CHAPTER SEVEN

Sentences Under Immigration Law[1]

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Many crime-related immigration penalties require merely that there be a conviction in order to apply. For example, the length of sentence is generally irrelevant to deciding the effect of a controlled substance violation. However numerous other common immigration penalties are triggered by either the length of sentence imposed, the maximum sentence that may be imposed, or in a few instances, the amount of time actually served.

7.1 SENTENCES AS DEFINED UNDER IMMIGRATION LAW

What constitutes a sentence under immigration law is controlled by the specific definition in the immigration statute. This definition refers to the sentence actually imposed or specified, regardless of any time suspended.[2] Under the immigration statute a sentence is defined as:

> Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.[3]

EXAMPLE: If a non-citizen defendant is sentenced to 365 days with 364 suspended for a Theft 3rd degree (committed before July 22, 2011) the sentence for immigration purposes is 365 days. Such a conviction is classified under immigration law as an aggravated felony since it is a theft offense for which a "sentence of one year or more" has been imposed.[4]

Unless otherwise explicitly specified in the immigration statute, this definition controls for immigration purposes.

7.2 EFFECT OF PROBATION

Jail time ordered as a condition of probation will be considered a "sentence imposed" under the immigration statute's definition.[5] However, a sentence to probation itself is not a sentence to incarceration or confinement that meets the definition of a sentence for immigration purposes. The period of jail time imposed after a probation or parole violation *will* be deemed a sentence

[2] 8 USC § 1101(a)(48)(B).
[3] 8 USC § 1101(a)(48)(B).
[4] 8 USC § 1101(a)(43)(G); 8 USC § 1227(a)(2)(A)(iii); 8 USC § 1228(b).
[5] *See, e.g.*, *Matter of F-*, 1 I&N Dec. 343 (BIA 1942); *Matter of V-*, 7 I&N Dec. 577 (BIA 1957); *Matter of De La Cruz*, 15 I&N Dec. 616 (BIA 1976). Note that some of these cases also provide that time ordered in jail as a condition of probation is not a sentence. That is no longer the case after the 1996 enactment of the statutory definition of sentence under 8 USC § 1101(a)(48)(B).

for immigration purposes.[6] For example, a defendant who initially receives a sentence of less than one year, but then violates his probation or parole and is sentenced to an additional term of imprisonment that, when added to the original term, brings the total sentence imposed to over one year, will be considered to have a sentence of "more than one year".[7] A guilty plea to a new or separate offense based on the violation, rather than to a sentence modified by a probation revocation on the original offense, would avoid that outcome.

Naturalization to U.S. citizenship will not be granted to an applicant who is on probation or parole. Probation or parole during any part of the time for which good moral character must be established can be viewed as a negative factor in a discretionary finding that the applicant lacks good moral character, although it cannot be the sole basis for the finding.[8]

7.3 CONSIDERATION OF IMMIGRATION CONSEQUENCES AT SENTENCING

Washington courts have held that consideration of a defendant's immigration status or consequences at sentencing is appropriate and does not violate the Supremacy Clause, offend equal protection, or impermissibly interfere with federal enforcement of immigration law.[9] Both Washington State and federal courts have held that a court should consider all factors relevant to the defendant, which can include immigration consequences.[10]

In *Padilla v. Kentucky*, the U.S. Supreme Court expressly sanctioned the legitimacy of crafting a sentence to permit the defendant to avoid immigration consequences such as deportation.[11]

7.4 IMMIGRATION ISSUES AT MISDEMEANOR SENTENCING

The phrase "a maximum term fixed by the court of not more than one year" in RCW 9.92.020 makes clear that a court sentencing a defendant for a gross misdemeanor may impose a sentence of *any length* up to the maximum. In other words, a court may impose a sentence of anywhere between 0 days in jail and 364 days in jail, unless a more specific statutory provision

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[6] *Matter of Perez-Ramirez*, 25 I&N Dec. 203, 206 (BIA 2010) ("[W]here a criminal alien's sentence has been modified to include a term of imprisonment following a violation of probation, the resulting sentence to confinement is considered to be part of the penalty imposed for the original underlying crime, rather than punishment for a separate offense.").

[7] *See, e.g., United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (a defendant sentenced to 365 days probation who then violated the terms of his probation and was sentenced to two years imprisonment had been sentenced to more than one year for purposes of the definition of an aggravated felony).

[8] 8 C.F.R. § 316.10(c)(1).

[9] *See State v. Osman*, 157 Wn.2d 474 (2006) (denial of Special Sex Offender Sentencing Alternative to noncitizen defendant did not violate equal protection); *State v. Quintero Morelos*, 133 Wn.App. 591, 137 P.3d 114 (2006), *review denied by State v. Morelos*, 159 Wn.2d 1018, 157 P.3d 403 (2007) (post-conviction sentence modification from 365 to 364 to avoid immigration consequences did not violate Supremacy Clause and was appropriate); *see generally State v. Grimes*, 111 Wn.App. 544, 46 P.3d 801 (2002).

[10] *See, e.g., U.S. v. Lopez-Gonzalez*, 688 F.2d 1275, 1277 (9th Cir. 1982); *State v. Cunningham*, 96 Wn.2d 31, 633 P.2d 886 (1981); *State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002).

[11] *See Padilla v. Kentucky*, 130 U.S. 1473, 1483 (2010).

controls.[12] Neither statute nor case law mandate imposition of the statutory maximum of 364 days.

A. The 2011 Amendments to Misdemeanor Sentencing Statutes

In 2011 the state legislature lowered the maximum sentence for a gross misdemeanor from 365 to 364 days.[13] The change took effect on July 22, 2011 and applies to any offense committed on or after that date.[14]

Under immigration law, certain misdemeanor offenses, such as theft, can be classified as aggravated felonies. Prior to the 2011 legislative change, many courts of limited jurisdiction routinely imposed suspended sentences up to the 365 day maximum in virtually all cases, resulting in many noncitizens having misdemeanor convictions that were classified as aggravated felonies under immigration law. See §4.1 for more on aggravated felonies.

The Washington legislature found this to be a "disproportionate outcome" for those convicted of gross misdemeanors in light of the fact that a person convicted of a more serious felony offense might be sentenced to less than a year and might not suffer immigration consequences; that is the sentence for the felony would have no impact on that person's residency status or disturb that person's opportunity to be heard in immigration proceedings where the court will determine whether deportation is appropriate. Thus, the legislature intended "to cure this inequity" by lowering the maximum sentence for a gross misdemeanor by one day.[15]

B. Immigration Consequences of Suspended Sentences

In exercising its discretion to impose and then suspend a portion of the defendant's sentence, a court may impose a sentence of any amount up to 364 days and suspend all or part of the sentence. There is no requirement that a court impose the statutory maximum period in connection with a suspended sentence.[16] For example, a district court sentencing a defendant for the gross misdemeanor of Theft 3rd degree, which carries a maximum sentence of 364 days, could impose a total sentence of 45 days. The court could then suspend 43 days, leaving the defendant 2 days to serve immediately. The remaining 43 days would be suspended for the length of probation.

The practice of routinely imposing the statutory maximum followed the passage of the Sentencing Reform Act (SRA) and the 1982 decision in *Avlonitis v. Seattle District Court,*[17]

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[12] For example, RCW 9.92.020 might not apply to the gross misdemeanor of driving under the influence (DUI) because RCW 46.61.5055 sets forth specific penalties that apply only to DUIs.
[13] RCW 9A.20.021(2); *see also* RCW 9A.20.021.
[14] S.B. 5168 - 2011-12 (amendments to RCW 9A.20.021 effective Jul. 22, 2011); *see also* RCW 9.94A.345 ("Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed").
[15] RCW 9A.20.021 (2011).
[16] *See, e.g.*, *State v. Donaldson*, 76 Wn.2d 513, 514, 458 P.2d 21 (1969) (Washington Supreme Court noted without comment that sentencing court imposed 90 days and suspended 45 for the offense of indecent liberties, which was, at the time, a gross misdemeanor).
[17] *Avlonitis v. Seattle District Court*, 97 Wn.2d 131, 641 P.2d 169 (1982).

which resulted in courts being unable to impose a period of probation beyond the period of sentence imposed. However, the statutes have long since been modified to allow district court judges to impose up to two years probation regardless of the sentence imposed.[18] As long as some portion of a sentence of any length is suspended, district court judges may impose up to two years probation.[19]

For immigration purposes, it is the amount of time imposed, regardless of time suspended, that will count. As outlined in §7.D, for many noncitizens imposition of a sentence of no more than 180 days, including time suspended, will be necessary to avoid immigration penalties.

EXAMPLE: On July 5, 2011, Sheena, a lawful permanent resident from the Philippines with no prior criminal history, plead guilty to Theft 3rd Degree. The court imposed a sentence of 365 days and suspended 364 days. Sheena now has a conviction that is classified as an aggravated felony under immigration law. Consequently, she will be removable and ineligible for any discretionary relief from removal from the immigration judge. Her conviction is also a crime involving moral turpitude (CIMT) under immigration law and will trigger the CIMT grounds of inadmissibility and (depending on whether it was committed within five years of her admission) the CIMT ground of deportation. A suspended sentence of 364 days or less would avoid aggravated felony classification. A suspended sentence of 180 days or less would avoid an aggravated felony classification, qualify her for the "petty offense exception," and avoid triggering the CIMT ground of inadmissibility and its associated penalties.[20]

C. Deferred Sentences Under Immigration Law

A deferred sentence under RCW 3.66.067 is granted by the court after the defendant has entered a plea of guilty. As such, it will be *a conviction in perpetuity under immigration law*, regardless of whether the defendant complies with the conditions imposed and the plea is subsequently withdrawn and the case dismissed.[21] However, where a conviction also has sentencing requirements to trigger immigration penalties such as deportation or inadmissibility grounds, deferred sentences can permit resolution of the criminal case without triggering these penalties.

Since a deferred sentence is a deferral of the whole sentencing process and does not involve the imposition of any jail time, it does not constitute a "sentence imposed" under immigration law. [22] (However, any period of incarceration specified in connection with a deferred sentence disposition will count as a sentence under immigration law.) Consequently, convictions involving a deferred sentence will not trigger grounds of deportation or inadmissibility that require a specified sentence to be imposed. They will also permit the offense to qualify under

[18] *See* RCW 9.95.210(1); RCW 3.66.067.
[19] *State v. Williams*, 97 Wn.App. 257, 262, 983 P.2d 687, 691 (1999).
[20] Gross misdemeanor convictions classified as CIMT offenses under immigration law committed after July 22, 2011, will no longer trigger the CIMT ground of deportation at 8 U.S.C. 1227(a)(2)(A)(i) since they no longer carry a maximum possible sentence of one year or more.
[21] *Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999), *vacated on other grounds by Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000); *Murrillo-Espinoza v. I.N.S.*, 261 F.3d 771, 774 (9th Cir. 2001).
[22] *State v. Gallagher*, 103 Wn.App. 842, 14 P.3d 875 (2000); *City of Bellevue v. Hard*, 84 Wn.App. 453, 457-58, 928 P.2d 452, 454 (1996) (distinguishing deferral of sentencing from suspending a sentence).

the "petty offense exception" outlined at §7.D below. To preserve both of these outcomes it is important that the judgment and sentence record clearly indicate a deferred sentence period and not include a period of incarceration to be imposed if the defendant violates certain conditions.[23]

EXAMPLE: Continuing on with the example of Sheena from above, a deferred sentence avoids classification of her theft conviction as an aggravated felony since the imposition of any sentence has been deferred. It will also qualify her conviction for the "petty offense exception" to the crime involving moral turpitude inadmissibility ground.

D. The "Petty Offense Exception" and Imposition of 180 Day Maximum Sentence

The ground of inadmissibility for a CIMT is one of the primary crime-related immigration provisions.[24] The CIMT inadmissibly grounds can apply to all noncitizens, both lawfully present and undocumented. A conviction that triggers this (and other) ground(s) of inadmissibility can have the following consequences:

- Denial of citizenship for lawful permanent residents (LPRs);
- Denial of re-entry to the U.S. after departure by an LPR or refugee;
- Denial of adjustment to LPR status for spouses and children of U.S. citizens, survivors of domestic violence and refugees;
- Denial of eligibility for numerous other avenues to obtain lawful immigration status, including avenues for discretionary relief in removal proceedings.

The petty offense exception to the CIMT ground of inadmissibility - A single gross misdemeanor offense that would qualify as a CIMT *will not trigger the CIMT ground* of inadmissibility and, thus, avoid these consequences where:

- the maximum possible sentence is not more than one year (all misdemeanor offenses under Washington law meet this requirement); and
- the actual sentence imposed (regardless of time suspended) is "not in excess of six months."[25]

For many noncitizens avoiding a sentence that does not exceed 180 days, including suspended time, may be the most important factor in resolving their misdemeanor charges.

[23] Although unsupported in the RCW, some courts of limited jurisdiction appear to conflate the deferred sentencing process with the suspended sentencing process by specifying a suspended sentence in conjunction with a deferred sentence (e.g., granting a deferred sentence but specifying in the record that they would impose 364 and suspend 360).
[24] *See* §4.2 for more information regarding crimes involving moral turpitude under immigration law.
[25] 8 USC § 1182(a)(2)(A)(ii)(II).

E. Consecutive and Concurrent Gross Misdemeanor Sentences

Under RCW 9.92.080, whenever a person is convicted of two or more offenses arising from a single act the sentences shall run concurrently; and when the offenses arise from separate and distinct acts or omissions the sentences shall run consecutively, unless the court expressly orders a consecutive or concurrent sentence instead.[26]

In some cases a non-citizen may desire to enter a plea agreement for consecutive sentences to multiple gross misdemeanors instead of to a single felony. For example, instead of a plea to Assault in the 2nd degree that would result in a 12 month sentence, the accused could agree to plead guilty to two counts of Assault 4th degree and avoid getting a 12-month sentence by agreeing to consecutive gross misdemeanor sentences of 7 months or more each. By accepting an equivalent or longer period of incarceration the defendant avoids a conviction for a crime of violence with a sentence of one year or more, which is an aggravated felony.[27] Such a plea and agreement to consecutive sentences are within the discretion of the sentencing judge and can be accepted if the plea is knowing, intelligent and voluntary.[28]

7.5 IMMIGRATION ISSUES IN FELONY SENTENCING

Various immigration issues implicated in felony sentencing are outlined here. However, the most significant issue likely to confront courts is noncitizen defendants, particularly lawful permanent residents, whose conviction will be classified as an aggravated felony under immigration law where a sentence of one year or more is imposed.

A. Downward Departures Under the SRA and Immigration Considerations

A trial court may impose a felony sentence outside the standard sentencing range if it finds that substantial and compelling reasons justify an exceptional sentence. RCW 9.94A.535(1) (a)-(j) give a non-exclusive list of possible mitigating circumstances that neither mention nor exclude immigration consequences such as deportation and family separation.

In a 2005 decision, *State v. Law*, the Washington Supreme Court noted that "[w]hile the statutory mitigating factors listed are 'illustrative' only…all the examples relate directly to the crime or the defendant's culpability for the crime committed," and held that "factors unrelated to the crime and factors personal in nature to a particular defendant" are prohibited from consideration at sentencing.[29] The Court found that a departure may not be based on factors "necessarily considered by the Legislature in establishing the standard sentence range."[30] The

[26] RCW 9.92.080(2)-(3).
[27] *See also Matter of Schaupp*, 66 Wn.App. 45, 51 n.6 (1992) (court sentencing defendant for misdemeanor could have ordered sentence to run consecutive to felony sentence already imposed in another county); *State v. Langford*, 67 Wn.App. 572, 588 (1992) (because the SRA does not apply to misdemeanors, a court may order a misdemeanor sentence to run consecutive to a felony sentence without justifying its decision).
[28] *Matter of Breedlove*, 138.2d 298, 979 P.2d 417 (1999).
[29] *State v. Law*, 154 Wn.2d 85, 89, 110 P.3d 717, 718 (2005) (factors which are personal and unique to the particular defendant, but unrelated to the crime, are not relevant under the SRA).
[30] *Law*, 154 Wn.2d at 95 (citing *State v. Ha'mim*, 132 Wan.2d 834, 840, 940 P.2d 633 (1997))..

underlying purpose of the SRA are factors deemed to necessarily have been considered by the legislature in establishing the standard sentence range, and as such are do not justify deviations from the standard range.[31] The second part of the test for sentence departures is if "the asserted aggravating or mitigating factor [is] sufficiently substantial and compelling to distinguish the crime in question from others in the same category."[32]

State v. Law was decided prior to the Supreme Court's decision in *Padilla v. Kentucky*, where the Court recognized that "as a matter of federal law, deportation is an integral part…of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[33] Washington courts have not yet addressed the issue of reconciling the contemporary recognition that deportation is an integral part of the criminal penalty with the factors taken into account by the legislature and included in the purposes of the SRA as originally formulated in 1981.[34]

Where a trial court approves a plea agreement as consistent with the interests of justice and the state's prosecuting standards, the court may "approve the plea agreement's stipulation to an exceptional sentence above or below the standard range" if the trial court finds that the sentence is consistent with the purposes of the SRA.[35]

B. Concurrent and Consecutive Sentences and Immigration Considerations

Concurrent sentences result in a sentence for immigration purposes equal to the actual term of imprisonment imposed for each count.[36] Under the RCW, multiple felony counts are presumed concurrent.[37] A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is considered an exceptional sentence subject to the limitations of 9.94A.535. The SRA contemplates that consecutive sentences may be imposed where a concurrent sentence would be insufficient punishment, such as for charges classified as "serious violent" offenses and certain weapons offenses.[38]

However, for a noncitizen, consecutive sentences of less than 12 months would avoid classification as an aggravated felony under immigration law, even if such an outcome results in a longer aggregate sentence to incarceration. For example, a single offense for Assault Second

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[31] *State v. Pascal*, 108 Wn.2d 125, 137–38, 736 P.2d 1065 (1987).
[32] *Id.* (referring to the *Ha'mim* test for sentencing departures).
[33] *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480 (2010).
[34] The purposes of the SRA under RCW §§ 9.94A.010 (1) - (7) include ensuring that the punishment for a criminal offense is proportionate and commensurate with the punishment imposed on others committing similar offenses, and promoting respect for the law by providing punishment which is just. In 2010 in *Padilla*, the U.S. Supreme Court recognized that prevailing professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea "for at least the past 15 years," reaching back to 1995. *Padilla*, 130 S.Ct. at 1485. Washington's statutory requirement under RCW 10.40.200 of a short formal written warning by the court that a conviction could have immigration consequences did not come into effect until Sept. 1, 1983.
[35] *Matter of Breedlove*, 138 Wn.2d 298, 309-10, 979 P.2d 417, 424 (1999).
[36] *Matter of Fernandez*, 14 I. & N. Dec. 24 (BIA 1972) (concurrent sentences not added together).
[37] Pursuant to RCW 9.94A.589(1)(a), "sentences imposed under this section shall be served concurrently."
[38] *State v. Vance*, 168 Wn.2d 754, 230 P.3d 1055 (2010) (holding that consecutive sentences imposed as an exceptional sentence could be done based on a finding by the court alone that concurrent sentences would be "clearly too lenient" and would not violate *Blakely*).

Degree that results in a one year sentence qualifies as an aggravated felony.[39] However, an alternative plea to two counts of Assault Fourth Degree with sentences imposed of six months each, to be served consecutively would not make any one count into an aggravated felony, even though the aggregate sentence was over one year.[40] A defendant can stipulate to an "aggravated exceptional sentence" and the court can approve it if the state also stipulates and the court finds the exceptional sentence to be consistent with, and in furtherance of, the interests of justice and the purposes of the Sentencing Reform Act.[41]

C. Indeterminate Sentencing

Under immigration law, the sentence for immigration purposes in the case of an indeterminate sentence is the maximum span of the term of incarceration possible under the sentencing order.[42] This is so even if the noncitizen actually was released before the maximum term.[43] Noncitizen inmates serving indeterminate sentences and subject to the Indeterminate Sentence Review Board can be released to ICE custody prior to completion of their statutory maximum.[44]

D. Special Sex Offender Sentencing Alternative (SSOSA)

A trial court is not barred from granting a SSOSA under RCW 9.94A.670 because a noncitizen is or may be subject to a deportation order. Ordering a non-SSOSA sentencing under that erroneous belief is an abuse of discretion[45] because no provision of RCW 9.94A.670 refers to immigration status, or lack of lawful immigration status, as a factor the court should consider.

E. Drug Offender Sentencing Alternative (DOSA)

The Drug Offender Sentencing Alternative under RCW 9.94A.660 is only available if the offender "has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence."[46] However, the statute governing the prison-based DOSA specifically does not make

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[39] *See* 8 U.S.C. § 1101(a)(43)(F).

[40] *See* 8 USC § 1101(a)(48)(B) ("any reference to a term of imprisonment or a sentence with respect to *an* offense…") (emphasis added) (the statute's use of the singular "*an* offense" does not permit adding the sentence of an additional offense for definitional purposes).

[41] RCW 9.94A.535(2)(a); *Matter of Breedlove*, 138 Wn.2d 298, 979 P.2d 417 (1999).

[42] *Matter of D-*, 20 I&N Dec. 827 (BIA 1994); *Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967); *Matter of Chen*, 10 I&N Dec. 671 (BIA 1964); *Matter of Ohnhauser*, 10 I&N Dec. 501 (BIA 1964).

[43] *Burr v. Edgar*, 292 F.2d 593 (9th Cir. 1961); *Matter of S-*, 8 I&N Dec. 344 (BIA 1959).

[44] According to an email from DOC personnel, "[t]he Indeterminate Sentence Review Board released 93 offenders to ICE Custody in Fiscal Year 2011. A majority – if not all of these offenders were released prior to their statutory maximum." Email from Robin Riley, Administrative Assistant, Department of Corrections Indeterminate Sentence Review Board (on file with authors).

[45] *State v. Osman*, 157 Wn.2d 474, 482, 139 P.3d 334, 339 (2006); *see also State v. Adamy*, 151 Wn.App. 583, 587-588, 213 P.3d 627, 629 (2009) ("[T]he record clearly establishes that the trial court believed that it could not grant a SSOSA because Mr. Adamy was subject to a deportation order. By ordering a non-SSOSA sentencing under that erroneous belief, the sentencing court abused its discretion.").

[46] *See* RCW 9.94A.660(e); 8 C.F.R. § 287.7(b) (list of DHS officers who can issue detainers). Note that neither a judge nor the U.S. Attorney generally makes a finding of the type described in the statute prior to issuance of an

termination mandatory upon an offender being "found by the United States attorney general to be subject to a deportation order."[47]

"[S]ubject to a deportation order" means that an immigration case has been concluded and any appeals and applications have been exhausted, and a final order of removal has been issued. An order to appear or a charging document initiating removal proceedings is not construed as a "deportation order." Mere lack of status does not subject a non-citizen to a deportation order, nor does having a pending immigration case.

A small sub-class of noncitizens have final deportation orders that cannot be executed. Such persons cannot be detained indefinitely by ICE, and will be released into the community when released from state custody.[48] They can be authorized to work.[49] It is not clear whether such persons are "subject to a deportation order" in the meaning of RCW 9.94A.660(e) and are barred from a DOSA, if the order cannot be carried out and the offender will continue to live as a member of the community for the foreseeable future, and could benefit from treatment.

F. Parenting Sentencing Alternative

The Parenting Sentencing Alternative statute contains immigration-related language similar to the DOSA provision outlined above at §7.5(E).[50]

7.6 IMMIGRATION CONSEQUENCES FOR AGGREGATE SENTENCES

Several immigration consequences are triggered based upon an aggregate of sentences, and in one case (good moral character), on an aggregate of time actually served.

A. Inadmissibility for Aggregate Sentences of Five Years or More

A noncitizen becomes inadmissible if she has been convicted of two or more offenses for which the aggregate "sentences to confinement actually imposed" equaled five or more years.[51] Sentences for any two valid criminal convictions will trigger this particular provision, regardless of the type of offense.

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administrative, non-judicial immigration detainer by a DHS enforcement officer, nor does the Justice Department issue immigration detainers. The authority of the Attorney General to make such findings is delegated to an immigration judge and only an order by an immigration judge would appear to satisfy the statute. Taken literally, a normal administrative immigration detainer issued solely by an ICE enforcement officer would not bar a noncitizen offender from DOSA under the statutory language.

[47] *See* RCW 9.94A.662(4) ("…if the department finds that the offender is subject to a valid deportation order, the department *may* administratively terminate the offender from the program.") (emphasis added).

[48] *Zadvydas v. Davis*, 533 U.S. 678 (2001).

[49] 8 C.F.R. § 274a.12(c)(18).

[50] RCW 9.94A.655(1)(c) ("The offender [is eligible if he or she] has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence.").

[51] 8 USC § 1182(a)(2)(B).

Concurrent sentences will not be aggregated.[52] Consecutive or separate sentences are aggregated but only for the purpose of the relatively few provisions such as this one, which consider "aggregate sentences."

B. Five-Year Sentence Bars Withholding of Removal

Withholding of removal is a last-resort provision designed to prevent the *refoulement*, or return in violation of international obligations, of people found to legitimately fear persecution but who are otherwise barred from seeking asylum.[53] A noncitizen who has been sentenced to an aggregate term of imprisonment of five years or more for one or more aggravated felony convictions is barred from being granted withholding of removal. Any aggravated felony conviction, regardless of sentence is a bar to political asylum, which also has a restrictive one-year time limit for applying after arrival.

C. Time Incarcerated: 180-Day Bar to Good Moral Character

A noncitizen will be statutorily ineligible to show "good moral character" if he or she has been actually confined *as a result of conviction* to a penal institution for an aggregate period of 180 days, during the time period for which good moral character must be shown.[54] Good moral character is a requirement for LPRs to become U.S. citizens. It is also a requirement for many of the discretionary avenues for relief from removal outlined at §1.5(E).[55]

7.7 POST-CONVICTION SENTENCE MODIFICATIONS EFFECTIVE UNDER IMMIGRATION LAW

Post-conviction sentence modifications are effective for immigration purposes. Sentences are distinct under immigration law from convictions, which case law has interpreted as existing in perpetuity, unless vacated for cause (specifically a defect in the original proceedings). The courts have held that the definition of a sentence is simply "the period of incarceration or confinement ordered by a court of law." Thus, if the criminal court alters the sentence, the immigration courts must accept it.[56] The Board of Immigration Appeals (BIA) held that when a trial judge modifies a sentence, this will control for immigration purposes even if the basis for the motion is not legal error but merely a need to avoid immigration consequences. [57]

Consequently, a post-conviction sentence modification such as reducing a 365 day sentence to 364 days will be given full faith and credit in subsequent immigration proceedings and can eliminate sentence-related immigration consequences, such as classification of a misdemeanor theft crime as an aggravated felony.

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[52] *Matter of Fernandez*, 14 I&N Dec. 24 (BIA 1972) (concurrent sentences not added together).
[53] 8 USC § 1251(b)(3)(B). *See* §§1.4(C) and 1.5(E).
[54] 8 USC §1101(f)(7).
[55] *See* §5.3 for more on good moral character determinations.
[56] *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005); *Matter of Song*, 23 I&N Dec. 173 (BIA 2001).
[57] *Matter of Song*, 23 I&N Dec. 173 (BIA 2001).

7.8 HOUSE ARREST AND ELECTRONIC HOME DETENTION UNDER IMMIGRATION LAW

Neither the Ninth Circuit nor the BIA has ruled on whether partial house arrest or electronic home detention constitutes a sentence to imprisonment for immigration purposes. This may turn on whether "confinement" means confinement in a penal institution, or includes a highly supervised or monitored form of release to one's home.[58] The question of whether such a monitored, restrictive release amounts to a period of confinement for immigration purposes is likely to arise only where it is imposed as a condition of probation, or as an explicit or separate alternative to a term of imprisonment.

7.9 EARLY RELEASE FROM DOC CUSTODY FOR DEPORTATION

An amended version of RCW 9.94A.685, which took effect April 29, 2011, permits early release for deportation under the following circumstances:

- Defendant is in the custody of the State Department of Corrections (DOC);
- Defendant is a noncitizen subject to a final order of removal (deportation);
- Defendant's conviction is a nonviolent offense (not listed as a violent or sex offense under RCW 9.943A.030).

DOC now has sole authority to make decisions regarding early release under the statute.[59] Upon release and transfer to ICE custody, the remaining portion of an offender's sentence is tolled and an arrest warrant is issued and remains in effect indefinitely. The early release statute only applies to inmates in the custody of the state DOC. It does not apply to a defendant serving time in a county or municipal jail facility.

[58] *See United States v. Takai* 941 F.2d 738, 741 (9th Cir.1991) (the court distinguished a sentence to home detention with electronic monitoring from imprisonment, for the purpose of federal criminal sentencing guidelines: "[T]he district court stated that it was departing downwards by one point, so that imprisonment was not required. The defendants were sentenced to four months in home detention under the electronic monitoring program."); *cf. Ilchuk v. Attorney General of the U.S.*, 434 F.3d 618, 623 (3d Cir. 2006) (the court gave a definition of "term of imprisonment" that included house arrest with electronic monitoring, holding that the Immigration Act's "disjunctive phrasing - 'imprisonment … include[s] the period of incarceration or confinement' - suggests that Congress intended for 'imprisonment' to cover more than just time spent in jail."); *see also Rodriguez v. Lamer*, 60 F.3d 745, 749 (11th Cir. 1995) (post-conviction home confinement may constitute custody for purpose of federal sentencing credit, but pre-trial home confinement is a restrictive condition of "release," as opposed to "detention," for purposes of the Bail Reform Act of 1984, 18 USC § 3142) (citing *Reno v. Koray* 515 US 50 (1995)).

[59] *See Deportation of Alien Offenders, Doc. No. 350.700*, STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS (June 24, 2011 revision), *available at* www.doc.wa.gov/policies/showFile.aspx?name=350700.