assault statute and construct an affirmative record that your client's assault conviction did not involve moral turpitude.** *Silva-Trevino* may make it more likely that an immigration court will examine the particular facts of a defendant's case, even where the defendant is prosecuted under a statute that punishes "simple" or general-intent assault, or where a statute punishes both *de minimis* offensive contact and conduct resulting in injury.[32] If your client is charged under such a statute and an alternate plea to negligent conduct is not possible, make a record at allocution that your client lacked a specific intent to injure and/or deny that injury resulted.

- **In jurisdictions with "simple" or non-specific intent assault statutes, controvert or keep the record clear of allegations of other aggravating factors.** Factors such as a special relation of trust between the defendant and the complainant, the use of a weapon or dangerous instrument, or a complainant's status as a police officer or other official may make even a "simple" assault a CIMT and should be excluded from the record.

Crimes Against Children

As discussed above, under the BIA's decision in *Velasquez-Herrera*, a conviction will only trigger removal under the rubric of a "crime of child abuse, child neglect, or child abandonment," if the minority of the complainant is an element of the statute of conviction.[33]

- **If a defendant is charged with an offense specific to minors, seek an alternate plea to an offense that does not include as an element the minority of the complainant.**

- **Be aware that such offenses may nonetheless constitute CIMTs or may trigger other removal grounds, depending on the nature of the offense.**

Domestic Violence Offenses

Apart from general assault crimes, discussed above, there is a distinct ground of deportability for "crimes of domestic violence," which requires for removability both that: 1) the offense must be a "crime of violence" as defined at 18 U.S.C. § 16 (discussed *supra* under "assault offenses" generally); and 2) the offense must have been committed against a complaining witness with a domestic relationship to the defendant as defined in the immigration statute or who would be protected by federal or state domestic violence laws.[34]

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[32] *Compare, e.g., Solon*, 24 I. & N. Dec. at 241 ("[T]he conviction will be found to be for a crime involving moral turpitude only if the full range of the conduct prohibited in the statute supports such a finding.") *with Silva-Trevino*, 24 I. & N. Dec. at 696–98 (rejecting the "minimum conduct" approach to determining whether a statute is a CIMT).
[33] 8 U.S.C. § 1227(a)(2)(E)(i). The government may argue that the *Velasquez-Herrera* decision should be revisited in light of the Supreme Court's decision in *United States v. Hayes*, 129 S. Ct. 1079 (2009), which held that a criminal statute that includes wording similar to 8 U.S.C. § 1227(a)(2)(E)(i) invited circumstance-specific inquiry into the status of the complainant, but no court has yet indicated that *Velasquez-Herrera*'s holding is in doubt.
[34] 8 U.S.C § 1227(a)(2)(E)(i).

- **Negotiate a plea to an offense that is not a "crime of violence."** (*See* discussion at pages 12–13, above). *Nijhawan* supports the proposition, and the circuits are nearly unanimous,[35] that the strict categorical approach applies to the categorization of an offense as a "crime of violence." By negotiating a plea to an offense that is not necessarily a "crime of violence," you can protect your client from the "crime of domestic violence" ground of deportability regardless of the relationship between your client and the complaining witness.

- **Keep the record clean—within and outside of the record of conviction—of any reference to the relationship between the defendant and the complaining witness.** *Nijhawan* and *U.S. v. Hayes*, 129 S. Ct. 1079 (2009), may support the government's argument that the "circumstance-specific" approach may be used to determine the relationship between the defendant and the complaining witness for the purpose of the domestic violence ground of deportability. This argument, if successful, allows the immigration court to reach beyond the record of conviction to establish a domestic relationship between the defendant and complaining witness. Most circuit courts of appeals were headed in this direction prior to *Nijhawan,*[36] with the exception of the Ninth Circuit, which continued to adhere strictly to the categorical approach for all aspects of the domestic violence ground of removability.[37] Although immigration practitioners will certainly continue to advance the argument that the entirety of this ground of removability should be subject to the categorical approach, defenders who cannot avoid a plea to a "crime of violence" offense can best protect their clients by keeping the relationship between the defendant and the complaining witness entirely out of the criminal record, not only the record of conviction.

- **Be aware of additional grounds of removability that may apply even if the offense does not fall within the "domestic violence" ground of removability discussed above.** Defenders should be aware that an offense at risk of categorization as a crime of domestic violence may also fall under: the CIMT ground of removability, 8 U.S.C. § 1227(a)(2)(A)(i); the "crime of violence" aggravated felony ground of removal if the sentence imposed is a term of imprisonment of one year or longer, 8 U.S.C. § 1101(a)(43)(F); and potentially the "sexual abuse of a minor" aggravated felony ground of removal, 8 U.S.C. § 1101(a)(43)(A). For tips on how to address these potential dangers, see the practice tips for "assault offenses" and "sex crimes" above.

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[35] *See, e.g., Sutherland v. Reno*, 228 F.3d 171, 177 n.5 (2d Cir. 2000); *Gonzales-Garcia v. Gonzales*, 166 F. App'x 740 (5th Cir. 2006) (unpublished); *Flores v. Ashcroft*, 350 F.3d 666, 671 (7th Cir. 2003); *Tokatly v. Gonzales*, 71 F.3d 613, 621–24 (9th Cir. 2004); *Cesar v. Attorney General*, 240 F. App'x 856, 857 (11th Cir. 2007) (unpublished).
[36] *See, e.g., Flores*, 350 F.3d at 671 (finding the second prong of the domestic violence ground of removability to be a "real-offense characteristic" which "may be proved without regard to the elements of the crime" and setting no real limit on the evidence that might be used to prove it). Several of the circuit courts had not reached the issue but deliberately failed to conclusively limit the analysis of the second prong to the record of conviction. *See, e.g., Sutherland*, 228 F.3d at 177; *Gonzales-Garcia*, 166 F. App'x at 743 n.6; *Cesar*, 240 F. App'x at 857.
[37] *See Tokatly*, 71 F.3d at 621–24 (applying the strict categorical approach to both the "crime of violence" categorization and the determination of the relationship between defendant and complaining witness, finding the government's argument that the second prong should reach beyond the categorical approach while the first prong remains within it to be a "convoluted and bipolar methodology"); *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 391–92 (9th Cir. 2006).

C. Offenses Against Property:

Offenses against property may trigger removal against noncitizen clients under a variety of grounds. Many theft, fraud and property damage offenses will trigger the CIMT grounds of removability.[38] In addition, there are specific aggravated felony grounds of removal for: fraud and deceit offenses with a loss to the victim exceeding $10,000; theft or burglary offenses for which a sentence of one year or more is imposed; offenses relating to commercial bribery, forgery and counterfeiting; and money laundering offenses "described in" specified provisions of federal criminal law and involving more than $10,000 in funds.[39]

"Fraud and Deceit" Offenses

As discussed above, *Nijhawan* narrowly addressed the question of whether a stipulation of monetary loss at sentencing could trigger the aggravated felony ground for crimes "involv[ing] fraud or deceit in which the loss to the victim . . . exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). While the Court held that the statute of conviction need not include the relevant loss amount as an element, the *Nijhawan* opinion does place limits on the evidence the immigration court may examine to determine loss amount. In addition, *Nijhawan* affirms that the question of whether an offense "involves fraud or deceit" remains a categorical one. 129 S. Ct. at 2297.

- **In cases involving charges of fraud or deceit and an actual or intended loss of more than $10,000, seek an alternate plea to a theft offense that does *not* involve an element of fraud or deceit.** Under *Nijhawan* and *Babaisakov*, this inquiry remains strictly categorical. The BIA regards theft and taking by fraud as distinct offenses. *See Matter of Garcia*, 24 I. & N. Dec. 436 (BIA 2008). A theft offense that does not include fraud or deceit as a necessary element for conviction is therefore probably not an aggravated felony under section § 1101(a)(43)(M)(i) even where actual or intended loss exceeds $10,000. Note, however, that such an offense may nonetheless constitute a "theft" aggravated felony if the sentence imposed is one year or more.

- **Where an alternate plea to a theft offense is not possible, create an affirmative record of "convicted" loss of $10,000 or less.** *Babaisakov* and *Nijhawan* both affirm that only losses specifically tied to *convicted* conduct are relevant to the $10,000 inquiry. In cases involving fraud or deceit where it is likely that restitution of over $10,000 will be ordered or charging instruments allege losses or intended losses over $10,000, allocute your client to a loss amount of $10,000 or less tied to convicted conduct, or enter a written stipulation or plea agreements to that effect. Such a record may prevent the immigration authorities from later proving by the requisite "clear and convincing evidence" that additional amounts for which restitution was ordered are tied to convicted conduct.

- **Be aware that fraud and deceit offenses may also trigger removability under the CIMT deportation ground as well as the aggravated felony grounds for various**

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[38] 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i).

[39] 8 U.S.C. §§ 1101(a)(43)(M)(i) (fraud and deceit); 1101(a)(43)(G) (theft and burglary); 1101(a)(43)(R) (bribery, forgery and counterfeiting); 1101(a)(43)(D) (money laundering).

forgery and counterfeiting and other offenses "described in" provisions of federal criminal law, 8 U.S.C. §§ 1101(a)(43)(D), (R).

Theft or Burglary Offenses

A "theft" or "burglary" offense, including receipt of stolen property, with a sentence of one year or more is an aggravated felony.[40] This inquiry remains categorical. *See Nijhawan,* 129 S. Ct. at 2299; *Duenas-Alvarez,* 549 U.S. at 189.

- **For theft, receipt of stolen property, and burglary offenses, seek a sentence of 364 days or less to avoid the aggravated felony ground.**

- **To avoid a CIMT, seek an alternate plea to an offense that punishes mere temporary conversion (*e.g.,* unauthorized use of vehicle or "joyriding" in preference to grand larceny or grand theft auto), and if possible create an affirmative record that the intention was to effect a temporary taking.** *Silva-Trevino* leaves undisturbed BIA case law holding that larceny statutes that punish an intent to convert property temporarily, as opposed to an intent permanently to deprive the owner of his/her property, do not involve moral turpitude. *See, e.g., Matter of Grazley,* 14 I. & N. Dec. 330 (BIA 1973); *Matter of P,* 2 I. & N. Dec. 887 (BIA 1947). However, for statutes that punish both temporary and permanent takings, *Silva-Trevino* greatly expands the universe of evidence that may be consulted to determine whether the defendant in fact intended a permanent taking. Where it is not possible to seek an alternate plea, try to controvert or keep the record clear of evidence suggesting an intent to effect a permanent taking.

D. Weapons Offenses:

Weapons offenses may trigger removability for noncitizen clients under the aggravated felony grounds related to firearms and explosive devices and illicit firearms trafficking, as well as the non-aggravated ground of removal for certain convictions relating to the purchase, sale, possession, use, ownership, and carrying of a "firearm or destructive device," including any attempt or conspiracy offenses.[41] *Nijhawan* affirms that the categorical analysis is used for convictions falling under the firearms aggravated felony grounds, both of which define the relevant categories of offenses as those "described in" listed federal statutes. Additionally, nothing in *Nijhawan* or the BIA's recent categorical approach cases purports to alter the analysis of the non-aggravated firearms ground, which remains categorical. The term "firearm or destructive device" is defined at 18 U.S.C. § 921(a).

- **To avoid aggravated felony removal grounds linked to federal firearm offenses, seek alternate pleas to state statutes that lack one or more of the elements required under the listed federal statutes.** Note, however, that the BIA and the Seventh and Ninth Circuits have held, under the categorical approach, that a state offense need not contain any counterpart to the federal "jurisdictional" element

[40] 8 U.S.C. § 1101(a)(43)(G).
[41] 8 U.S.C. §§ 1101(a)(43)(C), (E) (firearm and explosive device aggravated felonies); 1227(a)(2)(C) (non-aggravated felony firearms ground).

requiring an effect on interstate commerce in order to qualify as an aggravated felony. *See Matter of Vasquez-Muniz*, 23 I. & N. Dec. 207 (BIA 2002); *accord Anaya-Ortiz v. Mukasey*, 553 F.3d 1266, 1272 (9th Cir. 2009); *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 502 (7th Cir. 2008).

- **To avoid general firearm deportation ground, where your client is charged with possession of a firearm, seek an alternate plea to an offense that does not involve possession of a "firearm or destructive device" as defined at 18 U.S.C. § 921(a). Keep the record clear of the nature of the weapon if the statute includes but is not exclusive to "firearms" or "destructive devices" as defined in federal law.**

- **To avoid CIMT removal grounds, where your client is charged with possession of a weapon with intent to use it, seek an alternate plea to a weapons offense that punishes mere possession of a weapon with no intent to use. Create an affirmative record that the defendant did not intend to use the weapon unlawfully.** The recent developments discussed in this advisory leave undisturbed the longstanding distinction in BIA and circuit case law between weapons offenses that punish mere knowing possession of contraband weapons, which do not involve moral turpitude, and offenses that punish possession of a weapon with intent to use it unlawfully against the person or property of another, which generally do involve moral turpitude. Where a statute punishes both possession with intent to use and possession with no such intent, *Silva-Trevino* expands the universe of evidence an immigration judge may consult to determine whether the defendant possessed the weapon with intent to use it, so you should create an affirmative record regarding the lack of intent.

For further information on immigration consequences of convictions, please contact the Immigrant Defense Project at 212.725.6422 or visit www.immigrantdefenseproject.org.

Public defenders can also find resources on representing immigrants on the website of the Defending Immigrants Partnership, www.defendingimmigrants.org.

Immigration training – case hypos

Assume the relevant decisions are being made in the present.

1. Clara is an LPR who got her green card in March of 2006. It came in the mail a few weeks after her first arrival in the U.S. She has no prior convictions. She was arrested this past Saturday for shoplifting and was ROR'd at arraignments. She is charged with petit larceny, P.L. 155.25 (a class A misdemeanor). The offer is a plea to attempted petit larceny, $240 restitution and a conditional discharge.

    a. What immigration consequences would follow from taking this plea?

    b. What consequences would follow if she rejected the offer and were found guilty at trial of petit larceny and sentenced to probation?
    c. Same facts but now suppose Clara has a prior conviction for attempted petit larceny from 2008. What consequences would follow from taking the attempted petit larceny offer on the new case?
    d. Now suppose Clara has no priors, but is out of status and has a pending application for a green card. Can she take the attempted petit larceny offer? What would happen if *she* were convicted at trial of petit larceny and sentenced to probation? What if she were sentenced to 8 months?

2. Miguel has no prior convictions. He first came to the U.S. in 1996 and got his green card in 1999. He was arrested in May 2010 for stealing a high-end bike and was charged with grand larceny 4 (PL 155.50, an E felony), criminal possession of stolen property (P.L. 165.45(1), an E felony), and petit larceny (P.L. 155.25, an A misdemeanor). He warranted after arraignments and was later returned on the warrant and remanded, so he is in. He has just learned that his father in the Dominican Republic is very ill and he insists that the case be resolved so he can go visit him. The ADA will give him the felony grand larceny and probation, or will allow him to plead to petit larceny if he takes a time-served incarceratory sentence.
    a. Is either of these offers acceptable from an immigration standpoint?

    b. Is either preferable? Why?

3. James entered the U.S. in 2002 with a tourist visa and has not departed the country since then. He tells you he is here on a work permit. He was convicted in 2005 of attempted petit larceny. He has a U.S. citizen spouse, Martha. Martha called the cops and accused him of hitting her in the presence of their daughter, Jillian. The cops found a gun and marijuana in the apartment. He is charged with

assault 3 (P.L. 120.00(1), a class A misdemeanor); two counts of criminal possession of a weapon 4 (265.01(1) and (5), each an A misdemeanor); endangering the welfare of a child (P.L. 260.10(1), an A misdemeanor); harassment (P.L. 240.26(1), a violation), and criminal possession of marijuana (P.L. 221.10, an A misdemeanor). He is out.

a. What is his most likely immigration status?
b. What are his most likely goals for immigration purposes?
c. The ADA wants him to plead to attempted assault with a batterer's program and an order of protection. Should he take this offer? Why or why not?
d. Should you try to counter with the marijuana misdemeanor? Why or why not?
e. Is there anything else you would counter with from these charges?

Answer Key

Clara

a. Petit larceny is a CIMT. But she would not be deportable because although the offense was committed within five years of her admission as an LPR, the offense is only a B misdemeanor and therefore not punishable by a year or more. She would not become inadmissible because the maximum punishment for the offense is less than one year (the "petty offense exception"). However, if she were convicted of another CIMT in the future, she would be both inadmissible and deportable.

b. If she were convicted of the A misdemeanor, she would be deportable for a CIMT within five years of admission that is punishable by a sentence of a year or more. Her actual sentence is irrelevant.

c. Because she already has a CIMT conviction, this second one would make her deportable. It doesn't matter that it is only a B misdemeanor any more because the year-or-more requirement only applies to a single CIMT conviction.

d. Because she has never been lawfully admitted but is trying to get status now, her concern is admissibility. The B misdemeanor meets the petty offense exception so she would still be admissible. If she were convicted at trial of the A misdemeanor but sentenced to probation, she would still be admissible because even though the offense is punishable by a year or more, her actual sentence does not exceed 6 months. If she were sentenced to 8 months, her conviction would not meet the petty offense exception and she would be inadmissible.

Miguel

a. Neither conviction would make him deportable because the offense was not committed in the first five years after his admission for permanent residence and he has no priors.

b. The misdemeanor plea meets the petty offense exception, so it does not make him inadmissible. No felony offense can meet the petty offense exception because the maximum possible penalty *always* exceeds one year, making the actual sentence imposed irrelevant. The misdemeanor is preferable because the client's goal is to be able to travel outside the U.S.

James

a. He is probably a visa overstay. Tourist visas do not ordinarily result in authorized stays of eight years, so his authorized stay has probably expired. Work authorization is not a status, but is evidence that he may have a pending application for status—presumably through his U.S. citizen spouse.

b. As someone without status, he wants to avoid incarceration and ICE detection. He probably wants to preserve admissibility so he can obtain lawful status, whether through his wife or other means.

c. He already has a prior that is a CIMT, so pleading to attempted intentional assault, another CIMT, will make him inadmissible. In addition, the permanent order of protection may (1) cause difficulties for his possible pending green card application and (2) if he disobeys it, lead to a future arrest for contempt, raising the risk that bail might be set such that ICE would be able to place a detainer on him at Rikers.

d. He cannot plead guilty to any offense involving marijuana—even the violation—without becoming inadmissible and losing the opportunity to obtain lawful status. If the record of conviction clearly demonstrates that the offense involves less than 30g, he may be able to seek an extraordinary waiver under 8 U.S.C. § 1182(h) but we do not know if he could make the requisite showing that his wife or child (if she has status) would suffer extreme and exceptionally unusual hardship.

e. Posssesion of a firearm is not a CIMT unless there is intent to use it unlawfully. He could plead to either charged subsection of § 265.01 charge without becoming inadmissible because

neither requires an intent to use the weapon. To be safe, he should specifically deny any such intent as part of his plea colloquy because the CIMT inquiry is not purely categorical.

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