Immigration Resource Guide for Judges

Washington State
July 2013

Produced by the Washington State Supreme Court
Gender and Justice Commission and
Minority and Justice Commission

This project was supported by Grant No. SJI-10-E-096
awarded by the State Justice Institute

Dear Colleagues:

We are pleased to present this *Immigration Resource Guide* as a tool to assist you in understanding areas of immigration law relevant to your decision-making. As you know, the decisions we make in state court may have consequences in other venues. We recognize that immigration law is a complex area of law. This Resource Guide is not intended to be a comprehensive treatise on the topic. Rather, it is designed to help you become familiar with some general concepts and to provide some statutory and case law reference points that can "jump start" your own research should it becomes necessary. The goal is to help you remain a neutral but informed forum for ensuring that each person is properly advised of immigration consequences.

The development of this Resource Guide is the result of a coordinated effort between the Gender and Justice and the Minority and Justice Commissions. In addition, the Washington Defender Association, which is funded by the Legislature to provide assistance to prosecutors, defenders, and judges on topics related to immigration law, has provided invaluable support and assistance on this project. Ms. Ann Benson served as primary drafter of the book and her commitment to the effort is deeply appreciated.

The following individuals also deserve our recognition and gratitude:

Myra Downing, Executive Director of the Administrative Office of the Courts
Shayna Israel
Pam Dittman
Erin Sanders
Alanna Peterson

Finally, we caution the user to be aware that immigration laws are subject to change. The discussion of immigration reform is currently being undertaken by Congress and implementation of any policy changes could significantly change some of the practices and policies discussed in the Resource Book.

Sincerely,

Judge Ann Schindler Judge Mary Yu

TABLE OF CONTENTS

CHAPTER ONE

An Overview of Relevant Immigration Law & Procedure[1]

Table of Contents

[1] The work of attorneys Kathy Brady and Angie Junck, nationally recognized experts in the immigration consequences of crimes, contributed to this chapter. Both serve as attorneys with the Immigrant Legal Resource Center in San Francisco, California – www.ilrc.org.

1.1 KEY CONCEPTS FOR CRIMINAL COURT JUDGES

A. Removal (Formerly Deportation) Proceedings

Included in the significant changes to the immigration laws in 1996[2] was the restructuring of the process for excluding and expelling noncitizens. The previous "exclusion proceedings" and "deportation proceedings" were eliminated and reconstituted under the present scheme known as "removal proceedings." A person's "deportation" is now legally and formally known as "removal." These materials will use both terms to refer to a person's expulsion from the U.S. However, the term "grounds of deportation" will be used specifically to refer to the actual grounds of deportation outlined below (as distinct from the grounds of inadmissibility (also outlined below).

Removal proceedings are initiated when a noncitizen is alleged to be in violation of one or more of the grounds of deportation or the grounds of inadmissibility. Whether a noncitizen facing removal is subject to the grounds of deportation or the grounds of inadmissibility will depend upon his or her immigration status. The presence of crime-related grounds account for the majority of removal orders entered against noncitizens.[3] While the crime-related grounds of inadmissibility and the crime-related grounds of deportation are similar, they are not identical and their distinctions can have important consequences for noncitizens. See §1.5 for more about the removal process.

B. Grounds of Deportation[4]

The grounds of deportation apply to noncitizens who have been lawfully admitted. A noncitizen deemed to be in violation of one of these grounds will be subject to removal proceedings (and removal, unless they qualify for relief). The crime-related grounds of deportation also apply to bar undocumented persons from obtaining certain forms of discretionary relief from removal.[5]

---

[2] Immigration and Nationality Act under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).
[3] *See News Releases*, ICE (Oct. 18, 2011), http://www.ice.gov/news/releases/1110/111018washingtondc.htm.
[4] 8 U.S.C. § 1227(a).
[5] *See* 8 U.S.C. § 1229b(b)(1)(C) (cancellation of removal and adjustment of status for certain nonpermanent residents); 8 U.S.C. § 1229b(b)(2)(A)(iv)(cancellation of removal for battered spouse or child).

In order for a lawfully admitted person to be ordered removed, the government has the burden to prove by clear and convincing evidence that the noncitizen has violated a ground of deportation.[6] Most but not all grounds of deportation require a conviction in order to be triggered. The following are the crime-related grounds of deportation enumerated in the Immigration and Nationality Act (INA) (Title 8 U.S.C.)[7]:

- One crime of moral turpitude committed within five years of admission, with a possible sentence of one year or more;[8]
- Two or more crimes of moral turpitude, not arising out of a single scheme of conduct, committed at any time after admission;[9]
- Conviction for an aggravated felony as defined at 8 U.S.C. § 1101(a)(43);[10]
- Conviction for a crime relating to a controlled substance;[11]
- Known or reasonably believed to be a drug abuser or addict;[12]
- Known or reasonably believed to have participated in alien smuggling;[13]
- Conviction for a firearms offense;[14]
- Conviction for a crime of domestic violence;[15]
- Conviction for a crime of child abuse, neglect, or abandonment;[16]
- A judicial finding of a violation of a domestic violence protection/no contact order (no conviction required);[17]
- False claim to U.S. citizenship;[18]
- Document fraud;[19]
- Illegal voting;[20]
- Other crimes: high speed flight;[21] failure to register as a sex offender;[22] terrorist activity;[23] espionage, treason, or sedition, violation of the Selective Service Act, or illegal travel.[24]

---

[6] 8 U.S.C. § 1229a(c)(3)(A); *Woodby v. INS*, 385 U.S. 276, 286 (1966).
[7] There are numerous other non-criminal grounds of deportation contained in 8 U.S.C. §1227.
[8] 8 U.S.C. § 1227(a)(2)(A)(i) (emphasis added); *Matter of Ruiz-Lopez*, 25 I&N Dec. 551, at 6 (BIA 2011) ("Possible sentence" refers to the statutory maximum, not to the standard range of sentencing under the state sentencing guidelines). See Chapter Seven for more regarding sentences under immigration law. See §4.2 for more on "crimes involving moral turpitude" under immigration law.
[9] 8 U.S.C. § 1227(a)(2)(A)(ii).
[10] 8 U.S.C. § 1227(a)(2)(A)(iii). See §4.1 for more on "aggravated felonies" under immigration law.
[11] 8 U.S.C. 1227(a)(2)(B)(i). See §4.7 for more on controlled substance violations under immigration law.
[12] 8 U.S.C. 1227(a)(2)(B)(ii).
[13] 8 U.S.C. 1227(a)(1)(E).
[14] 8 U.S.C. § 1227(a)(2)(C).
[15] 8 U.S.C. § 1227(a)(2)(E)(i). See §4.4 for more on domestic violence crimes under immigration law.
[16] *Id.* See §4.5 for more on crimes involving minor victims under immigration law.
[17] 8 U.S.C. § 1227(a)(2)(E)(ii). No conviction required; a judicial finding is sufficient. *See* §4.4.
[18] 8 U.S.C. § 1227(a)(3)(D).
[19] 8 U.S.C. § 1227(a)(3)(C).
[20] 8 U.S.C. § 1227(a)(6).
[21] 8 U.S.C. § 1227(a)(2)(A)(iv).
[22] 8 U.S.C. § 1227(a)(2)(A)(v).
[23] 8 U.S.C. § 1227(a)(4)(B).
[24] 8 U.S.C. § 1227(a)(2)(D).

C. Grounds of Inadmissibility[25]

The grounds of inadmissibility are distinct from the grounds of deportation. The grounds of inadmissibility apply to noncitizens in any of the five circumstances described below. If triggered, they will have these consequences.

- Refusal of admission to non-U.S. citizens seeking entry into the U.S., including lawful permanent residents (LPRs) and refugees who depart and are seeking re-admission;[26]
- Bar LPRs from establishing the requisite "good moral character" necessary to become a U.S. citizen;[27]
- Render undocumented persons ineligible to be granted certain forms of discretionary relief by the immigration judge in removal proceedings.[28]
- Prevent undocumented persons married to U.S. citizens (and LPRs), DV survivors and other crime victims from obtaining LPR status;[29]
- In removal proceedings before the immigration judge, grounds of inadmissibility serve as the legal grounds to seek removal against undocumented persons who have never been lawfully admitted to the U.S.[30]

By contrast to removal proceedings charging lawfully admitted noncitizens with removal based upon alleged violations of the grounds of deportation, in removal proceedings against undocumented persons who have never been lawfully admitted (i.e., an "alien present…without being admitted"[31]), the undocumented person bears the burden to show clearly and beyond doubt that he or she is entitled to be lawfully admitted in order to avoid removal.[32] For most, this is not possible, so qualifying for discretionary relief before the immigration judge is their only means of remaining lawfully in the U.S. and avoiding permanent banishment (or long prison sentences if they are removed and illegally reenter).[33]

The following are the crime-related grounds of inadmissibility enumerated in the immigration statute:

- Conviction for, or admission to having committed, a crime of moral turpitude,[34] with an exception for one conviction for a crime that has a maximum sentence of less than one

[25] 8 U.S.C. § 1182(a) (lists the grounds of inadmissibility).
[26] 8 U.S.C. § 1101(a)(13)(A); 8 U.S.C. § 1225(a)(1).
[27] 8 U.S.C. § 1101(f), 1427(d).
[28] *See, e.g.*, 8 U.S.C. § 1229b(b).
[29] 8 U.S.C. § 1255(a)(2).
[30] 8 U.S.C. § 1225(a)(1).
[31] 8 U.S.C. § 1182(a)(6)(A)(i).
[32] 8 U.S.C. § 1229a(c)(2).
[33] 8 U.S.C. 1326. *See also* §1.5(B)(6).
[34] 8 U.S.C. § 1182(a)(2)(A)(i)(I)

year and for which the person was actually sentenced to 180 days or less (regardless of time suspended);[35]

- Conviction for, or admission to having committed, a crime relating to a controlled substance;[36]
- Any two criminal convictions with an aggregate sentence of five years or more;[37]
- Known or reasonably believed to have engaged in trafficking of a controlled substance;[38]
- Coming to the U.S. to engage in prostitution or having engaged in prostitution in the ten years prior to admission;[39]
- Known or reasonably believed to have engaged in trafficking in persons;[40]
- Known or reasonably believed to have engaged in money laundering;[41]
- Known or reasonably believed to have come to the US to engage in terrorist activity;[42]
- Known or reasonably believed to have come to the US to engage in various acts of espionage, treason, or sedition;[43]
- Illegal voting.[44]

D. Direct Appeal of a Conviction Does Not Toll Immigration Consequences

Prior to 2011, convictions on direct appeal of right could not be used as a basis to trigger conviction-based grounds of deportation and inadmissibility.[45] However, in June 2011 in *Planes v. Holder,*[46] the Ninth Circuit held that with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act in 1996[47], Congress had removed the finality requirement for convictions in the immigration context. Thus, according to *Planes*, Congress eliminated the requirement that the noncitizen be allowed to exhaust appeals of right before immigration consequences of a conviction could attach.[48] Consequently, where a formal judgment of guilt has been entered, a noncitizen will be considered "convicted" under immigration law, regardless of any pending appeals, and the government is permitted to pursue removal based upon the conviction.[49]

---

[35] 8 U.S.C. § 1182(a)(2)(A)(ii)(II); see also §4.2 for more on crimes involving moral turpitude under immigration law and the "petty offense" exception.
[36] 8 U.S.C. § 1182(a)(2)(A)(i)(II).
[37] 8 U.S.C. § 1182(a)(2)(B).
[38] 8 U.S.C. § 1182(a)(2)(C).
[39] 8 U.S.C. § 1182(a)(2)(D).
[40] 8 U.S.C. § 1182(a)(2)(H).
[41] 8 U.S.C. § 1182(a)(2)(I).
[42] 8 U.S.C. § 1182(a)(3)(B).
[43] 8 U.S.C. § 1182(a)(3)(A).
[44] 8 U.S.C. § 1182(a)(10)(D).
[45] *Morales–Alvarado v. INS*, 655 F.2d 172, 175 (9th Cir.1981); *accord Grageda v. INS*, 12 F.3d 919, 921 (9th Cir.1993); *Hernandez–Almanza v. INS*, 547 F.2d 100, 103 (9th Cir.1976).
[46] *Planes v. Holder*, 652 F.3d 991 (9th Cir. 2011).
[47] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).
[48] *Planes*, 652 F.3d at 995.
[49] See 8 U.S.C. § 1101(a)(48)(A) for the definition of "conviction" in the Immigration and Nationality Act.

E. Noncitizens Are Not Entitled to Appointed Counsel in Removal Proceedings

Under immigration law, a noncitizen is entitled to be represented by counsel in removal proceedings. However, such legal representation must be "at no expense to the [g]overnment".[50] Consequently, there is no appointment of counsel for indigent defendants facing removal. See §1.5(D) for more information on the rights that noncitizens do and do not have in removal proceedings.

The ABA's 2010 assessment of the removal process indicated that in 2008, 57% of noncitizens facing removal did so without counsel. The data showed that 84% of noncitizens who were detained for their removal proceedings were unrepresented.[51] Given the mandatory detention requirements for most noncitizens who are in removal proceedings due to criminal convictions (see §1.5(C)), in such cases information provided by defense counsel in the prior criminal proceedings regarding the immigration consequences that can or will result from their criminal charges will often be the only legal advice they receive regarding the immigration consequences of their criminal case.

F. State Classifications of Crimes Irrelevant Under Immigration Law

It is a common misperception that state offenses classified "only" as misdemeanors do not trigger immigration consequences such as deportation. The classification of a crime as either a misdemeanor or felony at the state level is irrelevant to the determination of whether a conviction renders a noncitizen deportable or inadmissible under immigration law.

In *Lopez v. Gonzales*, the U.S. Supreme Court held, for example, that a drug conviction that qualified as a felony under state law but as a misdemeanor under the Federal Controlled Substances Act was not an aggravated felony, noting that the immigration consequences of a conviction, a matter of federal law, should not depend on varying state criminal classifications.[52] Likewise, an offense classified as a misdemeanor under state law can, nonetheless, qualify as an "aggravated felony" under immigration law.[53]

Example: Prior to the 2011 changes to the statutory maximum sentence for Washington gross misdemeanor sentences, noncitizens convicted of the offense of Theft 3rd Degree under R.C.W. 9A.56.050 were routinely sentence to 365 day sentences. Since suspended time is

---

[50] 8 U.S.C. § 1362.

[51] *See Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency and Professionalism in the Adjudication of Removal Cases*, The American Bar Association Commission on Immigration, 5-8 (2010), http://www.americanbar.org/content/dam/aba/publications/commission_on_immigration/coi_complete_full_report.authcheckdam.pdf (last visited May 19, 2013) (citing *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, 1 (2008), http://www.vera.org/download?file=1780/LOP%2Bevaluation_May2008_final.pdf)).

[52] *Lopez v. Gonzales*, 549 US 47, 58, 60, 127 S.Ct. 625 (2006).

[53] *See, e.g., US v. Gonzalez-Tamariz*, 310 F.3d 1168, 1170-71 (9th Cir. 2002) (Nevada misdemeanor battery conviction qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43)(F) (crime of violence) where suspended sentence of 365 days was imposed).

irrelevant under immigration law, these convictions were – and still are – prosecuted by ICE as aggravated felonies under immigration law since such a conviction is classified as "a theft offense for which a sentence one year or more has been imposed."[54]

G. Whether Immigration Consequences Are "Clear" or "Unclear" Depends upon Individual Factors

Chapter Four outlines various categories of Washington State crimes and the immigration consequences that they can trigger for noncitizen defendants. While that analysis identifies the likelihood that a conviction for specific Washington State crimes would trigger removal, whether conviction for a crime in fact clearly triggers removal will often depend upon the individual factors in a person's case. Additionally, as outlined in Chapter Five, whether a conviction triggers grounds of deportation or inadmissibility can also depend upon not only the specific crime of conviction, but on the way that the record of conviction documents are developed in the criminal proceedings. Chapter Four outlines the "categorical approach" and the "modified categorical approach" which are the analytical frameworks that determine whether the immigration consequences are "clear" or "unclear" in many cases.

EXAMPLE: Theft offenses are generally deemed to be crimes involving moral turpitude (CIMT).[55] However, whether a theft conviction will trigger the CIMT grounds of removal and result in the removal of someone who is an LPR will depend upon when the offense was committed, whether it is a felony or misdemeanor and whether the person has any prior convictions. A third degree theft conviction of an LPR with no priors clearly *will not* trigger the CIMT removal ground regardless of when the offense was committed. A conviction of second degree theft committed within three years of admission by an LPR with no priors clearly *will* trigger the CIMT removal ground. If the second degree theft was committed six years after admission the CIMT ground clearly *will not* be triggered.[56]

EXAMPLE: Under the modified categorical analysis, whether an Assault Fourth Degree – Domestic Violence (DV) charge triggers the DV ground of deportation will depend upon whether the plea statement (or other documents used to establish the factual basis for the offense) establishes that it meets the federal definition of a "crime of violence" (COV) under 18 U.S.C. 16(a). A plea statement that indicates that the defendant committed an "offensive touching" cannot be deemed a COV[57] and thus clearly *will not* trigger the DV-related deportation ground. In contrast, a plea statement showing that the defendant committed the offense by use of force (e.g., punching or slapping) will be classified as a COV and *will* clearly trigger the DV-related deportation ground.[58]

---

[54] *See* 8 U.S.C. 1101(a)(43)(G) (definition of theft offenses that are classified as aggravated felonies).
[55] *Marmolejo-Campos v. Holder*, 558 F.3d 903, 921 (9th Cir. 2009) (citing *In re Lopez-Meza*, 22 I&N Dec. 1188, 1193 (BIA 1999)).
[56] The CIMT-related deportation grounds can be found at 8 U.S.C. § 1227(a)(2)(A)(i) and (ii). See §4.2 for more on CIMTs under immigration law.
[57] *Suazo-Perez v. Mukasey*, 512 F.3d 1222 (9th Cir. 2008).
[58] See §4.4(A) for more on immigration consequences of DV-related convictions.

It is defense counsel's duty to determine the immigration consequences of the convictions facing the defendant and advise and negotiate accordingly.[59] However, it is important for the court to have an awareness of this key concept since different crimes will impact noncitizens differently, depending upon their immigration and criminal history.

1.2 CATEGORIES OF IMMIGRATION STATUS

While common parlance tends to ascribe the term "immigrant" to all persons who are present, but not born, in the United States, there are, in fact, a myriad of possible categories that can define a person's "immigration status" under U.S. law. The following list highlights the main categories for classifying a person's immigration status.

Anyone who is not a U.S. citizen will be subject to the possibility of removal (a.k.a. deportation)[60] if they violate U.S. immigration laws, regardless of whether they have lawful status (such as a green card), how long they have lived in the U.S., or their family and community ties. However, a person's undocumented status alone does not indicate certain removal; undocumented persons may be eligible to pursue a pathway to obtain lawful status, even after being placed in removal proceedings.[61]

The immigration status of persons at risk of removal will determine which specific provisions of immigration law apply (e.g., the grounds of inadmissibility versus the grounds of deportation), the amount of due process afforded, and which, if any, avenues of discretionary relief from removal are available.

A. United States Citizens (USC) [62]

United States Citizens (USCs) cannot be removed (deported) from the U.S. unless they obtained citizenship through fraud or other illegal means, even if they are convicted of serious crimes. USCs may file petitions for their spouses, parents, and children or step-children under 21 to immediately become LPRs.[63]

- **Citizenship at Birth or Through a USC Parent**

A child born in the U.S., its territories and in certain possessions (e.g., Puerto Rico, Guam and the Virgin Islands) becomes a USC at birth, even if the parents are not USCs and/or are undocumented.[64] Generally, a child born outside the U.S., with at least one parent who is a USC

[59] *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct 1473, 1483 (2010); *State v. Sandoval*, 249 P.3d 1015, 1019 (2011).
[60] Under immigration law, "removal" and "removal proceedings" are the current terminology used to connote an individual's "deportation" from the U.S.
[61] *See* §1.5(E).
[62] 8 U.S.C. §1401-88.
[63] 8 U.S.C. § 1151(b)(2)(A)(i).
[64] 8 U.S.C. §§ 1401(a), 1402-07.

at the time of the child's birth, becomes a USC at birth.[65] A child born outside the U.S. may also become a USC when a parent naturalizes or adopts the child under specified conditions.[66]

- **Citizenship Though Naturalization**

Naturalization is the process whereby eligible persons can apply to become USCs. A person must first become a lawful permanent resident (LPR). Generally, an LPR becomes eligible to apply for naturalization once s/he has been a lawful permanent resident for five years. Persons who acquire LPR status based upon marriage to a USC become eligible to apply for naturalization after three years.

B. Lawful Permanent Residents (LPRs)[67]

LPRs, also known as "green card" holders, can live and work legally and indefinitely in the United States. A "green card" is proof of LPR status.[68] The card expires every 10 years and must be reissued, but LPR status does not expire. LPRs can only lose their LPR status if ordered removed by an immigration judge or if they leave the U.S. for a significant period of time and are deemed to have abandoned their status.[69]

If they violate U.S. immigration law, LPRs can be ordered removed at any time, regardless of their length of residence or ties to the U.S. Criminal convictions can, and often do, result in removal and are the primary way that LPRs lose their lawful immigration status. After five years (in some cases, three years), LPRs may apply to become U.S. citizens ("naturalize") by taking a test and fulfilling other requirements.[70]

There are numerous ways to become an LPR. These avenues to obtaining LPR status are outlined in §1.4. The most common ways are: a) by a petition filed by a USC or LPR family member; b) by first becoming a refugee or being granted asylum; c) by a petition filed by an employer for a person with specialized skills or education; or d) by a grant of "cancellation of removal" (or some other form of relief[71]) by an immigration judge in removal proceedings. A person who is granted LPR status is deemed to have been lawfully admitted, even if the original entry into the U.S. was unlawful.

C. Conditional Residents (CRs)[72]

Noncitizens who apply for lawful permanent resident status (a.k.a. a "green card") based on marriage to a USC or LPR are granted a two-year "conditional resident" (CR) status if they have been married for less than two years when they obtain their residency status. At the end of the

---

[65] *See* 8 U.S.C. § 1401(c)-(h).
[66] 8 U.S.C. § 1431.
[67] 8 U.S.C. § 1101(a)(20).
[68] "Green cards" are not green. They are, in fact, white and approximately the size of a driver's license.
[69] 8 U.S.C. § 1101(a)(13)(C)(i),(ii); 8 C.F.R. § 211.1(a)(2).
[70] *See* 8 U.S.C. §§ 1423, 1427.
[71] *See* §1.5(E) of this bench guide.
[72] 8 U.S.C. § 1186a.

two year conditional period, they must file a joint petition with their spouse requesting removal of the conditions and elevation to LPR status. Like LPRs, CRs are issued a "green card" with "CR" stamped on it. Like LPRs, they can live and work legally in the U.S. and can be removed for violating immigration laws, including obtaining deportable criminal convictions.

CRs who are divorced (but married in good faith), who would suffer extreme hardship if removed, or who were abused by their spouses, may file a petition to remove conditions on their own and request a "waiver" of the joint filing requirement.[73]

D. Asylum[74] and Refugee Status[75]

Asylum or refugee status is granted to noncitizens who prove that they have suffered persecution or have a "well-founded fear" of future persecution in their home country based on race, religion, nationality, political opinion or membership in a particular social group. Refugees are noncitizens who applied for and were granted refugee status *before* entering the U.S. Asylees are noncitizens who applied for and were granted asylum *after* entering the U.S.

Asylees and refugees are issued an employment authorization document (EAD) as proof of their lawful status. After one year in asylee or refugee status, these persons are eligible to apply to become LPRs.[76] Like LPRs, asylees and refugees can be removed at any time for violating immigration laws, including being convicted of crimes that trigger grounds of deportation. Convictions that trigger the grounds of inadmissibility will bar them from obtaining LPR status (unless they qualify for limited discretionary waivers).[77]

E. Temporary Protected Status (TPS)[78]

The U.S. may grant Temporary Protected Status for a limited period of time to qualifying persons who would otherwise be undocumented, or at risk of becoming undocumented if they are citizens of a particular country encountering catastrophic events (e.g., ongoing armed conflict, earthquake, flood, other disasters, or other extraordinary and temporary conditions).[79] Citizens of a designated country who apply for and are granted TPS status are issued an employment authorization document (EAD) which permits them to live and work in the U.S. for a designated period of time, usually 18 months, which can be, and often is, extended.

Persons with two misdemeanors or one felony conviction are ineligible to apply for or renew TPS.[80]

---

[73] *Id.*
[74] 8 U.S.C. § 1158.
[75] 8 U.S.C. § 1157. .
[76] 8 U.S.C. § 1159.
[77] 8 U.S.C. §1159(a)(1) and 8 U.S.C.8 C.F.R. §§209.1&2.
[78] 8 U.S.C. § 1254a.
[79] For a list of countries currently designated for TPS, see Temporary Protected Status, U.S. CITIZENSHIP AND IMMIGRATION SERVS., www.uscis.gov/tps/ (last visited May 19, 2013).
[80] 8 U.S.C. § 1254a(c)(2)(B)(i).

Unlike asylees and refugees, persons granted TPS status are not permitted to apply to become LPRs. Once the designated period of protection ends, these persons must obtain another lawful immigration status, leave the U.S., or face removal.

F. Nonimmigrant Visa Holders[81]

A nonimmigrant visa (NIV) is issued to permit a noncitizen to enter and remain lawfully in the U.S. for a specific purpose and for a limited period of time. There are more than 20 kinds of nonimmigrant visas including visitors for business or pleasure (tourists), foreign students, and temporary workers and trainees and their spouses and children. Most NIV holders are issued stamps in their passports. Nonimmigrant visa holders who violate the terms of their visa, such as a student who drops out of school, a tourist who stays beyond the date on their visa, or anyone who obtains a deportable criminal conviction, become undocumented and subject to removal.

G. Crime Victim Survivors - U Visa Holders[82]

Victims of certain designated crimes (e.g., domestic violence, felonious assault, involuntary servitude and numerous other offenses) can be granted a nonimmigrant "U" visa for three years when requisite officials (usually law enforcement) certify that the applicant has been, is, or is likely to be helpful in any investigation or prosecution of the crime. After three years, U visa grantees can apply for LPR status. Criminal convictions can render the applicant ineligible for U visa status as well as subsequent LPR status. U visa holders are issued EADs.

H. Victims of Trafficking - T Visa Holders[83]

Victims of sex trafficking and labor trafficking can be granted a "T" visa for three years when requisite officials (usually law enforcement) certify that the applicant has complied with any reasonable request for assistance in any investigation or prosecution of the trafficking crime or other crime in which "acts of trafficking are at least one central reason for the commission of that crime." After three years, T visa grantees can apply for LPR status. Criminal convictions can render the applicant ineligible for T visa as well as subsequent LPR status. T visa holders are issued EADs.

I. Undocumented or Unauthorized Persons

Undocumented or unauthorized persons are individuals who do not presently have lawful immigration status. Being present in the U.S. without lawful immigration status is not a crime unless a person was previously removed and then illegally reentered.[84] Undocumented status puts an individual at risk for the *civil* penalty of removal.

---

[81] 8 U.S.C. § 1101(a)(15).
[82] 8 U.S.C. § 1101(a)(15)(U). See §1.4(D) for additional information regarding U visas.
[83] 8 U.S.C. § 1101(a)(15)(T). See §1.4(D) for more information on T visas.
[84] 8 U.S.C. §§ 1229c(d), 1326.

There are two types of undocumented persons:

- Those who entered the U.S. without being legally admitted via inspection at a designated port of entry or used fraudulent documents to gain admission; and
- Nonimmigrants who entered the U.S. lawfully but whose legal immigration documents have since expired, or otherwise been violated (e.g., a tourist who overstays the time permitted or a student who drops out of school).

Undocumented persons do not have a legal right to work and are subject to being placed in removal proceedings if apprehended by immigration authorities.

J. Work Permits[85]

A work permit, called an Employment Authorization Document (EAD) is not, in itself, a category of lawful immigration status. Work permits are issued by immigration authorities for a variety of reasons, including: a) as proof of some type of lawful status (e.g., TPS or asylum); b) to permit some categories of noncitizens to lawfully work while their application for lawful status is pending; or c) as a benefit to persons who have agreed to act as informants for ICE enforcement officers. EAD documents, regardless of the legal basis for issuance, are generally valid for one year.

1.3 OVERVIEW OF THE FEDERAL IMMIGRATION SYSTEM

The following outline is an overview of the relevant structure and government agencies involved in the administration and enforcement of our immigration laws.

A. Department of Homeland Security (DHS)

- Created by Congress with the Homeland Security Act of 2002.[86]
  - Abolished the Immigration and Naturalization Service (INS);[87]
  - These changes went into effect on March 1, 2003.

- Although there are overlaps in practice, DHS has divided its enforcement and administration of our immigration laws among three of its agencies:
  - Immigration and Customs Enforcement (ICE) - Responsible for immigration enforcement within U.S. borders;
  - Customs and Border Protection (CBP) - Responsible for immigration enforcement and regulation of admissions at U.S. borders and ports of entry; and
  - Citizenship and Immigration Services (USCIS) - Responsible for adjudicating applications for immigration benefits such as lawful permanent residence [green cards], asylum and citizenship.[88]

---

[85] 8 C.F.R. § 274a.12-14.
[86] Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 745 (2002).
[87] Stanley Mailman & Stephen Yale-Loehr, *Immigration Law: Immigration in a Homeland Security Regime*, N.Y. L.J., Dec. 23, 2002, at 3, *reprinted at* 8 BENDER'S IMMIGR. BULL. 1 (2003).

- While Congress expressly stated that the missions of each of these agencies are of equal importance[89], the ICE and CBP enforcement agencies receive the majority of DHS's immigration-related funding.[90]

1. Immigration & Customs Enforcement (ICE)

- Charged with enforcement of immigration law within the borders (interior) of the U.S. [91]

- Primary responsibility for apprehending noncitizens present in the U.S. in violation of immigration law, initiating removal proceedings against them and effectuating orders of removal.

- Responsible for the detention of all detained noncitizens.
  - More than 32,000 noncitizens are detained under the auspices of ICE custody on any given day in over 350 facilities, most of which are private, contracted facilities or local jails with whom ICE operates intergovernmental service agreements (IGSA) that pay to house them.[92]

- Overseen by DHS headquarters in Washington D.C., ICE operates through a network of 24 field offices throughout the U.S. These field offices deploy ICE agents throughout their jurisdictions, including to state and county jails, to apprehend noncitizens suspected of being in violation of immigration laws. [93]

2. Customs and Border Protection (CBP)

- Responsible for patrolling the U.S. borders and controlling the inspection and admission of persons at the 300+ ports of entry into the U.S.

- CBP defines border areas as territory within 100 miles of U.S. borders.[94] Because of Washington's location as a border state, in practice there is often significant overlap in enforcement activities between ICE and CBP.

- Like ICE, CBP is headquartered under the auspices of DHS in Washington, D.C. and operates through a series of regional and field offices throughout the U.S.

---

[88] *See generally* Venable, LLP, *Homeland Security Deskbook* §§2.02[3], 9.03, James T. O'Reilly gen. ed. (2004).
[89] 6 U.S.C. § 294(1).
[90] For fiscal year 2012, CBP received 21% of all DHS funding; ICE received 10% for a combined total of nearly $18 billion. USCIS received $2.85 billion, more than half of which was generated by application fees. *FY 2012 Budget in Brief: Homeland Security*, *available at* http://www.dhs.gov/xlibrary/assets/budget-bib-fy2012.pdf (last visited Jul. 4, 2012).
[91] *See generally* Michael J. Wishnie, *Civil Liberties in a New America: State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).
[92] DETENTION WATCH NETWORK, http://www.detentionwatchnetwork.org/aboutdetention.
[93] *Enforcement and Removal Operations*, ICE, http://www.ice.gov/contact/ero/index.htm (last visited May 24, 2013).
[94] *See* 8 C.F.R. § 287.1(a)(2).

3. Citizenship and Immigration Services (USCIS or CIS)

- Primary responsibility is to adjudicate applications for immigration benefits such as asylum, lawful permanent residence and citizenship.

- Also maintains all immigration records and documents and is responsible for investigations of immigration fraud.

- In addition to the four regional service centers, which process many applications for immigration benefits (at least at their initial stage), CIS also operates a network of district field offices that conduct interviews of noncitizens seeking immigration benefits.

B. Department of Health and Human Services

- **Office of Refugee Resettlement (ORR)** – Located in the Department of Health and Human Services, the ORR has two primary immigration responsibilities:

    - Facilitate the resettlement of noncitizens designated abroad as refugees and relocated to the U.S.;
    - Provide care and services to unaccompanied noncitizen youth in immigration custody.

C. Department of Justice

Under the current structure, the Department of Justice retains involvement in immigration law in two primary ways, through the Executive Office for Immigration Review and the Office of Immigration Litigation, both agencies that operate under its jurisdiction. [95]

1. Executive Office for Immigration Review (EOIR)

- The **EOIR** administers the Board of Immigration Appeals (BIA), which sits in Falls Church, VA, and the immigration courts throughout the U.S.

- **Board of Immigration Appeals** – A quasi-judicial body (not an Art. III court) that consists of 15 permanent members; the BIA entertains appeals from decisions of the immigration judges.

- **Immigration Courts** – There are over 260 immigration judges in 59 immigration courts throughout the U.S. Immigration judges are not Article III judges, but quasi-judicial officers, similar to, but technically not, administrative law judges.

---

[95] The Executive Office for Immigration Review fulfills those responsibilities delegated to the "Attorney General" in the Immigration and Nationality Act. *See* 8 U.S.C. § 1103(g).

2. Office of Immigration Litigation

- Supervises all civil litigation (e.g., denaturalization proceedings).

- Primary responsibility is to represent the government in immigration litigation before the federal circuit courts.

D. Federal Courts

- Challenges to removal orders must be made by petition for review to the appropriate circuit court of appeals within 30 days of a final administrative removal order. [96]

- Congress eliminated federal circuit courts' jurisdiction to review questions of fact, discretionary determinations, and cases where removal is based on criminal convictions. However, the courts have made clear that they retain jurisdiction "to determine jurisdiction" and to review the application of facts to law.[97]

- Federal district and circuit courts have jurisdiction over criminal prosecutions involving immigration-related crimes such as illegal entry under 8 U.S.C. § 1325 and illegal reentry under 8 U.S.C. § 1326. These two offenses are the most prosecuted federal crimes in the U.S.[98]

1.4 AVENUES FOR OBTAINING LAWFUL STATUS

The legal pathway to obtaining U.S. citizenship (outside of birth or blood ties) requires, in almost all cases, that the person first become an LPR. However, there is no requirement that LPRs then become a U.S. citizen, as they may remain in LPR status permanently under U.S. law.

Consequently, for most foreign-born persons who seek to make their lives in the U.S., obtaining LPR status is either the initial prize on their way to U.S. citizenship or the end goal in itself. Of the estimated 38 million foreign-born individuals living in the U.S., more than two-thirds (71%) of them have already become U.S. citizens or LPRs[99]. The remaining 11 million undocumented individuals often lack a legal pathway to do so, or the knowledge and legal support to navigate the expensive labyrinth of required immigration laws and paperwork to become an LPR.

---

[96] With passage of the REAL ID Act of 2005, Congress eliminated the jurisdiction, including habeas jurisdiction under 28 U.S.C. § 2241 and the constitution, of federal district courts to entertain challenges to removal orders. Pub. L. No. 109-13, Div. B Tit. I § 106, 119 Stat. 302 (2005). Habeas and other forms of jurisdiction remain available to challenge other alleged immigration law violations, including detention (where not related to removal).

[97] *Daas v. Holder*, 620 F.3d 1050, 1053 (9th Cir. 2010).

[98] *See Illegal Reentry Becomes Top Criminal Charge*, TRAC REPORTS (June 10, 2011), *available at* http://trac.syr.edu/immigration/reports/251/.

[99] *See* WILLIAM A. KANDEL, CONG. RESEARCH SERV., R41592, U.S. FOREIGN-BORN POPULATION: SELECTED TRENDS AND CHARACTERISTICS (2011), *available at* http://www.hsdl.org/?view&did=11486.

The primary pathways for a noncitizen to obtain lawful status can be divided into the following categories.

A. Immigration Through Family Members

Family-based immigration is one of the primary forms through which noncitizens obtain lawful immigration status in the U.S.[100] U.S. citizens (USCs) and LPRs are entitled to petition for LPR status for certain family members - primarily spouses, parents and children (including step-children) under 21 years of age. Simply marrying a USC does not confer any lawful immigration status on an undocumented spouse or stepchildren. All family members must go through the application process and prove, *inter alia*, that they are admissible to the U.S. (or qualify for a waiver of inadmissibility) and be issued proper documentation.

Spouses, parents and children (under 21) of U.S. citizens are deemed "immediate relatives" under immigration law and are entitled to have their USC family member "immediately" file a petition for their lawful status.[101] All other qualifying familial relationships are subject to quotas allocated by Congress on an annual basis. Consequently, the wait time for many families to obtain the lawful status necessary to live together lawfully in the U.S. is often lengthy. These are the other qualifying familial relationships that entitle a U.S. citizen or LPR to petition for lawful status for their family members:

- Adult children (over 21) of U.S. citizens;
- Spouses, children (under 21), and unmarried adult children of LPRs;
- Brothers and sisters of U.S. citizens.[102]

Obtaining status through a family member is a two-step process where the USC or LPR family member first files a petition to USCIS establishing the validity of the relationship (e.g., spouse, parent, child or sibling). Once approved, the noncitizen seeking lawful status must then file an application for lawful admission to the U.S. To be approved, they must prove that they do not trigger any grounds of inadmissibility under U.S. law. Criminal convictions are one of the primary categories of inadmissibility grounds.

Some noncitizens already present in the U.S. are entitled to remain here while they apply for lawful status. This process is called "Adjustment of Status" as the person's immigration status is adjusted to that of an LPR. Other noncitizens are required to return to their home country to obtain an "immigrant visa" from a U.S. consulate there, by which they can legally re-enter the U.S. and be designated LPRs. This process is known as Consular Processing.[103]

---

[100] *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL32235, U.S. POLICY ON PERMANENT ADMISSIONS (2009), *available at* http://www.hsdl.org/?view&did=34466.

[101] Note that many U.S. citizens who acquired citizenship through the naturalization process will seek to petition for their family members through this process.

[102] 8 U.S.C. § 1153.

[103] Once a person is granted an immigrant visa and lawfully enters the U.S., she is automatically deemed a lawful permanent resident (LPR) and will be issued a green card.

Although the birth of a child in the U.S. will make the child a U.S. citizen, it does not confer any lawful immigration status on the parents. The child is not entitled to petition for lawful status for its parents until reaching the age of 21. Similarly, marriage to a U.S. citizen does not automatically grant lawful status to the noncitizen spouse. It simply provides a legal avenue by which the spouse can then apply for lawful immigration status pursuant to the process described above.

B. Employment-Based Immigration

Obtaining lawful immigration status based on employment is divided into two categories.

1. Temporary Work Visas[104]

A noncitizen who wishes to come to the U.S. legally and be authorized temporarily for work must qualify for and be issued, by a U.S. Consulate abroad, an employment-related non-immigrant visa based on the purpose of the travel and the type of work. There are annual numerical limitations on the number of these visas issued (less than 200,000 are issued annually). There are 11 categories of employment-related nonimmigrant visas. The majority, however, are issued for these following four categories:

- **H-1B - Persons in Specialty Occupation** which requires the theoretical and practical application of a body of highly specialized knowledge requiring completion of a specific course of higher education;
- **H-2A - Seasonal Agricultural Workers** from designated countries;
- **H-2B - Temporary or Seasonal Nonagricultural Workers** from designated countries; and
- **L - Intracompany Transferees** of U.S. based companies in a managerial, executive, or specialized knowledge capacity.

2. Obtaining Lawful Permanent Residence Through Employment[105]

Approximately 140,000 employment-based immigrant visas[106] are made available annually to qualified applicants. Noncitizens who do not qualify for one of these categories will only be authorized to work legally in the U.S. if they qualify for a temporary work visa or have some other path to obtaining lawful status outlined here.

---

[104] Information in this section was adapted from the website of the U.S. Department of State. *See Temporary Worker Visas*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/temp/types/types_1271.html (last visited July 3, 2012).

[105] Information in this section was adapted from the website of the U.S. Department of State. *See Employment-Based Immigrant Visas*, TRAVEL.STATE.GOV, http://travel.state.gov/visa/immigrants/types/types_1323.html#overview (last visited July 3, 2012).

[106] Once a person is granted an immigrant visa and lawfully enters the U.S., she or he is automatically deemed a lawful permanent resident (LPR) and will be issued a green card.

To be considered for an immigrant visa under one of the employment-based categories infra, the applicant's prospective employer or agent must first obtain a labor certification approval notice from the Department of Labor. The employer must then file a petition with USCIS for the appropriate employment-based preference category. The applicant (and qualifying family members) must establish that they do not trigger grounds of inadmissibility.

Employment-based immigrant visas are divided into the following five preference categories. Certain spouses and children may accompany employment-based immigrants. The vast majority of these visas are issued to persons within the first two categories.

- **Priority Workers -** There are four sub-groups within this category:
    - **Persons with extraordinary ability** in the sciences, arts, education, business, or athletics.
    - **Outstanding professors and researchers** with at least three years' experience in teaching or research, who are recognized internationally;
    - **Multinational managers or executives** who have been employed for at least one of the three preceding years by the overseas affiliate, parent, subsidiary, or branch of the U.S. employer;
    - **Professionals Holding Advanced Degrees and Persons of Exceptional Ability;**
- **Skilled Workers, Professionals, and Unskilled Workers (Other Workers)**
- **Certain Special Immigrants -** There are many subgroups within this category. However, there are only a fraction of employment visas given out under it.
- **Employment Fifth Preference (E5): Immigrant Investors -** To qualify as an Immigrant Investor, a foreign citizen must invest between U.S. $500,000 and $1,000,000 in a commercial enterprise in the U.S which creates at least 10 new full-time jobs for U.S. citizens or LPRs.

C. Fear of Persecution

U.S. law provides two primary pathways for persons fleeing persecution to be granted lawful status in the U.S. Both pathways require the person to establish that they have a well-founded fear of future persecution in their home country, or have suffered past persecution, on account of race, religion, nationality, political opinion, or membership in a particular social group.

- **Refugee Status**[107] – Refugees are persons who have made the requisite showing of a well-founded fear of persecution by applying abroad to a U.S. Consulate. If granted refugee status, the person will be permitted to legally enter the U.S. and be resettled here as a refugee. The number of allocated refugee visas for the fiscal year 2012 was 76,000.[108]

[107] 8 U.S.C. § 1157.
[108] U.S. DEPT. OF STATE, PROPOSED REFUGEE ADMISSIONS FOR FISCAL YEAR 2012: REPORT TO THE CONGRESS, *available at* http://www.state.gov/documents/organization/181378.pdf (last visited May 15, 2013).

- **Asylum Status**[109] – Asylees are persons who enter the U.S. first (either legally or illegally) and then seek the protection of the U.S. A noncitizen may apply for asylum affirmatively to USCIS, or defensively before an immigration judge after being placed in immigration proceedings. Asylum applications must be made *within one year of arrival in the U.S.*, unless there are changed circumstances in the applicant's home country or extraordinary circumstances related to the delay in filing. There are no limits on the number of asylum grants each year; however, significant legal hurdles ensure that the annual number is less than 10,000.

Convictions designated as "particularly serious crimes" will render an applicant statutorily ineligible to be granted refugee or asylee status.[110] After one year in refugee or asylee status, an individual is entitled to apply to "adjust his status" to become an LPR. A conviction of a "violent or dangerous" crime will make a refugee or asylee ineligible to be granted LPR status (and will usually subject them to removal proceedings). [111]

D. Status as a Survivor of Crime or Human Trafficking

1. U Visas – Victim/Witness to a Crime[112]

A "U" visa is an avenue to lawful status available to certain crime victims who possess information about criminal activity that would be useful in the investigation and prosecution of the crime.[113] If the victim is a child under the age of 16, then the parent, guardian or next of kin of the child victim may possess the information and indicate the willingness to be helpful.[114] The U visa is available to immigrants who have suffered "substantial physical or mental abuse as a result of having been a victim" of one of the following forms of criminal activity that occurred in the United States:

> Rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, hostage holding, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion,

---

[109] 8 U.S.C. § 1158.
[110] 8 U.S.C. § 1158(b)(2)(A)(ii).
[111] *See Matter of Jean*, 23 I&N Dec. 373, 383 (A.G. 2002); 8 C.F.R. § 212.7(d).
[112] 8 U.S.C. § 1101(a)(15)(U). More resources on the U visa are available at: www.dhs.gov/files/resources/u-visa-law-enforcement-guide.shtm; www.asistaonline.org; www.ilrc.org/uvisa.php; and www.nationalimmigrationproject.org.
[113] The U visa was added to the immigration statute as a part of the Violence Against Women Act of 2000, Pub. L. No. 106-386, Div. B, Tit. 5, § 1513, 114 Stat. 1491 (2000). Regulations implementing the U visa were issued in 2007 at New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014-01 (Sept. 17, 2007) (codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a and 299).
[114] The spouse or child (or, where the principal applicant is a child, the spouse, child, parent or unmarried sibling under 18 years of age) of a principal applicant for a U visa may apply for a derivative U visa. In order to qualify, the spouse, child, parent or sibling must show the qualifying family relationship. Parents and siblings will also need to show the age of the principal applicant at the time of application for U status. 8 U.S.C. § 1101(a)(15)(U)(ii).

manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, or attempt, conspiracy or solicitation to commit one of these offenses.

Law Enforcement Certification Required. No charges need to be filed, nor a conviction obtained, in order to receive the certification. However, in order to qualify for a U visa, an applicant must obtain law enforcement certification (Form I-918 Supplement B) that he or she has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the alleged criminal activity.[115] By statute the certification can come from a Federal, State or local law enforcement official, prosecutor, judge or other authority investigating or prosecuting the criminal activity.[116] No agency is required to do a certification. Certification must be submitted as part of the U visa application. USCIS has discretion to decide whether to grant a U visa. Congress imposed a numerical limit permitting no more than 10,000 U visas to be granted annually.

Disqualifying Criminal Convictions. U visa applicants must prove that they are entitled to be admitted to the U.S. (i.e., do not trigger any grounds of inadmissibility). All grounds of inadmissibility are waivable except the national security grounds.[117] However, in the case of U visa applicants inadmissible on criminal grounds, the interim regulations state that discretionary waivers for those convicted of "violent and dangerous crimes" will only be granted "in extraordinary circumstances,"[118] and that waiver denials are both revocable[119] and administratively unappealable.[120]

Path to Lawful Permanent Resident Status. Individuals granted U visas may apply for permanent residency after three years. Permanent residency will be granted for humanitarian, family unity or public interest purposes. The applicant must have maintained continuous presence in the U.S. during that time, and must not have unreasonably refused to participate in any investigation or prosecution related to the crime that was the basis for the U visa application.[121]

2. T Visas – Trafficking Victims

An applicant for a T visa must be a victim of "a severe form of trafficking in persons," who is in the U.S. as a result of the trafficking, and who would suffer "extreme hardship involving unusual and severe harm" if removed from the United States. Severe trafficking includes sex trafficking of persons under 18 years of age, or recruiting or obtaining persons for labor or services through the use of force, fraud, or coercion "for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[122] A T visa applicant who is 18 years old or older

---

[115] *See* 8 U.S.C. § 1101(a)(15)(U)(i)(III).
[116] *See* 8 U.S.C. § 1184(p).
[117] 8 U.S.C. § 1182(d)(14).
[118] 8 C.F.R. § 212.17(b)(2); *cf. Matter of Jean* 23 I&N Dec. at 383 (A.G. 2002); 8 C.F.R. § 212.7(d) ("exceptional and extremely unusual hardship" can be an "extraordinary circumstance").
[119] 8 C.F.R. § 212.17(c).
[120] 8 C.F.R. § 212.17(b)(3).
[121] 8 U.S.C. § 1255(m)(1).
[122] "Severe forms of trafficking in persons" is defined at 22 U.S.C. § 7102(8).

must also show compliance with any reasonable law enforcement agency request for assistance in the investigation or prosecution of the acts of trafficking. Individuals granted T visas may adjust to LPR status three years later. Only 5,000 nonimmigrant T visas and 5,000 adjustments to permanent residency based on T visas may be granted each year.

Like U visa applicants, individuals applying for a T visa must prove that they are entitled to be admitted to the U.S. All grounds of inadmissibility except national security grounds, including criminal acts and convictions, can be waived as long as the activities to be waived, including criminal acts, were caused by or incident to the trafficking victimization, in addition to any other waiver for which they are eligible.[123] Regulations, however, impose a high standard for waiver of some criminal convictions and, where not related to the trafficking, only "exceptional" cases will be granted waivers.[124]

E. Relief Granted by the Immigration Judge in Removal Proceedings

Most noncitizens placed in proceedings before an immigration judge (IJ) for the first time will be entitled to pursue any avenues they may legally have to request "relief from removal" from the IJ. Relief, if granted, will permit them to remain lawfully in the U.S. This includes avenues for LPRs, refugees and asylees to keep their lawful status, despite having incurred convictions that trigger their removal. It also includes renewing some applications for lawful status pursuant to one of the categories described in §1.2 that were denied by USCIS.[125] Eligible undocumented persons are also entitled to file initial applications for relief (e.g., cancellation of removal for certain undocumented persons). See §1.5(E) for an outline summary of avenues to obtain lawful status that may be granted by an IJ in removal proceedings.

1.5 REMOVAL PROCEEDINGS (A.K.A. DEPORTATION PROCEEDINGS)

A. Types of Removal Proceedings

Once a person is taken into immigration custody, ICE or CBP must decide within 72 hours how they are going to handle the person's case and whether the person will be detained or released. This will involve either initiating formal removal proceedings before an IJ or moving forward with one of the other types of removal or criminal proceedings outlined here. Removal Proceedings for detained noncitizens in Washington State are held at the Northwest Detention

---

[123] 8 U.S.C. § 1182(d)(13).
[124] 8 C.F.R. § 212.16(b)(2).
[125] In most circumstances, when USCIS denies applications for lawful status pursuant to one of the categories outlined here, they refer the case to ICE for issuance of a Notice to Appear. USCIS will also take into immediate custody during interviews in connection with applications for lawful status, individuals whom it believes are subject to removal and mandatory detention. For example, a LPR who applies for U.S. citizenship but is denied and placed into removal proceedings due to a prior misdemeanor theft 3rd degree conviction where a sentence of 365 days was imposed (regardless of suspended time).

Center in Tacoma. Noncitizens who are not detained will attend their removal proceedings at the Immigration Court in downtown Seattle.[126]

Additionally, noncitizens who are detained at the Washington State Department of Corrections (DOC) and placed in removal proceedings before an IJ may have their removal proceedings conducted while in DOC custody. As part of ICE's Criminal Alien Program, formerly known as the Institutional Removal Program, removal proceedings are conducted by an IJ who either travels to a designated DOC facility or appears by video teleconference. If the IJ issues a final order of removal, the individual will be removed immediately upon completion of his criminal sentence without entering ICE custody. This program has been drastically reduced since most DOC inmates have convictions that qualify as aggravated felonies under immigration law and, thus, do not qualify for hearings before an immigration judge unless they are lawful permanent residents (LPRs).[127] LPRs are issued expedited removal orders.[128]

1. Proceedings Before an Immigration Judge[129]

Issuance of Notice to Appear. ICE and CBP initiate removal proceedings against noncitizens by issuing a charging document called a Notice to Appear ("NTA", Form I-862)[130] containing allegations of fact and alleging statutory grounds of removal based upon alleged violations of immigration law, e.g., present in the U.S. without lawful admission.[131] The NTA is filed with the immigration court, although there are no time restrictions on when this must occur. Noncitizens can be detained for weeks, sometimes months, before the NTA is filed with the Immigration Court. Regardless of when the NTA is filed with the immigration court, a noncitizen not subject to mandatory detention can request a custody redetermination hearing with the immigration court.[132]

Master Calendar Hearing.[133] At the Master Calendar hearing, the IJ will request a plea from the noncitizen indicating whether they admit or deny the factual allegations in the NTA and whether they contest or concede to their removal pursuant to the charged removal grounds in the NTA. The IJ must inform the noncitizen of any avenues to seek relief from removal that they appear to be entitled to pursue. If the person contests facts that require an evidentiary hearing, or if the person wishes to pursue an application for relief from removal, the IJ will set the case to the Individual Calendar for a hearing. If the noncitizen admits factual allegations, does not contest the legal charges of removal and does not qualify for any relief from removal, the IJ will enter an order of removal at the Master Calendar hearing.

---

[126] The Seattle Immigration Court is located at 1000 Second Avenue, Suite 2500.
[127] *See generally Fact Sheet: Criminal Alien Program*, ICE (Mar. 29, 2011), *available at* http://www.ice.gov/news/library/factsheets/cap.htm (last visited May 15, 2013); Fentress Inc, *Institutional Removal Program: National Workload Study* (2009), *available at* http://www.cis.org/articles/2009/fentress-report.pdf (last visited May 15, 2013).
[128] *See* §1.5(B) (1).
[129] Removal proceedings before an immigration judge are governed by 8 U.S.C. § 1229a and 8 C.F.R. § 1003.
[130] 8 C.F.R. §§ 1003.13, 1003,14.
[131] 8 U.S.C. § 1229.
[132] See §1.5(C) for more on immigration detention.
[133] *See* GENERALLY THE OFFICE OF THE CHIEF IMMIGRATION JUDGE, IMMIGRATION COURT PRACTICE MANUAL, at 64 (2008), *available at* http://www.justice.gov/eoir/vll/OCIJPracManual/Chap%204.pdf (last visited May 15, 2013).

The IJ may grant continuances for good cause, e.g., to permit the noncitizen time to obtain legal counsel or await resolution of other legal issues, such as application for a U visa, that bear on removal. The IJ may also order the parties to submit legal briefing where the noncitizen's argument against removal is a pure question of law (e.g., whether their conviction for a particular crime is an aggravated felony).

Individual Calendar Hearings.[134] If a noncitizen is contesting removal on the grounds charged and requires an evidentiary hearing, or is applying for relief from removal (such as asylum or LPR cancellation of removal) the IJ will set the case for an individual calendar hearing. The Federal Rules of Evidence are not controlling, but serve as guiding principles. The noncitizen may present evidence and witnesses and the ICE attorney can question any witnesses as well as the noncitizen. During the proceedings, the IJ administers oaths, receives evidence, and can conduct examination and cross-examination of the noncitizen and any witnesses.[135] The proceedings may take place in person; in the absence of the noncitizen when agreed to by the parties; or through video or telephonic conference.[136] A complete record is kept of all testimony and evidence produced at the proceeding.[137] In most cases, the IJ issues an oral decision at the end of the Individual Calendar hearing as to whether the noncitizen is subject to removal as charged and granting or denying any applications for relief from removal.[138]

Failure to Appear. If a noncitizen fails to appear at the proceeding, removal may be ordered *in absentia* if clear and convincing evidence establishes that written notice was provided and that the noncitizen is removable.[139] Such an order will result in the noncitizen being barred from lawful reentry for a period of five years.

Appeals. A noncitizen has the right to file, within 30 days following entry of the order, a notice of appeal of the IJ's decision to the Board of Immigration Appeals (BIA).[140] Once the BIA enters its decision, the case becomes administratively final. Subject to statutory limitations, decisions of the BIA may be appealed within 30 days to the federal circuit court of appeals having jurisdiction over the place where the IJ's order was entered. Congress has imposed significant limitations on the types of immigration cases the federal courts may hear, as well as on the scope of their review.[141] Despite these restrictions, immigration-related cases account for almost half of all cases before the Ninth Circuit Court of Appeals.[142]

Lawful Permanent Residents. Only an immigration judge can issue a removal order against an LPR. Consequently, all LPRs facing removal will be placed in formal removal proceedings before an IJ.

---

[134] *See generally id.* at 75.
[135] 8 U.S.C. § 1229a(b)(1).
[136] 8 U.S.C. § 1229a(b)(2)(A).
[137] 8 U.S.C. § 1229a(b)(4)(C).
[138] 8 U.S.C. § 1229a(c)(1)(A).
[139] 8 U.S.C. § 1229a(b)(5).
[140] *See* §1.3(C).
[141] *See* 8 U.S.C. § 1252.
[142] *See* S. Moore and A. M. Simmons, *Immigrant Pleas Crushing Federal Appellate Courts*, L.A. TIMES, May 2, 2005, *available at* http://articles.latimes.com/2005/may/02/local/me-backlog2.

2. Voluntary Departure Orders

A noncitizen apprehended by ICE may be permitted to depart the U.S. voluntarily. After posting a bond, the person has up to 120 days to settle affairs in the U.S., prior to leaving at the person's own expense.[143] Voluntary departure can be granted either by an immigration judge after initiation of removal proceedings or administratively by ICE without initiating removal proceedings.[144] Voluntary departure requires a noncitizen to concede removability, but does not pose a bar to seeking lawful readmission to the U.S. at a later time.[145] If a noncitizen fails to depart after being awarded voluntary departure by an immigration judge, the voluntary departure order automatically becomes an order of removal and triggers a ten-year bar to any form of immigration relief and the possibility of a civil penalty.[146]

Administrative grants of voluntary departure were once a long-standing and primary focus of ICE enforcement efforts. However, with the 1996 changes to the immigration law and the expanded immigration enforcement efforts since that time, such grants have become increasingly rare. ICE now relies primarily on the other removal procedures outlined here.[147]

B. Expedited Removal Procedures

1. Expedited Removal of Aggravated Felons

Expedited removal of aggravated felons, also known as administrative removal, refers to the procedure through which ICE may on its own enter an unreviewable order for removal of a noncitizen *without a hearing before an immigration judge* if the noncitizen is not a lawful permanent resident or a conditional permanent resident and has been convicted of a crime classified as an aggravated felony.[148] No relief from removal exists once a noncitizen's case has been determined to meet the criteria for administrative removal.[149]

While a noncitizen in administrative removal is not entitled to a hearing before an immigration judge, noncitizens are entitled to notice of the charges against them, an opportunity to inspect the evidence against them, an opportunity to rebut the charges and access to an attorney at his or her own expense. If a noncitizen responds to the charges in writing and contests his removal on the charges, ICE will decide whether to issue a final administrative order

---

[143] 8 U.S.C. § 1229c.
[144] Once a common practice, ICE grants of administrative voluntary departure are now an infrequent occurrence.
[145] *Cf.* 8 U.S.C. § 1182(a)(9)(A)(i),(ii) (an individual who has previously been ordered removed is barred from legal reentry for at least five years).
[146] 8 USC § 1229c(d).
[147] *See* J. E. Marot and C. Pierce, *Voluntary Departure or Removal: Is there Any Difference?*, IMMIGRATION INFORMATION VISA LAW GUIDE, *available at* www.cpvisa.com/voluntarydep.html (last visited July 3, 2012).
[148] 8 U.S.C. § 1228(b).
[149] *Id.* Note that noncitizens who can prove that they will be tortured by the government in their home country are entitled to request relief pursuant to the Convention Against Torture. *See* 8 C.F.R. §208.16-18. Even where they are able to meet the significant evidentiary threshold, a grant of CAT relief does not confer lawful status.

of removal or place the noncitizen in removal proceedings before an IJ through the issuance of a NTA.[150]

Most noncitizens who are not permanent residents and who are sentenced to more than one year to be served through the Washington State DOC will be processed for expedited removal pursuant to these provisions. Noncitizens who are issued a final order of removal and who have not been convicted of a violent crime or sex offense will be processed for "early release for deportation."[151]

2. Expedited Removal Orders at U.S. Borders

Expedited removal is a process under which a noncitizen who is deemed to be an "applicant for admission"[152] to the U.S. and is suspected of having no documentation, or fraudulent documentation, can be removed from the U.S. without any hearing before an immigration judge or other review unless the noncitizen indicates a fear of persecution and an intention to apply for asylum.[153] Noncitizens subject to expedited removal must be detained until they are removed and may only be released due to medical emergency, if necessary for law enforcement purposes, or if they express intent to seek asylum and pass a "credible fear" review before an immigration judge. Noncitizens who have been expeditiously removed are barred from lawfully returning to the U.S. for five years.[154]

Although primarily used at border crossings and ports of entry, expedited removal procedures may be applied by the Department of Homeland Security, through ICE and CBP, to *any* noncitizen found in the U.S. whether or not encountered at border crossings, who cannot show that they have been lawfully admitted and continuously present for two years. Since 2006, DHS has exercised this authority in part to expand expedited removal to noncitizens who are present without being admitted, are encountered by an immigration officer within 100 air miles of the U.S. international land or sea border, and have not established to the satisfaction of an immigration officer that they have been physically present in the U.S. continuously for the 14-day period immediately preceding the date of encounter.[155]

3. Reinstatement of Removal Orders

ICE (or CBP) will reinstate, without a hearing before an immigration judge or other review, any final order of removal (or prior deportation) against a noncitizen who is apprehended and has illegally reentered the U.S. after having been removed (or previously deported), or who re-

---

[150] 8 U.S.C. § 1228(b)(4).
[151] See §7.9 for more information on early release for deportation.
[152] Any noncitizen present in the U.S. without having been admitted at a port of entry is considered an applicant for admission. 8 U.S.C. § 1225(a)(1).
[153] 8 U.S.C. § 1225(b)(1)(A)(i).
[154] 8 U.S.C. § 1182(a)(9)(i).
[155] *Notice: Designating Aliens for Expedited Removal*, 69 Fed. Reg. 48877 - 01 (Aug. 11, 2004); *DHS Streamlines Removal Process Along Entire U.S. Border*, U.S. DEP'T. OF HOMELAND SEC. (Jan. 30, 2006), *available at* http://www.aila.org/content/default.aspx?docid=18404 (last visited May 15, 2013).

enters after having departed voluntarily under a final order of removal.[156] The previous order is reinstated from its original date and is not subject to being reopened or reviewed; the noncitizen is not permitted to apply for any form of relief.[157] DHS must, however, ask such noncitizens whether they fear persecution or torture if removed from the U.S.[158] Where that is the case, the noncitizen will be interviewed to determine whether he or she may qualify for asylum or relief under the Convention Against Torture.[159]

4. Stipulated Orders of Removal

A detained noncitizen who has been served with an NTA and placed in formal removal proceedings before an IJ may concede that he is subject to removal as charged and elect to sign a stipulated order of removal agreeing to be removed without a hearing before an IJ.[160] The IJ, in the absence of the parties, then enters a final order of removal against the noncitizen without a hearing based on review of the stipulated order, the charging document, and any supporting documents.[161] Individuals ordered removed pursuant to this process are barred from lawfully reentering the U.S. for at least ten years and permanently if the order was based upon a conviction for a crime classified as an aggravated felony.[162]

Due process concerns[163] raised by immigration judges and advocates, as well a recent decision from the Ninth Circuit Court of Appeals,[164] have resulted in a significant reduction in ICE's use of stipulated removal orders for cases in Washington State since 2010.[165]

5. Referral for Federal Criminal Prosecution

Although not a specific removal procedure, the past decade has seen a dramatic rise in referrals by ICE and CBP of apprehended noncitizens for federal criminal prosecution.

Prosecution for Illegal Entry – 8 U.S.C. § 1325. Although unlawful presence is a civil law violation, not a crime, illegally entering the U.S. is a crime. However, long-standing legal precedent has construed this to be a crime that occurs only at the time of entry and does not

---

[156] 8 U.S.C. § 1231(a)(5); 8 C.F.R. § 241.8.
[157] *Id*.
[158] 8 C.F.R. § 241.8(a)(3)(e).
[159] 8 C.F.R. § 208.31.
[160] 8 U.S.C. § 1229a(d); 8 C.F.R. § 1003.25(b). By signing a stipulated order of removal, a noncitizen waives his or her rights to be represented by counsel, to appear before an immigration judge, to contest his or her removability from the U.S., to apply for any relief from removal, and to appeal the final order of removal.
[161] 8 C.F.R. § 1003.25(b).
[162] 8 U.S.C. § 1182(a)(9)(A)(ii).
[163] J.Koh, J.Srikantiah, K. Tumlin, *Deportation Without Due Process*, STANFORD UNIV. (2011), http://www.stanford.edu/group/irc/Deportation_Without_Due_Process_2011.pdf. According to data obtained through a Freedom of Information Act (FOIA) request, ICE uses the stipulated removal program primarily on noncitizens in immigration detention who lack lawyers and are facing deportation due to minor immigration violations.
[164] *United States v. Ramos*, 623 F.3d 672, 680-84 (9th Cir. 2010).
[165] Daniel Gonzales, *Immigration officials back away from deportation program*, THE ARIZONA REPUBLIC (Nov. 6, 2011) *available at* http://www.azcentral.com/arizonarepublic/news/articles/2011/11/06/20111106immigration-arizona-deportation-program.html.

continue.[166] Since it is not a continuing violation, noncitizens can only be prosecuted for illegal entry if apprehended at the time of entry.

Prosecution for Illegal Reentry after Deportation – 8 U.S.C. § 1326. Unlike 8 U.S.C. § 1325, a noncitizen who has illegally reentered the U.S. after having previously been removed can be subject to criminal prosecution at any time that they are "found in" the U.S. Consequently ICE and CBP have the option to refer any apprehended noncitizen with a prior order of removal for federal criminal prosecution. Noncitizens convicted of this crime will face sentence enhancements if they have prior criminal convictions, which can add between 2-20 years onto their prison time, after which they will be again removed.[167]

Operation Streamline, a program implemented in 2005, requires filing federal criminal charges for every person who crosses the border illegally. [168]

Those who are caught making a first entry are prosecuted for misdemeanors punishable by up to six months in prison, and those who reenter after removal may be prosecuted for felonies punishable by up to 20 years in prison. [169] Although individuals referred by ICE or CBP are transferred to federal criminal custody and have all the rights of criminal defendants, under this fast-track program, a federal criminal case with prison and removal consequences is typically resolved in 2 days or less.[170] Once released from federal prison, the noncitizen will be transferred back to ICE or CBP custody for removal.

As a result of Operation Streamline, immigration violations for illegal entry and illegal reentry are currently the most prosecuted federal crimes. [171] Latinos comprise more than half of the federal prison population, although they comprise only 16.3% of the general population.[172]

---

[166] *United States v. Rincon-Jiminez*, 595 F.2d 1192, 1194 (9th Cir. 1979); *United States. v. Pruitt*, 719 F.2d 975, 978 (9th Cir. 1983).
[167] *See* U.S.S.G. §§ 4B1.1, 4B1.2, 2L1.2.
[168] *See generally*, J. Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY & DIVERSITY, UNIVERSITY OF CALIFORNIA, BERKELEY LAW SCHOOL (2009) http://www.law.berkeley.edu/files/Operation_Streamline_Policy_Brief.pdf; S. Moore, *Push on Immigration Crimes is Said to Shift Focus*, N.Y. TIMES (Jan. 12, 2009), *available at* http://www.nytimes.com/2009 /01/12/us/12prosecute.html?pagewanted=all; S. Hsu, *Immigration Prosecutions Hit New High*, THE WASHINGTON POST (Jun. 2, 2008), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/06/01/AR20080601 02192.html.
[169] *Operation Streamline Fact Sheet*, NATIONAL IMMIGRATION FORUM (Jul. 21, 2009) *available at* http://www.immigrationforum.org/images/uploads/OperationStreamlineFactsheet.pdf.
[170] *Amended Written Statement of Heather E. Williams*,OVERSIGHT HEARING ON THE EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS BEFORE THE H. SUBCOMM. OF COMMERCIAL AND ADMINISTRATIVE LAW, at 4 (2008), *available at* http://judiciary.house.gov/hearings/pdf/Williams080625.pdf.
[171] *See Immigration Convictions for December 2011*, TRAC IMMIGRATION (2011), http://trac.syr.edu/trac reports/bulletins/immigration/monthlydec11/gui/.
[172] G. Burke, *Hispanics New Majority Sentenced to Federal Prisons*, ASSOCIATED PRESS (Sept. 6, 2011), *available at* http://cnsnews.com/news/article/hispanics-new-majority-sentenced-federal-prison.

C. Immigration Detention

Immigration detention is one of the most controversial issues in immigration law. As a result of the government's expanded use of immigration detention as a key component of its immigration enforcement strategy, thousands of immigrants are detained for prolonged periods of time[173] pending hearing and resolution in the immigration and federal courts. On an average day, ICE detains over 33,000 non-citizens in over 250 federal detention facilities and local jails across the country.[174] This represents a more than threefold increase in the immigration detention population in the past decade.[175] The immigration detention system is the largest detention system in the country[176] and more than $5.5 million is spent on detaining noncitizens in removal proceedings daily.

Immigration detention often creates a burden on families, many of whom are U.S. citizens or otherwise residing lawfully within the U.S. Noncitizens are often faced with the choice of prolonged immigration detention if they exercise their rights to challenge their removal or seek relief from removal, or forfeit any legal challenge and accept removal and banishment from the U.S. Eighty-four percent of such detainees will face this choice without legal representation.[177]

Noncitizens in Washington are detained at the Northwest Detention Center (NWDC) in Tacoma. NWDC has a current capacity of approximately 1,539 beds.[178]

1. Mandatory Detention During the Removal Process

Most noncitizens facing removal charges based on criminal convictions will be subject to mandatory detention for the duration of their removal proceedings, including any appeals. They will not be granted a custody determination hearing before an IJ to determine whether they present a flight risk or a danger to the community.

---

[173] *Id.*; *supra* note 62-63. For information regarding conditions at the Northwest Detention Center in Tacoma, contact the Seattle University School of Law International Human Rights Clinic or see ONEAMERICA, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center* (2008), www.weareonea merica.org/sites/default/files/OneAmerica_Detention_Report.pdf (last visited May 15, 2013).

[174] For an interactive map of ICE detention facilities and contract facilities throughout the U.S., see *The Detention Map*, DETENTION WATCH NETWORK, www.detentionwatchnetwork.org/dwnmap (last visited May 15, 2013).

[175] A. Siskin, Cong. Research Serv., RL 32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES (2010) *available at* http://www.ilw.com/immigrationdaily/news/2010,0518-crs.pdf; *see also* NATIONAL IMMIGRATION FORUM, *The Math of Immigration Detention: Runaway Costs for Immigration Detention Do Not Add Up to Sensible Policies* (2011), *available at* http://www.immigrationforum.org/images/uploads/MathofImmigratio nDetention.pdf; *Immigration Detention*, AMERICAN CIVIL LIBERTIES UNION, *available at* http://www.aclu.org/immi grants-rights/detention (last visited Jul. 5, 2012).

[176] D. Schriro, *Immigration Detention Overview and Recommendations*, DEPARTMENT OF HOMELAND SECURITY, at 2 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

[177] O. Byrne, Z. Cheng, N. Siulc and A. Son, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program*, VERA INSTITUTE OF JUSTICE (2008), *available at* http://www.vera.org/download?file=1780/LOP%2BEvaluation.

[178] *See Office of Detention Oversight Compliance Inspection: Enforcement and Removal Operations Seattle Field Office, Northwest Detention Center, Tacoma, Washington*, DEPARTMENT OF HOMELAND SECURITY (2012), *available at* www.ice.gov/doclib/foia/odo-compliance-inspections/2012northwest-detention-center-tacoma-wa-jan10-12.pdf.

Under the mandatory detention provisions of the immigration statue,[179] immigration authorities must "take into custody," and thereafter not release, a noncitizen during the course of removal proceedings if the noncitizen falls within either of the following categories:

- A noncitizen who is charged as inadmissible under the following grounds:
    - Convictions for crimes involving moral turpitude;
    - Drug convictions, or for whom there is reason to believe involvement in the illicit trafficking of drugs;
    - Engaged in prostitution;
    - Involvement in human trafficking, money laundering or terrorist activities.[180]
- A noncitizen who is charged with any of the following grounds of deportation:
    - Conviction of one crime of moral turpitude committed within five years of last entry if a sentence of one year or more of imprisonment was imposed;
    - Convictions for two crimes of moral turpitude;
    - Conviction for an aggravated felony;
    - Conviction for a controlled substance offense;
    - Conviction for a firearms offense;
    - Conviction for miscellaneous crimes (sabotage, espionage);
    - Determined to be a drug abuser or drug addict (no conviction required);
    - Suspected of abuse/addiction or terrorist activities (no conviction required).[181]

Notably, a person who is charged with grounds of deportation for a crime of domestic violence, stalking, child abuse and/or neglect, or one crime involving moral turpitude within five years of admission with a sentence of less than one year (regardless of time suspended) will not be subject to mandatory detention.[182]

Stays of Removal Orders Pending Petitions for Review to the Ninth Circuit Court of Appeals. Noncitizens whose appeals are denied by the Board of Immigration Appeals have an administratively final order of removal. They are then entitled to challenge the removal order by filing a petition for review with the Ninth Circuit Court of Appeals and requesting a stay of the removal order.[183] Where a stay of the removal order is granted in connection with a petition for

[179] 8 U.S.C. § 1226(c).
[180] 8 U.S.C. § 1226(c)(1)(A), (D).
[181] 8 U.S.C. § 1226(c)(1)(B), (C).
[182] *See* 8 U.S.C. § 1226(c).
[183] In order to be granted a stay of removal, the court considers (1) whether the stay applicant has made a strong showing that she is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

review, the Ninth Circuit has held that the mandatory detention statute no longer applies and the noncitizen is entitled to a custody determination hearing before an immigration judge.[184]

2. Discretionary Detention During the Removal Process

Persons not subject to mandatory detention who are not arriving aliens[185] and do not already have final orders of removal are eligible to be considered for release from detention during their removal proceedings unless they are a threat to national security or a flight risk.[186] In a bond hearing, the burden is on the noncitizen to show to the satisfaction of the IJ that he or she is not a flight risk, not a danger to the community and merits release on bond.[187] Although ICE has the authority to release a noncitizen on an Order of Recognizance, imposition of a bond is the standard practice.

Immigration bond amounts must be a minimum of $1,500 and the full amount must be paid in cash. [188] Bond amounts are usually much higher than this minimum and often exceed $5,000 for noncitizens with no criminal history and often start at $10,000 for noncitizens with convictions. The noncitizen may ask for a bond re-determination hearing before an IJ, who has wide discretion to decrease the bond amount or not.[189]

3. Noncitizens with Final Removal Orders Who Cannot Be Removed

Once a final administrative order of removal is issued, the IJ is divested of jurisdiction to grant a bond.[190] Immigration authorities are required to detain noncitizens subject to a final order of removal during a 90-day "removal period."[191] The 90-day post removal detention period may be extended by a second 90-day period. After that, the U.S. Supreme Court held that noncitizens who can show that there is "no significant likelihood of removal in the reasonably foreseeable future" must be released.[192]

Thus, many persons who have final orders of removal still find themselves in detention after months of waiting to be removed. Various reasons may exist for the delay, including the

---

[184] *Singh v. Holder*, 638 F.3d 1196, 1204 (9th Cir. 2011); *Diouf v. Holder*, 634 F.3d 1081, 1086 (9th Cir. 2011); *Casas-Castrillon v. DHS*, 535 F.3d 942, 947 (9th Cir. 2008); *see also Prieto-Romero v. Clark*, 534 F.3d 1053, 1066 (9th Cir. 2008).

[185] "Arriving aliens" are persons apprehended at the border or encountered within 100 miles of the border who cannot prove they have been physically present in the U.S. for at least 14 days.

[186] *Matter of Patel*, 15 I&N Dec. 666 (BIA 1976).

[187] See *Matter of Guerra*, 24 I&N Dec. 37 (BIA 2006) (permitting judge to deny bond where no conviction existed but criminal charges were pending).

[188] *See generally* 8 C.F.R. § 236.1(c)(2)-(c)(8); 8 C.F.R. § 1003.19(a)-(i).

[189] 8 C.F.R. § 236.1(d).

[190] The appropriate forum to challenge custody after a final order is federal district court through a petition for writ of habeas corpus. *See* § C(2), *infra.*

[191] 8 U.S.C. § 1231(a)(1).

[192] *Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1078 (9th Cir. 2006). In *Zadvydas*, the Court noted that "for detention to remain reasonable, as the period of prior post-relief confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink." *Zadvydas*, 533 U.S. at 701.

following: some countries, e.g., Cuba, Vietnam,[193] Laos, and Iran, have no diplomatic relations with the U.S. and do not repatriate deportees; some countries, such as Somalia, have no functioning government; some countries have ceased to exist; some persons are stateless, e.g., Palestinians and native Germans with no blood lineage; and some countries are notoriously slow to issue travel documents, e.g., Cambodia, India, Jamaica, Afghanistan. Depending upon whether removal is reasonably foreseeable, the person may be able to obtain release from custody despite having been actually ordered removed from the United States.

D. Removal Proceeding Rights

The legal rights to which a person is entitled in the removal process vary depending upon which type of removal procedures are applied, as well as numerous other circumstances, such as how the person entered the U.S., whether there has been a previous removal, or whether there has been a conviction of an "aggravated felony" under immigration law. What follows is a brief overview of the basic rights that people do, and do not, have in removal proceedings.

1. Right to Counsel (But Not to Appointed Counsel)

Every person in removal proceedings, regardless of the type of removal proceeding, is entitled under the Constitution to be represented by an attorney. However, unlike criminal proceedings, **there is no right to appointed counsel for indigent respondents**.[194] Eighty-four percent of detained noncitizens are not represented by an attorney during removal proceedings and appear *pro se*.[195]

2. Right to Remain Silent in Removal Proceedings

Every person has the right to remain silent when being questioned by immigration officials or during removal proceedings.[196] However, unlike criminal proceedings, the government is not required to inform a person that they have this right (i.e., no *Miranda* warnings are required).[197] Remaining silent regarding questioning related to alienage issues, e.g., place of birth, can be an important right for a noncitizen to exercise since the government must establish the person's alienage in order to place them in removal proceedings. In most cases in which the government

---

[193] The current agreement between the U.S. and Vietnam allows for the repatriation (or deportation) of Vietnamese citizens who entered the United States on or after July 12, 1995 (but not before that date).

[194] 8 U.S.C. § 1362.

[195] Among non-detained individuals, those who are represented have a 74% success rate in securing relief from removal compared to a 13% success rate for *pro se* litigants. With respect to detained noncitizens, the success rate falls to 18% percent for those with counsel and just 3% for unrepresented individuals. Steering Comm. of the N.Y. Immigrant Representation Study Report, *Accessing Justice: The Availability and Adequacy of Counsel in Removal Proceedings in New York Immigrant Representation Study Report: Part 1*, 33 CARDOZO L. REV. 357, 363–64 (2011).

[196] *See Kastigar v. United States.*, 406 U.S. 441, 444 (1972) (privilege against self-incrimination may be invoked "in any proceedings, civil or criminal, administrative or judicial, investigatory or adjudicatory.")

[197] See *United States. v. Solano-Godines*, 120 F.3d 957, 960 (9th Cir. 1997). This remains true despite the reality that disclosure of alienage information (e.g., foreign birth) exposes a noncitizen to the possibility of criminal prosecution. See *United States v. Salgado*, 292 F.3d 1169, 1174 (9th Cir. 2002).

has no record of the person, the requisite proof of alienage is obtained by admissions the noncitizen makes under questioning.

3. Right to a Hearing Before an Immigration Judge

As described in §1.5(A), not all noncitizens are entitled to a hearing before an immigration judge (IJ). Persons deemed to be "arriving aliens"[198] and noncitizens who are not LPRs and who have been convicted of crimes classified as "aggravated felonies" under immigration law will be subject to "expedited removal" and will not get a hearing before an IJ. Moreover, noncitizens who have previously been ordered removed will not get a hearing before an IJ; immigration officials will simply "reinstate" the prior removal order.

4. Right to Appeal Removal Orders[199]

Both the respondent and the government have the right to appeal decisions issued by the IJ to the Board of Immigration Appeals (BIA) within 30 days. The BIA is an administrative appellate body located in Virginia and it reviews and decides all the appeals taken from immigration judges throughout the U.S.[200] Most removal decisions issued pursuant to the other removal procedures outlined at §1.5(A) are subject to very limited administrative or judicial review processes, if at all.

E. Relief from Removal – Avenues to Remain Lawfully in the U.S.

Although significantly restricted by the 1996 Immigration Reform and Immigrant Responsibility Act legislation,[201] important avenues remain for many noncitizens to be granted "relief from removal" in proceedings before an immigration judge. Such a grant permits a noncitizen to remain permanently in the U.S., with lawful immigration status. Consequently, the fact that a defendant in criminal custody has an immigration hold request (also known as an ICE detainer) that will result in his transfer into ICE custody upon release is not determinative of whether or not the defendant will, in fact, be removed.

When placed in removal proceedings before an IJ, the IJ is required to inform the noncitizen of avenues of relief that he or she may be entitled to pursue, such as cancellation of removal or asylum.[202] The avenues of relief available to noncitizens will generally be determined by whether the person already has lawful status or the person is undocumented and seeking to obtain lawful status.

---

[198] "Arriving aliens" are classified as persons apprehended at the border or encountered within 100 miles of the border who cannot prove they have been physically present in the U.S. for at least 14 days.
[199] 8 C.F.R. § 1003.38
[200] *See* §1.3(C) for more information about the BIA.
[201] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996).
[202] *See* 8 C.F.R. § 1240.11(a); *Matter of Cordova*, 22 I&N Dec. 966, 970 n.4 (BIA 1999) (IJ must notify respondent of all relief available for which respondent has "apparent eligibility").

Criminal convictions are the primary reason that persons with lawful status are subjected to removal proceedings and are removed. In addition to triggering grounds of removal, criminal convictions can also render noncitizens, lawfully present and undocumented, ineligible for avenues of relief that they would otherwise be entitled to pursue. As the U.S. Supreme Court has recognized, resolving criminal charges in a way that preserves eligibility to pursue available options for relief from removal may be a paramount concern of a noncitizen defendant.[203]

EXAMPLE: An LPR who has continuously resided in the U.S. for seven years is entitled to request a discretionary waiver, known as an LPR Cancellation, from an IJ. A discretionary waiver permits the LPR to keep his LPR status and remain lawfully in the U.S. as an LPR, despite his criminal conviction, such as residential burglary with a 9-month sentence. However, the LPR becomes ineligible to request this waiver if his conviction is classified as an aggravated felony under immigration law, such as residential burglary with a 14 month sentence.

EXAMPLE: An undocumented noncitizen who is a survivor of domestic violence is entitled to apply for LPR status in removal proceedings before an IJ if married to, or the parent of a U.S. citizen or LPR. This avenue of immigration relief is known as VAWA Cancellation. Criminal convictions, even for misdemeanor offenses such as theft 3rd degree, can render her ineligible to pursue this avenue of relief from removal.

- **Granting Relief from Removal is Discretionary on the Part of Immigration Officials**

With few exceptions, the avenues for obtaining or keeping lawful immigration status and relief from removal for persons placed in removal proceedings are discretionary. This means that even though the noncitizen establishes that she is statutorily eligible to request a particular form of relief, she must also convince the immigration judge (or in some instances ICE agents or USCIS examiners) that she warrants a favorable exercise of discretion. In cases involving any criminal history, this will generally require rehabilitation, proof of compliance with any conditions imposed by the criminal court, and proof that recidivism is highly unlikely.

- **Outline of Avenues to Keep or Obtain Lawful Immigration Status**

An overview of all of the avenues of relief from removal is beyond the scope of this publication. However, to provide state court judges with a glimpse of possible outcomes from a noncitizen's removal proceedings, the outline below highlights the primary avenues of relief that can be available to a noncitizen facing removal. Many of these avenues of relief fall under one of the categories outlined in §1.2. Some of these avenues are available for qualified persons "affirmatively" (not in removal proceedings); other avenues are only available "defensively" (before the immigration judge once removal proceedings have been initiated). The chart that follows highlights the impact that criminal convictions can have on a noncitizen's eligibility to pursue one of these avenues to remain lawfully in the U.S.

---

[203] *Padilla v. Kentucky*, 130 U.S. 1473, 1483 (2011); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322-23 (2001).

- **Avenues for Relief from Removal to KEEP Lawful Immigration Status**

  - Relief from Removal for Lawful Permanent Residents
    1. LPR Cancellation;
    2. Former 212(c) Waivers;
    3. "Re"-Adjustment of Status Through U.S. Citizen or LPR Family Member;
    4. 212(h) Waivers;
    5. Fear of Persecution or Torture (Asylum, Withholding, Torture Convention).

  - Relief from Removal for Persons in Asylum or Refugee Status
    1. Adjustment of Status;
    2. Withholding of Removal and Relief Under the Convention Against Torture;
    3. 212(h) waiver for asylees.

  - The Waiver of DV Deportation Ground (only) for certain DV Survivors

- **Avenues for Relief from Removal for Undocumented Persons to Obtain Lawful Immigration Status**

  - Obtaining Lawful Status Through a Family Member
    1. Adjustment of Status & Consular Processing
       - 212(h) Waivers
    2. VAWA Self-Petitioning for DV Survivors
  - Cancellation of Removal for Undocumented Persons
    1. Ten-Year Cancellation
    2. VAWA Cancellation
  - Relief Based On Fear of Persecution or Torture
    1. Asylum
    2. Withholding of Removal
    3. Convention Against Torture Relief
    4. Adjustment of Status for Asylees and Refugees
  - Temporary Protected Status
  - Relief for Victims of Trafficking – T VISA
  - Relief for Victims of Crime – U VISA
  - Relief for Abused, Abandoned, Neglected Juveniles
  - Voluntary Departure

RELIEF	IMPACT OF AGGRAVATED FELONY CONFICTION	IMPACT OF CONFICTION FOR A DEPORTABLE OR INADMISSIBLE CRIME	OTHER REQUIREMENTS
LPR CANCELLATION For Long-Time Lawful Permanent Residents INA § 240A(a), 8 USC § 1129b(a)	AUTOMATIC BAR	NOT A BAR	7 YRS OF LAWFUL RESIDENCE SINCE "ADMISSION" IN ANY STATUS.
§ 212(h) INADMISSIBILITY WAIVER for persons applying or reapplying for LPR status; INA § 212(h), 8 USC § 1182(h)	AGG FELONY CONVICTION BAR FOR CERTAIN LPRs who seek to "re-adjust" to LPRs but were originally admitted at the border as LPRs, not those who adjusted status to LPR.	Waives inadmissibility for: Moral Turpitude, Prostitution, Possession of 30 Grams Marijuana, 2 Convictions With Total 5 Yrs Imposed In some contexts waives deport charges based on these convictions	*IF* LPR BAR APPLIES: Must have acquired 7 years lawful continuous status before removal proceedings initiated. Very tough standard for discretionary grant of § 212(h) if a "dangerous or violent" offense.
ADJUSTMENT or RE-ADJUSTMENT OF STATUS TO LPR Based on family or employment visa INA § 245(a), (i) 8 USC § 1255(a), (i)	Not a per se bar, because no agg felony inadmissibility ground; but see agg felony bar to § 212(h) for certain LPR's	Must not be inadmissible, or if inadmissible must qualify for a waiver	Must have and approved petition from qualifying family member or employer, but see 7 yr requirement for § 212(h) for LPR's
UNDOCUMENTED CANCELLATION INA § 240A(b)(1) 8 USC § 1229b(b)(1)	AUTOMATIC BAR	BARRED by conviction of offense that triggers grounds of deportation or inadmissibility	Must have ten years physical presence and good moral character immediately before filing; show extraordinary hardship to USC or LPR relative.
ASYLUM Based on fear of persecution INA § 208 8 USC § 1154	AUTOMATIC BAR if agg felony conviction	BARRED by "particularly serious crime;"	Must show likelihood of persecution; Must apply within one year of reaching U.S., unless changed or exigent circumstances

RELIEF	IMPACT OF AGGRAVATED FELONY CONFICTION	IMPACT OF CONFICTION FOR A DEPORTABLE OR INADMISSIBLE CRIME	OTHER REQUIREMENTS
ADJUST to LPR for ASYLEE OR REFUGEE Waiver at INA § 209(c), 8 USC § 1159(c)	Not a per se bar, because no agg felony ground of inadmissibility	Waives any inadmissibility ground except "reason to believe" trafficking,	Can apply within one year of admission as refugee or grant of asylee status Tough standard to get discretionary grant if convicted of a "dangerous or violent crime"
WITHHOLDING Based on fear of persecution INA § 241(b)(3), 8 USC § 1231(b)(3)	NO AGG FELONY BAR UNLESS five year sentence imposed for one or more AF's	Barred by conviction of "particularly serious crime," includes almost any drug trafficking	Must show clear probability of persecution; No time requirement regarding application
CONVENTION AGAINST TORTURE	AGG FELONY NOT A BAR	OTHER GROUNDS NOT A BAR	Must how likely to be tortured by gov't or groups it will not control; No time requirements regarding application
TEMPORARY PROTECTED STATUS (TPS) INA § 244A, 8 USC § 1254a	AGG FELONY is not technically a bar, but see next section	INADMISSIBLE; or convicted of two misdos or one felony or a particularly serious crime.	Must be national of a country declared TPS, and have been present in U.S. and registered for TPS as of specific dates. Go to www.uscis.gov to see list current list of TPS countries
VOLUNTARY DEPARTURE INA § 240B(a)(1) 8 USC 1229c(a)(1)	AGG FELONY IS A BAR (but question whether AF conviction shd bar an EWI applicant for pre-hearing voluntary departure)	No other bars to *pre-hearing* voluntary departure Post-removal hearing VD requires 5 yrs good moral character	Post-removal hearing voluntary departure requires one year presence in U.S. and five years good moral character
NATURALIZATION (Affirmative or with Request to Terminate Removal Proceedings)	AGG FELONY AUTOMATIC BAR to showing good moral character (GMC) unless conviction is prior to 11/29/90	DEPORTABLE applicants may be referred to removal proceedings	Certain period (e.g., three or five years) of good moral character; GMC bars include crime-related ground of inadmissibility

RELIEF	IMPACT OF AGGRAVATED FELONY CONFICTION	IMPACT OF CONFICTION FOR A DEPORTABLE OR INADMISSIBLE CRIME	OTHER REQUIREMENTS
DEFENDANT MAY BE A U.S. CITIZEN ALREADY **Derived or acquired citizenship**	If either of the following apply, defendant may have become a U.S. citizen automatically, without knowing it. 1. At the time of her birth, did she have a parent or grandparent who was a U.S. citizen? OR 2. Did the following two events happen, in either order, before her 18th birthday? She became an LPR, and a parent with custody of her naturalized to U.S. citizenship		
VAWA Cancellation	VAWA is for victims of abuse by a US citizen or LPR spouse or parent. VAWA cancellation is barred if inadmissible or deportable for crimes; also need 3 yrs good moral character.		
VAWA Self-Petition	Good moral character is required 3 years prior to application. Section 212(h) waiver can cure bar to GMC where offense is related to abuse. Adjustment requires admissibility or waiver to cure inadmissibility.		
Special Immigrant Juvenile	Minor in delinquency or dependency proceedings whom court won't return to parents due to abuse, neglect, or abandonment can apply to adjust to LPR. Adjustment requires admissibility; some waivers available, but none for "reason to believe" trafficking.		
T Visa	Victim/witness of "severe alien trafficking" (but not if person also becomes trafficker). For T Visas, all convictions, including aggravated felonies, are potentially waivable.		
U Visa	Victim/witness of certain types of crime (assault, DV-type offenses, etc). For U Visas, all convictions, including aggravated felonies, are potentially waivable.		

CHAPTER TWO

Immigration Enforcement and the Criminal Justice System

Table of Contents

2.1 THE U.S. SUPREME COURT'S DECISION IN *ARIZONA V. U.S.* [1]

There are many unresolved issues raised by the recent expansion of immigration enforcement operations. However, in *Arizona v. U.S.*[2], the Supreme Court addressed the state's authority to enforce immigration laws:

> As a general rule, it is not a crime for a removable alien to remain present in the United States. If the police stop someone based on nothing more than possible removability, the usual predicate for an arrest is absent. When an alien is suspected of being removable, a federal official issues an administrative document called a

[1] Portions of this analysis were adapted from materials provided by the Immigration Policy Center (www.ipc.org) and the National Immigration Forum (www.immigrationforum.org).
[2] 132 S.Ct. 2492 (2012).

> Notice to Appear. The form does not authorize arrest. Instead, it gives the alien information about the proceedings, including the time and date of the removal hearing…
>
> …The federal statutory structure instructs when it is appropriate to arrest an alien during the removal process. For example, the Attorney General can exercise discretion to issue a warrant for an alien's arrest and detention 'pending a decision on whether the alien is to be removed from the United States'…And if an alien is ordered removed after a hearing, the Attorney General will issue a warrant. In both instances the warrants are executed by federal officers who have received training…If no federal warrant has been issued, those officers have more limited authority. They may arrest an alien for being 'in the United States in violation of any [immigration] law or regulation', for example, but only where the alien 'is likely to escape before a warrant can be obtained."[3]

In *Arizona v. United States,* the federal government challenged four provisions of the Arizona law, "SB 1070", on preemption grounds. The Supreme Court ruled three of the four provisions were preempted by federal law:

- Section 3, which created a state misdemeanor criminal offense for "willful failure to complete or carry an alien registration document." The Court ruled that, with respect to alien registration, Congress intended to preclude states from enacting or enforcing their own complementary or auxiliary immigration enforcement regulations.

- Section 5(C), which created a state misdemeanor criminal offense for an "unauthorized alien to knowingly apply for work, solicit work in a public place or perform work as an employee or independent contractor." The Court ruled that the 1986 Immigration Reform and Control Act (IRCA) provided a comprehensive framework for regulating employment by immigrants not authorized to work. IRCA did not impose criminal penalties on unauthorized immigrants seeking work or engaging in work, and the imposition of such penalties by Arizona is thus preempted by federal law.

- Section 6, which gave state officers authority to arrest, without a warrant, any person the officer had "probable cause" to believe that the person "had committed any public offense that makes [that person] removable" from the U.S. The Court ruled that this section would give state officers greater authority to arrest noncitizens than authority given by Congress to trained federal immigration officers, and therefore this provision was also preempted.

The court ruled that SB 1070 **S**ection 2(B) was not preempted by federal law. Section 2(B) requires Arizona law enforcement officers to make a "reasonable attempt" to determine the immigration status of persons they stop, detain, or arrest if they have a "reasonable suspicion" that the person is unlawfully present in the U.S. Section 2(B) also requires authorities to determine the immigration status of anyone who is arrested before the person is released.

[3] *Arizona*, 132 S.Ct. at 2508. (internal citations omitted).

A chief concern is that Section 2(B) will lead to racial profiling: that persons of color will be stopped, detained, or arrested on some pretext, to check immigration status. However, because the law was not challenged on the grounds of equal protection, or violation of the 4th Amendment, the Court concluded that it was premature to determine whether this section "will be construed in a way that creates conflict with federal law." [4]

The Court made clear that, " [C]onsultation between federal and state officials is an important feature of the immigration system…[and] Congress has made clear that no formal agreement or special training needs to be in place for state officers to communicate with the federal government regarding the immigration status of any individual…"[5] But, the Court notes that "[d]etaining individuals solely to verify their immigration status would raise constitutional concerns."[6] The Court also states that the decision "does not foreclose other preemption and constitutional challenges to the law as interpreted and applied after it goes into effect."

2.2 A SNAPSHOT OF IMMIGRATION ENFORCEMENT AND THE CRIMINAL JUSTICE SYSTEM

A. ICE Priorities for Apprehension of Noncitizens

Since 2006, Immigration and Customs Enforcement (ICE) has expanded efforts to apprehend noncitizens[7] through state and local criminal justice systems.[8]

- **Designating a Noncitizen as a "Criminal Alien."**

In 2012, over 400,000 individuals were removed. More than half of these individuals were designated as "criminal aliens."[9] ICE defines a "criminal alien" as any noncitizen who has been convicted of a crime in a court of law regardless of the type or severity of the crime.[10] Government statistics show that noncitizens in the criminal justice system risk apprehension by ICE and subsequent removal proceedings.[11]

---

[4] *Arizona*, 132 S.Ct.at 2516.
[5] *Arizona*, 132 S.Ct. at 2512.
[6] *Arizona*, 132 S.Ct. at 2514.
[7] Christopher N. Lasch, *Enforcing The Limits of the Executive's Authority To Issue Immigration Detainers*, 35 WM. MITCHELL L.REV. 164, 167-73 (2008).
[8] Because Washington is a border state, in some counties some of the collaborative functions outlined here are carried out by Customs and Border Protection (CBP) agents as well as ICE.
[9] *Removal Statistics*, IMMIGRATION AND CUSTOMS ENFORCEMENT, *available at* http://www.ice.gov/removal-statistics/ (last visited Mar. 28, 2013).
[10] *See Detention of Criminal Aliens: What Has Congress Bought?*, TRAC IMMIGRATION (Feb. 11, 2010), http://trac.syr.edu/immigration/reports/224/ ("For ICE, the term 'criminal alien' includes the relatively small number of individuals convicted of serious offenses like armed robbery, drug smuggling, and human trafficking. But the term also includes those found guilty of minor violations of the law such as traffic offenses and disorderly conduct. Immigration violations such as illegal entry into the United States, which the law defines as a petty offense, are included as well.")
[11] *See Secure Communities: A Fact Sheet*, IMMIGRATION POLICY CENTER, *available at* http://www.immigrationpolicy.org/just-facts/secure-communities-fact-sheet#_edn1 (Nov. 29, 2011) (although ICE states that it prioritizes the most dangerous and violent offenders, "in Fiscal Year (FY) 2011, 26% of all Secure Communities deportations were immigrants with Level 1 convictions; 19% of those deported had Level 2

- **Civil Immigration Enforcement Priorities**

This section is subject to change if Congress adopts new immigration policies.

On June 30, 2010, the ICE Director issued a memorandum entitled *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, setting forth new immigration enforcement prioritization objectives.[12] **See Appendix A to view the ICE Civil Immigration Enforcement memo.**

The memo outlines civil immigration enforcement priorities as they relate to the apprehension, detention, and removal of noncitizens.

- **Priority 1.** Noncitizens who pose a danger to national security or a risk to public safety, including those suspected of terrorism, convicted of violent crimes, and gang members.
- **Priority 2.** Noncitizens who recently crossed the border or a port of entry illegally, or through the knowing abuse of a visa or the visa waiver program.
- **Priority 3.** Noncitizens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls.

The Memorandum further prioritizes immigration enforcement actions within Priority 1 with regard to criminal convictions:

- **Level 1:** "aggravated felonies as defined in [the immigration statute], or two or more crimes each punishable by more than one year" in prison.
- **Level 2:** "any felony or three or more crimes punishable by less than one year" in prison.
- **Level 3:** "crimes punishable by less than one year" in prison.

The Memorandum also specifically states that ICE special agents, officers, and attorneys may pursue the removal of any alien unlawfully in the United States. Thus, while ICE's enforcement efforts prioritize convicted "criminal aliens", ICE maintains the discretion to take action on any noncitizen it encounters.

Prosecutorial Discretion. On June 17, 2011, the ICE Director issued a memorandum providing guidance for ICE law enforcement personnel and attorneys on their authority to exercise prosecutorial discretion.[13] **See Appendix B to view the Prosecutorial Discretion to Not Remove Memo.** This memorandum is intended to help the agency use its limited resources to target criminals and those who pose a risk to public safety or national security. The Memorandum includes a list of factors that are to be taken into account when making an enforcement related decision. A separate memorandum provides policy and guidance regarding the use of discretion intended for protecting victims and witnesses of domestic violence and

---

convictions; and 29% were individuals convicted of Level 3 crimes (minor crimes resulting in sentences of less than one year). Twenty-six percent of those deported had immigration violations and no criminal convictions").

[12] *See* John Morton, *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Jun. 30, 2010) *available at* http://www.immilaw.com/FAQ/ICE%20prosecution%20priorities%202010.pdf.

[13] *See* John Morton, "Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens," (Jun. 17, 2011) *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

other crimes.[14] **See Appendix C to view the Prosecutorial Discretion Regarding Victims and Witnesses Memo**.

B. The Criminal Alien Program[15]

Traditionally, immigration enforcement has been a function of the federal government. Since 2006, however, ICE has worked with local law enforcement agencies (LLEA) to "prioritize the removal of dangerous criminal aliens."[16] ICE works with the states through the Criminal Alien Program (CAP) program, the Secure Communities initiative and the "287(g)" program.[17] A brief overview of CAP and Secure Communities is provided below.

The expansion of the CAP program and the implementation of the Secure Communities program have been the subject of significant controversy. In 2011, DHS appointed a Task Force comprised of law enforcement and other government officials, as well as civil and immigrant rights advocates, to make recommendations regarding Secure Communities.[18] To a large extent, the findings and recommendations in the task force's final report track the findings and criticisms included in reports issued by civil rights and immigrants' rights organizations regarding the Secure Communities initiative as well as the CAP Program.[19] These concerns include:

- the broad scope of the programs apprehend more than "dangerous criminals";
- the programs undermine community trust which is the linchpin to effective community policing and the criminal justice process;

---

[14] *See* John Morton, "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs," (Jun. 17, 2011) *available at* http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf.

[15] Information contained in this section was excerpted from: the Immigration and Customs Enforcement website, http://www.ice.gov/criminal-alien-program/; *see also* Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas* (Feb. 17, 2010) *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf; Trevor Gardner II and Aarti Kohli, *The CAP Effect: Racial Profiling in the ICE Criminal Alien Program*, CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY AND DIVERSITY AT UC BERKELEY SCHOOL OF LAW (Sept. 16, 2009).

[16] *Securing the Borders and America's Points of Entry, What Remains to be Done: Hearing Before the Subcomm. on Immigration, Refugees and Border Security of the Comm. on the Judiciary*, 111th Cong. 1st session (2009) (statement of John P. Torres, Deputy Assistant Secretary for Operations, U.S. Immigration and Customs Enforcement) *available at* http://www.gpo.gov/fdsys/pkg/CHRG-111shrg55033/pdf/CHRG-111shrg55033.pdf

[17] These programs are three of thirteen federal-local immigration enforcement programs that are included in ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security). *See* Fact Sheet: ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS), IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/access.htm. The 287(g) program deputizes local law enforcement officers to carry out immigration-related enforcement activities in the course of their law enforcement duties. The state of Washington has not agreed to participate in the 287(g) program.

[18] Members of the Task Force met for two months, took expert testimony, and convened information-gathering sessions in Dallas, TX; Los Angeles, CA; Chicago, IL; and Arlington, VA to hear from individuals and organizations about their experiences with the Secure Communities program.

[19] Homeland Security Advisory Council, *Task Force on Secure Communities: Findings and Recommendations* (2011), http://www.dhs.gov/xlibrary/assets/hsac-task-force-on-secure-communities-findings-and-recommendations-report.pdf. *See also* ACLU of Northern California, *Costs and Consequences: The High Price of Policing Immigrant Communities* (2011), https://www.aclunc.org/docs/criminal_justice/police_practices/costs_and_consequences.pdf; NDLON, et al., *Restoring Community: A National Community Advisory Report on ICE's Failed "Secure Communities" Program* (2011), *available at* http://altopolimigra.com/documents/FINAL-Shadow-Report-regular-print.pdf.

- the programs lack clear complaint and grievance processes; and
- the programs lack sufficient oversight and meaningful transparency.

- **What is the Criminal Alien Program (CAP)?**

The Criminal Alien Program (CAP) is an expansive immigration-enforcement program responsible for the majority of noncitizens apprehended and placed in removal proceedings. While CAP has existed in one form or another for decades, much remains unknown about how it is organized, and how it works. What is known is that CAP extends to every area of the country and intersects with most state and local law-enforcement agencies.

The primary duties of ICE agents acting under the auspices of CAP include identifying noncitizens booked and detained in municipal, county and state jails, facilitating their transfer into immigration custody, and initiating removal proceedings against them. CAP is currently active in all state and federal prisons, as well as more than 300 local jails throughout the country. It is one of several so-called "jail status check" programs intended to screen individuals in federal, state, or local prisons and jails for removability. While other such jail status check programs, like Secure Communities, have garnered much more attention, CAP is by far the oldest and largest such interface between the criminal-justice system and federal immigration authorities.[20]

ICE agents performing CAP-related duties are actively operating in Washington Department of Corrections (DOC) facilities, as well as in all county jails throughout Washington State, and in most municipal jails.

The majority of ICE removals each year are a result of the CAP program. According to DHS, CAP is the program responsible for the largest number of noncitizen apprehensions. In 2012 over 50 % of all noncitizens removed (over 200,000) were designated as "criminal aliens" and more than half of these individuals were apprehended through the CAP program.[21] Data from the most comprehensive review of CAP statistics, in Travis County, Texas, indicated that 58 % of noncitizens apprehended through the CAP program had been charged with misdemeanor offenses. An October 2009 DHS report found that 57 % of immigrants identified through the CAP program had no criminal convictions.[22] Because Congress did not enact legislation authorizing it, DHS and ICE operate CAP through interpretations of congressional appropriations and administrative initiatives. For 2013, ICE requested $216 million in congressional appropriations for CAP, a $50 million increase since 2006.

[20] *See The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, IMMIGRATION POLICY CENTER (January 2013), *available at* www.immigrationpolicy.org/just-facts/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails.
[21] *See generally* information on CAP and removal statistics at http://www.ice.gov/removal-statistics/.
[22] Andrea Guttin, *The Criminal Alien Program: Immigration Enforcement in Travis County, Texas*, IMMIGRATION POLICY CENTER (Feb. 17, 2010) *available at* http://www.immigrationpolicy.org/special-reports/criminal-alien-program-immigration-enforcement-travis-county-texas.

- **How does CAP work?**

All Washington State county jails, many municipal jails and the Department of Corrections (DOC) participate in the CAP program and allow ICE agents to access the booking information for those arrested and booked into jail. After ICE acquires information regarding arrested persons whom they believe to be noncitizens, ICE decides whether to issue an immigration hold request, known as an ICE hold or immigration "detainer," on those suspected of being removable. A detainer lets the jail officials know that ICE requests custody of an individual once the facility releases him either because charges have been dropped, bail has been secured, or a convicted individual has served the sentence. Once the ICE detainer is triggered by the individual's release, the detainer authority lasts 48 hours, excluding weekends and holidays. **See §2.3 for more information on ICE detainers.**

Local law enforcement collaborate with ICE in a variety of ways. For instance, some jurisdictions have ICE agents in the jails. Other jurisdictions allow telephone or video-conference, rather than in-person interviews with ICE. Some counties give ICE 24/7 access to the jail. Some local jurisdictions communicate to ICE daily, while others report less frequently. Under CAP, ICE also operates a statewide 24/7 call-in center in Seattle where local law enforcement can contact ICE agents regardless of whether the person is arrested or booked into jail.

- **Are state and local jurisdictions required to participate in the CAP program?**

Collaboration and cooperation with ICE enforcement actions pursuant to CAP is voluntary and at the discretion of the local jurisdiction.[23] Congress has not passed any law that mandates participation in CAP or any other ICE enforcement initiative.

C. The Secure Communities Initiative[24]

- **How does Secure Communities work?**

Secure Communities is a DHS technology-based program used to enhance efforts of the Criminal Alien Program to identify and apprehend immigrants in U.S. jails. When an individual is booked into a jail, his or her fingerprints are regularly sent to the Federal Bureau of Investigation (FBI) to be checked against criminal databases. Under Secure Communities, the FBI then sends the fingerprints to ICE, where they are checked against immigration-related databases.[25] This fingerprint check allows state and local law enforcement and ICE to automatically and immediately search the databases for an individual's criminal and immigration history.

---

[23] *See* § 2.2(D), *infra*.

[24] Portions of this section were excerpted and adapted, with permission, from Michelle Waslin, *The Secure Communities Program: Unanswered Questions and Ongoing Concerns*, IMMIGRATION POLICY CENTER (Nov. 2011) *available at* http://www.immigrationpolicy.org/special-reports/secure-communities-program-unanswered-questions-and-continuing-concerns. Information is also available on the ICE website at http://www.ice.gov/secure_communities/.

[25] Specifically, fingerprints are checked against the U.S. Visitor and Immigrant Status Indicator Technology Program (US-VISIT) and the Automated Biometric Identification System (IDENT).

If there is a database "hit," meaning that the arrested person is matched to a record indicating a potential immigration violation, local ICE agents are notified. The case is evaluated to determine the individual's immigration status and whether to pursue apprehension based on ICE's enforcement priorities. In most cases, ICE will file with the jail an immigration detainer request against the individual. Note that undocumented persons who have no immigration record will not be identified through the Secure Communities screening.

- **Is Washington State participating in the Secure Communities Program?**

When ICE began implementation of the Secure Communities program in 2008, it stated that participation in the program was voluntary and it negotiated memorandums of agreement (MOAs) with participating states and local jurisdictions. The Washington State Patrol, the state agency with authority over transmission of fingerprints to the FBI, declined to enter into a state-wide MOA and instead opted to permit individual counties to determine whether they wanted to participate in the Secure Communities program.

However, in August 2011, ICE declared that participation was no longer voluntary. ICE withdrew all prior MOAs and began routing fingerprint data received by the FBI through the Secure Communities program regardless of state and local decisions.[26] As of April 3, 2012, all fingerprint data from Washington counties is now routed through the Secure Communities program.

D. Administrative Warrants for Deportation & NCIC Data Base Information

ICE has the authority to issue an administrative warrant for any noncitizen with an outstanding order of deportation or removal that has become final.[27] Issued on Form I-205, this document authorizes ICE officers[28] to take into custody and remove the designated noncitizen. It does not authorize state or local law enforcement officials to arrest the designated noncitizen. **See Appendix D for a sample Form I-205**.

If consistent with state law, federal law permits state and local law enforcement officers to arrest an undocumented noncitizen for the purpose of facilitating their removal only where the individual has previously been convicted of a felony in the U.S. and departed or left (either voluntarily or under an order of removal/deportation) after such conviction.[29] A Washington law enforcement officer is permitted to arrest under those circumstances under Washington law since illegal re-entry after removal or deportation is a felony.[30]

---

[26] *See* Kirk Semple and Julia Preston, *Deal to Share Fingerprints is Dropped, Not Program*, N.Y. TIMES (Aug. 6, 2011), *available at* http://www.nytimes.com/2011/08/06/us/06immig.html.
[27] 8 C.F.R. § 1241.32.
[28] Form I-205 authorizes officers of the Immigration and Naturalization Service ("INS"). .INS's enforcement division was transformed into ICE, a division of DHS, in 2003. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 101, 116 Stat. 2135 (2002).
[29] 8 U.S.C. § 1252c.
[30] R.C.W. 10.31.100 (permitting warrantless arrest where probable cause exists to believe individual has committed a felony); 8 U.S.C. § 1326 (designating illegal re-entry after deportation as a felony offense).

Information about noncitizens with final orders of removal is entered into the National Crime Information Center (NCIC) database under one of several categories, the two most relevant of which are:

(1) Outstanding order of removal; and
(2) Convicted felons suspected of illegally re-entering the U.S. after deportation.

Local law enforcement officers do not have the authority to arrest based only upon the NCIC database indicating an outstanding order of removal. However, they do have arrest authority for individuals identified as convicted felons suspected of illegally re-entering the U.S. after removal.

E. Washington Law & Immigration Enforcement

- **State and Local Collaboration with ICE and Customs and Border Protection (CBP)**

With the exception of the two Washington statutes outlined below, no state or federal law requires local law enforcement officers or courts to participate in immigration enforcement activities. The anti-commandeering doctrine in the Tenth Amendment precludes Congress from mandating such participation. The anti-commandeering doctrine constrains the federal government's authority to enforce immigration (or any other) law by stating that state and local officials may not be commandeered for federal policies and programs.[31]

Thus, with the exception of having fingerprints routed through the immigration databases under the Secure Communities program, and subject to the current reporting and notification requirements under state law outlined below, any efforts to assist ICE (or CBP) to apprehend noncitizens suspected of being removable are voluntary on the part of local jurisdictions. ICE relies on the voluntary cooperation of state and local jurisdictions to carry out its apprehension of noncitizens through the CAP and Secure Communities programs.

Two Washington State statutes address mandated cooperation with immigration enforcement efforts:

- R.C.W. 10.70.140 requires that once a person is committed to a Washington penal facility, the jail must identify whether she is a noncitizen and, if she is, notify immigration officials.

- R.C.W. 70.150 mandates that upon official request, the Clerk of the Court where the noncitizen was sentenced shall provide immigration officials with copies of records relating to the criminal proceedings.

[31] *Printz v. United States*, 521 U.S. 898, 927-35 (1996) (holding that Congress is without the authority to "compel the States to enact or enforce a federal regulatory program" or circumvent that prohibition by conscripting the State's officers directly).

F. Communicating With Immigration & Customs Enforcement (ICE)

Federal law does not require state and local jurisdictions to identify or communicate with ICE regarding suspected noncitizens that come into their custody. However, federal law does prohibit states and localities from implementing policies that directly prohibit individual employees from communicating with ICE regarding suspected noncitizens.[32] Both Seattle and King County have passed ordinances that preclude law enforcement officers from questioning individuals whom they encounter regarding their citizenship and/or immigration status.[33]

G. Access Issues Raised by Current Immigration Enforcement Practices

ICE and CBP agents regularly conduct enforcement activities in and around courthouses throughout Washington State. Numerous jurisdictions report that ICE and/or CBP agents are in courtrooms and the courthouse, both in uniform and plain clothes, for the purposes of identifying noncitizens whom they wish to investigate, apprehend and/or remove.

Significant concerns have been raised that these practices may interfere with noncitizens' equal access to justice in Washington courts. Immigrant communities express fear that contact with law enforcement, the courts and other government officials will lead to either their apprehension and removal or the apprehension and removal of their family members.

In 2008, the King County Superior Court responded to these concerns by implementing a policy that prohibited immigration enforcement arrests inside its courtrooms. **See Appendix E: King County Superior Court Policy Limiting Ice Enforcement in Courtrooms.** Other court personnel have engaged in communications with ICE and CBP directly to address these concerns.

2.3 ICE HOLD REQUESTS ("IMMIGRATION DETAINERS")

A. Immigration Holds/Detainers: Key Concepts

The expansion of the CAP and the implementation of the Secure Communities program have dramatically increased the number of ICE hold requests (also referred to as "immigration detainers" or "ICE detainers") issued against defendants being held in local jails. This has raised a host of important questions that courts, communities and other government officials must grapple with, such as whether localities are required to honor ICE hold requests, what is the authority under which ICE issues detainers, who has custody of noncitizens subject to detainers and whether detainer practices violate non-citizens' Constitutional rights. These and many of the other issues raised remain both controversial and in flux.[34]

[32] 8 U.S.C. 1373.
[33] SMC 4.18.051; King County Code 2.15.010.
[34] For more information on the current state of these and other immigration detainer issues see Kate M. Manuel, *Immigration Detainers: Legal Issues*, CONGRESSIONAL RESEARCH SERVICE R42690 (Aug. 31, 2012), *available at* http://www.fas.org/sgp/crs/homesec/R42690.pdf.

Once arrested individuals have been identified through the CAP and/or Secure Communities programs outlined above, ICE hold requests are the primary tool used to transfer those noncitizens from a state or local jail facility into ICE custody and, usually, immigration detention. While the specific procedures for how local law enforcement agencies ("LLEA") communicate with ICE (and CBP) under the CAP and Secure Communities programs vary, ICE customarily files the hold request in-person, telephonically (followed by fax) or electronically.[35]

- **Immigration Hold Requests Are Distinct From Criminal Detainers.**

ICE's Form I-247 explicitly states that it is a notification request whereby ICE requests that the jail notify them upon the individual's release from criminal custody.[36] **See Appendix F for a Sample Form I-247.** An ICE hold request is in most circumstances not an immigration arrest warrant nor is it the equivalent of a criminal arrest warrant. Unlike criminal arrest warrants, ICE hold requests are issued by the prosecuting agency itself - not by a neutral, third-party adjudicator. Unlike criminal detainers - which pursuant to the Interstate Agreement on Detainers, are a means of seeking the transfer of an inmate serving a sentence in one jurisdiction to another jurisdiction, after the filing of a criminal complaint, information, or indictment - ICE hold requests can be issued without any formal proceeding having been initiated.

Criminal courts have held that the lodging of an immigration detainer is a "mere expression of ICE's intention to seek future custody" of defendant and that it is not equivalent to more traditional criminal "detainers" or "holds" since it provides no concurrent criminal basis for continued custody (such as the existence of pending criminal charges in another jurisdiction).[37] Additionally, unlike criminal detainers, there is no mechanism for judicial review: issuance of an ICE hold request is an unreviewable administrative action taken by ICE agents. Neither the immigration statute nor regulations proscribe a legal standard that must be met in order to issue an immigration detainer.

- **Legal Authority To Issue An ICE Detainer**

Express statutory authority for issuance of ICE detainers is contained in the immigration statute at 8 U.S.C. § 1357(d).[38] The language of the statute provides only for the issuance of detainers in cases of noncitizens charged with controlled substance violations and at the request of the local law enforcement agency that arrested and now has custody of the alleged noncitizen. The implementing regulations at 8 C.F.R. 287.7 provide for issuance of a detainer by ICE without a request from an LLEA and on any matter, not only cases involving an arrest for a controlled substances violation. [39] Although presently the subject of significant litigation, ICE

[35] *See* 8 U.S.C. § 1357, 8 C.F.R. § 287.7 (authorizing detainers).
[36] *See* 8 C.F.R. § 287.7. Note that form I-247 requests that jail authorities notify ICE upon release or provide 30 days or "as far in advance as possible" advance notice of release.
[37] *See State of Kansas v. Montes-Mata*, 208 P.3d 770 (Kan. App. 2009) (holding presence of ICE detainer did not toll defendant's speedy trial clock.); *State v. Sanchez*, 110 Ohio St. 3d 274 (2006) (same.)
[38] ICE asserts authority to issue detainers also pursuant to its general authority to detain under 8 U.S.C. § 1226 and its general authority to administer and enforce immigration laws under 8 U.S.C. § 1003.
[39] The extension of the use of ICE detainers beyond controlled substances violations is currently being challenged as *ultra vires* in several lawsuits across the country. *See, e.g., Brizuela v. Feliciano*, No. 3:12CV00226 (D. Conn. filed Feb. 13, 2012) *available at* http://lgdata.s3-website-us-east-

asserts that it also derives authority for issuance of detainers pursuant to several additional provisions of the immigration statute related to general enforcement of immigration laws.[40]

B. The New ICE Detainer Form and Guidance

In 2010, the ICE Director issued an interim policy addressing the issuance of ICE hold requests. **See Appendix G to view the Memo Regarding Interim Detainer Guidance**. In December 2012, the ICE Director issued a new immigration detainer form I-247 and additional guidance[41] outlining enforcement priorities for the placement of detainers on noncitizens in criminal custody. **See Appendix F for the current ICE detainer form and Appendix H for this updated guidance.** ICE's stated purpose in making these changes is to limit "the use of detainers to individuals who meet the department's enforcement priorities and restricts the use of detainers against individuals arrested for minor misdemeanor offenses such as traffic offenses and other petty crimes, helping to ensure that available resources are focused on apprehending felons, repeat offenders and other ICE priorities."[42]

- **What Has Changed?**

Though not definitively providing the basis for the issuance of an ICE hold request, the new form I-247 provides more detail than the previous version. While the vast majority of ICE hold requests using the previous form stated only that ICE has "[i]nitiated an investigation" to determine whether a person was removable from the U.S., the new form replaces this language by stating that ICE has "[d]etermined that there is reason to believe that the individual is an alien subject to removal from the United States." This statement is followed by seven boxes which ICE may check to provide the basis for its reason to believe that the person is removable. These seven boxes include various criminal charges and convictions, certain civil immigration violations, and catch-all public safety and "other" options. These boxes presumably clarify the basis for the placement of the detainer.

Additionally, the new guidance and form I-247 states that ICE detainers are requests.[43] Most recent guidance limits the noncitizens who should be the subject of ICE detainers to only those whom ICE has reason to believe are subject to removal from the U.S. and to whom one or more of the following conditions apply:

1.amazonaws.com/docs/213/410590/Brizuela_Petition_for_Writ_of_HC_and_Complaint__Feb._13__2012_.pdf; *Jimenez Moreno v. Napolitano*, 11CV05452 (N.D. Ill. filed Aug. 11, 2011) *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Complaint.pdf.

[40] *See* Kate M. Manuel, *Immigration Detainers: Legal Issues*, CONGRESSIONAL RESEARCH SERVICE R42690 (Aug. 31, 20120), *available at* http://www.fas.org/sgp/crs/homesec/R42690.pdf.

[41] John Morton, Director of ICE, *Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems*, ICE MEMORANDUM (December 21, 2012) *available at* http://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

[42] Immigration and Customs Enforcement, News Release, *FY 2012: ICE announces year-end removal numbers, highlights focus on key priorities and issues new national detainer guidance to further focus resources* (December 21, 2012), *available at* http://www.ice.gov/news/releases/1212/121221washingtondc2.htm.

[43] While the prior form used the word request, it also provided contradictory language that "… a law enforcement agency '*shall* maintain custody of an alien' once a detainer has been issued." The new form omits this language, leaving only the "requests" statement. *See* Department of Homeland Security, Immigration Detainer Notice of Action, Form I-247, issued December 2011.

- The individual has a prior felony conviction or has been charged with a felony offense;
- The individual has three or more prior misdemeanor convictions (not including three or more "minor traffic misdemeanors or other relatively minor misdemeanors");
- The individual has a prior conviction for or has been charged with a misdemeanor involving:
    - Violence, threats, or assault;
    - Sexual abuse or exploitation;
    - DUI;
    - Unlawful flight from the scene of an accident;
    - Unlawful possession of a firearm or other deadly weapon;
    - Trafficking in a controlled substance; or
    - Another significant threat to public safety (defined as "one which poses a significant risk of harm or injury to a person or property");
- The individual has been convicted of the federal crime of illegal entry under 8 USC § 1325;
- The individual has illegally re-entered the country after a previous deportation or return at the border;
- The individual has an outstanding final order of deportation;
- The individual has been found by an immigration officer or immigration judge to have knowingly committed immigration fraud; or
- The individual poses a significant risk to national security, border security, or public safety (listed examples include: suspected terrorists, known gang members, and subjects of outstanding felony arrest warrants).[44]

- **Defendants Who Should No Longer Receive ICE Detainers**

The new guidance and form I-247 should exclude certain groups of people who previously would have been subject to an ICE hold request. Though the catch-all categories may be used to circumvent ICE's stated enforcement priorities, the following categories of defendants should no longer be subject to ICE detainers:

- Defendants (whether undocumented or with lawful immigration status) with no prior convictions who have been arrested for the following non-priority offenses: misdemeanor theft, PSP3, patronizing a prostitute, malicious mischief 3 and other property destruction offenses, obstructing, DWLS, negligent or reckless driving, disorderly conduct, criminal trespass, attempted forgery or other gross misdemeanor fraud crime such as gross misdemeanor UIBC, or any gross misdemeanor identity theft, false statement, or obstructing offense.
- Defendants (whether undocumented or with lawful immigration status) who have been arrested for one of the above offenses EVEN IF they have one or two (and possibly three or more) prior convictions for the above non-priority offenses.

Note, however, that defendants with no prior convictions are still likely to receive an immigration detainer under the new guidance and form if they have been charged with any

[44] *See* December 21, 2012 Memorandum, *supra*.

felony or any misdemeanor involving violence, harassment, sexual abuse, DUI, hit and run, unlawful possession of a firearm or other weapon, trafficking in a controlled substance, or any "other significant threat to public safety."

C. Limitations on Detainers: The 48 Hour Rule

Where a jurisdiction chooses to honor an ICE detainer, federal regulations expressly limit the post-release period for which an individual may be held to no more than 48 hours (excluding weekends and holidays).[45] An immigration detainer is triggered when the jail's lawful authority to detain the individual expires. Thus, an immigration detainer is triggered if:

- The case is pending and the court orders release and, where imposed, defendant posts bail;
- The case is dismissed and the person is to be released; or
- A conviction is entered and the defendant completes his or her sentence.

The 48 Hour Rule. Once the jail's lawful authority to detain the person expires, the 48 hour clock starts. Federal regulations provide that a law enforcement agency can hold a noncitizen on a detainer ***no more than 48 hours*** past the time when he or she otherwise would have been released, excluding weekends and holidays.[46] State and local law enforcement officers have no independent authority to detain an alleged noncitizen beyond the 48 hour period after release.[47] Once the 48 hour period has lapsed, the jail is required to release the individual if ICE has not taken custody.

D. ICE Detainers Are Enforced at the Discretion of Local Jurisdictions

The official position of ICE is that detainers are requests that are honored at the discretion of local jurisdictions. This position is consistent with the legal conclusions of courts and state and local officials who have addressed the issue.

In *Printz v. United States*,[48] the Supreme Court considered the use of local law enforcement officers to implement a federal gun control program. The Court held the program unconstitutional for violating the Tenth Amendment, because Congress tried to require local officers to conduct background checks against a federal database.[49] Similarly, compliance with detainers requires the expenditure of resources and time of local and state officials on behalf of the federal government.[50] It requires reporting to the federal government, and bearing the costs of additional detention time on behalf of the federal government. In light of the anti-

[45] 8 C.F.R. § 287.7(d).
[46] 8 CFR § 287.7(d). Form I-247 indicates that "holidays" means federal holidays.
[47] 8 C.F.R. § 287.7(d).
[48] *Printz v. United States*, 521 U.S. 898, 927 (1996) (holding that Congress is without the authority to "compel the States to enact or enforce a federal regulatory program" or circumvent that prohibition by conscripting the State's officers directly).
[49] *Id.* At 927-35.
[50] The federal government provides only limited reimbursement for some local expenditures related to the costs associated with detaining noncitizens in the criminal justice system through the State Criminal Alien Assistance Program (SCAAP). *See State Criminal Alien Assistance Program*, BUREAU OF JUSTICE ASSISTANCE, *available at* https://www.bja.gov/ProgramDetails.aspx?Program_ID=86.

commandeering doctrine set by *Printz*, the federal government has not imposed mandatory requirements on state law enforcement agencies to identify suspected noncitizens and/or comply with ICE hold requests.[51]

The issue of whether the immigration statutes and regulations can and/or do require local jurisdictions to comply with ICE detainers is presently the subject of significant litigation and remains unresolved in the courts.[52]

However, a recent information bulletin clarified what many jurisdictions have already recognized, that compliance with ICE hold requests are not mandatory. Thus, localities have the discretion to enforce ICE hold requests only in certain circumstances or to not enforce them at all, as some counties have chosen to do. According to the Attorney General, "[s]everal local law enforcement agencies appear to treat immigration detainers, sometimes called "ICE holds," as mandatory orders. But immigration detainers are not compulsory. Instead, they are merely requests enforceable *at the discretion of the agency* holding the individual arrestee."[53] According to notes from a Congressional Briefing for the Congressional Hispanic Caucus, ICE stated that "local LE [law enforcement] are not mandated to honor a detainer, and in some jurisdictions they do not."[54]

E. Controversy Surrounding Immigration Detainers

Local jurisdictions have raised questions regarding the fiscal burdens, community costs and criminal justice system impacts that flow from the use of local government resources to honor ICE detainers. In response to these concerns, numerous communities across the country have passed detainer discretion laws and policies, limiting the community's cooperation with ICE detainer requests.[55]

A 2013 report by the University of Washington studied immigration detainer data from King County for 2011. The study's findings indicated the following:

- ICE detainer requests significantly extend jail stays (nearly 30 days on average);
- ICE detainers do not primarily target serious criminals;

---

[51] *See, e.g.*, 8 U.S.C. § 1357(g)(9).

[52] *Cf. Buquer v. City of Indianapolis*, 797 F.Supp.2d 905 (S.D. Ind. 2011) (**"**A detainer is not a criminal warrant, but rather a voluntary request that the law enforcement agency 'advise [DHS], prior to release of the alien, in order for [DHS] to arrange to assume custody.'[§ 287.7(a)]."); *Galarza v. Szalczyk*, 2012 U.S. Dist. LEXIS 47023 (E.D. Pa., March 30, 2012) ("[O]nce the immigration detainer is issued, the local, state or federal agency then holding the individual 'shall' maintain custody…").

[53] *Id*. (emphasis in original).

[54] *Detainers are Voluntary*, TURNING THE TIDE (2011), *available at* http://altopolimigra.com/wp-content/uploads/2011/12/ICE-FOIA-2674.020612.pdf.

[55] The County of Santa Clara, California; the City and County of San Francisco; the Counties of San Miguel and Taos, New Mexico; Cook County, Illinois (Chicago); the District of Columbia; Milwaukee, Wisconsin; New York City; and the State of Connecticut have all passed such laws. These laws range from honoring only a subset detainer requests based on the type of offense and other individual factors, to not honoring any detainer requests unless the federal government agrees to fully reimburse the locality for the costs associated with the detainers. A suggested standard in California was conviction of a serious or violent felony. A.B. 1081, 2011 Cal. Assembly, 2011–12 Sess. (Ca. 2011) ("TRUST Act") (passed by the California legislature, but vetoed by Governor Brown on Sept. 30, 2012).

- ICE detainers have a pronounced impact on the county's Latino population;
- ICE detainers consume significant government resources.[56]

F. Immigration Detainers Are Not Reliable Indicators of a Person's Immigration Status or Whether They Will Be Removed

As a general rule, an ICE detainer is not indicative of a person's immigration status, and no legal determination of the individual's removability is made at the time that the detainer is issued. As the detainer Form I-247 indicates, the presence of an ICE detainer means that ICE believes that the person is a noncitizen. The detainer Form I-247 makes no mention of the person's specific immigration status. Nor is the presence of a detainer determinative of whether or not a person will in fact be removed. An ICE hold generally leads to charges of removability, allegations that must be vetted by several bodies within ICE and, in many cases, a federal immigration court. Some noncitizens may not be removable at all, or may have a basis to contest their removal and request relief in immigration court. In many cases, such noncitizens will re-enter their communities.[57]

G. Immigration Detainers & Speedy Trial Issues

As a general rule, state courts that have considered the issues have held that an immigration detainer is not "custody" for speedy trial purposes; nor does the mere presence of an immigration detainer impact speedy trial calculations.[58] The Ninth Circuit, as well as other circuits, have recognized the importance of guarding against "cases of collusion between [immigration] officials and criminal authorities, where the civil [immigration] detention is merely a ruse to avoid the requirements of the Speedy Trial Act."[59]

In *State v. Chavez-Romero*[60], the Washington State Court of Appeals addressed the impact of an immigration detainer on a defendant's speedy trial rights under CrR 3.3. One week before the expiration of the 60-day time for trial date, the State asked the court to release the defendant on his own recognizance and to reset the trial date within the 90-day time for trial period under CrR 3.3(b)(3). The defendant objected to his release because he was subject to an immigration detainer and, upon release, would be taken into ICE custody and unlikely to appear for future hearings.

The court released the defendant. The defendant was taken into custody by ICE and missed the next court date. The trial court reset the case for trial. The jury convicted the defendant.

On appeal, the court held the State had the authority under CrR 3.3 to request the release of the defendant and extend the time for trial for 90 days. But the defendant's objection put the

[56] K. Beckett and H. Evans, *Immigration Detainer Requests In King County Washington: Costs and Consequences*, University of Washington, March 2013.
[57] *See* §1.5(E) for an overview of available avenues of relief from removal.
[58] *State v. Montes- Mata*, 41 Kan.App.2d 1078, 208 P.3d 770 (Kan. App. 2009); *State v. Sanchez*, 110 Ohio St. 3d 274, 853 N.E.2d 283 (2006).
[59] *Cepeda-Luna*, 989 F.2d 353, 355-56 (9th Cir.1993).
[60] 170 Wn. App. 568, 285 P.3d 195 (2012).

court on notice that he would be taken into federal custody. Consequently, the time in federal detention was excluded from the time for trial calculation. The court states that the decision to release defendant left the State with two options:

- Obtain the defendant from federal custody, or
- Allow the time for trial to toll.

The court held the trial court erred in resetting the trial rather than allowing the time for trial to toll.

H. Immigration Detainers & Custody Determinations

Article 1 § 20 of the Washington State Constitution provides, "All persons charged with crime shall be bailable by sufficient sureties, except for capital offenses when the proof is evident, or the presumption great."[61] The right to bail is implemented by CrR 3.2. The rule specifies that, in noncapital cases, there is a presumption in favor of release on personal recognizance without the posting of any sureties at all.[62] If conditions must be imposed in order to assure the defendant's appearance at trial, the trial court must release the accused on the "least restrictive" of conditions that will reasonably assure the defendant's presence at future hearings.[63]

The court rule provides a list of nine factors the court must consider in order to evaluate flight potential.[64] None of the mandatory flight-risk factors reference the defendant's immigration status.[65] The Washington Supreme Court has not amended the court rule to make citizenship and/or immigration status a factor in the bail determination process. Some of the flight-risk factors implicitly overlap with immigration status, including "[t]he length of the accused's residence in the community"[66] and the catch-all provision covering "any other factors indicating the accused's ties to the community."[67] However, these factors are not the same as a citizenship inquiry. A person's ties to the community are not dependent on her nationality or even on the lawfulness or unlawfulness of her immigration status. Many undocumented people have resided in their communities for many years, and are married, raising families, gainfully employed and otherwise engaged community members.

---

[61] WA. CONST. art. I, § 20.
[62] CrR 3.2(a), *available at* http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=sup&set=CrR.
[63] CrR 3.2(b). Custody determinations pursuant to CrR 3.2 also contemplate imposition of conditions to address issues of the defendant's apparent dangerousness to the community. *See* CrR 32(a)(2). The impact of the defendant's dangerousness on custody determinations is tangential to the issues presented by the presence of an ICE detainer and beyond the scope of this guide.
[64] CrR 3.2(c).
[65] Some states do direct courts to consider alienage, as does the federal government. *See, e.g.*, 725 ILCS 5/110-5(a) (Illinois statute providing, among dozens of other factors listed, that a court should consider "whether the individual is currently subject to deportation or exclusion under the immigration laws of the United States"); 18 U.S.C. § 3142(d)(1)(B) (federal statute providing for detention of noncitizen criminal defendants pending a decision by immigration officials on whether they will assume immediate custody of the individual).
[66] CrR 3.2(c)(5).
[67] CrR 3.2(c)(9).

In most cases, ICE has discretion to not assume custody of a noncitizen where the criminal court orders release on conditions (e.g., posting a bail amount) that are met, even where ICE chooses to simultaneously pursue removal proceedings.[68] Federal regulations also provide for the issuance of a "departure-control order" that will ensure that ICE does not remove a defendant in a pending criminal proceeding without the consent of the (state or federal) prosecutor.[69]

[68] However, 8 U.S.C. § 1226(c) requires mandatory detention for the commission of certain listed offenses, which, in most cases, require a conviction.
[69] *See* 8 C.F.R. § 215.2.

CHAPTER THREE[1]

The Implications of *Padilla v. Kentucky* and *State v. Sandoval*

Table of Contents

3.1 OBLIGATION TO ADVISE OF ADVERSE IMMIGRATION CONSEQUENCES

In *Padilla v. Kentucky*[2], the Supreme Court held that a defense attorney has an obligation under the Sixth Amendment to advise noncitizens about the potential adverse immigration consequences of a plea to criminal charges, and that the absence of such advice may be a basis for claim of ineffective assistance of counsel.

Judges play an important role in ensuring that defendants are advised about potential immigration consequences of a conviction and that they have an opportunity to obtain such advice. Judges can assure the voluntariness of a plea and compliance under *Padilla* without requiring disclosures that would breach attorney-client privilege, RCW 10.40.200, or violate the Fifth Amendment right against self-incrimination.

[1] Information in this chapter was adapted in part from materials generously provided by Professor Nancy Morawetz and Professor Alina Das of the New York University School of Law Immigrant Rights Clinic and Manuel Vargas and Benita Jain of the Immigrant Defense Project.

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

A. RCW 10.40.200 Precludes the Court from Compelling Disclosure of Status

Nearly thirty years ago the legislature enacted RCW 10.40.200 in recognition of the risk of serious immigration consequences facing noncitizen defendants. The statute requires the court to ensure that every defendant is advised that if the defendant is not a U.S. citizen, serious immigration consequences, such as deportation, may result from entering a plea that results in conviction. In so doing, the legislature specifically stated:

> "It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court."[3]

B. Fifth Amendment Protections Against Self-Incrimination[4]

All defendants, citizen and non-citizen alike, enjoy the constitutional protections of the Fifth Amendment. In *Mathews v. Diaz*, the Supreme Court held that every person, "even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[5] The Fifth Amendment right to avoid self-incrimination applies "to any official questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings."[6] Therefore, statements about citizenship/immigration status made on the record, either orally or in writing, including on plea forms, could be used as evidence in support of other criminal charges for offenses in which immigration status is an element, such as the federal crimes of illegal entry and illegal reentry following deportation, 8 U.S.C. §§ 1325 and 1326, respectively.[7]

---

[3] RCW 10.40.200(1).

[4] The Fifth Amendment states, "No person shall … be compelled in any criminal case to be a witness against himself." U.S. CONST. AMEND. V. However, its invocation is not limited to criminal trials. *See, e.g., United States v. Balsys*, 524 U.S. 666, 672 (1998) (" '[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,'" when an individual believes information sought or discoverable through testimony, "could be used in a subsequent state or federal criminal proceeding") (citing *Kastigar v. United States*, 406 U.S. 441, 444-45, (1972)); *see also McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (holding that Fifth Amendment privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it"). The Fifth Amendment applies to the states. *Malloy v. Hogan*, 378 U.S. 1 (1964) (making Self-Incrimination Clause of Fifth Amendment applicable to states through Fourteenth Amendment Due Process Clause).

[5] 426 U.S. 67, 77 (1976). Citizens and non-citizens alike may invoke the Fifth Amendment. *See Mathews v. Diaz*, 426 U.S. at 77 ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law…Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (internal citations omitted); *see also Kastigar v. United States*, 406 U.S. 441, 444 (1972) ("[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used."); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (individual subject to removal proceedings invoked Fifth Amendment, but court did not reach question of whether invocation was proper because it deemed the issue "not relevant to [its] decision ….").

[6] *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

[7] Examples of federal crimes for which "alienage" is an element of the offense include:

8 U.S.C. § 1282(c) – Alien crewman overstays;

Consequently, requiring defendants to disclose citizenship or immigration status risks compelling individuals to incriminate themselves.

C. Judicial Code of Conduct

Section 2.3(a) of the Judicial Code of Conduct states that a judge shall perform duties of judicial office without bias or prejudice. The comment states that bias and prejudice does not include a reference to national origin, unless it is "legitimately relevant to the advocacy or decision of the proceeding." In the 1999 disciplinary proceedings in *In Re Hammermaster*, the Supreme Court held that the judge's practice of inquiring about the citizenship of some defendants in criminal cases violated the Code of Judicial Conduct.[8]

D. Attorney Client Confidentiality and Effective Assistance

Eliciting information about a defendant's citizenship/immigration status may also invade the confidential attorney-client relationship.[9] There may be instances where it is necessary for a defense counsel to disclose a defendant's citizenship/immigration status in pursuing a particular resolution or course of action.[10] However, even in these circumstances, it is generally not necessary to make specific inquiries regarding a defendant's particular immigration status.

E. Immigration Status Issues at Custody Determinations Due to Presence of Immigration Detainers

As outlined at §2.3, the presence of an immigration detainer, although not definitive proof of immigration status, alerts the court that the defendant may not be a U.S. citizen and faces possible transfer to immigration authorities upon release. Assuming they are taken into ICE custody and placed in removal proceedings, there are numerous avenues of "relief from

---

8 U.S.C. § 1306(a) – If overstay after 30 days and no fingerprints/registration;
8 U.S.C. § 1304(e) – 18 or over not carrying INS documentation;
8 U.S.C. § 1306(b) – Failing to comply with change of address w/in 10 days;
8 U.S.C. § 1324c(e) – Failure to disclose role as document preparer;
8 U.S.C. § 1324(a) – Alien smuggling;
8 U.S.C. § 1325 – Entry Into United States without inspection or admission;
8 U.S.C. § 1326 – Illegal Reentry after deportation;
18 U.S.C. § 1546 – False statement/fraudulent documents;
18 U.S.C. § 1028(b) – False documents;
18 U.S.C. § 1001 False statement;
18 U.S.C. § 911, 1015 – False claim to U.S. citizenship.

[8] *See In re Hammermaster*, 139 Wn.2d 211, 244-45 (1999).

[9] The Supreme Court has repeatedly recognized "the importance of the attorney-client privilege as a means of protecting that relationship and fostering robust discussion." *See, e.g., Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1338 (2010); *see also Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) ("The attorney client privilege is one of the oldest recognized privileges for confidential communications. …The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.") (internal citations omitted).

[10] *See In Re Barr*, 684 P.2d 712 (1984). *See* §5.3 for more on *In Re Barr* pleas and factual basis issues in light of immigration issues.

removal" available that would permit eligible noncitizens to remain lawfully in the U.S. See §§ 1.2 and 1.5(E) for an overview of avenues to obtain lawful status and relief from removal.

Moreover, many noncitizens, regardless of their immigration status, have significant ties to their communities. Consequently, under Washington law governing custody and bail determinations, the indication that a person may be a noncitizen due to the presence of an immigration detainer is one factor in determining conditions of release and does not require judicial inquiries into a defendant's immigration or citizenship status. See §2 for more on noncitizens and custody determinations.

Chapter Five discusses in greater detail considerations of what constitutes a knowing and voluntary plea in light of immigration consequences. In short, judges can ensure that pleas are knowing and voluntary without inquiring into a defendant's citizenship/immigration status. However, judges should determine whether defense counsel has advised the defendant about potential immigration consequences of entering the plea consistent with *Padilla*.

With the exception of the one Washington criminal offense that has alienage as an element[11], an individual's nationality, citizenship or alienage has no bearing on his or her guilt or innocence regarding a criminal charge, or the factual basis of his or her plea.[12]

- **Disclosure of Citizenship and Immigration Status Can Have Significant Consequences for the Defendant and the Defendant's Family.**

Disclosure of citizenship/immigration status on the record can result in adverse action against defendants or their families.[13] For example, Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE) officers may be present in the court room. And in immigration proceedings, the federal government can use evidence from court transcripts to meet its burdens of establishing alienage and that a particular conviction sufficiently matches a charged ground of deportation or inadmissibility.[14]

[11] RCW 9.41.171 (Alien possession of firearms).

[12] Under Washington Judicial Code of Conduct Rule 2.9(C), "A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law."

[13] Courts have recognized that the disclosure of immigration status can have harmful impacts. *See e.g.*, *Perez v. United States*, 968 A.2d 39, 71 (D.C. Ct. App. 2009) (discussing potential prejudicial impact of disclosure of immigration status); *Serrano v. Underground Utilities Corp.*, 407 N.J. Super. 253, 280 (App. Div. 2009) (acknowledging chilling effect that disclosure of immigration status may have outside of particular case and requiring further proffer of admissibility (probative value outweighing prejudicial impact) before allowing inquiries regarding immigration status); *Arroyo v. State*, 259 S.W.3d 831, 836 (Tex. App. 2008) (holding that information regarding legal status in United States is admissible when relevant and finding court's refusal to allow questions about citizenship to be valid exercise of discretion); *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 460 (Cal. App. 4th Dist. 2003) ("[E]vidence relating to citizenship and liability to deportation almost surely would be prejudicial to the party whose status was in question.").

[14] *See* 8 U.S.C. § 1229a(c). Additionally, establishing alienage is a jurisdictional burden that the government must meet in order to pursue removal proceedings against someone.

Studies have found that the fear among immigrant communities that any contact with police could trigger removal has a chilling effect on reporting of crimes, resulting in further marginalization of already vulnerable populations.[15] This is of particular concern in cases of domestic violence, when the victim wants to stop the abuse but does not want to lose a family member to ICE detention and/or possible deportation.[16] Such fear and mistrust of the criminal justice system can have dangerous consequences, especially for the most vulnerable populations of women and children.

---

[15] Many law enforcement agencies, public officials and civil society organizations have raised concerns about the impact that local enforcement of immigration laws could have on immigrant confidence in and cooperation with the criminal justice system. *See, e.g.*, MAJOR CITIES CHIEFS (M.C.C.) IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES: M.C.C. NINE (9) POINT POSITION STATEMENT, 5-6 (June 2006) (describing concerns with local enforcement of federal immigration laws, including risk of undermining trust and cooperation of immigrant communities), *available at* http://www.houstontx.gov/police/pdfs/mcc_position.pdf; National Immigration Law Center, *Why Police Chiefs Oppose Arizona's SB 1070* (June 2010), *available at* http://www.nilc.org/immlawpolicy/LocalLaw/police-chiefs-oppose-sb1070-2010-06.pdf; America's Voice, *Police Speak Out Against Arizona Immigration Law* (May 18, 2010), *available at* http://amvoice.3cdn.net/cffce2c401fc6b2593_p6m6b9n1l.pdf; United States Conference of Mayors, 2010 Resolutions, 78th Conference, "Opposing Arizona Law SB1070", "Calling Upon the Federal Government to Pass Comprehensive Immigration Reform that Preempts Any State Actions to Assert Authority Over Federal Immigration Law," at 67-70, *available at* http://www.usmayors.org/resolutions/78th_Conference/adoptedresolutionsfull.pdf; UNITED STATES CONFERENCE OF MAYORS, 2004 MEASURE TO AMEND THE CLEAR AND HSEA ACTS OF 2003, *available at* http://www.usmayors.org/resolutions/72nd_conference/csj_08.asp (expressing concern about distracting local law enforcement from primary mission, undermining federal legislation protecting immigrant victims, and creating "an atmosphere where immigrants begin to see local police as federal immigration enforcement agents with the power to deport them or their family members, making them less likely to approach local law enforcement with information on crimes or suspicious activity"); ACLU AND IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, UNC-CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA, *available at* http://www.law.unc.edu/documents/clinicalprograms/287gp; *available*olicyreview.pdf; CHRISTINA RODRIGUEZ ET. AL., MIGRATION POLICY INSTITUTE, A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) at 8-9 (Mar. 2010), *available at* http://www.migrationpolicy.org/pubs/287g March2010.pdf.

[16] For a discussion of these issues, *see* NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, IMMIGRATION AND DOMESTIC VIOLENCE: A SHORT GUIDE FOR NEW YORK STATE JUDGES at 1-4 (Apr. 2009), *available at* http://www.courts.state.ny.us/ip/womeninthecourts/ImmigrationandDomesticViolence.pdf. The report explains how the immigration consequences that abusers may face upon criminal conviction can discourage women from bringing charges:

> Criminal proceedings, with their concomitant danger of deportation, are another kind of obstacle for abused immigrant women, who have reason not only to fear their own forced removal from the United States but that of their abuser.... Danger lurks for abused immigrant women in the possibility of their own arrests as well as the arrest of their abusers….Abusers, too, may be subjected to deportation if criminal cases are pursued against them, and this is not necessarily a desirable outcome for abused immigrant women. If a victim depends on her abuser for support, the last thing she may want is to see him transported thousands of miles away, where he may be unable to earn a living and where support enforcement mechanisms may be meaningless. Immigrant victims also may need their abusers' presence in the United States to legalize their own status. VAWA self-petition remedies are often unavailable when abusers have been deported. Beyond these considerations, victims may have family, even children, who remain in their home countries. An abuser returning to a victim's village or locale may take revenge on family members he finds there."

See also, ASSISTING IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE: LAW ENFORCEMENT GUIDE, *available at* http://www.vaw.umn.edu/documents/immigrantdvleguide/immigrantdvleguide.pdf

In response to these concerns, the King County Superior Court adopted a policy titled, "No Courtroom Arrests Based on Immigration Status." **See Appendix K for the full text of this policy.**

3.2 JUDICIAL OBLIGATIONS AFTER PADILLA V. KENTUCKY AND STATE V. SANDOVAL

In *Padilla*, the Supreme Court held that defendants have a Sixth Amendment right to advice from defense counsel regarding the adverse immigration consequences of entering into a plea.[17] The Court emphasized the unique nature of deportation and the importance of advising clients about the adverse deportation consequences of a criminal charge and entering into a plea. "We have long recognized that deportation is a particularly severe 'penalty,'" and that while not a criminal sanction in a strict sense, "deportation is nevertheless intimately related to the criminal process."[18] The Court described recent changes in immigration law as having "made removal nearly an automatic result for a broad class of noncitizen offenders."[19]

In *State v. Sandoval*, 171 Wn.2d 163 (2010), the Washington Supreme Court concluded the defendant established prejudice under the second prong of *Strickland* by showing that he would not have entered into the plea if he had known of the deportation consequences. Applying the U.S. Supreme Court's decision in *Padilla v. Kentucky*, the Court vacated defendant's conviction on the basis that he had received ineffective assistance of counsel regarding the advice provided on the immigration consequences of his conviction.

In *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), a native of Honduras faced deportation after pleading guilty to transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky. Padilla claimed that he pleaded guilty based on his attorney's advice that he "did not have to worry about immigration status since he had been in the country so long." Contrary to his attorney's advice, the drug charge made Padilla's deportation mandatory. Padilla argued he was entitled to post-conviction relief because he would have gone to trial if he had received correct advice from his lawyer before agreeing to enter his plea. The Kentucky Supreme Court denied his request for post-conviction relief.

The United States Supreme Court reversed and remanded. Accepting Padilla's assertions as true, the Court concluded he carried his burden of showing his attorney provided ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) by failing to advise him of the immigration consequences of the plea. Under *Strickland*, a defendant must demonstrate both deficient performance and resulting prejudice.[20]

In *Padilla*, the Court held that an attorney has an obligation under the Sixth Amendment to advise a defendant regarding deportation consequences of entering into a guilty plea. "[A]dvice

[17] *Padilla*, 130 S. Ct. at 1481-82.
[18] *Padilla*, 130 S. Ct. at 1473 n.8.
[19] *Id.* at 1482.
[20] *Strickland*, 466 U.S. 668, 687 (1984).

regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."[21] The Court emphasized the unique nature of deportation and the importance of advising defendants about the deportation consequences for a criminal charge.

> [C]hanges to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part . . . —of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.
> ....
> .. The severity of deportation—"the equivalent of banishment or exile," *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91, 68 S. Ct. 10, 92 L. Ed. 17 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. *Padilla*, 130 S. Ct. at 1480, 1486.

The Court rejected the rationale previously used by other courts that there was a distinction between "direct" and "collateral" consequences, and that defense counsel did not have a duty to advise a client about immigration and deportation consequences.[22]

> We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under *Strickland*. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.
> . . . .
> 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. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.

The Court in *Padilla* rejected the "limited conception" that the Sixth Amendment right to effective assistance of counsel did not include advising a defendant about the immigration consequences of a criminal conviction.

The Court emphasized that for "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." *Padilla*, 130 S. Ct. at 1485. The Court also defined the scope of the duty to advise a noncitizen client about immigration consequences as follows:

---

[21] *Padilla*, 130 S. Ct. at 1482.
[22] *Padilla*, 130 S. Ct. at 1481-82.

> When the law is not succinct and straightforward . . . , 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. . . . But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.[23]

Padilla does not apply retroactively to convictions that become final before *Padilla*.[24]

In *State v. Sandoval*, 171 Wn. 2d 163 (2011), the Washington Supreme Court followed the decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), and vacated the defendant's conviction because he received ineffective assistance of counsel regarding the advice his attorney provided on the immigration consequences of pleading guilty to rape in the third degree. The Court held that not only did defense counsel's performance fall below an objective standard of reasonableness, but the defendant also met his burden of showing prejudice under the *Strickland v. Washington* test.[25]

Key Points

Issue Presented Was Narrowly Construed – The Court narrowly construed the issue presented to focus on the specific advice defense counsel gave to his client regarding deportation consequences of entering into a plea. The Court did not address other issues related to the immigration consequences, such as the filing of a criminal charge or a conviction on the ability of a noncitizen to obtain discretionary relief from removal.

Clear vs. Unclear Risk of Deportation – As in *Padilla*, the Court in *Sandoval* held that defense counsel has an affirmative duty under the Sixth Amendment to provide effective assistance of counsel regarding the deportation consequences of entering into a plea. In doing so, counsel must identify relevant provisions of the immigration statute and research relevant case law. The advice required depends on whether the risk of deportation is "truly clear." If immigration law is clear, defense counsel must correctly advise the client that pleading guilty would lead to deportation. If immigration law is not clear, counsel must advise the client that the charges may carry the risk of possible adverse immigration consequences. (It is not possible to craft a simple list of "clear" crimes that trigger deportation since such determinations are fact-specific.)

Boilerplate Advisory Language In Plea Form Does Not Meet Defense Counsel's Sixth Amendment Duty – The Court also held that under *Padilla*, the deportation warnings under RCW 10.40.200 that are in the plea form do not mitigate defense counsel's Sixth Amendment obligations.

***Strickland's* Prejudice Analysis** – Unlike in *Padilla*, the Washington Supreme Court in *Sandoval* reached the prejudice prong of the *Strickland* test, and concluded the defendant showed that he would not have entered into the plea if he had known about the immigration

[23] *Padilla*, 130 S. Ct. at 1483.
[24] See *Chaidez v. United State*s, 133 S. Ct. 1103 (2013).

[25] Washington has adopted the two-prong test set forth in *Strickland* in determining whether counsel was ineffective. *State v. Cienfuegos*, 144 Wn.2d 222, 226-27 (2001). Whether an attorney provided effective assistance of counsel is a fact-specific inquiry. *Strickland*, 466 U.S. at 688-89.

consequences. Although the disparity in the punishment between rape in the third degree and the charged crime of rape in the second degree was significant, the Court states that "given the severity of the deportation consequence," it would have been rational for a lawful, permanent resident to go to trial.

Duty of the Court to Ensure Advice is Given on Immigration Consequences

The Court must ensure each defendant is advised of possible immigration consequences as required by RCW 10.40.200. However as noted in Padilla and *Sandoval*, just providing the warnings in RCW 10.40.200 is not sufficient.

Defense counsel has a duty to properly advise their client of the actual immigration or deportation consequences. Accordingly, the Court should inquire on the record as to whether there has been an opportunity for defense counsel to do so. Sample colloquies for the court to give at arraignment, before taking a plea, and at the beginning of trial are set forth in the bench cards.

Any colloquy adopted by the Court regarding immigration consequences should be applied uniformly to all individuals since selecting individuals by their names, appearance, or ability to speak English is improper. The Court should not make inquiries regarding an individual's legal status or ask counsel what advice was provided to a client. The proper inquiry is whether such advice has been provided. If requested, the Court should afford counsel the opportunity to review the immigration consequences with a client by setting the matter over to the end of the calendar or continuing the plea to another day.

The Court may also refer counsel to the attorneys at the Washington Defenders Association's (WDA) Immigration Project. The WDA Immigration Project, funded by the State, provides guidance to assist defenders and prosecutors in addressing the complex interplay between immigration and criminal law. Nationally recognized experts, Immigration Project staff attorneys Ann Benson (abenson@defensenet.org) and Jonathan Moore (jonathan@defensenet.org) can be reached by email. Additional resources are available at the WDA website at: www.defensenet.org.

In *Chaidez v. United States*,[26] the U.S. Supreme Court concluded that because the decision in *Padilla* announced a new rule of criminal procedure, *Padilla* does not apply retroactively to convictions that became final before that decision. That is, a "defendant whose convictions became final prior to *Padilla* cannot benefit from its holding."

[26] 133 S.Ct. 1103.

F. Obligation to Ensure Effective Assistance of Counsel

Judges have an obligation to ensure that defendants have access to competent counsel that can meet his/her obligation under the Sixth Amendment.

As the Supreme Court made clear in *Missouri v. Frye*,[27] it is not enough for attorneys to inform defendants of potential consequences.[28] Rather, the *Frye* Court reaffirmed that defendants are entitled to effective assistance at all critical stages of the proceedings, and held that plea negotiations are a critical stage.

G. Statutory Obligations Under Washington Law

In 1983, the legislature enacted RCW 10.40.200. RCW 10.40.200 states that prior to accepting a plea, the court must make a determination that defendants have been advised of "the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." The statute expressly states that no defendant be required to disclose her or his immigration status when entering a plea.

For many years, this requirement has been accomplished by including the following standardized language in plea forms:

> If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law may be/is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.[29]

However, the Washington State Supreme Court in *Sandoval* made clear that this statutory advisal alone is not enough to satisfy defense counsel's Sixth Amendment obligations.[30]

---

[27] 132 S.Ct. 1399 (2012).
[28] *Frye*, 132 S.Ct. at 1347 ("[C]riminal defendants require effective counsel during plea negotiations").
[29] *Compare* CrR LJ 4.2(g) (sample guilty plea statement) indicating that a conviction "may be" grounds for the stated consequences *with.*CrR 4.2(g), indicating that a conviction "is" grounds for the state consequences, which is erroneous since not all convictions are grounds for these consequences.
[30] *Sandoval*, 171 Wash.2d at 173-74.

3.3 JUDICIAL BEST PRACTICES

One of the most effective things judges can do is to ensure that defense attorneys have had the opportunity to meet with and advise their client on immigration consequences. It will often boil down to making sure that counsel has the time necessary for providing such advice.

> It 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.[31]

Nowhere are resources more readily available than in Washington State. Funded by the legislature, **The Washington Defender Association's Immigration Project** (WDA's Immigration Project) exists in large part to provide defense counsel with assistance regarding the immigration consequences facing any given noncitizen client. On average, WDA's Immigration Project staff respond to case inquiries within 48 hours, sooner if needed. WDA's Immigration Project also makes extensive resources, including crime-specific practice advisories, available on its website.

Defendants who choose to proceed *pro se* must be advised that there may be potential immigration consequences. Prior to accepting any waiver of counsel, a defendant considering proceeding *pro se* should be informed that they have the right to retain or request an attorney to obtain individualized advice regarding the immigration consequences of a plea or conviction. The court should also inform the defendant that if he or she is not a U.S. citizen, a conviction can trigger serious immigration consequences such as deportation, even if he/she has a green card (lawful permanent residence), and that if defense counsel is appointed, he/she has the right to have his/her defense attorney address the immigration consequences presented by the criminal charges.

Significant adverse immigration consequences, including removal, can result even (and sometimes especially) from low-level misdemeanor offenses. **Judges should always appoint counsel in criminal proceedings to ensure that if the defendant is a noncitizen, s/he will have the opportunity to receive individualized advice regarding immigration consequences.** Only counsel can provide such advice, since judges are not in a position to conduct the detailed factual investigation and legal analysis required to advise each individual defendant regarding his or her specific circumstances.

****

REAL LIFE EXAMPLE: Tomas (not his real name) is a noncitizen from El Salvador who came to the U.S in 1999. In 2002, he was granted employment authorization and the right to remain in the U.S. lawfully when the President designated noncitizens from El Salvador eligible for Temporary Protected Status (TPS)[32] in the wake of the devastation brought upon that country by hurricanes. (TPS for Salvadorans has been subsequently renewed every 18 months by

[31] *Padilla*, 130 S. Ct. at 1484.
[32] *See* 8 U.S.C. § 1254a.

presidential decree.) In 2003, Tomas was convicted of DUI. In 2010, he was charged with the gross misdemeanor of Commercial Fishing Without a License under RCW 77.15.500. On advice from the Court, he waived counsel and was found guilty and fined $150. Unbeknownst to him, Tomas will no longer be eligible for TPS since he now has two misdemeanor convictions. When he next applies to renew his TPS status, he will be denied and placed in removal proceedings.[33]

****

The responsibility for compliance with *Padilla* ultimately rests with defense counsel. But judges should advise defendants early in the proceedings of the need to obtain advice about the actual immigration consequences of a plea or conviction before proceeding to a disposition. A judge should provide the defendant with sufficient time to obtain legal advice on immigration consequences.

Several other states have had statutes mandating that courts provide such additional time. There is little evidence that the practice has generated problems in their court systems.[34]

Selectively issuing such notice to some defendants and not to others runs the risk of being under-inclusive. Providing notice only to those who state that they are non-citizens or whom the court believes to be non-citizens may mean that people who face potential immigration consequences of a conviction are not informed of their right to advice from counsel about those consequences. Assumptions about defendants' citizenship/immigration status and information provided in response to judicial questioning about citizenship may be erroneous and thus an unreliable basis on which to decide whether or not an immigration warning is necessary.[35] Universal administration of advisory notices of the right to receive advice on immigration issues will save courts time and resources in the long run.

Furthermore, selective questioning of some defendants and not others about their citizenship/immigration status on the basis of their race, ethnicity, accent, foreign-sounding name or use of interpreters, risks violating constitutional protections. Non-citizens and citizens alike enjoy protections under the law against discrimination on the basis of suspect classes and unreasonable search or seizure. That protection extends to government interrogation. Courts have held that racial or ethnic criteria are insufficient bases to question someone about their citizenship.[36]

---

[33] 8 U.S.C. § 1254a(c)(2)(B)(i) (conviction of any felony or two or more misdemeanors committed in the United States renders a noncitizen ineligible for TPS).

[34] Currently, five states, including California, Connecticut, District of Columbia, Oregon, and Nebraska, mandate that courts should afford defendants additional time if they require advice from counsel regarding immigration consequences of their plea or conviction or further negotiations with the prosecution in light of those potential consequences.

[35] *See People v. DelVillar*, 235 Ill. 2d 507, 516, 519 (2009) (Illinois Supreme Court held that a court's failure to warn a defendant about the immigration consequences of a guilty plea is not automatically grounds for vacatur, while confirming that issuance of the advisal is nonetheless mandatory under state law and must be administered to defendants on the basis of the plea they are entering, not their citizenship or immigration status).

[36] *See, e.g., United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that officers may only stop vehicles on basis of specific 'articulable' facts that warrant suspicion vehicle contains "aliens who may be illegally in the country" and that Mexican appearance, alone, does not justify such stop). The Ninth Circuit discussed Supreme

When judges are advising defendants, it is important that the colloquy be administered regardless of the charge an individual is facing. Some convictions classified as misdemeanors and even alternative dispositions and sentences that do not constitute a "conviction" in criminal court may nevertheless carry potentially serious immigration consequences, including deportation. The potential impact of a given plea, admission or conviction on an individual's immigration status can only be determined in view of the specific individual's personal history, citizenship/immigration status, and past criminal record—specific facts that a judge does not have before him or her when processing a defendant at the arraignment or plea stage. Given the complex and intertwined nature of criminal and immigration law, any charge should be treated as though it may have the potential to impact an individual's immigration status presently, or in the future. Whether that potential exists, and whether it can be avoided or mitigated through an alternative disposition, must be ascertained by the defense counsel, in conjunction with his or her client. **See Appendix I: Sample Immigration Colloquies for Judges.**

Court jurisprudence on this point in *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000), holding that racial or ethnic appearance, without more, was of little probative value and insufficient to meet requirement of particularized or individual suspicion. *Id.* ("[T]he Supreme Court has repeatedly held that reliance 'on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.'" (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986))). *See also Fullilove v. Klutznick*, 448 U.S. 448, 491(1980)); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994) (finding that officer's stop of individual solely on basis of race was egregious violation of Fourth Amendment, triggering exclusionary rule requiring suppression of evidence obtained); *Ohrorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (holding that search on basis of foreign-sounding name was egregious violation of Constitution warranting suppression of evidence obtained); *But see Mena v. City of Simi Valley*, 354 F.3d 1015, 1019 (9th Cir. 2004) ("The officers here deserve qualified immunity because a person who is constitutionally detained does not have a constitutional right not to be asked whether she is a citizen … ."), *vacated and remanded by Muehler v. Mena*, 544 U.S. 93, 100-01 (2005) (holding that because mere police questioning does not constitute seizure officers did not need reasonable suspicion to ask for date and place of birth or immigration status during otherwise lawful detention/custody). While the federal government may distinguish among aliens in immigration matters, state action that discriminates between U.S. citizens and lawful permanent residents may be subject to stricter scrutiny.

CHAPTER FOUR

Washington State Crimes and the Grounds of Deportation and Inadmissibility

Table of Contents

Chapter Four provides criminal court judges with general familiarity with the most common grounds of deportation and inadmissibility that are triggered by criminal convictions and criminal conduct, as well as the immigration consequences that can be triggered in regard to the most common Washington criminal statutes.

4.1 CONVICTIONS CLASSIFIED AS "AGGRAVATED FELONIES"

A. Consequences of Aggravated Felony Classification

A conviction for an offense classified as an aggravated felony under 8 U.S.C. § 1101(a)(43) of the immigration statute triggers the most severe immigration consequences for a noncitizen (see categories below).

- Lawful permanent residents (LPRs) – triggers deportation grounds[1] and renders an LPR ineligible for most forms of discretionary relief from removal, regardless of their length of residence, family ties or any other equities;[2]

- Noncitizens who are not LPRs (including refugees, other lawfully present noncitizens and undocumented persons) – Qualifies them for "expedited removal" proceedings which, if ICE initiates (rather than formal removal proceedings), will result in unreviewable removal order without a hearing before an immigration judge to pursue avenues for relief from removal.[3]

- Undocumented Persons - Triggers some statutory bars to obtaining lawful immigration status and bars eligibility for many forms of relief from removal ;[4]

- All noncitizens – Triggers mandatory immigration detention for the duration of removal proceedings, including any appeals.[5]

- A permanent bar to lawful reentry into the U.S. after deportation;[6]

- Significant sentence enhancements for noncitizens criminally prosecuted for illegal reentry after deportation/removal.[7]

B. Record of Conviction (ROC) Often Determines Aggravated Felony Classification

A Washington State criminal conviction for a crime that sufficiently matches one of the offenses listed in the categories below will be classified as an aggravated felony under immigration law. Whether or not a state (or federal) criminal conviction sufficiently matches a provision of the aggravated felony definition under immigration law is

---

[1] 8 U.S.C. § 1227(a)(2)(A)(iii).
[2] *See, e.g.*, 8 U.S.C. §1229b(a) (LPR cancellation); 8 U.S.C. § 1229b(b) (10-year cancellation); 8 U.S.C. § 1182(h) (212(h) waiver); 8 U.S.C §§ 1158(b)(2)(A)(ii) & (2)(B)(I). See Relief from Removal Chart at §1.5(E).
[3] 8 U.S.C. § 1228(b)(1).
[4] *See, e.g.*, 8 U.S.C. § 1229b(b)(2)(A)(iv) (aggravated felony renders noncitizen survivor of domestic violence ineligible for special DV-related cancellation of removal).
[5] 8 U.S.C. § 1226(c)(1).
[6] 8 U.S.C. §§ 1182(a)(9)(A)(i),(ii)(II).
[7] U.S.S.G. § 2L1.2(b)(1)(C)

governed by an analytical framework called the "categorical approach", which is explained in Chapter Five.

Generally, for most provisions of the aggravated felony definition (as well as other deportation and inadmissibility grounds), application of the categorical approach framework has been an "elements-based" test. This means that where the elements of the criminal conviction sufficiently match the elements of the aggravated felony provision at issue, the offense will be classified as an aggravated felony.[8]

However, in many cases the immigration judge will consult the record of conviction from the criminal proceedings to determine the specific elements necessary to convict the defendant. As outlined in more detail in Chapter Five, this means that whether a noncitizen's conviction is classified as an aggravated felony (or triggers other grounds) will depend upon the information contained in the criminal record, specifically, the defendant's plea statement.

C. Qualifying Misdemeanors Will Be Classified as Aggravated Felony Offenses

Although the immigration statute specifies that this provision defines aggravated *felonies*, circuit courts have extended its reach to misdemeanor offenses that fall within the scope of its provisions.[9]

The 2011 amendments to the Washington misdemeanor sentencing statutes eliminated the possibility that Washington misdemeanor offenses can be classified as aggravated felonies where such classification was dependent upon imposition of one year sentences. There are only a handful of Washington misdemeanor offenses that now risk aggravated felony classification under the other provisions of this definition.

Misdemeanor convictions, particularly for Theft 3rd degree and certain Assault 4th degree, that were committed prior to the effective date (July 22, 2011) of these amendments and where a sentence of 365 days was imposed (regardless of suspended time) will still be classified as aggravated felonies under immigration law and prosecuted by ICE as such.

---

[8] *See Taylor v. United States*, 495 U.S. 575, 599, 601 (1990) (introducing the "categorical" and "modified categorical" approach in the sentencing context); *but see Nijhawan v. Holder*, 129 S.Ct. 2294, 2300 (2009) (introducing a "circumstance-specific" approach that applies to certain components of specific removal grounds that are based on non-record facts about a specific criminal incident).

[9] *See, e.g., United States v. Gonzalez-Tamariz*, 310 F.3d 1168, 1170 (9th Cir. 2002) (holding that a Nevada misdemeanor battery conviction with a 365 day sentence imposed constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(F)); *Matter of Small*, 25 I&N Dec 448 (BIA 2002).

D. Categories of Offenses Classified as Aggravated Felonies[10]

The aggravated felony definition includes the following categories of crimes:

Offenses Against Persons that can be Classified as Aggravated Felonies

- Murder;[11]
- Rape;[12]
- Convictions that qualify as "sexual abuse of a minor" offenses;[13]
- Any crime of violence, per 18 U.S.C. § 16, with a sentence of 1 year or more;[14]
- Demand of or receipt of ransom;[15]
- Child pornography;[16]
- Federal alien smuggling convictions;[17]
- Involuntary servitude and human trafficking;[18]
- RICO convictions;[19]

Offenses Against Property that can be Classified as Aggravated Felonies

- Theft, burglary, or possession of stolen property, with sentence of one year or more;[20]
- Commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers, with a sentence of one year or more;[21]
- Money laundering, as defined by federal law, in an amount exceeding $10,000;[22]
- Fraud, including theft and forgery, where the loss to victim exceeds $10,000;[23]
- Tax fraud;[24]

---

[10] 8 U.S.C. § 1101(a)(43) (definition of "aggravated felony).
[11] 8 U.S.C. § 1101(a)(43)(A).
[12] *Id*.
[13] *Id*.
[14] 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 16 defines "crime of violence" as: (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. *Leocal v. Ashcroft*, 125 S.Ct. 377, 383 (2004) (Negligent causation of injury is not a crime of violence); *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1129-30 (9th Cir. 2006) (*en banc*)(A *mens rea* of recklessness is also too low to be a crime of violence.)
[15] 8 U.S.C. § 1101(a)(43)(H).
[16] 8 U.S.C. § 1101(a)(43)(I).
[17] 8 U.S.C. § 1101(a)(43)(N).
[18] 8 U.S.C. § 1101(a)(43)(K)(iii).
[19] 8 U.S.C. § 1101(a)(43)(J), described in 18 U.S.C. 1962 (racketeer influenced corrupt organizations).
[20] 8 U.S.C. § 1101(a)(43)(G). Convictions for receipt of stolen property must include an element that the person knew that the property was stolen or intended to divest the true owner of his or her property rights, to be an aggravated felony. *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 886-87 (9th Cir. 2003).
[21] 8 U.S.C. § 1101(a)(43)(R).
[22] 8 U.S.C. § 1101(a)(43)(D).
[23] 8 U.S.C. § 1101(a)(43)(M). The loss in excess of $10,000 does not need to be an element of the crime charged, but can be proven in immigration proceedings through a variety of mechanisms. *Matter of Babaisakov*, 24 I&N Dec. 306, 316 (BIA 2007).

Other Offenses that can be Classified as Aggravated Felonies

- Trafficking, sale, manufacture, or delivery (and PWI) of a controlled substance;[25]
- Trafficking in firearms or explosives;[26]
- Other firearms offenses, including felon-in-possession;[27]
- Owning, managing, or supervising a prostitution business or providing transportation for the purpose of prostitution for commercial advantage;[28]
- Forgery of an immigration document with a sentence of one year or more;[29]
- Failure to appear for service of a sentence where the underlying offense was punishable by five years or more;[30]
- Failure to appear to answer to a felony charge with a possible sentence of two years or more;[31]
- Obstruction of justice, perjury, subordination of perjury, or bribery of a witness with a sentence of one year or more.[32]

4.2 OFFENSES CLASSIFIED AS CRIMES INVOLVING MORAL TURPITUDE (CIMT)

The immigration consequences of a conviction that is classified as a CIMT under immigration law will vary depending on a noncitizen's immigration status, criminal history and whether he or she is subject to the CIMT grounds of deportation or the CIMT grounds of inadmissibility.

A. Grounds of Deportation for Crimes Involving Moral Turpitude (CIMT)

These grounds of deportation apply to noncitizens who have been lawfully admitted.[33] They will also bar undocumented persons from seeking certain forms of discretionary relief in removal proceedings, which would permit them to remain lawfully in the U.S.[34]

---

[24] *Id*.
[25] 8 U.S.C. § 1101(a)(43)(B).
[26] 8 U.S.C. § 1101(a)(43)(C).
[27]8 U.S.C. § 1101(a)(43)(E).
[28] 8 U.S.C. § 1101(a)(43)(K)(i),(ii). The element of "commercial advantage" in § (K)(ii) does not need to be included as an element of the crime of which the person is convicted and can be established through the presentence report, the respondent's own convictions, or other evidence admitted in the criminal case. *Matter of Gertsenshteyn*, 24 I&N Dec. 111, 115-16 (BIA 2007).
[29] 8 U.S.C. § 1101(a)(43)(P).
[30] 8 U.S.C. § 1101(a)(43)(Q).
[31] 8 U.S.C. § 1101(a)(43)(T).
[32] 8 U.S.C. § 1101(a)(43)(S).
[33] 8 U.S.C. § 1101(a)(13)(A); 8 U.S.C. § 1227(a)(2)(A)(i)-(ii).
[34] *See, e.g.*, 8 U.S.C. § 1229b(b)(1)-(2).

There are two grounds of deportation related to CIMT convictions:

- **One CIMT Conviction**: Convicted of one CIMT offense committed within five years of being admitted to the US and the *possible* sentence for the crime is one year or more,[35] or

- **Multiple CIMT Convictions:** Convicted of two crimes involving moral turpitude, not arising out of a single scheme of misconduct, at any time after being admitted, regardless of the sentence and regardless of whether the convictions occurred as the result of a single trial.[36]

EXAMPLE: David is an LPR from Guatemala who was lawfully admitted on April 8, 2006 following marriage to U.S. citizen spouse. He is convicted of Theft. Theft is a CIMT offense under immigration law. If David's crime was committed after April 8, 2011 (five years after admission), his conviction will not trigger deportation, even if it was a felony, since it was not within five years of his admission. If committed prior to April 8, 2011, David's conviction will trigger the "one CIMT offense" deportation ground if it was for a felony (maximum possible sentence of more than one year), but not if it were for a gross or simple misdemeanor (maximum possible sentence only 364 days). If David has a prior conviction for patronizing a prostitute (or any other offense deemed as a CIMT), then his theft conviction will trigger the "multiple CIMT offenses" deportation ground, regardless of his date of entry or the possible sentence.

B. Ground of Inadmissibility for Crimes Involving Moral Turpitude (CIMTs)

A noncitizen convicted of a CIMT offense will trigger the CIMT inadmissibility ground, which can cause the following consequences:

- Trigger an additional ground of removal for undocumented persons;
- Bar undocumented persons and refugees from obtaining LPR status and other forms of relief from removal.[37]
- Although it will not trigger removal for LPRs and refugees (for removal purposes refugees are subject to the CIMT *deportation* ground outlined

[35] 8 U.S.C. § 1227(a)(2)(A)(i). After the 2011 passage of SB 5168 in Washington, lowering the maximum available sentence for misdemeanors from 365 to 364 days, no Washington State misdemeanor conviction for an offense committed on or after July 22, 2011, will satisfy this element of the deportation ground. *See also Matter of Ruiz-Lopez*, 25 I&N Dec. 551 (BIA 2011) ("Possible sentence" refers to the statutory maximum, not to the standard range of sentencing under the state sentencing guidelines).
[36] 8 U.S.C. § 1227(a)(2)(A)(ii). The term "single scheme" is interpreted narrowly to include only acts that are part of a "complete, individual, and distinct crime." *Matter of Islam*, 25 I&N Dec. 637, 639 (BIA 2011).
[37] 8 U.S.C. § 1182(a)(2)(A)(i)(I); s*ee e.g.*, 8 U.S.C. § 1255(a); 8 U.S.C. § 1229b(b)(1)(C). Certain qualifying applicants for LPR status can seek discretionary waivers of this inadmissibility ground in conjunction with their application. *See* 8 U.S.C. § 1182(h) (undocumented persons); 8 U.S.C. § 1159(c)(refugees).

above), it will bar them from being lawfully readmitted to the U.S. if they depart.[38]

- Bar LPRs from seeking U.S. citizenship.[39]

C. Important: The "Petty Offense" Exception

Unlike the CIMT deportation ground, there are no additional requirements (such as date of admission or possible sentence) to triggering the CIMT inadmissibility ground other than a conviction for a CIMT offense. [40] However, there is an important exception to the CIMT inadmissibility ground that will keep qualifying noncitizens from triggering it.[41] Known as the "petty offense" exception, a noncitizen will not trigger this inadmissibility ground if he meets the following requirements listed below. The petty offense exception is particularly relevant to criminal courts as the sentence imposed (regardless of time suspended) is a key factor.

- Only one CIMT conviction;
- The maximum *possible* sentence was not more than one year; and
- The *actual* sentence imposed (regardless of time suspended) **was not more than 180 days**.[42]

EXAMPLE: Continuing with the example from above regarding David, an LPR charged with a theft offense. If David is convicted of a misdemeanor Theft 3rd degree, Theft 3rd degree *and* he received a sentence of 180 days with 179 suspended, he will qualify for the petty offense exception and will not trigger this ground of inadmissibility. So he would be able to be lawfully re-admitted to the U.S. if he departs and, importantly, remain eligible for U.S. citizenship. If David were undocumented, this scenario would permit him to remain eligible to seek lawful immigration status. If David is convicted of felony Theft 1st or 2nd degree, or if he received a sentence of more than 180 days (e.g., 364 days) he will not qualify for the petty offense exception.

[38] 8 U.S.C. § 1101(a)(13)(C); 8 U.S.C. § 1182(a)(2)(A)(i)(I).
[39] 8 U.S.C. § 1427(a)(3). LPRs who apply for U.S. citizenship are required to show "good moral character" for a period of five years (three if they obtained LPR status based upon marriage to a U.S. citizen) prior to their application. An applicant who triggers any of the crime-related grounds of inadmissibility (e.g., the CIMT ground) during the requisite period are statutorily barred from establishing good moral character during this period. *See* 8 U.S.C. § 1101(f).
[40] 8 U.S.C. § 1182(a)(2)(A)(i)(I). This ground can also be triggered by admissions to acts constituting the essential elements of a CIMT offense. However, such admissions are subject to significant procedural protection, such that immigration officials generally focus on convictions. *Matter of K-*, 9 I&N Dec. 715 (BIA 1957); *but see Pazcoguin v. Radcliff*, 292 F.3d 1209 (9th Cir. 2002).
[41] 8 U.S.C §1182(a)(2)(A)(ii)(II) (the so-called "petty offense exception" to inadmissibility for one CIMT).
[42] 8 U.S.C. § 1182(a)(2)(A)(ii)(II).

D. Determining Whether a Conviction Is a Crime Involving Moral Turpitude (CIMT)

- **Analytical Framework for Determining CIMT Offenses**

Whether or not a state (or federal) criminal conviction constitutes a CIMT has traditionally been governed by an analytical framework known as the "categorical approach" which is outlined further in Chapter Five. Traditionally this has been an "elements-based" approach such that where the elements of the criminal conviction fall within the case law definitions of what constitutes a CIMT offense, the offense will be deemed a CIMT. Under this framework, the reviewing immigration judge or immigration examiner looks first to the underlying criminal statute and, if necessary, to the actual record of the noncitizen's conviction.[43]

Under the traditional categorical approach, the focus of the inquiry is not on what the defendant actually did, rather, it is to identify the elements of the crime for which she was convicted and compare them to the CIMT definitions. However, recent decisions from the Ninth Circuit and the Board of Immigration Appeals have attempted to erode the categorical approach's focus on the nature of the crime as defined by the elements of conviction.[44] These decisions have shifted the focus in many cases away from identifying the elements of the conviction to focus on the facts upon which the conviction "necessarily rests" as outlined in the reviewable criminal record.[45]

What this means for criminal courts. The important "take-away" is that, despite the current dynamic state of the law, in many cases the record of conviction created in the criminal proceedings will be the determinative factor as to whether a particular conviction is deemed to be a CIMT offense under immigration law that triggers removal (or denial of lawful status or U.S. citizenship). Given the court's participation in the development of the record of conviction that is created at plea and sentencing hearings (or trial) it is important for the court to be aware of the immigration context and consequences that may be influencing the creation of the criminal record. See Chapter Five for an overview of how the criminal record of conviction is used in immigration proceedings.

- **Definition of a "Crime Involving Moral Turpitude**"

Unlike the aggravated felony definition outlined at §4.1, the immigration statute does not provide a definition or enumerated list of crimes involving moral turpitude. Moral

---

[43] *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir. 2006). A statute that includes both removable and non-removable offenses and so requires examination of the record of conviction, is often referred to as "divisible."

[44] *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 937 (9th Cir. 2011)*; Aguilar-Turcios v. Holder*, __ F.3d __ (Aug. 15, 2012); *Sanchez-Avalos v. Holder*, __ F.3d __ (Sept. 4, 2012); *Matter of Lanferman,* 25 I&N Dec. 721, 729 (BIA 2012); *Matter of Silva- Trevino*, 24 I&N Dec. 687, 704 (A.G. 2008); *Matter of Ahortalejo-Guzman*, 25 I. & N. Dec. 465 (BIA 2011).

[45] *Id.*

turpitude is generally defined as conduct that "is inherently base, vile, depraved, and contrary to accepted rules of morality and the duties owed to other persons, either individually or to society in general."[46]

In the 2008 decision *Matter of Silva-Trevino*, the Attorney General put forth a broad "rearticulation" of the existing case-law, defining a CIMT as any "reprehensible conduct" that involves any form of *scienter.*[47] This summary reaffirmed that crimes involving a negligent *mens rea* do not constitute CIMT offenses but crimes of recklessness can.[48]

Despite the lack of a clear definition, however, it remains well-settled that the key test for moral turpitude is the presence of evil intent.[49] The designation of a crime as "infamous" or "*malum in se*" (intrinsically wrong), does not necessarily make a crime turpitudinous.[50] However, a crime that is only *malum prohibitum*, or purely regulatory, is generally not considered a CIMT (especially where there is no requirement of an intentional, knowing, or reckless *mens rea).* [51]

---

[46] *Knapick v. Ashcroft*, 384 F.3d 84, 89 (3d. Cir. 2004); *see also Morales v. Gonzales*, 478 F.3d 972, 978 (9th Cir. 2009); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1169 (9th Cir. 2006).

[47] *See Silva-Trevino*, 24 I&N Dec. at 706. According to Atty. Gen. Ashcroft: "[T]he definition in existing Board precedent merits judicial deference . . . [T]his opinion rearticulates the Department's definition of the term [and] makes clear that, to qualify as a crime involving moral turpitude. . . , a crime must involve both reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness. This definition rearticulates with greater clarity the definition that the Board (and many courts) have in fact long applied." *id.* at n.1

Unfortunately, summarizing moral turpitude with the adjective "reprehensible" creates "a blanket definition at such an elevated level of generality as to retrospectively encompass virtually every BIA decision that has come before or will come afterward [and] cannot fairly be said to add clarity to definitions created by earlier case-law." *Marmolejo-Campos v. Holder*, 558 F.3d 903, 922, n.4 (9th Cir. 2009) (Berzon, J., dissenting). However, the proposed *methodology* was radically new.

[48] *Id.* See earlier case-law on recklessness: *Matter of Medina*, 15 I&N Dec. 611, 613 (BIA 1976) (aggravated assault a CIMT even where *mens rea* may be as low as recklessness); *Matter of Wojtkow*, 18 I&N Dec. 111, 113 (BIA 1981) (reckless homicide a CIMT); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1166-1168 (9th Cir. 2006).

[49] *Marmolejo-Campos v. Holder*, 558 F.3d 903, 923-24 (9th Cir. 2009) (Berzon, J., dissenting) (summarizing inconstant BIA case law on turpitude and "evil intent"); *Rodriguez-Herrera v. INS*, 52 F.3d 238, 240 (9th Cir. 1995) (noting that the Ninth Circuit has "held only that without an evil intent, a statute does not necessarily involve moral turpitude"); *Gonzalez-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994) (noting that "[a] crime involving the willful commission of a base or depraved act is a crime involving moral turpitude, whether or not the statute requires proof of evil intent"); *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406 (9th Cir. 1969) (a crime requiring even non-sinister willful conduct may involve turpitude because "[w]hen the crime is heinous, willful conduct and moral turpitude are synonymous terms").

[50] *See United States ex rel. Griffo v. McCandless*, 28 F.2d 287, 288 (E.D. Pa. 1928)*; Matter of Y-*, 2 I&N Dec 600 (BIA 1946); *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999) ("While it is generally the case that a crime that is 'malum in se' involves moral turpitude and that a 'malum prohibitum' offense does not, this categorization is more a general rule than an absolute standard.").

[51] *Matter of Torres-Varela*, 23 I. & N. Dec. 78 (BIA 2001); *Matter of K-*, 7 I. & N. Dec. 178, 181 (BIA 1956).

The following generalizations can be applied in determining if a crime is a CIMT:

- Crimes that include an element of fraudulent intent are almost universally considered to involve moral turpitude.[52] An offense can be fraudulent in one of two ways: either the intent to defraud is an element of the offense, or the nature of the offense itself is "inherently fraudulent."[53] To be "inherently fraudulent," the offense must involve making knowingly false representations or using affirmative deceit to gain something of value.[54] Dishonesty or evasion alone does not necessarily amount to fraud.[55]

- Theft crimes, whether they are felonies or misdemeanors, almost always involve moral turpitude where they involve intent to permanently deprive an owner of property.[56]

- Crimes in which there is intent to cause or threaten great bodily harm, or in some cases if such harm is caused by a willful act or recklessness, involve moral turpitude.[57] Note, however, simple assault is generally not a crime of moral turpitude because only general intent is required and *de minimis* harm is usually sufficient for a conviction.[58]

- Offenses that are vile, base, or depraved and violate societal moral standards involve moral turpitude.[59] The offense also must be committed willfully or with evil intent[60] and "involve some level of depravity or baseness 'so far contrary to the moral law' that it gives rise to moral outrage."[61]

---

[52] *Jordan v. De George*, 341 U.S. 223, 229 (1951) ("[F]raud has consistently been regarded as such a contaminating component in any crime that American courts have, without exception, included such crimes within the scope of moral turpitude.").

[53] *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1076 (9th Cir. 2007), *overruled on other grounds by U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (citing *Goldeshtein v. INS*, 8 F.3d 645, 647-50 (9th Cir. 1993)*; see also Carty v. Ashcroft*, 395 F.3d 1081, 1084 (9th Cir. 2005) ("Intent to defraud is implicit in willfully failing to file a tax return with the intent to evade taxes.")

[54] *See Navarro-Lopez*, 503 F.3d at 1076.

[55] *Id.* at 1077 ("Most crimes involve dishonesty of some kind, but our precedents require more for an offense to be considered fraudulent.… 'Fraud' is a term with a specific meaning in the law- it is not synonymous with 'dishonesty.'").

[56] *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1020 (9th Cir. 2005), *abrogated on other grounds by Holder v. Martinez Gutierrez*, 132 S.Ct. 2011 (2012) (noting that crimes of theft or larceny are CIMTs); *U.S. v. Exparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999), *cert. denied*, 531 U.S. 842 (2000) (California petty theft is CIMT); *See also Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009) (receipt of stolen property is not categorically a CIMT because it does not require intent to permanently deprive the owner of property); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."); *cf. State v. Komok*, 113 Wn.2d 810, 816–17, 783 P.2d 1061 (1989) (the "intent to deprive" element of theft in Washington does not require an intent to deprive permanently).

[57] *Matter of Solon*, 24 I&N Dec. 239, 241-42 (BIA 2007).

[58] *Matter of Danesh*, 19 I&N Dec. 669, 670 (BIA 1988).

[59] *See, e.g.*, *Navarro-Lopez*, 503 F.3d at 1074.

[60] *Quintero-Salazar*, 506 F.3d at 693 (quoting *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1165-66 (9th Cir. 2006)). However, some offenses have been found to involve moral turpitude because they are "morally

- Offenses involving sexual conduct with a minor are crimes of moral turpitude.[62]

- Sex offenses involving abusive conduct or "lewd" intent are crimes of moral turpitude.[63]

4.3 GOOD MORAL CHARACTER DETERMINATIONS

LPRs who apply for U.S. citizenship are required to show that they are persons of "good moral character" (GMC) for a period of at least five years prior to the date of their application.[64] Additionally, a showing of GMC for specified periods prior to the date of application is required in order to be granted lawful status under any of the following avenues:

- LPR status as the spouse or child of a U.S. citizen/LPR spouse from whom the applicant is a survivor of domestic violence (a.k.a., the VAWA self-petitioning process);[65]
- LPR status after obtaining a T Visa as a victim of trafficking;[66]
- Cancellation of removal (and thereby, a grant of LPR status), a form of relief that the immigration judge may grant in removal proceedings to long-time undocumented persons, as well as certain undocumented domestic violence survivors.[67]

"Good moral character" itself has no affirmative statutory definition. Instead, the immigration statute defines certain classes of persons as barred from establishing "good moral character."[68] If the applicant is statutorily barred because of criminal conduct or a conviction from showing "good moral character" during the required period, her application will be denied, and depending on the criminal conviction, removal proceedings may be instituted against her.[69] The relevant crime-related GMC bars are:

---

reprehensible and intrinsically wrong," without much attention to *mens rea*. *Matter of Olquin-Rufino* 23 I&N Dec. 896 (BIA 2006) (knowing possession of child pornography).

[61] *Navarro-Lopez*, 503 F.3d at 1071 (quoting *Jordan v. DeGeorge*, 341 U.S. 223, 236 n.9 (1951) (Jackson, J., dissenting)).

[62] *Matter of Silva-Trevino*, 24 I&N Dec. 687, 705-07 (A.G. 2008) (sexual conduct with a minor whom the defendant knew or should have known was under 16 is a CIMT); *Matter of Guevara-Alfaro*, 25 I&N Dec. 417 (BIA 2011) (same) *but see Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007).

[63] *Matter of Macias-Leon*, 2008 WL 5537792, at *2 (BIA Dec. 19, 2008); *Matter of Coronado Orozco*, 2008 WL 4722691 (BIA Oct. 3, 2008) (citing *Matter of Alfonzo-Bermudez*, 122 I&N Dec. 225 (BIA 1967)); *Matter of Alfonzo-Bermudez*, 12 I&N Dec. 225, 227 (BIA 1967); *Matter of Lambert*, 11 I&N Dec. 340, 342 (BIA 1965).

[64] 8 U.S.C. § 1427(a)(3). LPRs who obtained status via marriage to a U.S. citizen can seek U.S. citizenship after 3 years. 8 U.S.C. § 1430. LPRs serving in the military become eligible after 1 year. 8 U.S.C. § 1439.

[65] 8 U.S.C. § 1154(a)(1)(A).

[66] 8 U.S.C. § 1255(l)(1)(B).

[67] 8 U.S.C. § 1229b(b)(1)(B).

[68] 8 U.S.C. 1101(f), incorporating 8 USC §§ 1182(a)(2)(A)-(D), (6)(E),(10)(A).

[69] Note, however, that if the applicant shows exemplary conduct during the required period, his application cannot be denied based solely on his prior criminal record. *See Santamaria-Ames v. INS*, 104 F.3d 1127, 1132 (9th Cir. 1996).

- Triggering any of the crime-related grounds of inadmissibility outlined at §1.1(C);[70]
- Serving 180 days or more in jail during the requisite GMC period;[71]
- A conviction for a crime classified as an aggravated felony.[72]

Two statutory exceptions in the inadmissibility and removal grounds also apply to GMC determinations:[73]

- The "petty offense" exception, outlined at §4.2(C) will apply to exempt one qualifying CIMT offense from barring a showing of GMC; and

- The GMC statute contains a specific exception for a single conviction for simple possession of less than 30 grams of marijuana.[74]

4.4 CRIMES OF DOMESTIC VIOLENCE

As outlined, domestic violence-related offenses create a significant risk of removal for noncitizen defendants, both those lawfully present as well as undocumented persons, regardless of their family ties, length of residence or other equities. Domestic violence offenses can trigger removal under any of the following grounds.

A. The Domestic Violence (DV) Ground of Deportation

- **When the DV Deportation Ground Applies**

A conviction, or a deferred disposition that constitutes a conviction under immigration law[75] (e.g., a stipulated order of continuance), for a DV-related offense can trigger the ground of deportation related to DV offenses (there is no corresponding DV ground of inadmissibility applying to noncitizens seeking admission). This will result in an order of removal for LPRs, refugees and others who have been lawfully admitted unless they qualify for one of the limited forms of discretionary relief from removal.[76]

---

[70] 8 U.S.C. § 1101(f)(3). There is also a bar for two or more gambling offenses during the period, at §(f)(5).
[71] 8 U.S.C. § 1101(f)(7).
[72] 8 U.S.C. § 1101(a)(8).
[73] *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 554 (BIA 2008). Note, however that the affirmative waivers contained in the inadmissibility statute are not available to overcome statutory GMC bars. *Sanchez v. Holder*, 560 F.3d 1028, 1032 (9th Cir. 2009).
[74] 8 U.S.C.§ 1101(f)(3). The Good Moral Character *statutory exception* for one small marijuana possession coincides with the only statutorily *waivable* drug offense in the inadmissibility grounds, and with the only *statutory exception* to deportability in the deportation grounds. 8 USC 1101(f)(3); *compare* 8 USC §1182(h) *and* 8 USC § 1227(a)(2)(B)(i).
[75] 8 USC § 1101(a)(48)(A). See Chapter Six for information regarding what constitutes a conviction under immigration law.
[76] See §1.5(E) for more information regarding avenues for discretionary relief from removal that permit the immigration judge to allow otherwise removable noncitizens to remain lawfully in the U.S.

The DV-related deportation ground does not impact removal determinations for undocumented person who are already present without admission. However, triggering the DV-related deportation ground will render undocumented persons ineligible for important forms of discretionary relief that would otherwise permit the immigration judge to cancel their removal and allow them to obtain lawful status to remain in the U.S.

- **Elements of the DV Deportation Ground**

An offense must meet the following criteria in order to trigger the DV-related ground of deportability.[77]

- **The noncitizen must have been <u>convicted</u> for purposes of immigration law -** Deferred adjudication agreements, such as Stipulated Orders of Continuance (SOCs) will constitute convictions (in perpetuity and regardless of subsequent compliance and dismissal) under immigration law, and thus trigger this ground of deportation, where they satisfy the immigration statute's definition of conviction (e.g., where they include a defendant's stipulation to facts sufficient); [78]

- **The offense must be a <u>crime of violence</u> (COV) as defined by 18 U.S.C. 16**[79] **-** 18 U.S.C. § 16 defines "crime of violence" as: (a) "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" or (b) "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[80]

- **The offense must be a crime <u>against a person</u>** – Even though 18 U.S.C.'s COV definition includes offenses against both persons and property, the DV-related deportation statute's language is specifically limited to crimes "against a person[]."[81] Thus, property-related DV convictions such as Malicious Mischief should not result in removal orders premised on this ground;

[77] 8 U.S.C. § 1227(a)(2)(E)(i).
[78] See 8 U.S.C. § 1101(a)(48) for the definition of the term "conviction" for immigration purposes.
[79] This is the same statute that defines "crimes of violence" for purposes of the aggravated felony provision at 8 U.S.C. § 1101(a)(43)(F).
[80] *Flores-Lopez v. Holder* 685 F.3d 857,__ (9th Cir. 2012) ("[A] conviction[]is not a crime of violence because it requires only the use of *de minimis* force, as opposed to the "physical force" necessary to constitute a crime of violence. We agree."); *Singh v. Ashcroft,* 386 F.3d 1228, 1234 (9th Cir. 2004) (Oregon harassment not a categorical crime of violence because it may be violated just by " 'causing spittle to land on the person' of another") (citation omitted); *Sareang Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) ("[T]he force necessary to constitute a crime of violence [] must actually be violent in nature.") (internal citations omitted).
[81] 8 U.S.C. § 1227(a)(2)(E)(i).

- **The offense must have been committed against a person with whom the noncitizen has <u>the requisite domestic relationship.</u>**[82]

    - Under the immigration statute, this includes anyone covered by Washington's domestic violence laws: a current or former spouse of the person, an individual with whom the person shares a child in common, an individual who is cohabiting with or has cohabited with the person as a spouse, an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or any other individual who is protected from the person's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

    - R.C.W. 10.99.040(1)(d) requires the court to "identify by any reasonable means on docket sheets those criminal actions arising from acts of domestic violence."[83] Whether or not the state's DV designation is deemed an element of the offense does not control whether it provides the relationship element of the deportation ground.[84]

    - Documents in the criminal record of conviction, such as a charging document related to a guilty plea, or judgment and sentence, which identify the case as a "domestic violence" case pursuant to these statutes, will satisfy the domestic relationship element of the DV deportation ground. However, removing a DV designation does not necessarily prevent a noncitizen from being subject to this deportation ground since admissions in the defendant's plea statement or on the record that establish the requisite relationship to the victim will suffice.[85]

    - In some Assault 4th degree cases, defense counsel may try to eliminate the name of the victim. The name of the victim is not a requirement for conviction of this crime under Washington law.[86]

---

[82] *Id.*

[83] "Domestic violence" means a crime "committed by one family or household member against another," RCW 10.99.020(3). "Family or household member" is defined at 10.99.020(1).

[84] *See Matter of Velasquez*, 25 I&N Dec. 278, 280 n.1 (BIA 2010) (citing *United States v. Hayes*, 129 S.Ct. 1079 (2009) (domestic or family relationship need not be an element of the predicate offense to qualify as a deportable crime of domestic violence). Under Ninth Circuit law the domestic relationship must be proved up from record of conviction documents using the modified categorical approach . *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004); *contra Bianco v. Holder*, 624 F.3d 265, 269 (5th Cir.2010).

[85] *Tokatly v. Ashcroft*, 371 F.3d at 622- 623. *See also, Cisneros-Perez v. Gonzalez*, 465 F. 3d 386, 392 (9th Cir. 2006) (immigration judge may look to limited record of conviction to determine existence of requisite domestic relationship that is not an element of the criminal offense).

[86] *See State v. Plano*, 67 Wn.App. 674, 678-80 (1992); *State v. Johnston*, 100 Wash App. 126, 134 (2000); *State v. Larson*, 178 Wn.App. 227, 228-229 (1934).

B. Assault Offenses as Crimes of Domestic Violence

- **Assault 4th Degree**

Whether Assault 4th degree triggers the DV deportation ground for a noncitizen will be determined by the information contained in the record of conviction. Specifically, immigration authorities will review the record of conviction to determine whether the factual basis for the defendant's conviction rests on an assault that was committed with the requisite use of force.[87] Where the record reveals that the assault was for an offensive touching (or lacked the requisite use of force), a charge of removal pursuant to the DV ground cannot be sustained (regardless of whether the case is designated DV).[88] Conversely, a record of conviction revealing that the conviction rests upon the use or threat of use of force will trigger this deportation ground, if the other elements are satisfied.

- **Other Assault Offenses**

Intentional assaults with an element of "intent to cause physical injury," [89] of reckless causing of substantial harm, [90] or assault with a deadly weapon,[91] such as Assault 2nd Degree, will be classified as crimes of violence.[92] Offenses involving the *threatened* use of force are also likely to be deemed crimes of violence under immigration law. As such, where these crimes are designated DV offenses they will trigger the deportation ground.[93]

---

[87] *Suazo Perez v. Mukasey*, 512 F.3d 1222, 1225-26 (9th Cir. 2008). *See also Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) ("Interpreting [18 U.S.C.] § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes."); *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006) (quoting *Singh v. Ashcroft*, 385 F.3d 1228, 1233 (2004) ("The force necessary to constitute a crime of violence [under 18 U.S.C. § 16(b)] must actually be violent.")).

[88] *Matter of Sanudo*, 23 I&N Dec. 968, 974-75 (BIA 2006).

[89] *Matter of Martin*, 23 I&N Dec. 491, 499 (BIA 2002).

[90] *United States v. Lawrence*, 627 F. 3d. 1281, 1284 (9th Cir. 2010) (holding that RCW 9A.36.021(1)(a) was a COV pursuant to the Armed Career Criminal Act's definition of "violent felony," the relevant part of which, 18 USC § 924(e)(2)(B)(i), is nearly identical to 18 U.S.C. § 16(a) as far as the existence of the element of physical force); *United States v. Hermoso-Garcia*, 413 F.3d 1085, 1089 (9th Cir.2005) (ruling that RCW§ 9A.36.021(1)(a) has the use of force as an element); *see, e.g.,In re Phyra Norng* 2008 WL 5537842 (BIA 2008) (same).

[91] *U.S. v. Grajeda* 581 F.3d 1186, 1192 (9th Cir.2009); *Aragon-Ayon v. INS*, 206 F.3d 847, 851 (9th Cir. 2000).

[92] No case addresses if a conviction for Assault 2 under RCW 9A.36.021(1)(e) ("[w]ith intent to commit a felony, assaults another") would automatically be a COV, as a common-law assault if the intended felony were specified as nonviolent and not against a person. *Cf. Matter of Juan Ramon Martinez*, 25 I. & N. Dec. 571, 574 (BIA 2011) (Assault with intent to commit a felony *against a person* is an aggravated felony).

[93] *Lisbey v. Gonzales*, 420 F.3d 930, 934 (9th Cir. 2005) (sexual battery is COV because by its nature it involves a substantial risk that physical force against a person might be used); *Rosales-Rosales v. Ashcroft*, 347 F.3d 714, 717 (9th Cir. 2003) ("Making terrorist threats" is a COV because it has as an element the threatened use of physical force against the person or property of another); *United States v. De La Fuente*, 353 F.3d 766, 770 (9th Cir. 2003) ("Mailing a threat to injure" may be COV because "creation and use of a 'fear of…unlawful injury' includes the elements of 'threatened use of physical force.'").

Assault offenses with a negligent *mens rea*, such as Assault 3rd Degree under R.C.W. 9A.36.031(d),(f) cannot currently be classified as COV offenses under immigration law; nor can offenses with a reckless *mens rea* such as Reckless endangerment under R.C.W. 9A.36.050; and thus will not trigger the crime of DV deportation ground, regardless of DV designation.[94]

- **Disorderly Conduct**

Disorderly conduct under R.C.W. 9A.84.030 is not deemed to be a deportable offense under the DV deportation ground or any other ground of inadmissibility or deportability.

C. Domestic Violence Offenses as Aggravated Felonies

All noncitizens, lawfully admitted as well as those who entered illegally, can be ordered removed for convictions classified as "aggravated felonies" under 8 U.S.C. § 1101(a)(43). In addition to rendering noncitizens removable, a conviction for an aggravated felony offense will eliminate virtually all avenues for a person to obtain discretionary relief from removal.[95]

Specifically, DV offenses that qualify as crimes of violence under 18 U.S.C. § 16 will also be classified as aggravated felonies under immigration law where a sentence of one year or more is imposed (regardless of time suspended).[96] This includes Assault 4th degree convictions committed prior to July 22, 2012, where sentences of 365 days were imposed. DV offenses that qualify as "sexual abuse of a minor" and "rape" offenses will also be classified as aggravated felonies.[97]

D. Domestic Violence Offenses as Crimes Involving Moral Turpitude

Convictions for domestic violence offenses may also trigger the grounds of deportation and of inadmissibility relating to crimes involving moral turpitude (see §4.2).[98] However, simple assault as under RCW 9A.36.041, has traditionally not been classified as a crime involving moral turpitude even if it is committed against a person with whom the defendant has a domestic relationship.[99]

---

[94] *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (force cannot be used negligently or accidentally); *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121, 1130 (9th Cir. 2006) (reckless *mens rea* is insufficiently volitional as "use" of force to be a crime of violence under 18 USC 16); *Covarrubias Teposte v. Holder* 632 F.3d 1049, 1053 (9th Cir. 2011) (same); *contra Aguilar v. Attorney General of U.S.* 663 F.3d 692, 700 (3d. Cir. 2011).
[95] *See* §1.5(E).
[96] *See* 8 U.S.C. § 1101(a)(48)(B).
[97] *See* 8 U.S.C. § 1101(a)(43)(A).
[98] 8 U.S.C. § 1182(a)(2)(A)(i)(I). *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 2003) ("willful infliction of corporal injury on spouse or cohabitant" is a CIMT), *declined to follow by Morales-Garcia v. Holder*, 567 F.3d 1058 (9th Cir. 2009)(assault not generally a CIMT unless it involves either intentional infliction of serious harm or infliction of harm on a protected class of victim; cohabitant distinguished from spouse).
[99] *See Matter of Danesh* 19 I. & N. Dec. 669, 671 (BIA 1988); *Matter of Fualaau*, 21 I&N Dec. 475, 477 (BIA 1996); *Matter of Short*, 20 I&N Dec. 136, 139 (BIA 1989). Note, however, the Attorney General's subsequent decision in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), has left this area of law unsettled. *See e.g.*, *Matter of Ahortalejo-Guzman,* 25 I. & N. Dec. 465 (BIA 2011).

E. Violations of Domestic Violence No-Contact/Protection Orders

This is a specific deportation ground that is distinct from the DV deportation ground outlined at §4.4(A). This ground is triggered where there has been a civil or criminal court finding that a noncitizen has violated a protection or no-contact order designed to protect against credible threats of violence, repeated harassment, or bodily injury.[100]

- No conviction is required to trigger the violation of a protection order ground (but a conviction will suffice). Rather, the government need only prove that there has been a judicial determination that the protection or no-contact order was violated and that the order was related to domestic violence.[101]

- The statute encompasses both civil and criminal protection/no-contact orders.

- A violation finding will trigger deportability under this ground even if the conduct that constituted the violation of the order was innocuous and did not in itself threaten "violence, repeated harassment or bodily injury" as outlined in the immigration statute.[102]

F. Stalking and Harassment Offenses

The DV ground of deportation also includes convictions related to stalking.[103] Although there are no decisions defining the term "stalking" for this deportation ground yet, offenses such as at R.C.W. 9A.46.110 will likely be deemed to qualify as "stalking" under this provision. It is possible for stalking offenses to be charged as aggravated felonies (as crimes of violence offenses) under immigration law where a sentence of one year or more is imposed.[104] Harassment offenses, such as those under R.C.W. 9A.46.020, Malicious harassment (R.C.W. 9A.36.080) and Telephone harassment (R.C.W. 9.61.230), risk triggering deportation as DV offenses (§4.4(A)), and where a sentence of one year is imposed, as aggravated felonies, if the record of conviction establishes that they involved the use or threat of use of force (e.g. if they fall within 18 U.S.C. § 16's COV definition). These offenses are also likely to risk being charged or deemed CIMTs.[105]

---

[100] 8 U.S.C. § 1227(a)(2)(E)(ii). There is no corresponding ground of inadmissibility.
[101] *Id*.
[102] *Alanis-Alvarado v. Holder*, 558 F.3d 833, 839-40 (9th Cir. 2009)*; Szalai v. Holder*, 572 F.3d 975, 978 (9th Cir. 2009); *Matter of Strydom,* 25 I&N Dec.507, 510 (BIA 2011).
[103] 8 U.S.C. 1227(a)(2)(E)(i).
[104] *See Malta-Espinoza v. Gonzalez*, 478 F.3d. 1080, 1084 (9th Cir. 2007) ("Harassing can involve conduct of which it is impossible to say that there is a substantial risk of applying physical force to the person or property of another"), *reversing Matter of Malta-Espinoza*, 23 I. & N. Dec. 656, (BIA 2004*). But see Matter of U. Singh*, 25 I&N Dec. 670 (BIA 2012). Such a determination may depend on the factual basis for the stalking conviction, as reflected in the record of conviction.
[105] See §4.2 for additional information regarding crimes of moral turpitude. The BIA has found that "threatening behavior can be an element" of a CIMT and that "intentional transmission of threats is evidence of a vicious motive or a corrupt mind." *See Matter of Ajami*, 22 I&N Dec. 949, 952 (BIA 1999) (aggravated stalking involving credible threat to kill or injure as part of a course of conduct, is a CIMT). In

4.5 CRIMES INVOLVING MINOR VICTIMS

A. Immigration Consequences for Crimes Involving Minors

Criminal convictions that involve a minor victim will trigger, or risk triggering, one of the following removal grounds. As highlighted throughout these materials, the consequences of doing so are most often, removal proceedings, mandatory detention, denial of eligibility for relief from removal and expulsion from the United States.

- **Domestic Violence Ground of Deportation**

While not *per se* related to minors, offenses involving minors (as well as adults) that are designated as DV crimes under Washington law that qualify as COVs under federal law will trigger this ground of removal. *See* § 4.4(A).

- **The "Crimes of Child Abuse, Abandonment or Neglect" Deportation Ground**

Noncitizens that have been lawfully admitted and are convicted of a crime of child abuse will trigger this specific ground of deportation.[106] Like the DV deportation ground, there is no corresponding ground of inadmissibility. However, convictions triggering this ground of deportation can bar undocumented persons from discretionary relief from removal that would grant them lawful status to remain in the U.S.[107]

The terms "crimes of child abuse, child neglect, or child abandonment" under this provision have been interpreted by the Board of Immigration Appeals broadly to encompass:

> "any 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, including sexual abuse or exploitation… this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight [and] mental or emotional harm, including acts injurious to morals...."[108]

---

the case of harassment under RCW 9A.46.020, which has four different subsections, the one most likely to risk being charged as a crime of violence or a CIMT is 9A.46.020(1)(a)(i) (threat to bodily injure). A threat to only damage property under 9A.46.020(1)(a)(ii) should not be deemed a threat to use force "against a person," which the DV deportation ground requires.

[106] 8 U.S.C. § 1227(a)(2)(E)(i).

[107] *See, e.g.*, 8 USC 1229b(b)(1)(C) (cancellation of removal for undocumented residents); *Matter of Cortez*, 25 I&N Dec. 301 (BIA 2010).

[108] *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512 (BIA 2008). *See also Matter of Soram*, 25 I&N Dec. 378, 380-81 (BIA 2010) (child endangerment can be a crime of child abuse for immigration purposes, even if actual harm or injury to the victim is not required).

- **Classification as an Aggravated Felony**

Classification of a conviction as an aggravated felony triggers the most severe consequences under immigration law. See §4.1 for more on aggravated felonies.

➢ **Rape**

Rape is per se an aggravated felony and encompasses child rape offenses. The courts have not decided whether it also includes statutory rape offenses such as Rape of a Child 3rd degree under R.C.W. 9A. 44.079.[109]

➢ **Sexual Abuse of a Minor (SAM)**

The plethora of Ninth Circuit case law grappling with how to define this term under the immigration statute is complex and remains volatile (particularly regarding consensual sexual contact with adolescents 15 years or older). The following are guidelines gleaned from current law: (1) The conduct prohibited by the criminal statute is sexual; (2) The statute protects a minor; and (3) The statute requires abuse. A criminal statue includes the element of abuse if it expressly prohibits conduct that causes "physical or psychological harm in light of the age of the victim in question."[110]

➢ **Crimes of Violence (COV)[111]**

While not per se related to minors, any conviction that meets the federal definition of a COV at 18 U.S.C. 16[112] will be deemed an aggravated felony if a sentence of one year or more is imposed (regardless of suspended time). As with many Washington offenses, it will often be the record of conviction from criminal proceedings that determines whether or not the conviction at issue involved the requisite use of force and can, thus, be classified as a COV.

➢ **Child Pornography Crimes[113]**

A Washington conviction where the reviewable criminal record reveals that a conviction rests on facts indicating that the crime involved child pornography, including

---

[109] *See Rivas-Gomez v. Gonzales,* 441 F.3d 1072, 1075 (9th Cir. 2006) (statutory rape in form of consensual sex with person under 16 is "rape."). This opinion was withdrawn for jurisdictional reasons, *see Rivas-Gomez v. Gonzales*, 2007 U.S. App. LEXIS 6606 (9th Cir. Mar. 22, 2007), and the court remanded the case to the BIA. Although there is no published case making this holding, DHS may re-assert this argument in the future.

[110] *Pelayo-Garcia v. Holder* 589 F.3d 1010 (9th Cir. 2009); *U.S. v. Medina-Villa*, 567 F.3d 507, 513 (9th Cir. 2009); *See also Estrada-Espinoza v. Mukasey*, 546 F. 3d 1147, 1158 (9th Cir. 2008) (en banc), *abrogated on other grounds by U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc); *U.S. v. Baron-Medina*, 187 F.3d 1144, 1146-47 (9th Cir. 1999) (any sexual contact with a minor under 14 is *per se* abuse).

[111] 8 U.S.C. § 1101(a)(43)(F).

[112] See §18 U.S.C. 16 for the federal definition of COV offenses.

[113] 8 U.S.C. § 1101(a)(43)(I) (crimes described in 18 USC §§ 2251, 2251A, or 2252 are aggravated felonies).

possession, is likely to be deemed an aggravated felony as a crime "relating to child pornography."[114]

- **Crimes with Minor Victims as Crimes Involving Moral Turpitude**

The grounds of inadmissibility and deportation for crimes of moral turpitude can be, and often are, also triggered by offenses related to child abuse or minor victims.[115] See §4.2 for more on CIMT offenses under immigration law. Although the definition of "crimes of child abuse" outlined above does not specifically govern CIMT determinations, offenses involving physical harm to, or neglect of, a minor victim will generally be deemed CIMT offenses.[116] Note that all sexual contact offenses with minors also either qualify or be prosecuted by ICE as CIMT offenses.

B. Washington Crimes Regarding these Immigration Consequences

Offenses under R.C.W. 9A.36 and 9A.44 that specify "child" or "minor" as an element will clearly qualify as a "child" under the removal grounds outlined in §4.5(A) above. The same is true for whether or not the crime involves the requisite abuse, violence, moral turpitude or child pornography.

Offenses that do not specify the victim's minor status as an element arguably do not satisfy this element, and, as such, cannot trigger these removal grounds.[117] However, given the current volatility in the Ninth Circuit and Board of Immigration Appeals (BIA) case law, whether or not the victim's minor status is identified in the reviewable record of conviction is likely to be an important, and possibly determinative, factor in subsequent removal proceedings (regardless of whether it is an element of the statute of conviction).[118]

---

[114] *Aguilar-Turcios v. Holder*, --- F.3d ----, 2012 WL 3326618 (9th Cir. 2012) In *Aguilar-Turcios*, the Ninth Circuit held that a violation of Uniform Military Code of Justice directive prohibiting uses of government computer "involving pornography" is not categorically an aggravated felony relating to child pornography because (1) it lacks an element requiring that the pornography depict a minor and (2) there were no factual admissions mentioning child pornography or minors in the reviewable record of the count of conviction. In addition, the factual basis from a different charge could not be used under modified categorical approach.

[115] 8 U.S.C. § 1182(a)(2)(A)(i)(I); 8 U.S.C. § 1227(a)(2)(A)(i),(ii). *See e.g., Matter of Guevara-Alfaro*, 25 I&N Dec. 417 (BIA 2011) (any intentional sexual conduct by an adult with a child involves moral turpitude, if perpetrator knew or should have known that the victim was under the age of 16); *but see Quintero-Salazar v. Keisler*, 506 F.3d 688 (9th Cir. 2007) (consensual intercourse between a 15 year–old and 21 year–old is not automatically a CIMT) (this decision was not followed by the BIA).

[116] *Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) ("cruel or inhuman corporal punishment or injury" upon a child is a CIMT); *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 2003) ("willful infliction of corporal injury on spouse " is a CIMT); *Matter of Sanudo*, 23 I. & N. Dec. 968, 971 - 72 (BIA 2006) ("infliction of bodily harm upon a person[] deserving of special protection, such as a child []has been found a CIMT], because the intentional or knowing infliction of injury on such persons reflects a degenerate willingness [ ] to prey on the vulnerable or to disregard his social duty.").

[117] *E.g.*, RCW 9A.36.041(f) (Assault 3rd degree or Assault 4th degree).

[118] *Compare Matter of Velasquez-Herrera*, 24 I&N Dec. 503, 515 (2008) (where criminal record shows conviction rests on fact that establishes the immigration statute definition, offense satisfies the removal ground only if fact is element of the criminal statute) *with Sanchez-Avalos v. Holder*, --- F.3d ----, 2012 WL 3799665 (9th Cir. 2012). *See also U.S. v. Aguila-Montes de Oca*, 655 F.3d 915, 927-28 (9th Cir. 2011)

Where the statute has a specific element of abuse, violent use of force or child pornography it will be deemed categorically to fall within the immigration statute provision at issue.[119] Where the statute is less clear or lacks such elements (e.g. Assault 4th degree), it will turn on the facts upon which the conviction rests as outlined in the record of conviction. **See Chapter Five for further explanation regarding the analysis of state convictions under immigration law and the importance of the record of conviction.**

In light of the importance of the record of conviction in determining the immigration consequences of numerous convictions involving minors, judges might encounter defense counsel trying to comply with his Sixth Amendment duties by carefully focusing on specific language and facts in creating the record of conviction that will follow his/her client into removal proceedings. In addition to **Assault 4th degree**, this is particularly true for the following offenses:

- **Child Molestation 3rd, R.C.W. 9A.44.089** – although certain to be prosecuted by ICE as an aggravated felony, where the record indicates that the conviction is based an otherwise consensual contact there are still unresolved issues as to whether Child Molestation 3rd will be classified as an aggravated felony by the courts.[120]

- **Communicating with a Minor for Immoral Purposes (CMIP) R.C.W. 9.68A.090 -** While it will always be deemed a crime involving moral turpitude, the Ninth Circuit has held that whether a CMIP offense will be classified as an aggravated felony as a sexual abuse of a minor offense will be determined by whether the conduct identified as the basis for the conviction in the record of criminal proceedings qualifies as "abuse" under immigration law.[121]

(where criminal record shows conviction necessarily rests on fact that establishes the immigration statute definition, offense satisfies the removal ground *even if criminal statute lacked this specific element*); *Matter Of Lanferman*, 25 I. & N. Dec. 721 (BIA 2012).

[119] *E.g.*, RCW 9A.44.076 (Rape of Child 2nd degree).

[120] RCW 9A.44.089 is broader than the aggravated felony definition of "sexual abuse of a minor." Although it contains two elements of the generic crime – sexual conduct with a minor – it covers conduct that is not necessarily abusive under Ninth Circuit case law. If an offense is not *per se* abusive, then Ninth Circuit case law requires, *inter alia*, a "sexual act." *See Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008), *abrogated on other grounds by United States v. Aguila–Montes de Oca*, 655 F.3d 915 (9th Cir. 2011).

[121] *Parrilla v. Gonzales*, 414 F.3d 1038, 1043-44 (9th Cir. 2005). (Immigration court was permitted to review the police reports to determine the conduct of conviction, which it found sexually abusive, because Parilla had entered an *Alford* plea and stipulated in his plea agreement that the criminal court could rely on the police report as the factual basis for his plea).

4.6 CRIMES AGAINST PERSONS (ADULTS) THAT ARE NOT DOMESTIC VIOLENCE-RELATED

A. Homicide Offenses

Crimes of murder have been included within the aggravated felony definition since its inception in 1988. Both **Murder 1st degree** and **Murder 2nd degree** under R.C.W. 9A.32 fall *per se* within the scope of its definition regardless of sentence imposed.[122]

- **Manslaughter 1st degree** under R.C.W. 9A.32.060 and **Vehicular Homicide** under R.C.W. 46.61.520 are not likely not to be classified as aggravated felonies under either the murder or crime of violence (or any other) provisions.[123] Convictions under the "recklessness" prongs of these statutes will, however, be deemed crimes involving moral turpitude (CMIT) offenses.[124]

- Regardless of the sentence imposed, **Manslaughter 2nd Degree** under R.C.W. 9A.32.070 will not trigger grounds of inadmissibility or deportability (assuming the victim is not a minor) as it cannot be classified as an aggravated felony offense (under either the murder or crime of violence provisions); nor can it be classified as a CIMT offense.[125]

B. Assault Offenses

- **Assault 1st Degree** under R.C.W. 9A.36.011 will trigger inadmissibility grounds (as a CIMT offense) and deportability grounds as both an aggravated felony (crime of violence)[126] and as a CIMT.[127]

- **Assault 2nd Degree** under R.C.W. 9A.36.021 will almost always be deemed a "crime of violence" under immigration law and, thus, almost always classified as an

---

[122] *Matter of M-W-*, 25 I&N Dec. 748, 758 (BIA 2012) ("murder" under 8 U.S.C. § 1101(a)(43)(A) includes a violation of any statute requiring that the individual acted with extreme recklessness or a malignant heart, regardless of whether the requisite mental state was due to voluntary intoxication and no intent to kill was established); RCW 9A.32.030 (requiring intent to cause death or circumstances manifesting an extreme indifference to human life); RCW 9A.32.050 (requiring intent to cause death).
[123] *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc) ("Neither recklessness nor gross negligence is a sufficient mens rea to establish that a conviction is for a crime of violence under [18 U.S.C.] §16."). *See also Leocal v. Ashcroft*, 543 U.S.A. 1 (2004).
[124] *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 706 n.5 (A.G. 2008) (a CIMT must "involve[] some form of scienter" such as willfulness or recklessness); *Matter of Solon*, 24 I&N Dec. 239,__ (BIA 2007) ("[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.").
[125] *Id.*
[126] *U.S. v. Grajeda*, 581 F.3d 1186 (9th Cir. 2009) (California assault with a deadly weapon is categorically a COV).
[127] *See Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (assault with a deadly weapon is CIMT).

aggravated felony, especially where a sentence of one year or more is imposed.[128] It will also always be considered CIMT.[129]

- Convictions for **Assault 3rd Degree under §(f) and §(d)** of 9A.36.031 (negligent felony assault) cannot be classified as aggravated felony crimes of violence or CIMT offenses since they are crimes of negligence.[130] As such, they will not trigger the corresponding inadmissibility or deportation grounds. Note that where the record indicates that the conviction "necessarily rests" on the crime having been committed with a firearm, convictions under these statutory provisions can trigger the firearms-related deportation ground.[131]

C. Kidnapping Offenses

- **Kidnapping 1st Degree** under R.C.W. 9A.40.020 and **Kidnapping 2nd Degree** under R.C.W. 9A.40.030 will prosecuted by ICE as a crimes of violence under 18 U.S.C. § 16, and therefore as aggravated felonies, when there is a sentence imposed of one year or more.[132] Kidnapping will be considered a CIMT.[133]

- **Unlawful Imprisonment** R.C.W. 9A.40.040 is likely to be prosecuted as an aggravated felony crime of violence where a sentence of one year or more is imposed or as a deportable crime of domestic violence if the requisite relationship is established in the record. [134] Unlawful Imprisonment will also likely be prosecuted as a CIMT if the record of conviction shows the use of force, threats or intimidation. Because there is no intent to harm or intent to use force as a required element, a

---

[128] *See Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006) (assault offenses are CIMTs if they necessarily involve aggravating factors that significantly increase their culpability, such as use of a deadly weapon, intentional infliction of serious bodily harm or intentional or knowing infliction of bodily harm on a person deserving of special protection).

[129] *Matter of Martin*, 23 I&N Dec. 491, 494 (BIA 2002) (an assault involving the intentional infliction of physical injury has as an element the use of physical force within the meaning of 18 U.S.C. § 16). *See also United States v. Lawrence*, 627 F. 3d. 1281, 1284 (9th Cir. 2010) (holding that RCW 9A.36.021(1)(a) constitutes a COV pursuant to the Armed Career Criminal Act's definition of "violent felony," the relevant portion of which, 18 U.S.C. § 924(e)(2)(B)(i), is nearly identical to 18 U.S.C. § 16(a) as far as the existence of the element of physical force).

[130] *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (negligent crimes are not COVs). *Matter of Silva-Trevino*, 24 I&N Dec. at 706 n.5 (negligent crimes are not CIMTs); *Matter of Perez-Contreras* 20 I&N Dec 615 (BIA 1992).

[131] *United States v. Aguila–Montes de Oca*, 655 F.3d 915 (9th Cir. 2011).

[132] 8 USC § 1101(a)(43)(F) (crime of violence); 8 USC § 1101(a)(43)(H) (crimes described in USC "relating to the demand for or receipt of ransom"); 8 USC § 1101(a)(43)(S) (offense relating to obstruction of justice).

[133] *Matter of Nakoi*, 14 I&N Dec. 208 (BIA 1972); *Matter of P--*, 5 I&N Dec. 444 (BIA 1953).

[134] The Ninth Circuit has not ruled on whether restraint *only through deception* or because a minor or incompetent victim acquiesces is a categorical crime of violence under 18 USC § 16. *See* RCW 9A.40.010(6); *U.S. v. Osuna-Armenta*, 2010 WL 4867380, at *6 (E.D.Wash. 2010) (Washington Unlawful Imprisonment includes elements not requiring the use or threat of force.) *but c.f. Dickson v. Ashcroft*, 346 F.3d 44, 49-51 (2d Cir. 2003) (unlawful imprisonment of competent adult, even if accomplished by deception, involves substantial risk of violence, whereas unlawful imprisonment of an incompetent person or a child under sixteen, could occur without satisfying the crime of violence definition of 18 USC § 16).

decision as to whether it is a CIMT may depend on the plea language and the facts established by the record of conviction.[135]

D. Sex Offenses

- **Rape** is *per se* an aggravated felony.[136]

- **Indecent Liberties R.C.W. 9A.44.100(1)(a)** by forcible compulsion will be an aggravated felony as a crime of violence (since the sentence will always be one year or more.)

- **Voyeurism 9A.44.115** will qualify as an aggravated felony unless the pleadings, record of conviction or factual basis establish that the conviction *necessarily rests* on sexual abuse of a minor or is linked to child pornography. Voyeurism is likely to be deemed a crime involving moral turpitude, but there is as of yet no immigration case-law addressing the issue.[137]

E. Disorderly Conduct

Disorderly Conduct under R.C.W. 9A.84.030 does not trigger any grounds of inadmissibility or deportation under immigration law. Like all convictions, it will be a negative discretionary factor in any application for immigration benefits, such as lawful permanent residence, U.S. citizenship or discretionary relief from removal.

---

[135] *Cf. Saavedra-Figueroa v. Holder*, 625 F.3d 621, 626 (9th Cir. 2010) (California misdemeanor false imprisonment was not a necessarily a conviction for a CIMT, and record held no facts narrowing it to a CIMT).

[136] 8 USC § 1101(a)(43)(F). *See U.S. v. Yanez Saucedo* 295 F.3d 991, 996 (9th Cir. 2002) (Rape 3rd degree under § 9A.44.060(1)(a) "fits within a generic, contemporary definition of rape, which can, but does not necessarily, include an element of physical force."). There is no case saying if a conviction for Rape 3rd Degree under RCW 9A.44.060(1)(b) is an aggravated felony as "rape" where the record of conviction shows it was exclusively by "threat of substantial unlawful harm to property rights of the victim." *See Yanez Saucedo*, 295 F.3d at 994 n.5 ("We need not address Yanez-Saucedo's arguments concerning § 9A.44.060[1](b), which defines rape as sexual intercourse under a substantial threat to the victim's property rights. Yanez-Saucedo argues that part (b) does not fit within the "classical definition" of rape because "theoretically" a person could be found guilty even if he had consensual sexual intercourse.").

[137] *See, e.g., State v. Glas*, 147 Wn.2d 410 (2002) (holding that the part of the body the accused views doesn't have to be a part that would normally be concealed). In addition, the court held that "[a] place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance" applies to locations where a person may not normally disrobe, but if he or she did, he or she would expect a certain level of privacy. . ." *Id* at 416.

4.7 CONTROLLED SUBSTANCE VIOLATIONS[138]

A. Possession Offenses

1. Lawfully Admitted Noncitizens & Possessory Controlled Substance Violations

Noncitizens who have been lawfully admitted to the U.S. (e.g. permanent residents and green card holders) and who are convicted of "a violation of (or conspiracy or attempt to violate) a law or regulation of a State, the United States, or a foreign country relating to a controlled substance" will trigger both the controlled substances violations grounds of removal[139] and inadmissibility. [140] See §1.1(B) and (C) for the immigration consequences of triggering these grounds.

- **Exception: Solicitation to Possess**

Offenses for solicitation to possess a controlled substance under R.C.W. § 9A.28.030 do not qualify as controlled substance offenses under immigration law and, thus, will not trigger this ground of deportation.[141]

- **Exception and Waiver: Simple Possession Less Than 30g of Marijuana**

The **controlled substances deportation ground** contains an explicit exception for "a single offense involving possession for one's own use of 30 grams or less of marijuana."[142] Note, however, that misdemeanor simple possession under R.C.W. § 69.50.4014 encompasses possession of 40 grams or less of marijuana. Thus, in order to safely qualify for the exception, the defendant's record of conviction must clearly state that the amount actually possessed was less than 30 grams.

The corresponding **controlled substances inadmissibility ground** does not contain this exception. Rather it permits a limited universe of qualifying noncitizens that have marijuana possession offenses involving less than 30 grams to apply for a discretionary waiver of this ground. Like the deportation ground exception, in order to safely qualify for this waiver, the defendant's record of conviction must clearly state that the amount actually possessed was less than 30 grams.

---

[138] For immigration purposes, the federal definition of a controlled substance at 21 U.S.C. § 802 applies.
[139] 8 U.S.C. § 1227(a)(2)(B)(i).
[140] 8 U.S.C. § 1182(a)(2)(A)(II).
[141] *See Coronado-Durazo v. INS*, 123 F.3d 1322, 1325 (9th Cir. 1997) (unlike "attempt" and "conspiracy" Congress did not include "solicitation" offenses in the deportation or inadmissibility grounds). This exception is recognized only in the Ninth Circuit.
[142] 8 U.S.C. § 1227(a)(2)(B)(i).

- **Eligibility for Relief From Removal For Longtime Permanent Residents**

Although conviction for possession of a controlled substance will trigger this ground of deportation (unless for solicitation or for less than 30 grams of marijuana as stated above), unlike conviction for a drug offense that qualifies as a drug-trafficking crime, LPRs who have lawfully resided in the U.S. for seven years will be eligible to request "cancellation of removal" from the immigration judge in removal proceedings. If granted they will be permitted to retain their lawful permanent residence.[143]

2. Undocumented Persons and Possessory Controlled Substance Violations

A conviction for possession of a controlled substance will trigger the controlled substances ground of inadmissibility for undocumented people.[144] In addition to establishing another basis of removal (beyond simply being undocumented), such a conviction will render a noncitizen ineligible for most legal avenues to obtain lawful immigration status, regardless of the person's equities.[145]

- **Exception: Solicitation to Possess**

Offenses for solicitation to possess a controlled substance under R.C.W. § 9A.28.030 do not qualify as controlled substance offenses under immigration law and, thus, will not trigger this ground of inadmissibility.[146]

- **No Marijuana Exception; Limited Waiver**

Unlike the deportation ground, the controlled substance violations inadmissibility ground does not include an automatic exception for first-time marijuana convictions involving 30 grams or less. Rather it permits a limited universe of qualifying noncitizens who have marijuana possession offenses involving no more than 30 grams to apply for a discretionary waiver of this ground. In order to safely qualify for the exception, the defendant's record of conviction must clearly state that the amount actually possessed was less than 30 grams.[147]

---

[143] 8 U.S.C. § 1229a(a).

[144] 8 U.S.C. § 1182(a)(2)(A)(i)(II).

[145] *See, e.g.*, 8 U.S.C. § 1229b(b)(1)(C) (cancellation of removal for longtime undocumented persons); 8 U.S.C. § 1229b(b)(2)(A)(iv) (cancellation of removal for immigrant survivors of domestic violence); 8 U.S.C. § 1255(a) (adjustment of status to that of lawful permanent resident due to marriage to a U.S. citizen).

[146] *See Coronado-Durazo v. INS*, 123 F.3d 1322, 1325 (9th Cir. 1997) (unlike "attempt" and "conspiracy" Congress did not include "solicitation" offenses in the deportation or inadmissibility grounds). This exception is recognized only in the Ninth Circuit.

[147] 8 U.S.C. § 1182(h) ("212(h) waiver" of inadmissibility). The § 212(h) waiver is available to the spouse, parent, son or daughter of a United States citizen or permanent resident, an applicant under the Violence Against Women Act's immigration provisions, or to anyone if the waivable conviction occurred at least fifteen years before the waiver application. There are restrictions for persons who committed the offense

3. Attempt and Conspiracy Convictions Trigger Inadmissibility & Deportation

Both the controlled substances ground of deportation and the ground of inadmissibility outlined above include convictions for any attempt or conspiracy to commit a controlled substance violation.[148] As such, unlike convictions for solicitation to possess, noncitizens who plead guilty to any attempt or conspiracy offense related to controlled substances will trigger this ground of inadmissibility and, if they have been lawfully admitted, trigger this ground of deportation. [149]

4. Paraphernalia Violations Constitute Controlled Substance Violations

Simple misdemeanor convictions related to drug paraphernalia under R.C.W. 69.50.412 are offenses related to a controlled substance under immigration law. As such, they trigger the controlled substance violation grounds of inadmissibility and deportation.[150] The exception and waiver for marijuana outlined above will apply if the paraphernalia conviction relates to one single simple possession of 30 grams or less of marijuana for personal use.[151]

Use of paraphernalia where the record of conviction and admitted factual basis establish that the paraphernalia involved manufacture of a controlled substance or other drug trafficking purpose, will be treated as a drug-trafficking crime and an aggravated felony.[152]

5. Simple Possessory Offenses Do Not Constitute Aggravated Felonies or Crimes Involving Moral Turpitude

Generally speaking, state simple possessory offenses will not be classified as drug-trafficking aggravated felony offenses under immigration law (absent specific prosecution for and findings of recidivism that correspond to federal recidivism procedures).[153] Simple possessory offenses are generally not prosecuted under immigration law as crimes involving moral turpitude.[154]

---

after becoming a permanent resident. The § 212(h) waiver can waive a CIMT or a single marijuana possession offense involving less than 30 grams (and no other drug crime).

[148] 8 U.S.C. § 1227(a)(2)(B)(i).

[149] 8 U.S.C. § 1182(a)(2)(A)(i)(II); 8 U.S.C § 1227(a)(2)(B)(i).

[150] *Estrada v. Holder*, 560 F.3d 1039, 1042 (9th Cir. 2009) (possession of drug paraphernalia is offense relating to a controlled substance); *Bermudez v. Holder*, 586 F.3d 1167, 1168-69 (9th Cir. 2009); *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786, 797 (9th Cir. 2009) (state conviction for possession of drug paraphernalia equivalent to drug possession); *Luu-Le v. INS*, 224 F.3d 911, 915-16 (9th Cir. 2000); *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009).

[151] *See Matter of Martinez-Espinoza*, 25 I&N Dec. 118, 125 (BIA 2009) (The 212(h) inadmissibility waiver is available if the applicant demonstrates by a preponderance of the evidence that his possession of paraphernalia "relates to" a single offense of simple possession of 30 grams or less of marijuana).

[152] 8 USC § 1227(a)(2)(A)(iii); 8 USC § 1101(a)(43)(B); 18 USC § 841.

[153] *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580 (2010); *see also U.S. v. Munoz-Camarena*, 631 F.3d 1028, 1029-30 (9th Cir. 2011) (per curiam) (applying *Carachuri-Rosendo* to the illegal reentry sentencing context); *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 391-94 (BIA 2007) (outlining

6. Deferred Sentence Resolutions

Imposition of a deferred sentence under R.C.W. 3.66.067 is a common resolution for first-time simple possessory (and other) offenses. As outlined in greater detail in Chapters Six and Seven, a plea entered in a case where a deferred sentence was granted remains a conviction ***in perpetuity*** even if the defendant complies with all conditions and subsequently withdraws her plea and the case is dismissed under state law. [155]

Consequently, noncitizens who plead guilty and are granted a deferred sentence for simple possession of a controlled substance will be deemed to permanently have a controlled substance conviction under immigration law that will trigger grounds of deportation and inadmissibility and render them ineligible for discretionary relief from removal regardless of any compliance and future dismissal.[156]

7. Expedited or Fast-Track Drug Proceedings

Numerous jurisdictions throughout Washington engage in "expedited" or fast-track procedures when dealing with first-time simple possessory offenses. In general, in these proceedings, the defendant agrees early on to plead guilty to the lesser offense of attempted possession (or conspiracy to possess). Unless such convictions qualify for one of the exceptions outlined above, such as solicitation to possess rather than attempted possession, convictions obtained through expedited procedures will trigger the controlled substances grounds of deportation and inadmissibility.

8. Legend Drug Convictions are broader than the drug removal grounds.

A negotiated plea to an offense involving a legend drug that is not identified in the pleadings, factual basis or the record of conviction as being a controlled substance will not trigger the controlled substance removal grounds.[157]

---

requirements for state recidivism prosecutions to sufficiently correspond to federal law to make the conviction qualify as an aggravated felony under immigration law). Washington does not have a qualifying recidivist possession drug offense. *See* RCW 69.50.408.

[154] *See Matter of Khourn*, 21 I&N Dec. 1041, 1046 n.5 (BIA 1997) (collecting circuit courts of appeal and state court cases).

[155] *Murillo-Espinoza v. INS*, 261 F.3d 771, 774 (9th Cir. 2001); *Matter of Marroquin*, 23 I&N Dec. 705, 706 (A.G. 2005); *Matter of Roldan-Santoyo*, 22 I&N Dec. 512, 521 (BIA 1999) (state rehabilitative actions, such as dismissal after deferred sentence, have no effect on whether an individual is "convicted" for immigration purposes. *Matter of Boldan-Santoya* was vacated in part by *Lujan-Armendariz v. INS*, 222 F.3d 728, 743 (9th Cir. 2000), where the Ninth Circuit held that a first-time simple possession offense expunged under state law is not an immigration "conviction". That decision was later overruled for offenses committed after July 14, 2011. *See Nunez-Reyes v. Holder*, 646 F.3d 684, (9th Cir. 2011).

[156] The exception to this would be if there were a deferred sentence with a plea entered, but *no penalty, punishment or restraint of any kind*. This would not meet the definition of a conviction in the Immigration Act. *See Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010) (suspended non-incarceratory penalties do not meet the penalty or restraint requirements of conviction definition for deferred adjudications at 8 USC §1101(a)(48)(A)(ii)).

[157] "Legend drug" is defined in RCW § 69.41.010(9), (12); *see* RCW 69.41.030 (possession prohibited). *But see* RCW 69.41.072 (violations of chapter 69.50 not to be charged under chapter 69.41).

B. Drug Trafficking Offenses[158]

1. Drug Trafficking Offenses Under Immigration Law Generally

- **Drug Trafficking Defined Under Immigration Law**

Drug trafficking offenses qualify as drug trafficking crimes under immigration law if they are an "illicit trafficking" offense or a "drug trafficking crime."

- The term "illicit trafficking" offense is broadly defined and includes any offense with a commercial element.[159] Possession for sale and possession with intent to sell qualify as "illicit trafficking" offenses.[160]

- The term "drug trafficking crime" refers to any state offense that is sufficiently analogous to a federal drug felony as defined in 18 U.S.C. § 924(c)(2). [161] That inquiry almost always turns on whether the offense is a "felony punishable under" the Controlled Substances Act.

2. Immigration Consequences of Drug Trafficking Offenses

Convictions for drug trafficking offenses, such as R.C.W. 69.50.401, will render noncitizens both deportable and inadmissible under the grounds relating to a controlled substance conviction described.[162] Convictions for "illicit trafficking in a controlled substance," will always be classified as aggravated felonies under immigration law.[163] As such they will trigger certain removal for virtually all noncitizens, regardless of their immigration status and regardless of any family considerations or other equities.[164]

Exception: Solicitation to Deliver Under R.C.W. 9A 28.030. Like the controlled substances violation grounds of deportation and inadmissibility, a solicitation conviction based on a drug trafficking offense will not fall within the scope of the drug trafficking aggravated felony.[165]

3. Exception: Solicitation Convictions Under R.C.W. 9A.282.030

Convictions under Washington's generic solicitation statute, even if it is for solicitation to sell, manufacture or deliver a controlled substance, will not trigger the

---

[158] 8 U.S.C. § 1101(a)(43)(B); 8 USC § 1227(a)(2)(A)(iii); 8 USC §1228(b); 8 USC §1182(a)(2)(C).
[159] *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992).
[160] *Rendon v. Mukasey*, 520 F.3d 967, 975-76 (9th Cir. 2008).
[161] 8 USC § 1101(a)(43)(B); 21 U.S.C. § 841(a)(1); *Matter of Davis* 20 I&N Dec. 536 (BIA 1992).
[162] 8 U.S.C. § 1227(a)(2)(B)(i); 8 U.S.C. § 1182(a)(2)(A)(i)(II).
[163] 8 U.S.C. § 1101(a)(43)(B). Pursuant to the statute, this classification applies to convictions involving controlled substances as defined at 21 U.S.C. § 802, and includes drug trafficking crimes as defined at 18 U.S.C. § 924(c).
[164] *See e.g.*, 8 U.S.C. § 1229b(a)(3) (aggravated felony bar to cancellation of removal for longtime lawful permanent residents).
[165] *Leyva-Licea v. INS*, 187 F.3d 1147, 1149 (9th Cir. 1999).

controlled substance violations grounds of inadmissibility or deportability. They also will not be classified as drug trafficking aggravated felonies.[166]

4. Attempt and Conspiracy Convictions Related To Drug Trafficking

Both the aggravated felony definition and the controlled substance violation grounds of deportation and inadmissibility specifically include convictions for any attempt or conspiracy to commit a drug trafficking offense.[167] As such, noncitizens who plead guilty to any attempt or conspiracy offense related to drug trafficking will be classified as aggravated felons under immigration law and deemed deportable and inadmissible.

5. Ground of Inadmissibility for "Reason to Believe" Drug Trafficking

An undocumented noncitizen whom the government "knows" or has "reason to believe" has participated in drug trafficking is inadmissible (there is no corresponding "reason to believe" ground of deportation for noncitizens who have been lawfully admitted).[168] No conviction is required to trigger this ground. Rather the government can sustain its burden by any "clear, substantial, and probative evidence."[169] Drug trafficking has been defined under this provision as "some sort of commercial dealing,"[170] and "the unlawful trading or dealing of any controlled substance."[171] Evidence such as police reports, police testimony, admissions by non-citizens, delinquency adjudications, adult convictions, and other evidence of involvement in manufacture, sale or possession with intent to distribute have all been held to supply "reason to believe."[172]

This "reason to believe" inadmissibility ground also applies to anyone who has knowingly aided, abetted, or assisted in drug trafficking.[173] Any spouse, son, or daughter of a drug trafficker who has received some "financial or other benefit" from the trafficking is also inadmissible if the benefit was received in the previous five years.[174]

With the exception of U and T visa applicants, there are no exceptions or waivers to this ground of inadmissibility.

---

[166] *Coronado-Durazo v. INS*, 123 F.3d 1332 (9th Cir. 1997); *Leyva-Licea*, .187 F.3d 1147 (9th Cir 1999).
[167] 8 U.S.C. § 1101(a)(43)(U).
[168] 8 U.S.C. § 1182(a)(2)(C).
[169] *Matter of Rico*, 16 I&N Dec. 181, 185-86 (BIA 1977). *See also Alarcon-Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir. 2000); *Castano v. INS*, 956 F.2d 236, 238 (11th Cir. 1992) (government's knowledge or reasonable belief that an individual has trafficked in drugs must be based on "credible evidence").
[170] *Lopez v. Gonzales*, 549 U.S. 47, 47 (2006).
[171] *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992).
[172] *Matter of Favela*, 16 I&N Dec. 753, 756 (BIA 1979); *Matter of Rico*, 16 I&N Dec. 181, n. 160 (1977) ("reason to believe" found based on testimony of Border Patrol agents that respondent frequently drove a car in which 162 pounds of marijuana was found).
[173] 8 U.S.C. § 1182(a)(2)(C)(i).
[174] 8 U.S.C. § 1182(a)(2)(C)(ii).The standard is "knew or reasonably should have known" the illicit source.

C. Drug Courts, Drug Addiction & Drug Abuse

As outlined in Chapter 6, a drug court agreement entered into by a noncitizen will constitute a conviction in perpetuity under immigration law where there is a finding of guilt, entry of a guilty plea, or where the noncitizen admits facts sufficient to support a finding of guilt.[175] Drug court agreements, such as those presently in use in King County, do not require any of these conditions to be met in order for the defendant to enter into and complete drug court and, as such, do not constitute convictions under immigration law.[176] **See Appendix K for the "Immigration Safe" King County Drug Court Agreement.**

Both lawfully admitted as well as undocumented noncitizens will trigger a ground of inadmissibility where it is established that they are a *current* drug addict or abuser.[177] A noncitizen who has been lawfully admitted (e.g. a refugee, permanent resident or foreign student) can be found deportable for having been a drug addict or abuser at *any time since being admitted to the United States*.[178] Drug addiction is defined as use "which has resulted in physical or psychological dependence."[179] The definition of drug "abuser" is defined as nearly synonymous with "use" as it is generally deemed to include conduct beyond a single use of a controlled substance.[180]

Despite the inherent risks of admitting to a substance abuse problem, drug court agreements that do not constitute convictions under immigration law can, depending on an individual's circumstances, be less likely to result in removal or a bar to admission than an outright conviction for a controlled substance offense since this ground is infrequently invoked.

4.8 FIREARMS OFFENSES

A. The Deportation Ground for Firearms Offenses

Convictions for crimes related to firearm possession or sale trigger a ground of deportation for noncitizens who have been lawfully admitted to the U.S. (there is no

---

[175] 8 U.S.C. § 1101(a)(48)(A).

[176] *See* Appendix K for a copy of the King County Drug Court agreement, *available at* http://www.kingcounty.gov/courts/DrugCourt.aspx. .

[177] 8 U.S.C. § 1182(a)(1)(A)(iv). A lawful permanent resident will not become subject to the inadmissibility ground unless she makes a departure and a new admission. A departure of 180 days or less and return by an LPR who has no triggering criminal convictions is not considered a new admission. 8 U.S.C. § 1101(a)(13)(C).

[178] 8 U.S.C. § 1227(a)(2)(B)(ii). This specific ground as applied to LPRs has fallen generally into disuse.

[179] 42 C.F.R. § 34.2(h).

[180] The relevant regulations define drug abuse as "the non-medical use of a substance listed in section 202 of the Controlled Substances Act … which has not necessarily resulted in physical or psychological dependence." 42 C.F.R. § 34.2(g). "Non-medical use" is "more than experimentation with the substance (e.g., a single use of marihuana or other non-prescribed psychoactive substances, such as amphetamines or barbiturates). Technical Instructions for Medical Examination of Aliens, Amendments to p. III-14, 15.

corresponding ground of inadmissibility).[181] This provision encompasses any offense of "purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying…any weapon, part, or accessory which is a firearm or destructive device" as well as attempt or conspiracy to do so.[182] This deportation ground is triggered by a conviction for a simple possession offense such as an Alien in Possession of Firearm (License violation) under R.C.W. 9.41.171, as well as many of the other offenses contained under R.C.W. 9.41 that include firearms as an element.

Statutes that contain the use of a "weapon" as an element, such as R.C.W. 9.41.300 (Weapons prohibited in certain places) will trigger deportation under the firearms ground where the ROC indicates that the weapon related to the conviction was, in fact, a firearm.[183] Even where an offense does not have a gun or a weapon as a statutory element, such as commission of negligent assault under R.C.W. 9A.36.031(f), where the record of conviction indicates that the conviction "necessarily rests" on having been committed with a firearm, it will trigger this deportation ground.[184]

The firearm offense provision, likewise, encompasses the use of a firearm in the commission of another crime, where the presence of a firearm is an element of that crime.[185] Firearms and weapons sentencing enhancements will also trigger deportability if the element of the use of a firearm was either admitted by the noncitizen or proven to a jury beyond a reasonable doubt.[186]

B. Firearms Offenses as Aggravated Felonies

Trafficking In Firearms.[187] Offenses under R.C.W. 9.41 (and any other Washington firearms-related offense) must meet the common-sense definition of "trafficking" in order to qualify as aggravated felonies under this provision. Most do not.

Federal Analogues. Firearms offenses that do not necessarily involve trafficking can also be designated as aggravated felonies under 8 U.S.C. § 1101(a)(43)(E) if they are sufficiently analogous to one of the many commonly prosecuted federal firearms offenses.[188] The most common Washington firearms offense that risks aggravated felony classification under these analogous federal statutes is Unlawful Possession of a Firearm.[189]

---

[181] 8 U.S.C. § 1227(a)(2)(C).
[182] 18 U.S.C. § 921 (a)(3)-(4). For deportation purposes the definition of a firearm is that found at 18 U.S.C. § 921(a), basically requiring a projectile "propelled by action of an explosive."
[183] *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 323 (BIA 1996) (transcript of respondent's plea and sentencing hearing where he admitted possession of a firearm was held to be part of the ROC and, thus, sufficient to establish that he was deportable for a firearms offense).
[184] *See United States v. Aguila-Montes de Oca*, 655 F.3d 915, 927-28 (2011) (en banc).
[185] *Matter of Lopez-Amaro*, 20 I&N Dec. 668, 674 (BIA 1993); *Matter of P-F-*, 20 I&N Dec. 661, 665 (BIA 1993); *Matter of K-L-*, 20 I&N Dec. 654, 757 (BIA 1993).
[186] *Matter of Martinez-Zapata*, 24 I&N Dec. 424, 426 (BIA 2007).
[187] 8 U.S.C. § 1101(a)(43)(C). This includes trafficking in explosives.
[188] *Id.* (See, for example, 18 U.S.C. § 922(g)(1)-(5)).
[189] 8 U.S.C.§ 1101(a)(43)(E)(ii), specifying an offense "described in" 18 USC § 922(g)(1).

- **Unlawful Possession of a Firearm (UPFA) R.C.W. 9.41.040**

    - Convictions under this statute will always trigger the firearms ground of deportation.

    - **UPFA 1st Degree R.C.W. 9.41.040(1)(a**) has been classified as an aggravated felony.[190]

    - **UPFA 2nd Degree R.C.W. 9.41.040(2)** will be prosecuted as an aggravated felony when the predicate prior conviction is a felony covered under R.C.W. 9.41.040(2)(a)(i). Where the prior conviction is one of the domestic violence misdemeanors or other non-felonies specified by that section or in §(ii), UPFA 2nd degree will not be an aggravated felony under the felon-in-possession provision.

    - R.C.W. 9.41.040 is not a clear match to the firearms-related aggravated felony definition because it punishes mere ownership without possession. A conviction under either UPFA 1st or 2nd degree for felon-in-possession that is limited to "owns" but is clearly not a conviction for possessing or having in control may not be classified as an aggravated felony firearms conviction.[191]

- **R.C.W. 9.41.171 Alien Possession of Firearms**

    - This offense is always considered a deportable firearms offense.[192]

    - The courts have not yet ruled on whether the current version of this statute is an aggravated felony.[193] Where the record establishes only that the accused is not a citizen of the United States or an LPR, has not obtained a valid alien firearm license pursuant to R.C.W. 9.41.173, and does not meet the requirements of R.C.W. 9.41.175 it will likely not be classified as an aggravated felony.

---

[190] *U.S. v. Mendoza-Reyes* 331 F.3d 1119 (9th Cir. 2003), *as amended, certiorari denied* 124 S.Ct. 33 ,(2003).(RCW 9.41.040(1)(a) addresses the full range of conduct described in 18 U.S.C. § 922(g)(1) and referenced in 8 U.S.C. § 1101(a)(43)(E)(ii)."

[191] 18 USC § 922(g)(1) covers only shipping, transporting, possessing or receiving. *U.S. v. Casterline*, 103 F.3d 76,78 (9th Cir.1996) *certiorari denied* 118 S.Ct. 106, 522 U.S. 835 (1997) (For purposes of felon-in - possession of a firearm statute, while ownership may be circumstantial evidence of possession, it cannot amount to, or substitute for, possession; possession, actual or constructive, must be proven. Ownership without physical access to, or dominion and control over, firearm does not constitute possession.)

[192] 8 USC § 1227(a)(2)(C).

[193] 8 USC § 1101(a)(43)(E)(ii); 18 USC § 922(g)(5).

4.9 DRIVING AND VEHICLE-RELATED OFFENSES

A. DUI and Other Misdemeanor Driving Offenses

- Neither felony nor misdemeanor convictions for alcohol-related **Driving Under the Influence** in violation of R.C.W. 46.61.502[194] trigger any criminal conviction-based grounds of inadmissibility or deportation.

- **Driving While License Suspended** under R.C.W. 46.20.342 and **No Valid Operator's License** under R.C.W. § 46.20.015 do not fall under any enumerated ground of deportation or inadmissibility in the immigration law.

B. Attempting to Elude Police Vehicle

- **Attempting to Elude As A Crime Involving Moral Turpitude**

The Board of Immigration Appeals held that the pre-2003 version of R.C.W. 46.61.024 does constitute a crime involving moral turpitude under immigration law. [195] The 2003 amendments lowering the *mens rea* to require only "reckless" conduct[196], rather than "wanton or willful disregard for the lives or property" of others, is not likely to change the CIMT classification.[197]

- **Attempting to Elude as an Aggravated Felony**

This offense will not be classified as a "crime of violence" aggravated felony crime of violence. Where a sentence of one year or more is imposed, an attempt to elude conviction is likely to be deemed an "obstruction of justice" aggravated felony.[198]

C. Reckless Driving

Reckless Driving has traditionally not been prosecuted by the government or classified by the courts as crime involving moral turpitude under immigration law. It also does not fall within any of the provisions of the aggravated felony definition. As such,

---

[194] Alcohol-related DUI offenses are not crimes involving moral turpitude. *Matter of Torres-Varela*, 23 I&N Dec. 78, 86 (BIA 2001). Alcohol-related DUIs are also not classified as aggravated felony "crimes of violence." *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004). DUIs involving controlled substances risk triggering the controlled substances grounds of deportation and inadmissibility.

[195] *Matter of Ruiz-Lopez* 25 I&N Dec. 551 (BIA 2011),*pet. for rev. denied*, 682 F.3d 513 (6th Cir. 2012).

[196] *See State v. Ridgley*, 141 Wn.App. 771, 781–82 (2007) (the "reckless manner" standard, effective as of 7-27-2003, in the attempting to elude statute involves a lesser mental state than the previous "wanton or willful" standard).

[197] *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008) (crimes committed with recklessness can be classified as CIMT offenses).

[198]*Matter of Valenzuela-Gallardo*, 25 I&N Dec. 838, 841-42 (BIA 2012) (Any offense that has as an element an "affirmative and intentional attempt, with specific intent, to interfere with the process of justice" may be an obstruction of justice aggravated felony under 8 U.S.C. § 1101(a)(43)(S), irrespective of the existence of an ongoing criminal ongoing criminal investigation or proceeding).

convictions under RCW. 46.61.500 will not trigger any grounds of inadmissibility or deportability.

D. Making a False Statement

Making a False Statement to an officer under R.C.W. 9A.76.175 is not classified as a crime involving moral turpitude as the Ninth Circuit has found that such offenses lack the requisite "fraudulent intent."[199]

E. "Hit and Run" Offenses

Whether or not convictions under RCW. 46.52.010 and RCW. 46.52.012 are deemed to be CIMTs will depend upon what is contained in the record of conviction as the specific basis for the conviction. [200] Since R.C.W. 46.52.010 only relates to failure to report the requisite information for an accident involving an unattended vehicle, and does not involve injury to a person, it is even less likely to be a CIMT offense if the conviction involves a conviction for minimum culpable conduct.

Since the criminalized conduct included in both RCW 46.52.010 and RCW 46.52.012 does not involve the use of force, whether intentional or not, but rather a failure of a duty to provide information or assistance, neither offense can be classified as a crime of violence aggravated felony. In addition, neither offense falls within the scope of any other provisions of the aggravated felony definition at 8 U.S.C. § 1101(a)(43).

F. Vehicular Assault and Vehicular Homicide

Vehicular Homicide R.C.W. 46.61.520

- Convictions under the DUI prong for vehicular homicide, RCW 46.61.520(1)(a), "while under the influence of intoxicating liquor or any drug," will not trigger removal as either crimes involving moral turpitude (CIMTs) or aggravated felony offenses. [201]

[199] *Blanco v. Mukasey*, 518 F.3d 714, 720 (9th Cir. 2008). However, the Board of Immigration Appeals (BIA) has found that unsworn, false misleading *written* statements to a public official involved turpitude even if materiality was not an element, if there was intent to mislead or disrupt the performance of the official's duties. *Matter of Jurado-Delgado*, 24 I&N Dec. 29 (BIA 2006).

[200] *Cerezo v. Mukasey*, 512 F.3d 1163, 1169 (9th Cir. 2007); *Latu v. Mukasey*, 547 F.3d 1070, 1074 (9th Cir. 2008).

[201] *See Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (negligence (or strict liability) offenses cannot constitute crime of violence aggravated felonies). *See also Matter of Silva –Trevino*, 24 I&N Dec. 687, 698 n.1 (A.G. 2008) (to be classified as a CIMT, a crime must carry a *mens rea* more culpable than negligence). DUIs involving controlled substances risk triggering the controlled substances grounds of removal at 8 U.S.C. §§ 1182(a)(2)(A(i))(II), 1227(a)(2)(B)(i).

- Convictions under R.C.W. 46.61.520(1)(b), the recklessness prong for vehicular homicide, *will* be considered CIMT offenses,[202] but *will not* be considered aggravated felonies.[203]

- Convictions under R.C.W. 46.61.520(1)(c), the "disregard" prong for vehicular homicide, *will not* be considered aggravated felonies and should not be considered CIMT offenses, since they are crimes of negligence.[204]

Vehicular Assault R.C.W. 46.61.522

- Convictions under R.C.W. 46.61.522(1)(b), the DUI prong, for vehicular assault, "while under the influence of intoxicating liquor or any drug," will not trigger removal as either crimes involving moral turpitude (CIMTs) or aggravated felony offenses.

- Convictions under the recklessness prong for vehicular assault under R.C.W. 46.61.522(1)(a) *will* be considered CIMT offenses, but *will not* be considered aggravated felonies.

- Convictions under the "disregard" prong for vehicular assault under R.C.W. 46.61.522(1)(c) *will not* be considered aggravated felonies and should not be considered CIMT offenses, since they are crimes of negligence. Conscientious defense counsel may seek to make explicit for immigration purposes that, in pleading to a "disregard" prong, the offender is pleading to a crime of negligence.

4.10 PROPERTY OFFENSES

A. Identity Theft

ID Theft 1st Degree R.C.W. 9.35.020

- Convictions under R.C.W. 935.020(2), Identity Theft (ID Theft) 1st Degree, will be classified as a CIMT under immigration law.[205]

---

[202] *See Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994) (involuntary manslaughter with recklessness is a CIMT). *Matter of Medina*, 15 I&N Dec. 611, 613 (BIA 1976) (aggravated assault found to be a CIMT even where *mens rea* may be as low as recklessness); *Matter of Wojtkow*, 18 I&N Dec. 111, 113 (BIA 1981) (reckless homicide found to be a CIMT)

[203] *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121 (9th Cir 2006) (en banc) (crimes of recklessness cannot be crime of violence aggravated felonies).

[204] *State v. Eike*, 72 Wn.2d 760, 765-766, 435 P.2d 680, 684 (1967) (disregard prong is of a negligence greater than ordinary negligence but "falling short of recklessness."); *State v. May*, 68 Wn.App. 491, 496 843 P.2d 1102, 1104 -1105 (1993) (same); *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992) (negligence is not moral turpitude).

[205] *Juarez-Romero v. Holder*, 2009 WL 4913912, at *1 (9th Cir. 2009) (unpublished opinion)(Washington ID Theft 1st degree is always a CIMT, since it is a fraud crime.)

- A conviction for ID Theft 1st degree risks being classified as an aggravated felony theft offense if a sentence of one year or more is imposed *and* the record of conviction establishes that the intended crime is a theft, or that the means of identification of another person was itself stolen from a living person. [206]

- A conviction for ID Theft 1st degree also risks classification as an aggravated felony offense if the record of conviction establishes that the means of identification or financial information of another person was obtained by fraud or deceit or the intended crime involved fraud or deceit, and the loss to the victim is $10,000 or more. [207]

ID Theft 2nd Degree R.C.W. 9.35.020(3)

- ID Theft 2nd degree risks being classified as a CIMT unless the record of conviction indicates that the intended crime was not a CIMT, nothing of value was obtained, and the ID was not obtained by theft. [208]

- A conviction for ID Theft 2nd degree will be classified as an aggravated felony where a sentence of one year or more is imposed and the record of conviction establishes an unconsented taking from a living person. [209]

- Although it lacks the element of fraudulent intent, ID Theft 2nd degree could be charged as an aggravated felony "fraud or deceit" offense if the record of conviction establishes that the offense necessarily involved, or rests on facts that establish fraud or deceit, and there was a loss or attempted loss to the victims of $10,000 or more.[210]

B. Burglary Offenses

1. Burglary Convictions As Aggravated Felonies

In order for a burglary conviction to be classified as an aggravated felony under the "burglary offenses" provision, the Washington State statute must sufficiently match the immigration statute's definition of burglary, which is "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[211]

---

[206] 8 U.S.C. § 1101(a)(43)(G).
[207] 8 U.S.C. § 1101(a)(43)(M)(i), (U)
[208] *See Matter of Hernandez-Leon*, 2011 WL 891906, at *1 n.1 (BIA 2011) (upholding immigration judge's bond ruling that DHS is *likely to prevail* that Arizona ID theft is a CIMT, although "the respondent raises some serious questions concerning whether the [] offense is . . . a crime involving moral turpitude").
[209] 8 U.S.C. § 1101(a)(43)(G); *Mandujano-Real v. Mukasey* 526 F.3d 585, 590 (9th Cir. 2008) (using identity of a dead person cannot be with intent to "deprive [an] owner of the rights and benefits of ownership,"); *Mandujano-Real*, 526 F.3d at 590 (" the Oregon law . . . encompasses conduct that is broader than that proscribed by the generic theft definition- conduct that does not constitute theft. For example, a person may be convicted under the law even if the owner of the identity consents").
[210] 8 USC § 1101(a)(43)(M)(i). Loss amount for this particular purpose is "circumstance-specific."
[211] 8 U.S.C. § 1101(a)(43)(G); *Taylor v. United States*, 495 U.S. 575, 598 (1990).

Since Washington's definition of a "building" under R.C.W. 9A.04.110 is broader than this generic definition (it includes, e.g., fenced areas and railway cars), immigration officials will look to the record of conviction to determine whether the noncitizens conviction matches the immigration statute's generic definition. Burglary convictions can also be classified as aggravated felonies under the "crime of violence" provision.

Where a sentence of one year or more is imposed:

- **Burglary 1st degree** (RCW 9A.52.020) – will always be deemed an aggravated felony under both the burglary and crime of violence provisions.[212]

- **Residential Burglary** (RCW 9A.52.025) has been definitively classified as an aggravated felony as a crime of violence, regardless of whether the conviction record establishes that it qualifies under the aggravated felony "burglary" provision.[213]

- **Burglary 2nd Degree** (RCW 9A.52.030) – Unlike Burglary 1st degree and Residential Burglary, in order for Burglary 2nd degree convictions to constitute aggravated felonies the record of conviction must clearly indicate that the defendant unlawfully entered or remained in a "building" or "structure" (versus, e.g., a cargo container or railway car).[214]

2. Burglary Offenses As Crimes Involving Moral Turpitude

- **Burglary 1st degree** will always be deemed a CIMT.

- **Residential Burglary** - Burglary of an occupied dwelling has been deemed to categorically be a CIMT, regardless of the underlying intended crime.[215]

- **Burglary 2nd degree** will be classified as a CIMT offense where the record of conviction reveals that the underlying intended crime is a CIMT offense.[216] For example, where the plea statement reveals that the intended crime was theft (generally a CIMT), the offense will be classified as a CIMT. However, a conviction wherein the plea statement shows that the intended crime was Malicious Mischief (not a CIMT), or the plea statement does not specify the crime the defendant intended to commit, the offense should not be classified as a CIMT.

---

[212] Even where the record of conviction does not show that the conviction squarely falls within the immigration statute's generic definition of "burglary," burglary of a dwelling will constitute a crime of violence under 18 U.S.C. § 16(b) as an offense that "by its nature involves a substantial risk that physical force against persons or property of another may be used in the course of committing the offense." *United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990).
[213] 8 USC § 1101(a)(43)(G); *United States v. Becker*, 919 F.2d at 571. .
[214] *See Taylor*, 495 US at 599-602.
[215] *Matter of Louissaint*, 24 I&N Dec. 754, 758-59 (BIA 2009).
[216] *Cuevas-Gaspar v. Ashcroft*, 430 F.3d 1013, 1020 (9th Cir. 2005), *abrogated on other grounds by Holder v. Martinez Gutierrez*, 132 S.Ct. 2011 (2012); *Matter of M*, 2 I. & N. Dec. 721, 723 (BIA 1946); *Matter of G*, 1 I. & N. Dec. 403, 404-406 (BIA 1943)

Consequently, the record of conviction established during the criminal proceedings will determine whether the conviction is designated as a CIMT.

3. Burglary Offenses Designated as Domestic Violence Crimes.

- **Burglary 1st degree** and **Residential Burglary** constitute crimes of violence under immigration law. If the offenses are designated DV, they will trigger this ground of deportation.[217]

- **Burglary 2nd degree** convictions will trigger this ground of deportation where the record of conviction shows actual use of violent force and the conviction rests on an intended crime that qualifies as a crime against a person (e.g. assault). [218]

C. Trespass Offenses

Convictions for trespass under RCW 9A.52, even if designated as domestic-violence-related, will not trigger any grounds of deportation or inadmissibility.[219]

D. Theft, Stolen Property and Robbery Offenses

1. Aggravated Felony Classification

- A **theft** conviction will be classified as an aggravated felony under immigration law where a sentence of one year or more is imposed (regardless of time suspended).[220]

- **Theft** offenses can also be aggravated felonies, regardless of the sentence imposed under a separate provision of the aggravated felony definition where the record of conviction indicates that the conviction was for "theft by deception" and the loss to the victim was $10,000 or more. [221]

- **Robbery** offenses with a one year sentence will also be classified as aggravated felony crimes of violence.[222]

- **Receipt of stolen property** is also an aggravated felony where a sentence of one year or more is imposed.[223] However, convictions under R.C.W. 9A.56.150-170

[217] *United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990).
[218] *Ye v. I.N.S.*, 214 F.3d 1128, 1134 (9th Cir. 2000).
[219] *See Cuevas-Gaspar v. Ashcroft*, 430 F.3d 1013, 1020 (9th Cir. 2005) *abrogated by Holder v. Martinez Gutierrez*, 132 S.Ct. 2011 (2012) (on other grounds); *Matter of M-*, 2 I&N Dec. 721, 723 (BIA 1946) (third degree burglary is only CIMT if crime intended to be committed within is turpitudinous).
[220] 8 U.S.C. § 1101(a)(43)(G).
[221] RCW 9A.56.020(1)(b) (theft "[b]y color or aid of deception"); 8 U.S.C. § 1101(a)(43)(M)(i) (crimes involving fraud or deceit where the loss to the victim is $10,000 or more).
[222] *United States v. David H.*, 29 F.3d 489, 494 (9th Cir. 1994).

will constitute aggravated felonies where the record of conviction makes clear that the conviction was for receiving, retaining or possessing the stolen property.[224] Where the record of conviction does not clearly specify, or indicates the conduct of conviction was for concealment or disposal of the stolen property, it is unclear whether the government would be able to sustain aggravated felony charges in removal proceedings.[225]

- **Trafficking in Stolen Property R.C.W. 9A.82.050-055** is also an aggravated felony where a sentence of one year or more is imposed.[226]

2. Classification As Crimes Involving Moral Turpitude

Theft, stolen property and robbery offenses have generally been deemed by the courts to be CIMT offenses.[227] Notably, theft in the CIMT context is defined differently than for purposes of aggravated felony classification. Specifically, theft is considered to involve moral turpitude only where a permanent taking is intended.[228]

E. Taking a Motor Vehicle Without Permission (TMVWP) & Vehicle Prowl

- **Taking a Motor Vehicle**

It is well-established that theft crimes inhere moral turpitude and as such constitute CIMT offenses under immigration law.[229] As such, TMVWP 1st degree under R.C.W. 9A.56.070 will always be a CIMT offense. However, TMVWP 2nd degree under R.C.W. 9A.56.075 is arguably not a CIMT where the record of conviction reveals only that the defendant was just riding in the vehicle, or even that the vehicle was driven away or taken, without the intent to permanently deprive. Such conduct can be analogized to "joyriding," which does not have the requisite intent to permanently deprive the owner of property to constitute a CIMT offense.[230]

---

[223] 8 U.S.C. § 1101(a)(43)(G) (a theft offense (including receipt of stolen property) for which the term of imprisonment is at least one year).
[224] *Compare Matter of Bahta*, 22 I&N Dec. 1381, 1391 (BIA 2000) *with Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 887-88 (9th Cir. 2003).
[225] *Matter of Fernando Salas-Lopez*, 2007 WL 1724884, at *2 (BIA May 22, 2007).
[226] 8 U.S.C. § 1101(a)(43)(G) (a theft offense (including receipt of stolen property) for which the term of imprisonment is at least one year).
[227] *Matter of H-N-*, 22 I&N Dec. 1039, 1049 (BIA 1999) (California conviction for robbery 2nd degree is CIMT); *Wadman v. I.N.S.*, 329 F.2d 812, 814 (9th Cir. 1964) (receipt of stolen property is a CIMT).
[228] *Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009) (PSP where intent to permanently deprive is not an element is not automatically a CIMT); *Matter of V-Z-S-*, 22 I&N Dec. 1338 (BIA 2000); *Matter of Grazley*, 14 I&N Dec. 330, 333 (BIA 1973).
[229] *See, e.g.*, *Cuevas-Gaspar v. Ashcroft*, 430 F.3d 1013, 1020 (9th Cir. 2005) *abrogated on other grounds by Holder v. Martinez Gutierrez*, 132 S.Ct. 2011 (2012); *U.S. v. Exparza-Ponce*, 193 F.3d 1133, 1136-37 (9th Cir. 1999); *Rahstabadi v. INS*, 23 F.3d 1562, 1568 (9th Cir. 1994).
[230] *See e.g.*, *Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161-62 (9th 2009); *Matter of M-*, 2 I&N Dec. 686, (BIA 1946); *Matter of P-*, 2 I&N Dec. 887, (BIA 1947); *Matter of D-*, 1 I&N Dec. 143 (BIA 1941) (all

Where a sentence of one year or more is imposed on a TMVWP 1st or 2nd degree conviction it will be classified as an aggravated felony under immigration law.[231]

- **Vehicle Prowling**

➢ **Vehicle Prowling 1st Degree, R.C.W. 9A.52.095** (vehicle burglary) is highly likely to be charged as an aggravated felony where the sentence is one year or more.[232] If the record shows the conviction was for entry into an occupied motor home or dwelling, or if the intended crime is theft or some other CIMT, it will be charged as a CIMT as well.[233]

➢ **Vehicle Prowling 2nd degree R.C.W. 9A.52.100** will not be an aggravated felony unless there is a sentence of 12 months or more, *and* (1) if either the intended crime is a theft offense or the intended crime is a crime of violence, or (2) if the record of conviction shows that violent force was necessarily used in committing the offense. [234] Vehicle Prowling 2nd Degree will be a CIMT if the intended crime is a CIMT.[235]

F. Arson, Reckless Burning and Malicious Mischief Offenses

- **Arson in the 1st & 2nd Degree**

Arson 1st degree convictions will be classified as aggravated felonies unless the defendant did damage to structures only belonging to the arsonist, or the arson did not involve danger to another human being.[236] Arson 2nd degree will be an aggravated felony crime of violence where a sentence of one year or more is imposed. Arson will be classified as a CIMT.[237]

---

holding that offenses committed without the intent to permanently deprive an owner of his or her property are not categorically crimes of moral turpitude).

[231] 8 U.S.C. § 1101(a)(43)(G). *See U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc).

[232] 8 U.S.C. § § 1101(a)(43)(G), (U); *United States v. Becker*, 919 F.2d 568, 571 (9th Cir.1990); *Sareang Ye v. INS*, 214 F.3d 1128, 1133 (9th Cir. 2000) (vehicle burglary is outside the aggravated felony definition of a "burglary."); *but see Ngaeth v. Mukasey*, 545 F.3d 796 (9th Cir. 2008) (entering a locked vehicle with intent to commit theft is an attempted "theft offense.").

[233] *Cf. Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009) (burglary of occupied dwelling always a CIMT).

[234]*Cf. Sareang Ye v. INS*, 214 F.3d 1128, 1134 (9th Cir. 2000) (entry into a locked non-residential vehicle not essentially violent in nature). *But see Matter of Brieva*, 23 I&N Dec. 766 (BIA 2005) (felony unauthorized use of a motor vehicle is by its nature a crime of violence), *overturned on other grounds by Judulang v. Holder*, 132 S.Ct. 476, 481-482 (2011).

[235] *See, e.g., Casas-Castrillon v. Mukasey* 265 Fed.Appx. 659, 661 (9th Cir. 2008) (applying rule of *Cuevas-Gaspar, supra*, that burglary is only inherently a CIMT when intended crime is a CIMT.)

[236] RCW 9A.48.010(2)(Arson can be to your own property); *Jordison v. Gonzales*, 501 F.3d 1134, 1135 (9th Cir. 2007) (setting fire only to own property did not necessarily involve substantial risk of using force against person or property); *but see Matter of Palacios*, 22 I&N Dec. 434 (BIA 1998) (Felony arson is a crime of violence because of substantial risk that physical force may be used against the person or property of another, because of risk that fire may spread or that responders may be injured).

[237]The Ninth Circuit said that it was "undisputed" that arson is a CIMT in *Rodriguez-Herrera v. INS*, 52 F.3d 238 (9th Cir. 2005). The BIA has long held that even attempted arson is a CIMT. *Matter of S-*, 3 I&N Dec. 617 (BIA 1949). If the conviction is a crime of violence and involves DV, it will also be a deportable

- **Reckless Burning R.C.W. 9A.48.040-50**

Reckless burning offenses are unlikely to be classified as aggravated felonies since the use of force against property to cause the damage is reckless and not intentional.[238] Reckless burning is only arguably a CIMT as the courts have not ruled on the issue.[239] What the criminal court record shows as the conduct of conviction will likely be determinative.

- **Malicious Mischief**

The Ninth Circuit has specifically ruled that Malicious Mischief 2nd Degree under R.C.W. 9A.48.080(1)(a) is *not* a CIMT. [240] While this decision is still good law, subsequent case law developments now mean that the immigration judge might review the ROC.[241] Where the ROC reveals that the requisite physical damage occurred due to conduct such as theft that is generally deemed to involve moral turpitude, the malicious mischief offense could now be designated a CIMT offense under immigration law. Conversely, where the ROC indicates only that the defendant caused a "diminution in the value of the property" or that the physical damage occurred in a manner that would not generally be deemed to involve moral turpitude (e.g. putting valuables out in the rain; by commission of a prank; or done merely to annoy), the conviction will not be classified as such.

Malicious Mischief convictions that receive a sentence of one year or more risk classification as aggravated felony crimes of violence where the conviction necessarily rests on facts that indicate that the defendant committed the property destruction by the use or threatened use of force as defined under 18 U.S.C.§ 16.[242] If identified as DV, a disposition where the conviction necessarily rests on facts that indicate that the unlawful property devaluation was brought about by the use or threatened use of force risks being charged as a deportable DV crime.[243]

---

crime of domestic violence; if it involves a specified minor victim it is likely to also be charged as a deportable crime of child abuse.

[238] *Cf Matter of Palacios-Pinera*, 22 I&N Dec 434 (BIA 1998) (arson requiring intentional property damage and reckless endangerment to other person is crime of violence under 18 USC 16(b)).

[239] A crime of recklessness can involve turpitude. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (BIA 2008). But Reckless Burning does not seem to entail the serious consequences contemplated in such cases, especially since the damaged property can be one's own. *Compare Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994) (reckless manslaughter a CIMT) *and Matter of Medina*, 15 I&N Dec. 611, 613 (BIA 1976) (reckless aggravated assault a CIMT) *with Matter of Solon*, 24 I&N Dec. (BIA 2007) ("[A]s the level of conscious behavior decreases, i.e., from intentional to reckless conduct, more serious resulting harm is required [for crime to be CIMT].") *and Matter of Fualaau*, 21 I. & N. Dec. 475 (BIA 1996) (for assault to be a CIMT the element of a recklessness "must be coupled with an offense involving the infliction of serious bodily injury.").

[240] *Rodriguez-Herrera v. I.N.S.*, 52 F.3d 238, 240 (9th Cir.1995); *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1019 -1020 (9th Cir. 2005), *abrogated on other grounds by Holder v. Martinez-Gutierrez*, 132 S. Ct. 2011 (2012); *Fernandez-Ruiz v. Gonzales*, 468 F.3d 1159, 1169 (9th Cir. 2006).

[241] *See U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc); *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012); *Matter of Silva-Trevino*, 24 I&N Dec. 687 (BIA 2008).

[242] 8 U.S.C. § 1101(a)(43)(F).

[243] 8 U.S.C. § 1227(a)(2)(E)(i).

4.11 PROSTITUTION OFFENSES

A. The Inadmissibility Ground Related to "Engaging In" Prostitution

Noncitizens found to have "engaged in" prostitution will trigger a specific prostitution-related to inadmissibility grounds. [244] There is no corresponding ground of deportation. This is a *conduct-based* ground of inadmissibility that does not require a conviction. However, evidence of a prostitution-related conviction can suffice. This ground applies to acts by prostitutes and procurers ("pimps"), but not by customers.[245]

Prostitution is defined under immigration law as engaging in promiscuous sexual intercourse for hire.[246] To be found to have "engaged in" prostitution, a noncitizen must be found to have engaged in conduct that indicates a pattern of behavior or deliberate course of conduct entered into primarily for financial gain or for other considerations of material value, or to have engaged in a pattern or practice of sexual intercourse for financial or other material gain.[247] A finding of a pattern or practice of prostitution requires that there be evidence of "continuity and regularity," as distinguished from "casual or isolated acts." The prostitution inadmissibility ground is not triggered by "casual or isolated acts,"[248] and does not penalize conduct less than intercourse.

B. Owning a Prostitution Business as an Aggravated Felony

Convictions for offenses related to owning, controlling, managing, or supervising a prostitution business, or for transporting for the purpose of prostitution when committed for commercial advantage, all qualify as aggravated felonies under immigration law. [249] The courts have held that the "commercial advantage" element of this provision is "circumstance specific," meaning that it does not need to be an element of the criminal offense. Thus, the government can meet its burden to establish this element of the removal ground by any substantial, credible and probative evidence (including testimony from the noncitizen).[250]

---

[244] 8 U.S.C. § 1182(a)(2)(D).
[245] *Matter of R-M-*, 7 I&N Dec. 392, 396 (BIA 1957).
[246] 22 C.F.R. § 40.24.(b); *Kepilino v. Gonzales*, 454 F.3d 1057, 1058 (9th Cir. 2006).
[247] *Kepilino v. Gonzales*, 454 F.3d 1057, 1061 (9th[t] Cir. 2006); *Matter of Gonzalez-Zoquiapan*, 24 I&N Dec. 549, 554 (BIA 2008); 22 C.F.R. § 40.24(b).
[248] 22 C.F.R. 20.40(b).
[249] 8 U.S.C. § 1101(a)(43)(K).
[250] *Matter of Gertsenshteyn*, 24 I&N Dec. 111, 114 (BIA 2007); *rev'd by Gertsenshteyn v. U.S. Dept. of Justice*, 544 F.3d 137 (2d Cir. 2008); *but see Nijhawan v. Holder*, 557 U.S. 29, 38 (2009), (calling *Gertsenshteyn v. U.S. Dept. of Justice* into severe doubt).

C. Prostitution Offenses as Crimes Involving Moral Turpitude (CIMT)

All prostitution-related convictions under RCW 9A.88 will be charged as crimes involving moral turpitude (CIMTs) under immigration law. Thus, convictions for these offenses can trigger the applicable inadmissibility and deportation grounds for noncitizens unless they qualify for the exceptions outlined in §4.2, or some other form of discretionary relief from removal.[251]

D. Washington Prostitution Crimes Under R.C.W. 9A.88

RCW 9A.88.70-85 - Promoting Prostitution & Travel for Prostitution. A conviction under any of these statutes will or is highly likely to be classified as an aggravated felony under immigration law, especially where the government can prove that the person committed the crime for "commercial advantage." A noncitizen convicted for one of these offenses will also be determined to have engaged in prostitution and, as such, trigger the inadmissibility ground outlined. These offenses will also be classified as CIMTs.

RCW 9A.88.090 – Permitting Prostitution. Although only a simple misdemeanor under Washington law, this statute risks being classified as an aggravated felony under immigration law and triggering the related inadmissibility ground described, where the government can prove that the activity "related to" the *owning, controlling, managing, or supervising* of a prostitution business; or that the activity involved travel for prostitution and the individual factually derived a commercial advantage from her conduct. This offense will be deemed a CIMT.[252]

RCW 9A.88.110 – Patronizing a Prostitute. While a conviction for this offense cannot be classified as an aggravated felony and will not fall within the prostitution-related inadmissibility ground described, it will be deemed a CIMT offense and, as such, can trigger deportation or inadmissibility grounds that result in removal and denial of lawful status and citizenship.[253]

---

[251] *Rohit v. Holder*, 650 F.3d 1085, 1089-91 (9th Cir. 2012) (holding California statute penalizing solicitation of prostitution is a CIMT offense and providing overview of case law related to classification of prostitution offenses as (or as not) CIMT offenses); *Matter of Cordoba*, 2011 WL 400449 (BIA Jan. 25, 2011) (soliciting a prostitute is a crime of moral turpitude); *Matter of Peckoo*, 2010 WL 2846299 (BIA Jun. 21, 2010) (it is well-settled that soliciting prostitution inheres moral turpitude); *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965) (soliciting a prostitute constitutes a crime of moral turpitude); *Matter of W-*, 3 I&N Dec. 231 (BIA 1948) (keeping a "bawdy house" is a crime of moral turpitude); *Matter of W-*, 4 I&N Dec. 401, 402 (BIA 1951) ("It is well established that the crime of practicing prostitution involves moral turpitude.").

[252] *Matter of Lambert*, 11 I&N Dec. 340 (BIA 1965).

[253] *Rohit v. Holder*, 650 F.3d 1085, 1089-91 (9th Cir. 2012); *but see Matter of Gonzalez-Zoquiapan*, 24 I&N Dec 549, __ (BIA 2008) (there is a question if merely soliciting prostitution is a CIMT).

4.12 CRIMINAL CONVICTIONS AS NEGATIVE DISCRETIONARY FACTORS

Almost all applications for immigration status, relief from removal or other immigration benefits (e.g., U.S. citizenship) have a discretionary component. This means that in addition to establishing statutory eligibility for the immigration benefit that the noncitizen is seeking, the applicant must also convince the immigration judge or immigration examiner that s/he deserves, as a matter of discretion, to be granted the benefit.

So, even where a criminal conviction does not trigger statutory ineligibility for an immigration benefit, it will constitute an adverse discretionary factor that a noncitizen must overcome to warrant the favorable exercise of discretion. With regard to convictions and criminal conduct, this will almost always include a showing of compliance with conditions of probation, payment of court costs and rehabilitation, or certainly no meaningful recidivism.

Discretion is only exercised after statutory eligibility is determined. Thus, if the criminal disposition does not trigger a per se bar to eligibility, the applicant will be allowed to present evidence and provide explanations. Such an application can still be denied in the exercise of discretion.[254]

[254] *See Vargas-Hernandez v. Gonzales*, 497 F.3d 919, 924 -925 (9th Cir. 2007) (Even if eligible to "adjust status" to LPR, the IJ and the BIA can consider criminal conviction in application for discretionary relief or adjustment of status); *Matter of Marchena*, 12 I&N Dec. 355 (BIA 1967) (conviction a non-CIMT did not trigger inadmissibility but applicant had failed to pay court-ordered restitution and LPR status was denied as matter of discretion); *Matter of Marin*, 16 I&N Dec. 581, 584 (BIA 1978) (factors deemed adverse to a waiver application include[]"the existence of a criminal record and, if so, its nature, recency and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability."); *Matter of Thomas*, 21 I&N Dec 20 (BIA 1995) (non-final conviction can be considered in exercise of discretion).

CHAPTER FIVE

The Importance of the Criminal Record of Conviction in Determining Immigration Consequences[1]

Table of Contents

[1] The work of attorneys Kathy Brady and Angie Junck, nationally recognized experts in the immigration consequences of crimes, contributed to this chapter. Both serve as attorneys with the Immigrant Legal Resource Center in San Francisco, California (www.ilrc.org).

5.1 THE NEXUS BETWEEN CRIMINAL & IMMIGRATION PROCEEDINGS: THE CATEGORICAL APPROACH

A. Why the Rules of the Categorical Approach Matter

Not all state criminal convictions trigger removal or denial of immigration benefits. Nor does proof of the mere existence of a potentially removable conviction suffice to enter an order of removal against a noncitizen.[2] In the majority of cases, immigration officials will use the analytical framework known as the **"categorical approach" (**and its derivative the "**modified categorical approach")**, discussed below, to determine the specific immigration consequences of a criminal conviction.

The categorical approach framework provides strict guidelines that the immigration judge must follow to decide whether a conviction for a state criminal offense is a sufficient match to the elements of the deportation or inadmissibility ground at issue.[3] As a general rule, this approach limits the analysis to the statute of conviction and, in some cases, may rely on a specified set of documents known as the record of conviction.

In addition to applying statutory construction, courts also limit the use of evidence from the criminal proceedings in subsequent immigration proceedings based on fairness and judicial efficiency.

- **Fairness**: A defendant in a criminal proceeding lacks notice that it is important to correct or dispute a particular non-element fact (e.g. the exact age of a minor victim) when doing so would not affect guilt or punishment.[4] Permitting the immigration judge in removal proceedings to search for and rely on any facts contained in the criminal record, regardless of whether they were relied upon to obtain the conviction, risks unfairly depriving the defendant of the benefit of a negotiated plea to a lesser or different offense.[5]

- **Judicial Efficiency**: Long before the present removal system was contending with its current burgeoning volume of cases, it was an established tenet of immigration law that efficient administration of removal proceedings required the immigration judge to give full faith and credit to determinations made in criminal proceedings.[6] Immigration judges

[2] The government is permitted to introduce a range of materials to establish the existence of a noncitizen's conviction. This range of materials is outlined by statute at 8 U.S.C. § 1229a(c)(3)(B) and in *United State v. Felix*, 561 F.3d 1036, 1042-43 (9th Cir. 2009).

[3] Both the U.S. Supreme Court and the Ninth Circuit have held that the categorical analysis applies in both immigration proceedings and federal criminal proceedings as the method by which to determine whether a defendant's conviction can be classified as an immigration violation, e.g. crime of moral turpitude, deportable firearms offense or aggravated felony. *See Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 185-86 (2007); *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004); *Chang v. I.N.S.*, 307 F.3d 1185, 1189 (9th Cir. 2002).

[4] *Li v. Ashcroft*, 389 F.3d 892, 900-01 (9th Cir. 2004) (Kozinski, J., concurring). *See also Navarro-Lopez v. Gonzalez*, 503 F.3d 1063, 1073 (9th Cir. 2007) *overruled by U.S. v. Aguila-Montes de Oca*, 655 F.3d 1063 (9th Cir. 2011).

[5] *Taylor*, 495 U.S. at 601-602.

[6] *See generally* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1688-1698 (2011) (discussing the origins of the categorical approach in immigration law).

have been precluded from going behind a criminal conviction to decide removability and in most cases are only permitted to consult the record of conviction for limited purposes discussed herein.[7]

B. The Categorical Approach Often Determines Whether Immigration Consequences Are "Clear" or "Unclear," Informs Effective Plea Negotiations and Impacts the Creation of the Record of Conviction

Given the importance of a judge's role in creating the criminal record that will follow a noncitizen defendant into immigration proceedings, it is important that judges presiding over criminal cases have a basic understanding of how the records developed in state court criminal proceedings play a critical role in subsequent immigration proceedings. Additionally, in many cases, applying the categorical and modified categorical approach is essential to determine whether a conviction's immigration consequences (such as removal) are "clear" or "unclear" as articulated by the U.S. Supreme Court in *Padilla v. Kentucky.*[8]

Under the Supreme Court's decisions in *Padilla* and *Missouri v. Frye*,[9] defense counsel representing noncitizen clients has a duty to advise his/her client regarding immigration consequences and a duty to seek to avoid or mitigate potential adverse immigration consequences.[10] Where relevant, defense counsel will need to create a record that not only comports with Washington law, but that also ensures that the noncitizen defendant is not at risk of losing a crucial benefit of the plea bargain, namely avoiding or mitigating the subsequent immigration consequences.[11]

EXAMPLE: Noncitizen Defendant, George, Convicted by Plea of Assault 4th Degree – DV

George's conviction will clearly trigger the domestic violence (DV)-related deportation ground if it is classified as a "crime of violence" (COV) under federal law's 18 U.S.C. § 16(a), which requires that the offense have as an element the use or threatened use of force. [12] George's

---

[7] *Aguilar-Turcious v. Holder*, 656 F.3d 1025, 1032 (9th Cir. 2012) ("We have identified two important goals service by this limited inquiry into a past conviction: First, I confines our inquire to the fact of conviction and avoids the need to rummage through the 'actual proof at trial' to see 'whether the defendant's conduct constituted [a] generic [immigration offense], preventing possible 'trial over trials'. Second, by relying exclusively on the crime of conviction, we avoid situations where the government arguably could prove that the defendant actually committed a greater offense, one that would satisfy the generic [immigration] crime, but would deprive the defendant of his conviction (or plea to) a lesser charge.") (internal citations omitted).

[8] 130 S.Ct. 1473, 1483 (2010).

[9] 132 S.Ct. 1399 (2012).

[10] *Padilla*, 130 S.Ct. at 1486 ("[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process….The severity of deportation-"the equivalent of banishment or exile," only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation) (internal citations omitted); *Frye*, 132 S.Ct. at 1403 ("The [*Padilla*] Court made clear that negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel); *Frye* at 1407 ("criminal defendants require effective counsel during plea negotiations.").

[11] The *Padilla* Court recognized that it is a legitimate consideration for defense counsel, prosecutors and courts to factor immigration consequences into the various stages of the criminal proceedings, including plea negotiations and sentencing. *Padilla*, 130 S.Ct. at 1480.

[12] *See* 8 U.S.C. § 1227(a)(2)(E)(i).

conviction will clearly not trigger this deportation ground if it lacks the requisite use of force. The immigration judge in removal proceedings will review George's record of conviction, in particular the factual basis for his plea, to determine whether it matches the federal COV definition.

Under Washington law, a defendant can be convicted of Assault 4th degree in one of three ways, two of which match the COV definition's requisite use of force and one that does not (offensive touching).[13] If George's plea statement reveals that he was convicted of "offensive touching," or does not specify the manner in which the assault was committed[14] it will clearly not be classified as a COV and cannot trigger this deportation ground.[15] Conversely, where the plea (or other documents used as the factual basis for the conviction) reveal that George punched, slapped, choked or otherwise used more than *de minimis* force, the conviction will clearly will trigger the DV-deportation ground.[16]

5.2 HOW IMMIGRATION JUDGES USE THE CATEGORICAL APPROACH TO DETERMINE WHETHER A NONCITIZEN'S CONVICTION TRIGGERS IMMIGRATION PENALTIES, SUCH AS REMOVAL

Crime-related penalties under immigration law include loss of lawful immigration status (such as a green card or refugee status), bars to obtaining future lawful immigration status, or ineligibility for certain immigration benefits such as U.S. citizenship. As highlighted in Chapter One, most, but not all, crime-related penalties under the immigration statute require a conviction in order to apply.[17]

Consequently, in most removal proceedings involving criminal convictions, immigration authorities will use the categorical and modified categorical analysis outlined below to determine whether the conviction triggers the immigration penalty. As this framework often relies upon the documents developed in the criminal court that become the "reviewable record of conviction" for immigration purposes, those documents can, and often do, play a critical role in subsequent immigration proceedings.

---

[13] *State v. Hupe*, 50 Wn.App. 277, 282, 748 P.2d 263 (1988) ("Three definitions of assault have been recognized by Washington courts: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is incapable of inflicting that harm.") .

[14] E.g., plea language that states "On August 8th 2010, I committed an assault against the victim that did not amount to Assault 1, 2, or 3."

[15] *Suazo Perez v. Mukasey*, 512 F.3d 1222, 1227 (9th Cir. 2008).

[16] *See U.S. v. Gonzalez-Tamariz*, 310 F.3d 1168 (9th Cir. 2002) (Nevada conviction for battery causing substantial bodily harm was COV under 18 U.S.C. § 16 and therefore an aggravated felony).

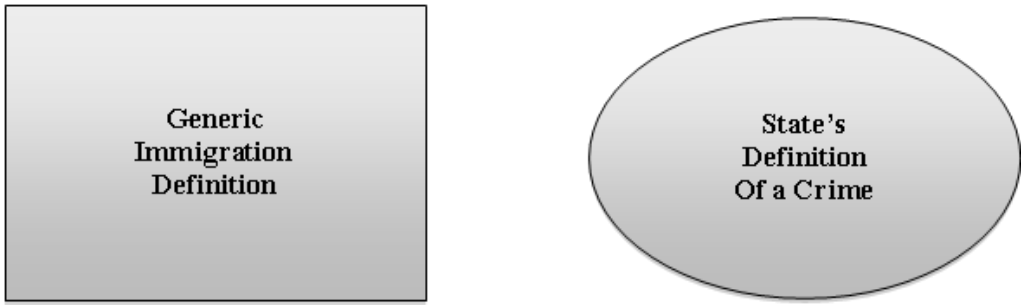
[17] As highlighted in Chapter 2, most, but not all, crime-related provisions of the immigration statute require convictions in order to apply. The crime-related immigration provisions that do not require a conviction are not subject to the strict evidentiary standards of the categorical approach framework. *See Nijhawan v. Holder*, 557 U.S. 29, 40 (2009). While criminal court records can play an important role in non-conviction-based removal provisions, the lower evidentiary standards that govern these determinations generally make them less critical to the outcome. Consequently, the information in this chapter will focus on conviction-based immigration provisions that are subject to the categorical approach.

KEY POINT: The information contained in the documents that make up the record of conviction is often the determining factor as to whether or not the state conviction triggers removal (or some other immigration penalty).

A. The Categorical Approach: Do the Statutory Elements or Facts Necessary to the Conviction Sufficiently Match the Immigration Removal Ground at Issue?[18]

The basic idea behind the categorical approach is that federal immigration law uses a single definition for certain types of removable offenses (such as "theft" or "domestic violence") in order to promote consistency. This definition is known as the "generic definition" of the immigration provision and is either expressly defined by Congress in the immigration statute or by federal caselaw.[19] However, state criminal codes often use a different set of elements to define the criminal offense that may or may not sufficiently match up with the immigration statute's generic definition. Making the determination as to whether (or not) the elements of the state offense of conviction sufficiently match the generic definition of the ground of deportation or ground of inadmissibility at issue is the primary task of the immigration judge when applying the categorical analysis in removal proceedings.

It helps to conceive of this visually. Here, the square represents the generic immigration definition of an offense while the circle represents the state's definition:

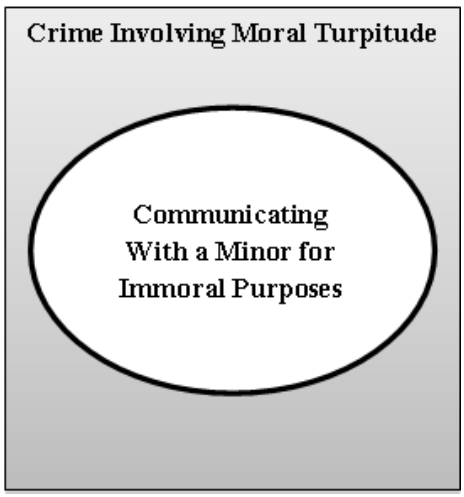


If all of the criminal conduct covered by the state's definition of its crime falls within the generic immigration definition, all convictions under the state statute will "categorically" trigger the immigration provision at issue.

[18] This section was adapted and used with permission from Kara Hartzler, *Surviving Padilla: A Defender's Guide To Advising Noncitizens on the Immigration Consequences of Criminal Convictions*, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT (2011), *available at* http://www.firrp.org/resources/criminaldefense/.

[19] *See, e.g.*, 8 U.S.C. § 1101(a)(43)(F) (defining a crime of violence by referencing 18 U.S.C. § 16); *U.S. v. Corona-Sanchez*, 291 F.3d 1201, 1205 (9th Cir. 2002) (en banc) (establishing a generic definition of "theft offense" under 8 U.S.C. § 1101(a)(43)(G)).

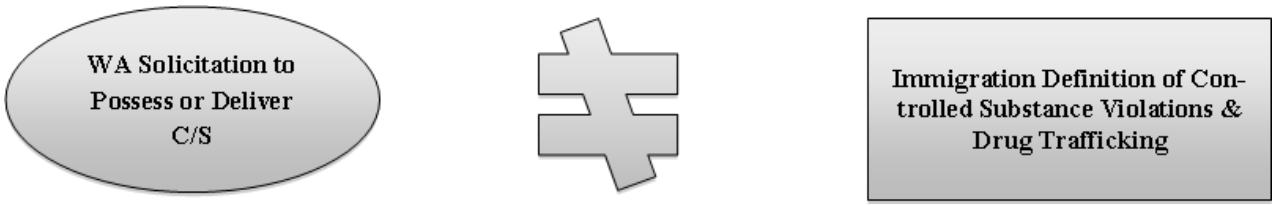
CATEGORICAL MATCH



EXAMPLE: Communicating With A Minor For Immoral Purposes (CIMP) under R.C.W. 9.68A.090. The Ninth Circuit has held that all conduct prohibited under this statute comes within the generic definition of what constitutes a "crime involving moral turpitude" (CIMT) under immigration law. Thus, CIMP will be deemed "categorically" a CIMT for immigration purposes and, unless one of the statutory exemptions apply, all convictions under this statute will trigger the CIMT grounds of deportation and inadmissibility *regardless of what information is contained in the criminal record*.[20]

NOT A CATEGORICAL MATCH

Conversely, some criminal statutes punish conduct that falls completely outside the scope of the immigration statute's generic definition. Convictions under these statutes are deemed to not "categorically" match the generic definition of the immigration provision at issue and, thus, cannot trigger grounds of deportation or inadmissibility.



EXAMPLE: The Ninth Circuit has held the generic immigration definition of the removal grounds relating to controlled substance violations[21] does not include solicitation-related drug offenses.[22] As such, *regardless of what is contained in the criminal record*, a conviction under R.C.W. 9A.28.030 for solicitation to either possess or deliver a controlled substance is categorically not a match to these drug-related immigration provisions and will not trigger these removal grounds.

[20] *Morales v. Gonzalez*, 472 F.3d 689, 694 (9th Cir. 2007). See §4.2 for more information regarding crimes of moral turpitude and the immigration consequences of having a crime that is classified as such under immigration law.
[21] 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i), 1227(a)(2)(A)(iii), 1101(a)(43)(B).
[22] A conviction for a drug-related solicitation offense under R.C.W. 9A.28.030 cannot be classified as a drug-trafficking aggravated felony under 8 U.S.C. § 1101(a)(43)(B). *Leyva Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999); *U.S. v Rivera Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc). It also does not trigger deportation as a controlled substance violation. *Coronado Durazo v. INS*, 123 F.3d 1322, 1323 (9th Cir. 1997). WA's solicitation statute is on par with the Arizona solicitation statue considered in these cases.

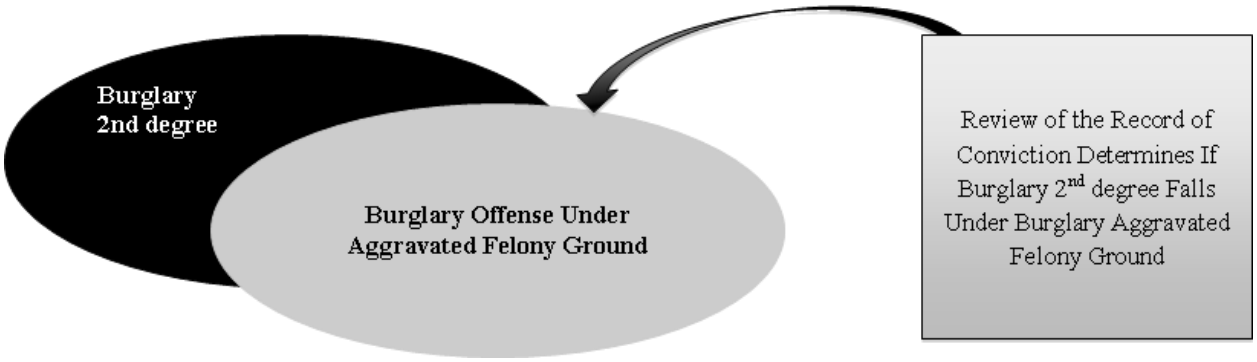
B. The Modified Categorical Approach: The Importance of the Criminal Record of Conviction

In many cases it is unclear whether the conviction is clearly or "categorically" a match (or not) to the removal ground at issue because the statute of conviction is "broader" in that it covers multiple crimes, only some of which match the elements of the generic immigration definition of the removal ground. Under these circumstances, U.S. Supreme Court caselaw directs immigration courts to engage in the **"modified categorical approach."** [23]

The modified categorical approach permits the immigration judge to consult the limited set of documents from the record of the criminal proceedings, known as the "reviewable record of conviction" to clarify whether (or not) the defendant's conviction matches the definition of the removal ground at issue. See §6.2(A) *supra* for an outline of the documents that do and do not make up the record of conviction. In cases involving the modified categorical approach, the specifics of what happened in criminal court - as contained in the reviewable record of conviction - will determine whether the conviction triggers the ground of deportation or inadmissibility.

EXAMPLE #1: The Modified Categorical Approach & Burglary 2nd Degree

Federal courts have defined the "generic" definition of burglary "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[24] Since Washington's definition of "building" under R.C.W. 9A.04.110 is broader than this generic definition (it includes, e.g., cargo containers and fenced areas), it does not categorically match. As such, to determine whether a particular noncitizen's Burglary 2nd degree conviction constitutes a "burglary offense" under immigration law, the immigration judge will consult the



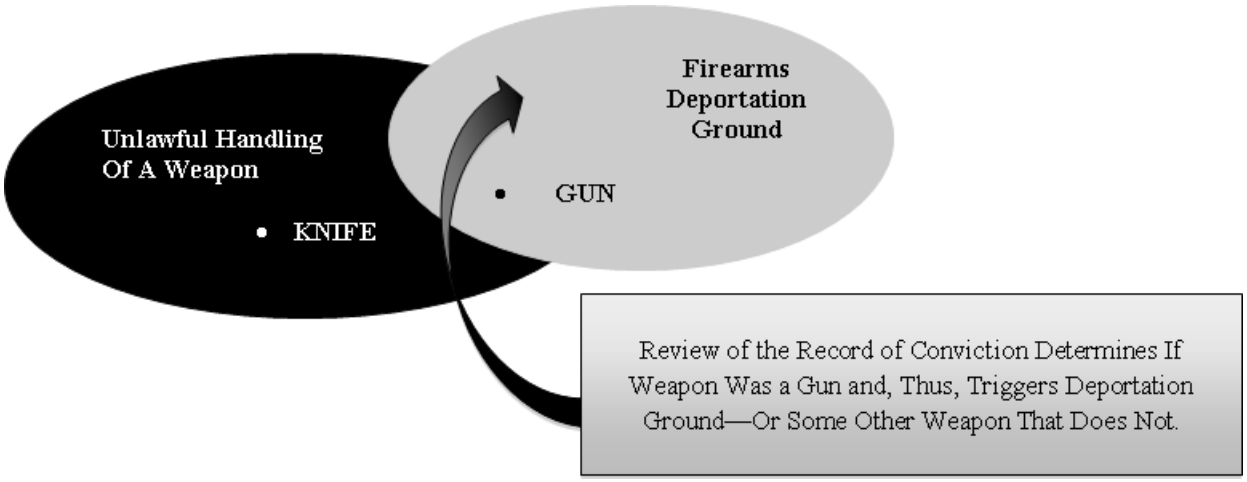
[23] *Nijhawan v. Holder*, 557 U.S. 29, 31 (2009). In *Nijhawan v. Holder*, the U.S. Supreme Court stated that the immigration court can apply a "modified categorical" analysis where a state statute contains "different crimes, each described separately" (either in the statute itself or in caselaw interpreting it), at least one of which has elements that are a categorical match with the generic definition. In *Johnson v. United States*, 130 S.Ct. 1265, 1273 (2010), the Court stated that "[w]hen the law under which the defendant has been convicted contains *statutory phrases that cover several different generic crimes*… the 'modified categorical approach' that we have approved permits a court to determine *which statutory phrase* was the basis for the conviction by consulting the trial record…." (internal citations omitted) (emphasis added).

[24] 8 U.S.C. § 1101(a)(43)(G); *Taylor v. United States*, 495 U.S. 575, 598 (1990).

reviewable record of conviction to identify what type of structure the defendant was convicted of unlawfully entering or remaining in. Where the record indicates that the conviction is predicated upon entry of a space (e.g., a railway car or fenced yard), or where the record is unclear, the conviction clearly will not be classified as an aggravated felony.[25]

EXAMPLE #2: Modified Categorical Approach & Unlawful Handling of a Weapon

Unlawful Carrying/Handling of a Weapon under R.C.W. 9.41.270 is another example of a state statute that includes some offenses which can trigger removal and some that do not since it lists numerous types of weapons that can be unlawfully displayed, one of which is a gun (firearm).[26] If the noncitizen defendant is convicted of this offense using a gun he will trigger this deportation ground. If he is convicted using a knife (or any weapon other than a gun) he will not. To clarify whether a specific conviction involved a gun, an immigration judge will consult the reviewable record of conviction. If the record of conviction clearly shows that the defendant was convicted for unlawful display of a firearm it will clearly trigger the firearms ground of deportation; whereas if the conviction was for display of a knife, or the record only indicates "weapon" but does not specify what type, it clearly will not.



[25] *See Taylor v. U.S.*, 495 U.S. at 599-602. Note that Burglary 1st degree (R.C.W. 9A.52.020) and Residential Burglary (R.C.W. 9A.52.025) will always be deemed "crime of violence" aggravated felonies under 8 U.S.C. 1101(a)(43)(F) where the term of imprisonment is at least one year (regardless of time suspended). *See United States v. Becker*, 919 F.2d 568, 571 (9th Cir. 1990).

[26] The deportation ground relating to firearms violations are at 8 U.S.C. § 1227(a)(2)(C).

C. The Record of Conviction Documents for Immigration Purposes

The "record of conviction" (ROC) for immigration purposes is limited to a specific universe of documents from the criminal proceedings. It is this list of documents that follow the noncitizen defendant into removal (or other immigration) proceedings, and that the immigration judge is permitted to consult when applying the categorical and modified categorical approach framework outlined below.[27] The U.S. Supreme Court has made clear which documents do, and do not, comprise the reviewable record of conviction for immigration purposes.[28]

- **The ROC in a conviction by plea includes the following documents**:

  - ✓ The statutory definition of the crime (including caselaw defining elements of an offense);
  - ✓ Charging documents related to the offense of conviction:[29]
  - ✓ Written plea agreements;
  - ✓ Admissions at a colloquy between judge and defendant:[30] and
  - ✓ Any explicit factual finding by the trial judge to which the defendant assents; or
  - ✓ Some other "comparable judicial record" of information about the factual basis for the plea.[31]

Where the conviction was by jury, the Supreme Court has held that the complaint, jury instructions, and verdict can be used to the extent that they clearly establish that the defendant was convicted of an offense containing the elements of the "generic definition" of the immigration provision at issue.[32] Where a court conducts a bench trial, the judge's formal rulings of law and findings of fact will be part of the reviewable record of conviction. [33]

- **The record of conviction does NOT include the following:**

- ✓ A Presentence Report[34];
- ✓ Certificate of Probable Cause;
- ✓ Arrest reports[35];

---

[27] Distinct from determinations regarding whether a conviction triggers removal grounds or renders a noncitizen ineligible for discretionary relief, immigration authorities are permitted to consult any relevant, credible evidence in order to make determinations as to whether a noncitizen deserves to be granted relief.

[28] *Shepard v. U.S.*, 544 U.S. 13, 26 (2005) (citing *Taylor v. U.S.*, 495 U.S. 575, 602 (1990)).

[29] Charging papers alone are never sufficient, however. *U.S. v. Hernandez-Hernandez*, 431 F.3d 1212, 1223 (9th Cir. 2005); *Martinez-Perez v. Gonzales*, 417 F.3d 1022, 1028 (9th Cir. 2004); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) ("charging documents in combination with a signed plea agreement, jury instructions, guilty pleas, transcripts of a plea proceeding, and the judgment may suffice to document the elements of conviction…."); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc).

[30] *Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 325 (BIA 1996).

[31] *Shepard v. United States*, 544 U.S. 13, 26 (2005).

[32] *Taylor v. United States*, 495 U.S. 575, 602 (1990).

[33] *Shepard*, 544 U.S. at 14 ("In cases tried without a jury, the closest analogs to jury instructions would be a bench-trial judge's formal ruling of law and finding of fact….").

[34] *See Hernandez-Martinez v. Ashcroft*, 343 F.3d 1075, 1076 (9th Cir.2003); *United States v. Pimental-Flores*, 339 F.3d 959, 968 (9th Cir. 2003); *Abreu-Reyes v. I.N.S.*, 350 F.3d 966 (9th Cir. 2003) *reversing* 292 F.3d 1029 (9th Cir. 2002); *Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc).

- ✓ Statements by prosecutor only;
- ✓ Dropped or dismissed charges, complaints or informations.

However, **where these documents or facts are stipulated by the defendant as providing the factual basis for the plea, they will be deemed incorporated into the reviewable ROC**.[36]

NOTE: Alford Pleas for Noncitizens. An *Alford* plea that specifically references any of the above documents as the factual basis for the plea will make these documents part of the record of conviction for immigration purposes.

D. Current Rules and Controversy Regarding Consultation of the Criminal Record in Removal Proceedings

The parameters for when, and for what purpose, immigration authorities can review the record of conviction under the modified categorical approach has been the subject of extensive litigation since it was officially incorporated into immigration proceedings over 20 years ago. However, the U.S. Supreme Court, along with most of the federal circuit courts, has consistently prevented courts from reviewing the record of conviction in search of *facts* to warrant triggering a removal ground where a criminal statute was not a sufficient match because it was missing an *element* of the removal ground. Prevailing case law only permitted immigration courts to engage in a review of the record of conviction for the limited purpose of *clarifying the elements of the specific statutory provision* under which the defendant was convicted when the statute at issue had multiple provisions or multiple means of committing an offense.[37]

---

[35] *Matter of Teixeira*, 21 I& N Dec. 316, 319-20, n.2 (BIA 1996).

[36] "Although police reports and complaint applications, standing alone, may not be used to enhance a sentence following a criminal conviction, the contents of these documents may be considered in removal proceedings if specifically incorporated into the guilty plea or admitted by a defendant." *Parrilla v. Gonzales*, 414 F.3d 1038, 1044 (9th Cir. 2005) (Certification for Determination of Probable Cause, incorporated by reference into guilty plea, demonstrated that conviction met the definition of sexual abuse of a minor) (internal citation omitted); *see also United States v. Espinoza-Cano*, 456 F.3d 1126, 1132-33 (9th Cir. 2006) (police report could be considered in determining whether prior conviction qualified as an aggravated felony because report was incorporated by reference into the charging document and stipulated to formed the factual basis of a guilty plea).

[37] *See generally, Shepard v. United States,* 544 U.S. 13 (2005) and *Taylor v. United States*, 495 U.S. 575 (1990). Traditionally, consultation of the record of conviction under the modified categorical approach has been limited to permitting the immigration judge to consult the record of conviction to clarify which specific provision of a criminal statute was the subject of the defendant's conviction, or to identify the specific elements of the defendant's conviction in order to compare them with the removal ground at issue. The U.S. Supreme Court has twice reaffirmed these limitations in recent decisions. *See generally U.S. v. Johnson*, 130 S.Ct. 1265 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009).

However, in a controversial opinion in ***U.S. v. Aguila-Montes de Oca*[38] *(Aguila)***, the Ninth Circuit recently altered this landscape when it held that immigration authorities and courts must consult the record of conviction *in all cases* where a criminal statute is deemed "broader" than the generic definition of the removal ground at issue, i.e., when there is any question as to whether the conviction categorically is or is not a match to the removal ground's generic definition.[39]

In these instances, the Ninth Circuit directed the immigration courts to consult the record of conviction to determine the following:

What are *the facts* upon which the conviction "necessarily rested" (that is, what facts the trier of fact was actually required to find); and
Whether these *facts* satisfy the elements of immigration law's generic definition of the offense.[40]

Under this new "revised" version of the modified categorical analysis, immigration courts will now be reviewing the record of conviction more frequently. More importantly, **the focus of this review has now shifted from the *elements of the statute of conviction*, to the exact *factual basis* for a defendant's plea as evidenced by the record of conviction**. Consequently, for many noncitizen defendants, the factual basis for the plea, as referenced in the record of conviction, will, in many cases, determine the immigration consequences of the conviction.

- **Examples of Post-*Aguila* Application of the Modified Categorical Approach Where Defendant's Factual Basis for Her Plea Determines Immigration Consequences**

EXAMPLE 1: Negligent Felony Assault Involving a Gun – Assault 3rd degree under R.C.W. 9A.36.031(f) (negligent assault) has traditionally never been classified as an offense that triggers any grounds of deportation or inadmissibility (even if DV-related).[41] Under pre-*Aguila* caselaw, this offense also could never trigger the firearms ground of deportation, even if the record contained the fact that the assault was committed with a firearm, because use of a firearms was not an element of the crime. [42] Now, the government can sustain removal charges under the

[38] 655 F.3d 915 (9th Cir. 2011).
[39] *See Flores-Lopez v. Holder*,685 F.3d 857 (9th Cir. 2012) (summarizing *Aguila*'s new approach to the modified categorical analysis). It is not at all clear that *Aguila*'s new approach will survive Supreme Court scrutiny. The federal circuit courts of appeal agree that under recent U.S. Supreme Court precedent, the modified categorical approach only permits consulting the record of conviction to identify under which particular statutory provision the accused was actually convicted, but not, as *Aguila* directs, as a means of bringing a conviction within the scope of a removal ground where the statute of conviction lacks an element of the ground at issue. *See generally Nijhawan v. Holder*, 557 U.S. 29, 31 (2009); *U.S. v. Johnson*, 130 S.Ct. 1265, 1273 (2010).
[40] *Aguila*, 655 F.3d at 936.
[41] Assault 3rd degree under §(f) cannot be deemed a crime involving moral turpitude (CIMT), nor a crime of violence (COV), under immigration law due to its negligent mens rea. *See Matter of Silva-Trevino*, 24 I&N Dec. 687, 688 (A.G. 2008) (CIMT offenses require mens rea of more than negligent); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (COV under immigration law requires same).
[42] *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617 (BIA 1992); *see also* 8 U.S.C. § 1227(a)(2)(C) (the deportation ground relating to firearms violations).

firearms deportation ground where the reviewable record of conviction shows that the assault was committed with the use of a gun.

EXAMPLE 2: Misdemeanor Assault Involving a Minor Victim – A conviction deemed to be a crime of "child abuse, abandonment or neglect" will trigger a ground of deportation. Assault 4th degree will qualify as "abuse" under the generic immigration law definition.[43] Consequently, even though a victim's minor status is not an element of Assault 4th degree, under *Aguila*'s test, where the record of conviction includes the fact that the victim was a minor, an Assault 4th degree conviction will now trigger this grounds of deportation.

5.3 THE CRIMINAL COURT'S ROLE & PRACTICES IN LIGHT OF THE CATEGORICAL APPROACH

A. Providing Informed Consideration when Creating the Criminal Record

Giving informed consideration to the immigration consequences facing a noncitizen defendant may require paying attention to how the documents that comprise the record of conviction are created. These documents are part of immigration proceedings and serve as the critical link to determine whether the conviction triggers removal or some other immigration penalty.

The two primary ways in which the court's actions can impact the record of conviction and the outcome of removal proceedings are:

- The creation of the record of conviction, particularly with regard to the factual basis requirements of a knowing and voluntary plea; and
- The sentence imposed.[44]

B. The Importance of the Factual Basis for a Noncitizen's Plea

When an immigration judge is reviewing the record of conviction under the modified categorical approach, the information that sets forth the factual basis for the conviction is, without doubt, the most important. In most cases, it will be the factual basis contained in the noncitizen defendant's statement on plea of guilty that will identify the "facts upon which the conviction necessarily rests." It will be these facts which determine whether the conviction is a categorical match to the generic definition of the removal ground at issue and, thus, triggers removal or other immigration penalties.

[43] 8 U.S.C. § 1227(a)(2)(E)(i). The Board of Immigration Appeals has defined the generic definition of "child abuse, abandonment or neglect" broadly to essentially include any crime, regardless of mens rea, that involves an "act or omission that constitutes maltreatment of a child." *See Matter of Soram*, 25 I&N Dec. 378, 381 (BIA 2010); *Matter of Velasquez-Herrera* 24 I&N Dec. 503, 512 (BIA 2008).

[44] *See* Chapter Seven.

Defense counsel complying with his/her Sixth Amendment obligations should address immigration issues prior to advising the client to enter a plea and negotiate accordingly with the prosecutor. As neutral decision-makers, judges should recognize that defense counsel and the prosecutor may have reached an agreement during plea negotiations as to what are the "facts upon which the plea rests" and this may in fact be a critical piece to the plea agreement.

C. Knowing and Voluntary Plea

The purpose of knowing and voluntary requirements. The U.S. Constitution requires that a plea be voluntary, knowing, and intelligent. A defendant must understand the "essential elements of the charge to which he pleads guilty."[45] A plea is not knowing if based on misinformation.[46] The only purpose of a factual basis requirement is to insure that a plea is truly voluntary and knowing.[47]

A plea is knowing, voluntary, and intelligent where the accused understands the nature and elements of the *original* charges, the nature and elements of the charge to which she is pleading, and how the alleged conduct relates to those elements. This is true even if the defendant pleads to a charge that she knows to be a legal fiction or contain some technical deficiency, if she does so knowingly in order to receive the benefit of a bargain.

The Washington Supreme Court has articulated the standard for a knowing and voluntary plea as follows:

> "What must be shown is that the accused understands the nature and consequences of the plea bargain and has determined the course of action that he believes is in his best interest."[48]

1. Knowing & Voluntary Pleas in Light of Criminal Court Rule 4.2(d)

In accordance with criminal rule 4.2, a court shall not enter a judgment on the plea unless it is satisfied there is a factual basis for the plea. A judicial officer may rely upon the facts set forth in the plea agreement or in the defendant's written statement in the plea agreement as the factual basis and need not incorporate the certification for probable cause or police reports if it is a straight plea for purposes of complying with criminal rule 4.2.

---

[45] *McCarth*y, 394 U.S. at 467–68 n.20.
[46] *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011).
[47] *State v. Zhao*, 157 Wash.2d 188, 200, 137 P.3d 835 (2006) ("Since the factual basis requirement, both in case law and in this court's rule is founded on the concept of voluntariness, we hold that a defendant can plead guilty to amended charges for which there is no factual basis, but *only* if the record establishes that the defendant did so knowingly and voluntarily and that there at least exists a factual basis for the original charge, thereby establishing a factual basis for the plea as a whole") (emphasis in original).
[48] *Id*. at 269-270 (internal citations omitted) (italicization added); *See North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

D. The Use of *In Re Barr* Pleas and Noncitizen Defendants

Where the original charges will clearly trigger removal grounds, counsel may negotiate with the prosecutor and advise her/his client to enter an *In Re Barr* plea to an alternative offense and it will not trigger removal grounds (or will preserve the noncitizens eligibility to seek discretionary relief from the immigration judge in removal proceedings).

1. What is an *In Re Barr* Plea?

In *In Re Barr*, the Washington Supreme Court upheld the trial court decision to permit an accused person to plead guilty to a substitute charge that was a legal fiction in order to receive the benefit of a plea bargain.[49] In *In re Personal Restraint of Barr*,[50] a defendant was permitted to plead to an offense different and less serious than the one originally charged, even though there was no factual basis for the substituted charge. Mr. Barr was originally charged with one count of second degree statutory rape and one count of third degree statutory rape. He pled guilty to one substituted count of indecent liberties.

> Barr brought a post-conviction motion arguing that the court had accepted the plea without obtaining a sufficient factual basis for the indecent liberties charge. Barr asserted that the plea was invalid because it did not comply with court rule CrR 4.2(d) and that the plea was constitutionally invalid, since without knowing the elements of indecent liberties he could not have made a voluntary and intelligent plea.[51]
>
> The Washington Supreme Court dismissed Barr's claim and held that the plea to the substituted offense was knowing and voluntary because the record established a factual basis for the crimes originally charged and the defendant was aware that the evidence available to the State on the original offense would have been sufficient to convince a jury of his guilt. [52] At his plea proceeding Mr. Barr acknowledged that he understood the charge and had received copies of the police reports filed, and that he understood that the evidence was sufficient to support conviction on the original charges.[53]

---

[49] *In re Barr*, 102 Wn.2d 265, 684 P.2d 712 (1984); *State v. Zhao*, 157 Wn.2d 188, 137 P.3d 835 (2006). *State v. Robinson*, 172 Wn.2d 783, 788 (2011) (he Washington Supreme Court reaffirmed *Barr*).

[50] *In re Barr*, 102 Wn.2d 265 (1984), *holding modified by Matter of Hews*, 108 Wn.2d 579, 741 P.2d 983 (1987). *Hews* clarified that the accused still must understand the critical elements of the charge to which he is pleading, but a technical infirmity does not invalidate a plea. *Hews*, 108 Wn.2d at 592-93. The defendant in *Barr* erroneously believed that the victim was 14 and that the crime of indecent liberties encompassed victims of 14 years *or* less. In fact, the crime required that the victim be *under* 14, and so the information was potentially defective. *Id*.; *Barr*, 102 Wn.2d at 270. The *Barr* court held that although the defendant's understanding of the law and facts was technically deficient, the defendant did understand the essential nature of the charges, and was not misled. *Hews*, 108 Wn.2d at 593-94.

[51] *Id*. at 268. The Court only directly addressed the alleged constitutional violation, holding that Barr could not collaterally challenge a merely procedural requirement in his Personal Restraint Petition.

[52] *Id*. at 270.

[53] *Id*.

2. In *State v. Zhao* the Supreme Court Clarified the Requirements for a *Barr* Plea

In *State v. Zhao*[54] the accused was originally charged with two counts of first degree child molestation. In order to take advantage of a plea bargain, Mr. Zhao pleaded guilty to two counts of conspiracy to commit indecent liberties and one count of second degree assault, even though there was no co-conspirator.[55]

The *Zhao* court held that "[t]he factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty." There must only be sufficient evidence, from any reliable source, such that a jury could find guilt on the original charge.[56]

When pleading to an amended charge "for which there is no factual basis" (or insufficient factual basis), the validity of the plea turns on both the trial judge's and the defendant's understanding of the infirmity in the amended charge and the voluntariness of the plea.[57] Underpinning this validity is the acknowledgement that the defendant is knowingly getting an actual benefit from the plea (avoiding the danger of conviction on the original charge).[58]

Zhao clarified that, since the purpose of the factual basis requirement, both in case law and in the court rule, is to ensure voluntariness, a defendant can plead guilty to amended charges for which there is no factual basis, but only when "the record establishes that the defendant did so knowingly and voluntarily and that there at least exists a factual basis for the original charge, thereby establishing a factual basis for the plea as a whole."[59] Given that the courts presume that plea deals are validly negotiated contractual agreements,[60] the court's primary role in accepting the plea is to ensure that the defendant is making an informed choice.

---

[54] *State v. Zhao*,157 Wn.2d 188, 137 P.3d 835 (2006) (*State v. Zhao* was a direct appeal, and unlike *Barr*, the Court addressed the requirements of CrR 4.2(d)).
[55] *Id.* at 190.
[56] *Zhao*, 157 Wn.2d at 198 (internal citations omitted). Mr. Zhao then entered an *Alford* plea to the amended, legally fictitious charges. An *Alford* plea allows a defendant to plead guilty in order to take advantage of a plea-bargain even if he or she is unable or unwilling to admit guilt. *See State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976) (citing *N. Carolina v. Alford*, 400 U.S. 25, 31 (1970)). When entering a *Barr* plea, however, the additional step of an *Alford* plea is generally not desirable for noncitizens.
[57] *Zhao*, 157 Wn.2d at 199. "The advisory committee drafting Fed.R.Crim.P. 11 was of the unanimous view 'that a specific finding in the record (of a factual basis) is unnecessary, and that the pronouncement of judgment is sufficient indication that the required determination has been made.'" *Id.* (internal citations omitted).
[58] *Barr*, 102 Wn.2d at 269-270.
[59] *Zhao*, 157 Wn.2d at 200.
[60] *Robinson*, 263 P.3d at 1233; *see also U.S. v. Arnett*, 628 F.2d 1162, 1164 (9th Cir. 1979).

CHAPTER SIX

Convictions Under Immigration Law[1]

Table of Contents

As highlighted throughout these materials, most (but not all) crime-related immigration penalties require that there be a conviction in order to trigger consequences. The immigration statute specifically defines what constitutes a conviction under immigration law, and this definition is distinct from Washington State law.

[1] The work of attorneys Kathy Brady and Angie Junck, nationally recognized experts in the immigration consequences of crimes, contributed to this chapter. Both serve as attorneys with the Immigrant Legal Resource Center in San Francisco, California (www.ilrc.org).

6.1 CONVICTIONS DEFINED UNDER IMMIGRATION LAW

A. The State's Definition of a Conviction Is Irrelevant for Immigration Purposes.

The Immigration and Nationality Act has had its own, statutory definition of a conviction for immigration purposes since 1997. That definition is as follows:

> The term conviction means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where
>
> > (i) a judge or jury has found the alien guilty or the alien 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 alien's liberty to be imposed.[2]

Regardless how Washington law treats the case or defines a conviction, it is this definition that will control in any subsequent immigration proceeding.

B. Convictions Exist in Perpetuity for Immigration Purposes

Unless vacated for cause, any resolution that meets this definition will be a conviction permanently and in perpetuity for immigration purposes, even where the convicting jurisdiction holds that no conviction exists. A resolution that matches the above definition becomes a conviction for immigration purposes at the time that it is entered and will remain a conviction in perpetuity for immigration purposes regardless of subsequent state court action (unless vacated for cause). For example, a noncitizen defendant enters a plea of guilty for possession of a controlled substance under R.C.W. 69.50.4013 and is granted a 24 month deferred sentence with conditions. This resolution will be a permanent conviction under immigration law even if the defendant complies with conditions and the court subsequently permits a withdrawal and dismissal under state law.[3]

C. *Nolo Contendre* and *Alford* Pleas Constitute Convictions Under Immigration Law

The statutory definition of conviction for immigration purposes includes a "plea of nolo contendere".[4] Therefore, such a plea does not insulate a defendant from having a conviction for immigration purposes.

Courts have long, and consistently, held that *Alford* pleas are analogous to *nolo contendere* pleas and that they are convictions under state and federal criminal law.[5] They are also clearly

---

[2] 8 U.S.C. § 1101(a)(48)(A).
[3] *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).
[4] 8 U.S.C. § 101(a)948)(A)(i).

convictions under the immigration statute's definition.[6] As outlined in Chapter 5, the factual basis for a defendant's plea is often the critical determining factor as to whether removal grounds are triggered.

D. Infractions Are Not Convictions Under Immigration Law

Infractions are certain minor offenses handled in non-conventional criminal proceedings that do not require the usual constitutional protections such as access to counsel and right to jury trial.[7] The Board of Immigration Appeals (BIA) has held that this type of disposition will not be considered a conviction for immigration purposes.[8] The BIA held that the phrase "judgment of guilt," appearing in the immigration statute's definition of conviction, is "a judgment in a criminal proceeding, that is, a trial or other proceeding whose purpose is to determine whether the accused committed a crime and which provides the constitutional safeguards normally attendant upon a criminal adjudication."[9]

E. No Finality Requirement to Trigger Immigration Consequences

Recently, the Ninth Circuit overturned decades of precedent to eliminate the requirement that a conviction will only be classified as such under immigration law where it is deemed final under state law. In *Planes v. Holder*, a Ninth Circuit panel held that that under the immigration statute's definition the term "conviction" means a formal judgment of guilt against a noncitizen entered by a court, regardless whether appeals have been exhausted or waived. Consequently, the government will now proceed with removal proceedings and deport noncitizens even where a timely appeal of right is pending.[10]

6.2 WHAT CONSTITUTES "PUNISHMENT" UNDER THE IMMIGRATION STATUTE'S DEFINITION

In addition to jail time, most criminal court sanctions including probation, imposition of court costs and fines, will all be considered a "punishment, penalty, or restraint" under the immigration statute. As explained in more detail in Chapter Seven, suspended jail sentences are deemed "sentences" under immigration law (regardless of time suspended) and, as such, will constitute punishment regardless of whether any suspended time is ever converted into actual jail time served.

In general, a court order to pay costs or surcharges in the context of criminal sentencing constitutes a "punishment" or "penalty" under this definition.[11] However, the Ninth Circuit

---

[5] *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); *U.S. v. Buonocore*, 416 F.3d 1124, 1128 (10th Cir. 2005); *Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004); *State v. Heath*, 168 Wn.App. 894, 279 P.3d 458, 459 (2012).
[6] *United States v. Guerro-Velasquez*, 434 F.3d 1193, 1197-98 (9th Cir. 2006).
[7] *See* RCW 7.84.020 and IRLJ 1.1(a).
[8] *Matter of Eslamizar*, 23 I&N Dec. 684, 687-88 (BIA 2004).
[9] *Id.* at 687.
[10] *Planes v. Holder*, 652 F.3d 991, 996 (9th Cir. 2011) *rehearing en banc denied*, 2012 WL 1994862 (9th Cir. 2012); *contra Paredes v. Attorney General of U.S.*, 528 F.3d 196, 198 (3d Cir. 2008).
[11] *Matter of Cabrera*, 24 I&N Dec. 459, 462 (BIA 2008).

recently held that a suspended "nonincarcertatory" sanction is not a punishment under the immigration statute. Consequently, a deferred sentence resolution where the court imposed court costs and/or a fine and then suspended them, *with no additional conditions* would not qualify as a conviction under immigration law.[12] So, for example, a noncitizen defendant facing a first-time offense for the charge of Theft 3rd degree, would not be deemed "convicted" under immigration law where she entered a deferred sentence agreement and the court imposed, and then suspended, $300 in court costs and $150 in fines and imposed no additional conditions.

6.3 DEFERRED DISPOSITIONS (E.G., SOC AGREEMENTS, SPECIALTY COURT AGREEMENTS & DEFERRED SENTENCES)

As outlined in §6.1, the immigration statute's definition of a conviction includes dispositions where adjudication of guilt is withheld, usually for a remedial purpose. Thus, deferred adjudication agreements or procedures that do not constitute a conviction under state law, where the defendant complies with conditions and the case is subsequently dismissed, will nonetheless be deemed convictions under immigration law if they comport with the immigration statute's definition.[13]

A deferred disposition will be a permanent conviction for immigration purposes, even where the noncitizen defendant has complied with conditions and the charges are subsequently dismissed, if:

1. the noncitizen entered a plea of guilty; or
2. the noncitizen has admitted sufficient facts to warrant a finding of guilt, and;
3. some form of punishment, penalty or restraint has been ordered.

A. Stipulated Orders of Continuance, Deferred Disposition and Specialty Court Agreements

Stipulated orders of continuance (SOC), dispositional continuances, and specialty court (e.g., drug or mental health court) agreements will all be deemed permanent convictions for immigration purposes, unless the language of the deferral agreement does not involve a finding or plea of guilty, nor an admission of facts sufficient "to warrant a finding of guilt." Without such language in such agreements, the benefit of these deferred adjudication opportunities are often rendered moot for noncitizen defendants since they will end up with removable convictions, even if they comply with the conditions imposed and the charges are subsequently dismissed.

Many courts throughout the state have revisited these agreements and are now using agreements whose language comports with state law, maintains the integrity of the procedures and is "immigration safe" (i.e., does not require admission of guilt or facts sufficient to warrant a finding of guilt). "Immigration safe" agreements avoid fitting the immigration definition of a

[12] *Retuta v. Holder*, 591 F.3d 1181, 1181-89 (9th Cir. 2010). (Noncitizen plead guilty to a drug offense and the judge deferred entry of judgment, imposed a small fine, and immediately suspended the fine with no conditions attached).
[13] *Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999); *Matter of Marroquin*, 23 I&N Dec. 705, 706 (A.G. 2005).

conviction by making clear that the agreement itself is not an admission of sufficient facts or guilt, and that the consideration of evidence is contingent on lack of future compliance. If a court decides to use "immigration-safe" agreements, best practices suggest that they be used in all cases, rather than a separate agreement for noncitizen defendants.

Immigration safe deferred adjudication agreements generally use some version of the following language:

> I understand that I have a right to contest and object to evidence presented against me. I give up the right to contest and object to any evidence presented against me as to my guilt or innocence regarding the underlying charge at any future hearings if I fail to comply with the conditions of this agreement. I also understand that I have the right to present evidence on my own behalf. I give up the right to present evidence on my own behalf as to my guilt or innocence regarding the underlying charge.
>
> I understand that if I do not comply with the conditions of this agreement, evidence will be presented against me at a future hearing and I understand that the judge will read and review that evidence in determining my guilt or innocence. I understand that this agreement and the statements contained herein are not an admission of guilt, and are not sufficient by themselves to warrant a finding of guilt.

In numerous agreements, evidence, such as police reports, is entered into the record at the time of the agreement with caveats on the record that it is being entered for administrative purposes only.

See APPENDIX J for a sample Immigration-Safe SOC Agreement.

See APPENDIX K for a sample Immigration-Safe Drug Court Agreement.

B. Deferred Sentence Resolutions

Washington State law permits courts to defer imposition of a sentence where a defendant has been "convicted," which in most cases means that the defendant has entered a plea of guilty.[14] Because a finding of guilt has been entered, these agreements will be classified as convictions in perpetuity under immigration law from the time that they are entered, regardless of any subsequent compliance, withdrawal, or dismissal. However, as explained in §6.2 above, a deferred sentence resolution where the court imposed court costs and/or a fine and then suspended them, with no additional conditions would not qualify as a conviction under immigration law because such a resolution does not establish the required punishment to constitute a conviction under immigration law.[15]

[14] *See* RCW 3.50.320 (municipal courts); RCW 3.66.067 (district courts) and RCW 35.20.255 (municipal courts in cities over four hundred thousand).

[15] *Retuta v. Holder*, 591 F.3d 1181, 1181-89 (9th Cir. 2010) (Noncitizen plead guilty to a drug offense and the judge deferred entry of judgment, imposed a small fine, and immediately suspended the fine with no conditions attached).

C. Deferred Prosecution Under R.C.W. 10.05

A deferred prosecution under RCW 10.05 is a permanent conviction for immigration purposes at the time it is entered because RCW 10.05.020(3)(c), and 020(3)(i) require stipulation to the admissibility and sufficiency of facts in the written police report and that the person not believe that he or she is innocent. Note, however, that a conviction for DUI under RCW 46.61.502 involving alcohol[16] is not a removable offense under immigration law; it can have other immigration consequences, but it does not trigger crime-related statutory grounds of deportability or inadmissibility. [17]

6.4 POST-CONVICTION RELIEF, EXPUNGEMENTS AND PARDONS

A. Vacation of the Conviction Pursuant to Post Conviction Relief

In order to eliminate a disposition that constitutes a conviction under immigration law, a noncitizen must obtain post-conviction relief that vacates the conviction for cause, not for rehabilitation or hardship considerations. The Board of Immigration Appeals has held that a conviction is *not eliminated* for immigration purposes if the court vacated it for reasons "solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings."[18]

Immigration authorities will not question the validity under state law of the vacation of judgment, but will give "full faith and credit" to the state court. Thus, just as the respondent cannot attack the validity of a criminal conviction in removal proceedings, neither can the government attack the validity of a facially valid vacation for cause.[19] The Ninth Circuit has held that the government bears the burden of proof to establish by clear and convincing evidence that an order vacating a conviction is ineffective to eliminate the conviction for immigration purposes.[20]

B. Post-Conviction Sentence Modifications

Some of the grounds of deportation are only triggered where a specific sentence is imposed. For example, theft offenses (whether misdemeanors or felonies) will be classified as aggravated felonies under immigration law only where a sentence of one year or more is imposed (regardless of time suspended).[21]

Unlike post-conviction vacations of a conviction, sentence modifications or reductions for any reason (including avoiding immigration consequences) will be recognized by immigration

[16] Convictions for DUI offenses involving drugs will be deemed offenses relating to a controlled substance and, thus, trigger the drug-related deportation and inadmissibility grounds.
[17] *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (DUI offense not a crime of violence aggravated felony); *Matter of Torres-Varela*, 23 I&N Dec. 78, 90 (BIA 2007) (DUI not a crime involving moral turpitude).
[18] *Matter of Pickering*, 23 I&N Dec. 621, 621 (BIA 2003).
[19] *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378, 1380 (BIA 2000).
[20] *Nath v. Gonzalez*, 467 F.3d 1185, 1188-90 (9th Cir. 2006).
[21] 8 U.S.C. § 1101(a)(43)(G).

courts. In *Matter of Cota-Vargas*[22] the Board of Immigration Appeals held that when a 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. In that case, a San Diego judge granted a motion to reduce a sentence to 364 days, in response to counsel's argument that this would prevent the conviction from being an aggravated felony and allow the defendant, a lawful permanent resident, to qualify to ask the immigration judge for cancellation of removal. *Matter of Cota-Vargas* reaffirmed the long-standing rule that where a court reduces a sentence under any legal procedure, or the sentence is commuted by appropriate authorities, only the reduced sentence is the sentence imposed for immigration purposes, even if the noncitizen has actually served a longer time period.[23] For more information on sentencing issues see Chapter Seven.

C. Expungements

Vacation of the record of conviction under R.C.W. 9.60.060 (misdemeanors) or 9.94A.640 (felonies) will not eliminate a conviction for immigration purposes.[24] In short, obtaining an expungement under one of these statutes has no effect on the immigration consequences of the conviction.

D. Pardons

The immigration statute provides that a "full and unconditional pardon" by the President or a Governor of a state will prevent a conviction from triggering the grounds of deportation relating to crimes involving moral turpitude and aggravated felonies.[25] It will not eliminate deportability based on other grounds, for example the domestic violence or firearms grounds, even if the conviction also is a crime involving moral turpitude or aggravated felony.[26]

6.5 JUVENILE DISPOSITIONS

A juvenile adjudication is not considered a conviction for immigration purposes.[27] However a juvenile convicted as an adult will have a conviction for immigration purposes.[28] Like adult convictions, juvenile dispositions can be used to establish deportability or inadmissibility under certain conduct-based grounds such as "engaged in prostitution" or being a "drug addict or drug

---

[22] 23 I&N Dec. 849, 849 (BIA 2005).

[23] *See Matter of Song*, 23 I&N Dec. 173, 173 (BIA 2001) (revised sentence); *Matter of Martin*, 18 I&N Dec. 226, 226 (BIA 1982) (correction of illegal sentence); *Matter of H-*, 9 I&N Dec. 380 (BIA 1961) (new trial and sentence); *Matter of J-*, 6 I&N Dec. 562 (A.G. 1956) (commutation by Board of Pardons and Paroles).

[24] *See Matter of Roldan*, 22 I&N Dec. 512, 523 (BIA 1999).

[25] 8 U.S.C. § 1227(a)(2)(A)(vi).

[26] *Matter of Suh*, 23 I&N Dec. 626, 626 (BIA 2003).

[27] *Matter of Devison*, 22 I&N Dec. 1362, 1362 (BIA 2000) (resentencing of New York youthful offender following probation violation does not convert juvenile adjudication into a judgment of conviction); *Matter of De La Nues*, 18 I&N Dec. 140, 140 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 135 (BIA 1981); *Matter of F-*, 4 I&N Dec. 726, 726 (BIA 1952); *Matter of A-*, 3 I&N Dec. 368, 368 (BIA 1948); *Matter of O'N-*, 2 I&N Dec. 319, 319 (A.G. 1945).

[28] *Matter of De La Nues*, 18 I. & N. Dec. 140, 140 (BIA 1981); *Matter of C-M-*, 9 I. & N. Dec. 487, 487 (BIA 1961); *Matter of P-*, 8 I. & N. Dec. 517, 517 (BIA 1960); *Matter of N-*, 3 I. & N. Dec. 723, 723 (BIA 1949); *Matter of F-*, 2 I. & N. Dec. 517, 517 (BIA 1946).

abuser," or where they could give the government "reason to believe" the person ever has been a drug trafficker. See Chapter Eight for more on noncitizen juveniles.

6.6 NOT GUILTY BY REASON OF INSANITY RESOLUTIONS

A finding of Not Guilty by Reason of Insanity under R.C.W. 10.77 has never been found to constitute a conviction for immigration purposes. However, depending on the defendant's immigration status and the underlying conduct this type of resolution can trigger serious non-conviction, conduct-based immigration consequences. It will also trigger the mental health-related ground of inadmissibility.[29]

[29] 8 U.S.C. § 1182(a)(1)(A)(iv) (physical or mental disorder and associated harmful behavior).

CHAPTER SEVEN

Sentences Under Immigration Law[1]

Table of Contents

[1] The work of attorneys Kathy Brady and Angie Junck, nationally recognized experts in the immigration consequences of crimes, contributed to this chapter. Both serve as attorneys with the Immigrant Legal Resource Center in San Francisco, California – www.ilrc.org.

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

---

[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]

---

[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

---

[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

---

[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.

---

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.

---

[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.

CHAPTER EIGHT

Juveniles

Table of Contents

8.1 IMMIGRATION CONCEPTS RELEVANT TO DELINQUENCY DETERMINATIONS

A. Delinquency Determinations Can Directly Impact Noncitizen Youths' Immigration Issues

While juvenile court judges do not have direct jurisdiction to make decisions about immigration status, it is imperative that judges be aware that the decisions that are made within delinquency and dependency proceedings can have far-reaching immigration implications for a noncitizen youth. For example, entering a finding that a noncitizen youth violated a no-contact order triggers a ground of deportation, which can result in the removal of lawfully present

noncitizen youth (such as permanent residents and refugees) and can foreclose avenues to obtain lawful status for undocumented youth.[1]

Additionally, in some cases, juvenile courts can play an important role in facilitating eligible non-citizen youth to obtain lawful immigration status. For example, in order for an undocumented youth to obtain lawful status under the "special immigrant juvenile status" (SIJS) provisions, a delinquency, dependency or other family court must make specific findings regarding their status.[2]

If juvenile courts do not understand their role in this process, they may jeopardize the lawful status of noncitizen youthful offenders and/or foreclose otherwise viable avenues to obtain lawful status for undocumented youth.

B. Delinquency Determinations Are Not "Convictions" Under Immigration Law

A juvenile delinquency adjudication is not considered a conviction for immigration purposes.[3] However a juvenile convicted as an adult will have a conviction for immigration purposes.[4] Consequently, declining a juvenile under RCW 130.04.030 to be prosecuted in adult court can have severe immigration consequences for a noncitizen youth.

---

[1] 8 U.S.C. § 1229a(b)(2)(A)(4) (statutory bar to cancellation of removal for survivors of domestic violence where applicant triggers crime-related deportation grounds).

[2] *See* 8 U.S.C. § 1101(a)(27)(J).

J) An immigrant who is present in the United States--

(i) who has been declared dependent on a juvenile court located in the United States or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States, and whose reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law;

(ii) for whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that--

(I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this chapter; and 8 CFR § 204.11 (Special immigrant status for certain aliens declared dependent on a juvenile court (special immigrant juvenile); and 8 CFR § 204.11.

[3] *Matter of Devison*, 22 I&N Dec. 1362, 1362 (BIA 2000) (resentencing of New York youthful offender following probation violation does not convert juvenile adjudication into a judgment of conviction); *Matter of De La Nues*, 18 I&N Dec. 140, 140 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135, 135 (BIA 1981); *Matter of F-*, 4 I&N Dec. 726, 726 (BIA 1952); *Matter of A-*, 3 I&N Dec. 368, 368 (BIA 1948); *Matter of O'N-*, 2 I&N Dec. 319, 319 (A.G. 1945).

[4] *Matter of De La Nues*, 18 I. & N. Dec. 140, 140 (BIA 1981); *Matter of C-M-*, 9 I. & N. Dec. 487, 487 (BIA 1961); *Matter of P-*, 8 I. & N. Dec. 517, 517 (BIA 1960); *Matter of N-*, 3 I. & N. Dec. 723, 723 (BIA 1949); *Matter of F-*, 2 I. & N. Dec. 517, 517 (BIA 1946).

For example, a delinquency determination for the offense Robbery 1st Degree does not trigger grounds of deportation or inadmissibility. Consequently it cannot result in the youth's removal (deportation) from the U.S., nor does it create statutory bars to being admitted to the U.S. or to being granted lawful status. (Note that it will be a significant negative discretionary factor warranting denial of any application for immigration status or citizenship.) If the same youth were convicted in adult court of Robbery 1, he is likely to face removal for the conviction since Robbery 1 is classified as both a crime of moral turpitude (CIMT) and an aggravated felony "crime of violence" under immigration law.

The fact that juvenile delinquency determinations are not convictions under immigration law is a distinction with important implications, namely that no delinquency determination can trigger crime-related grounds of deportation or inadmissibility that require a "conviction" (which most do). However, as outlined below, this does not mean that these decisions do not have significant immigration consequences. Certain offenses can trigger the "conduct-based" removal grounds, which do not require formal convictions to apply.

C. Detention of Noncitizen Youth during Immigration Proceedings

Youth in state custody are generally identified and apprehended by Immigration and Customs Enforcement (ICE) when state or local law enforcement or detention officials share information with ICE regarding children and/or allow ICE to question youth while in custody. Federal law does not mandate that state and local officials report noncitizens (children or adults) to ICE. However, as noted at the end of this chapter, there is a question of whether RCW 10.70.140 requires notice to ICE when a noncitizen juvenile is detained.

Once ICE becomes aware of a suspected undocumented youth, they may file an immigration hold or detainer with state or local detention authorities. A detainer is a request that a criminal justice agency inform ICE of impending release of an immigrant in order for ICE to assume custody in order to initiate deportation proceedings against a person.[5] As with adults, detainers or holds over a juvenile does not mean that he or she is actually deportable or that the case is active with ICE; as ICE commonly places a hold on anyone it believes to be in violation of immigration laws. In many cases, the youth may not be subject to deportation and/or has legal relief from deportation. See Chapter Two for more information on ICE detainers and ICE enforcement issues.

Once ICE assumes custody over a noncitizen youth removal proceedings are generally initiated. Children, like adults, have no right to counsel in removal proceedings and most go unrepresented.[6]

Youth who are apprehended and placed in removal proceedings are either detained by ICE, or transferred to the custody of the U.S. Department of Health and Human Services, depending on an initial determination by ICE of whether that child is "accompanied" or "unaccompanied." In 2002, the U.S. Department of Health and Human Services, Office of Refugee Resettlement,

[5] 8 U.S.C. 1357(d); 8 CFR 287.7
[6] 8 U.S.C.A. § 1182(a)(9).

Division of Unaccompanied Children's Services (ORR/DUCS) became the agency responsible for the custody and care of "unaccompanied alien children."[7] An Unaccompanied Alien Child is defined as a child who is under eighteen, without legal status, and without a parent or guardian who can take custody.[8] In many cases, a youth may have family in the United States, but the family members cannot come forward to claim their child from ICE without risking their own apprehension by ICE, resulting in determination that the youth is "unaccompanied."

If a youth is deemed by ICE as "accompanied," (either because he or she has legal status, or he or she has family willing to come forward) the youth will remain detained by ICE, usually at a contracted facility such as a local city or county jail or juvenile detention facility. A youth who is determined by be "unaccompanied" must be transferred out of ICE custody to the custody of ORR/DUCS within 72 hours.[9]

Pursuant to a 1996 settlement agreement, youth detained by federal immigration authorities must be held in the least restrictive setting suitable to meet the child's needs and ensure s/he will not pose a danger to himself or the community.[10] ORR contracts facilities throughout the United States to provide four levels of care: foster care, shelter care, staff-secure, and secure facilities.

Youth who come into ORR custody via the juvenile or criminal justice systems are usually placed into staff-secure or secure facilities; often the same facilities contracted by state and local agencies to detain juvenile offenders. In determining the most appropriate placement for a youth, ORR considers the minor's juvenile delinquency or criminal record, including charges not yet adjudicated. Youth may also be stepped-down to a less restrictive placement or stepped-up to a more restrictive facility, depending on behavior.[11] Placement decisions, including initial placement and transfers, are also influenced by bed space availability. Children are frequently placed or transferred to ORR facilities out of state, even if the youth's family is local and/or his criminal or juvenile delinquency case is still pending in Washington.

ORR generally does not transport children in its care to out of state juvenile court hearings, or have a formal process for notifying juvenile courts regarding a youth's custody status with ORR. This frequently results in a youth's nonappearance at juvenile court hearings.

If ORR identifies a family member or suitable non-family member who is willing to accept custody and care of a child, it will seek to release the child to that person's care (referred to by ORR as a "sponsor"). A parent or other sponsor who seeks to have a child released to his or her care must complete a series of paperwork including background checks and affidavits of support. If a youth is on active probation or there are other concerns about the suitability of a sponsor,

[7] Homeland Security Act of 2002 § 462(a), 6 U.S.C. § 279(a)(2006). Information regarding the Office for Refugee Resettlement's Division of Unaccompanied Children *available at* http://www.acf.hhs.gov/programs/orr/programs/unaccompanied_alien_children.htm.
[8] Homeland Security Act of 2002 § 462(g)(2); 6 U.S.C. § 279(g)(2).
[9] Homeland Security Act of 2002 § 462(g); 8 U.S.C. § 279(a)(2006); Trafficking Victims Protection Reauthorization Act §235(b)(3).
[10] *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. filed Jan 17, 1997).
[11] *Id.*

ORR will conduct a home study prior to releasing a child. A child who is released to a sponsor is still in removal proceedings until or unless those proceedings are concluded.

Many youth are subject to prolonged immigration detention even after having completed his or her juvenile or criminal sentence. Although children are placed in immigration custody because of unlawful immigration status rather than any underlying offense, in many cases the underlying offense (including unadjudicated charges) will result in a youth's placement in a more secure immigration detention facility. A child transferred to ORR or ICE custody who has no family member or sponsor to be released to, or whose release is not approved, may remain in ORR custody until the resolution of his or her removal proceedings. In some cases, particularly if a youth is seeking legal relief in immigration court, this can take many months and sometimes many years.

D. Ensuring Effective Assistance of Counsel to Noncitizen Juvenile Offenders

Like their adult counterparts, youthful offenders have a Sixth Amendment right to effective assistance of counsel.[12] As such, defense counsel representing noncitizen youth have a duty to address immigration consequences as outlined in *Padilla v. Kentucky*[13] as part of his/her representation, including both negotiating to avoid outcomes that would trigger removal as well as preserving eligibility for avenues to obtain lawful immigration status and U.S. citizenship.[14]

Remembering that there is no appointed counsel in removal proceedings, juvenile defense counsel is often the first and last lawyer noncitizen youth ever see. As such, it is often times the only opportunity to both avoid triggering negative immigration consequences such as removal, but also a critical time to identify avenues for undocumented youth to obtain lawful status.

Juvenile court judges can play an important role in ensuring that noncitizen youth who appear before them are receiving representation consistent with *Padilla* by making sure that the defenders who appear before them are consistently accessing the readily available resources available to them through the Washington Defender Association's Immigration Project.[15] The Washington Defender Association's Immigration Project has a specific focus on assisting juvenile defenders to not only negotiate resolutions that avoid or mitigate negative immigration consequences, but also to identify undocumented youth who qualify for one of the avenues to obtain lawful immigration status outlined below – and connect them with legal resources to assist their clients in that process.

8.2 IMMIGRATION CONSEQUENCES OF DELINQUENCY FINDINGS

Although delinquency adjudications are often less severe than adult court convictions, juvenile offender adjudications pertaining to certain criminal offenses can still significantly impact a youth for immigration purposes. Chapter One provides in greater detail an overview of

[12] *Application of Gault*, 387 U.S. 1 (1967).
[13] 130 S.Ct. 1473 (2010).
[14] *Id.* at 1482-83.
[15] Information about WDA's Immigration Project is available at www.defensenet.org.

immigration law and procedure, and outlines the important distinctions between the grounds of inadmissibility and the grounds of deportation, such as when and to whom they apply.

A. Delinquency Determinations & the Grounds of Inadmissibility

If triggered, the grounds of inadmissibility can render undocumented youth statutorily ineligible to obtain lawful immigration status through one of the avenues outlined in §8.3. They can also prevent lawfully present youth from obtaining U.S. citizenship, and bar them from re-entering the U.S. if they go abroad.

Juvenile delinquency determinations can trigger the following conduct-based grounds of inadmissibility:

- **Where the government has "reason to believe" that a juvenile is or has been, or has assisted a drug trafficker**.[16] This includes juvenile adjudications for sale, possession for sale, cultivation, manufacture, distribution, delivery, and other drug trafficking offenses that contain a commercial element. This is the harshest provision affecting juveniles because it can be a permanent bar to obtaining lawful status despite significant equities and there are generally no waivers available to forgive this conduct.

- **Being a current drug addict or abuser.** [17] This involves repeated findings of drug abuse and/or addiction to drugs. "Current" is defined as drug abuse or addiction in the last three years for non-medical purposes.[18] Drug addiction is defined as non-medical use of a controlled substance "which has resulted in physical or psychological dependence."[19] Drug abuse is *any* drug use that goes beyond mere "experimentation" with drugs. The example provided for experimentation was *taking an illegal drug one time*.[20] This ground rarely comes up in immigration proceedings.

- **Engaging in prostitution**.[21] This involves being the prostitute and not the customer. Although a finding of guilt related to the offense of being the customer is a crime involving moral turpitude, triggering the CIMT inadmissibility ground generally requires a conviction. See §4.11 for more on the immigration consequences of prostitution offenses.

- **Mental disability posing threat to self or other**.[22] This encompasses suicide attempt, torture, mayhem, repeated sexual offenses against younger children (predator), and perhaps repeated alcohol offenses (showing alcoholism).

---

[16] 8 U.S.C. § 1182(a)(2)(C).
[17] 8 U.S.C. § 1182(a)(1)(A)(iv).
[18] Amendments to p. III-14, 15 of Technical Instructions for Medical Examination of Aliens.
[19] 42 U.S.C. § 201(k).
[20] 42 C.F.R. §§ 34.2(g) and (h).
[21] 8 U.S.C. § 1182(a)(2)(D).
[22] 8 U.S.C. § 1182(a)(1)(A)(iii).

- **False claim to U.S. citizenship**.[23] This involves the use of false documents and fraud offenses where a juvenile claims to be a U.S. citizenship for any purpose or benefit under immigration laws or any federal or state law.

B. Delinquency Determinations and the Grounds of Deportation

Most of the crime-related grounds of deportation require convictions to apply. However, triggering one of the **conduct-based deportation grounds** listed below can result in loss of immigration status for noncitizen youth who are lawful permanent residents (LPRs) and refugees (as well as other lawfully present youth).

- **Where Court finds violation of domestic violence protective order or "no-contact" order** issued to prevent repeated harassment, credible threats of violence or bodily injury.[24] See §4.4(E) for more information on violations of no-contact order offenses.

- **Being a drug addict or abuser anytime since being admitted to the U.S., even if the juvenile has overcome the problem.** [25] Although it appears to be applied randomly and infrequently, drug addiction is defined as non-medical use of a controlled substance "which has resulted in physical or psychological dependence." [26] Drug abuse is *any* drug use that goes beyond mere "experimentation" with drugs. The example provided for experimentation was *taking an illegal drug one time*. [27] This ground rarely comes up in immigration proceedings.

- **False claim to U.S. citizenship**.[28] This involves the use of false documents and fraud offenses where a juvenile claims to be a U.S. citizen for any purpose or benefit under immigration laws or any federal or state law.

C. Delinquency Determinations Are Negative Discretionary Factors

Most immigration benefits (e.g. LPR status and U.S. citizenship) and most avenues to request relief from removal before an immigration judge are discretionary. Thus, even though a juvenile delinquency determination will not trigger conviction-based grounds of deportation or make someone statutorily ineligible for immigration benefits, it can and will be a significant negative factor in weighing whether the noncitizen deserves the requested benefit or relief from removal as a matter of discretion.

Gang-Related Allegations & Serious Felony Conduct. In particular, delinquency findings involving serious felony offenses will be significant and weighty negative discretionary factors that a noncitizen youth must overcome by a showing of rehabilitation in order to be granted any

[23] 8 U.S.C. § 1182(a)(6)(C)(ii), (F).
[24] 8 U.S.C. § 1182(a)(2)(E)(ii).
[25] 8 U.S.C. § 1182(a)(1)(A)(iv).
[26] 42 U.S.C. § 201(k).
[27] 42 C.F.R. §§ 34.2(g) and (h).
[28] 8 U.S.C. § 1182(a)(6)(C)(ii), (F).

immigration benefits such as lawful immigration status or U.S. citizenship. In particular, allegations of gang-related or sexual activity will present especially high hurdles since targeting non-citizen gangs and sex offenders are a high priority to federal immigration authorities and therefore, may be insurmountable for a juvenile to overcome. As such, competent defense counsel may be seeking to eliminate or avoid gang-related references in the record, where possible.

8.3 AVENUES FOR NONCITIZEN YOUTH TO KEEP OR OBTAIN LAWFUL IMMIGRATION STATUS

Noncitizen youth can pursue avenues to avoid deportation and obtain or retain lawful immigration status (often referred to as "**immigration relief**") either affirmatively (before they are placed in removal proceedings) or defensively (before the immigration judge in removal proceedings). Youth applying for relief affirmatively have a distinct advantage. Most affirmative applications for adjustment of status or immigration relief are submitted to United States Citizenship and Immigration Services (USCIS). The process is administrative, and there is no opposing party or adversarial process. On the other hand, asserting eligibility for relief defensively occurs in the context of adversarial and onerous proceedings in which the noncitizen youth is accused of illegal conduct and opposed by the federal government. The noncitizen also does not have a right to government appointed counsel and often goes unrepresented in these proceedings.

These avenues for immigration relief, particularly the protections for noncitizen juveniles, are generally only available to noncitizen youth if juvenile justice system actors identify them and assist them to get the resources needed to navigate the application and/or removal process. Juvenile court judges can also play an important role in this effort by ensuring that defenders, prosecutors and probation officers associated with their courts have policies and practices in place for addressing these issues with regard to noncitizen youth. Juvenile justice policies that encourage the referral of juveniles to immigration authorities and which result in the initiation of removal proceedings decrease the odds that eligible youth will achieve legal status. In addition, policies and practices that subject noncitizen youth to more restrictive detention criteria than those applied to citizen youth can effectively bar access to immigration advocacy services.

- **Readily Available Resources to Assist Juvenile Justice System Actors:**

    - The **Washington Defender Association's Immigration Project (www.defensenet.org)** provides case assistance and other resources to defenders, prosecutors and courts to 1) address immigration-consequences associated with criminal charges 2) identify avenues available to noncitizen youth for obtaining or retaining lawful status and 3) connect eligible youth to legal resources.

    - **Volunteer Advocates for Immigrant Justice (VAIJ),** a program of the American Bar Association located in Seattle, provides legal representation to noncitizen youth throughout Washington State to obtain or retain lawful immigration status. VAIJ contact: Rebekah Fletcher, Children's Program Supervising Attorney at Rebekah@vaij.org or (206) 359-6203.

- **The Northwest Immigrant Rights Project (NWIRP) (www.nwirp.org)**, with offices in Seattle, Tacoma (serving noncitizens detained at the Northwest Detention Center), Yakima and Moses Lake, provides immigration legal representation to low income noncitizens and their families throughout Washington State. NWIRP has dedicated resources to serve noncitizen youth. Contact Diana Moller at Diana@nwirp.org.

A. Immigration Relief Lawfully Present Noncitizen Youth: LPRs and Refugees

Noncitizen youth who are LPRs or in refugee status who end up in removal proceedings due to criminal activity will have the same avenues for seeking relief from removal (i.e., keeping their lawful status) as adults, which are outlined at §1.5(E).

B. Avenues for Undocumented Noncitizen Youth to Obtain Lawful Immigration Status

Obtaining lawful immigration status allows youth to live and work openly in their communities, remain with their families and in their schools, and gain access to the basic necessities essential to their well-being. In some cases, return to one's country of origin presents grave dangers and gaining immigration status can save a juvenile's life.

Congress has provided a specific avenue for certain undocumented juveniles to obtain lawful permanent resident status, known as **Special Immigrant Juvenile Status (SIJS).** In recognition of the special needs of undocumented youth, Congress, in 2008, expanded the legal protections for these youth with the passage of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA).[29] The TVPRA expanded the protections available to noncitizen youth through the SIJS process and provided for more sensitive procedures for all noncitizen youth in immigration custody and at risk of imminent removal.

The chart below highlights the primary legal avenues for noncitizen youth to obtain lawful immigration status. Because SIJS requires specific involvement from Washington delinquency and/or dependency courts, it is highlighted below at §8.3(C). More information on the U and T visa options, as well as the other forms of immigration relief listed in the chart (which are available to noncitizen youth, but are not juvenile specific), is available at §1.4 and §1.5(E).

[29] Pub.L. 110−457, 122 Stat. 5044, enacted December 23, 2008.

Overview of Forms of Immigration Relief for Noncitizen Youth

Special Immigrant Juvenile Status (SIJS)	A youth can become eligible to apply for lawful permanent residence if • He or she is under the jurisdiction of a juvenile court (dependency, delinquency or guardianship), • the court has made a finding that reunification with one or both parents is not viable due to abuse, neglect or abandonment or a similar basis under state law, and • it is not in the child's best interest to be returned to his/her home country. An order is required from the juvenile court making the above findings.
Violence Against Women Act (VAWA)	A youth is eligible for lawful permanent residence if • he/she has been "battered or subject to extreme cruelty" (including purely emotional abuse) by a *U.S. citizen or permanent resident spouse, parent, or step-parent,* or • his/her parent was a victim of domestic violence by a U.S. citizen or Lawful Permanent Resident.
T Visas for Victims of Trafficking	A youth can obtain a visa with a path to permanent residence if • he/she or his/her parent is a victim of severe forms of trafficking in persons[30] ("human trafficking") • he/she complies with reasonable requests for assistance in investigation or prosecution of the offense (unless he/she is under the age of 16), and • he or she has suffered extreme hardship.[31]
U Visas for Victims of Violent Crimes	A youth can obtain a visa with a path to permanent residence if • he/she or his/her parents suffer substantial physical or mental abuse resulting from a qualifying crime, • he/she possesses information concerning the activity and is helpful to the investigation or prosecution of the criminal activity.[32] A judge, prosecutor, investigator (police) or similar official must sign a certification regarding the requirements.[33]

[30] 8 USC § 1101(a)(15)(T).
[31] For information on the T visa, see the Legal Aid Foundation of Los Angeles, www.lafla.org.
[32] 8 USC § 1101(a)(15)(U).
[33] For information on the U visa see www.ilrc.org and www.nationalimmigrationproject.org.

Asylum	A youth can obtain asylum with a path to permanent residence if • He/she fears return to his/her home country because of an individualized fear of persecution on account of race, religion, political opinion, nationality, or membership in a particular social group. Applicants are subject to specialized procedures to determine whether they have a valid asylum claim.
Cancellation of Removal (CoR) for Non-Permanent Residents	A youth can obtain permanent residence if • He/she has lived in the United States illegally for ten years or more and • He/she can show that he/she has a parent, spouse or child who is a U.S. citizen or permanent resident who would suffer extraordinary hardship if the youth were deported.
U.S. Citizenship and Family Immigration	Some youth may be citizens based on U.S. citizenship of parents and in some cases, grandparents. Some youth may have U.S. citizen or lawful permanent resident family members in the U.S. who can help them become a lawful permanent resident.
Deferred Action For Childhood Arrivals (DACA)	DACA will defer any government action to pursue removal and grant the applicant a work permit. It will not grant him LPR status or a way to obtain LPR status. Noncitizens can qualify if they establish the following: • In U.S. and under 30 yrs. old on June 15, 2012; • Entered the U.S. when she or he was under age 16; • Continuously resided in U.S. during preceding 5 years; • Currently in school, graduated from high, obtained a GED, or honorably discharged from armed forces; • **Have not been *convicted of* a felony, a "significant" misdemeanor or multiple misdemeanors (juvenile dispositions are not deemed "convictions")**; and • **Does not pose a threat to public safety or national security**.

C. Special Immigrant Juvenile Status & Washington Delinquency and Dependency Courts

- **An Overview of Special Immigrant Juvenile Status**

Special Immigrant Juvenile status is a classification under federal law that makes some undocumented children who are under a juvenile court's jurisdiction eligible to apply for lawful permanent residence.[34] Juvenile delinquency and dependency courts play an integral part in establishing a child's eligibility for SIJS classification, as Congress specifically deferred to juvenile courts to make the required findings.[35] Thus, a child cannot request SIJS classification without a predicate order from a state juvenile court. For many noncitizen children who come into contact with the delinquency and/or dependency system, SIJS may be the only route to lawful immigration status. Juvenile courts can support efforts to ensure that policies and procedures are in place to identify such children and connect them with needed legal representation.

- To be eligible for SIJS status, a noncitizen youth present in the U.S. must prove that she is someone:
  - who has either been declared dependent on a juvenile court located in the United States, or
  - whom such a court has legally committed to, or
  - who is placed under the custody of an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States;
- Whose reunification with one or both parents is not viable due to abuse, neglect, abandonment or a similar basis found under State law; and
- For whom it has been determined in administrative or judicial proceedings that it would not be in the alien's best interest to be returned to his/her home country.

Federal regulations also require that a child must be unmarried and under the age of 21 at the time s/he petitions for SIJS status. [36]A "Juvenile Court" is defined in the regulations as a court located in the United States having jurisdiction under State law to make judicial determinations about the custody and care of juveniles[37]; therefore, in many states, including Washington, **SIJS findings can be made by the Juvenile Court in dependency or juvenile offender proceedings, or in guardianship proceedings.**

A SIJS predicate order by a juvenile court must include the following findings:

- The child is under 21;
- The child is unmarried;

[34] See 8 U.S.C. 1101(a)(27)(J).
[35] 8 U.S.C. § 1101(a)(27)(J)(i); 8 C.F.R. § 204.11(a); *Perez-Olano v. Gonzales*, 248 F.R.D. 248, 265 (C.D. Cal. 2008).
[36] 8 C.F.R. § 204.11(c).
[37] *Id*.

- The child is either dependent of a juvenile court; **or** a juvenile court has placed the child in the custody of a state agency or department; or an individual or entity appointed by the juvenile court;
- Reunification with one or both of the child's parent(s) is not viable on account of abuse, abandonment, neglect, or a similar basis under State law; and
- It is not in the child's best interest to return to his/her home country.

It is important to note that factual findings by the juvenile court, standing alone, do not entitle a child to SIJS status. Rather, the SIJS-predicate order entered by a state court is the first step in the SIJS status process – it simply makes an immigrant child *eligible* for SIJS classification by USCIS, but USCIS retains the ultimate authority over whether to grant SIJS status to the immigrant child. Furthermore, children who are granted SIJS and who then apply for lawful permanent residence are subject to the same eligibility requirements, with some exceptions, as any individual seeking lawful permanent residence.

8.4 POLICY CONSIDERATIONS FOR WASHINGTON COURTS REGARDING NONCITIZEN YOUTH

As outlined in in Chapter Two, federal law does not require state or local governments to inquire into or report immigration violations to federal immigration authorities. Moreover, federal law does not compel the reporting of immigration information about juveniles.[38] However, determining whether to cooperate with immigration enforcement efforts focused on the juvenile justice system, and, if so, to what degree, is a significant question for many local jurisdictions.

The question raises a host of significant issues that local juvenile justice systems must grapple with in order to craft their policies. These issues include whether local officials identify and report noncitizen children to ICE, whether and under what circumstances does ICE have access to confidential records and information, and under what circumstances do ICE agents have access to detained youth. The list below, which is not intended to be exhaustive, is offered to assist judges and courts in facilitating discussions with relevant participants.

- **Whether Reporting Youth To ICE And Is Consistent With The Goals of the Juvenile Justice Act (JJA) and Core Mission Of The Juvenile Justice System**

The Washington Supreme Court has recognized the core mission of the juvenile justice system has two animating goals: punishment and rehabilitation.[39] In crafting local policies, local

[38] *See, e.g., Sturgeon v. Bratton*, 174 Cal. App. 4th 1407 (2009) (upholding "Special Order 40," a local provision restricting city police from questioning individuals about immigration status and holding that it did not conflict with § 1373); *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 771 (C.D. Cal. 1995) (preempting and invalidating state law provision requiring state and local law enforcement to notify federal immigration authorities of immigration violators); *see also* 8 U.S.C. § 1357(g)(9) (section 1357(g) enables states and localities to enforce immigration laws pursuant to a signed agreement with the Attorney General, but cannot be construed to require states or localities to sign such an agreement).

[39] *State v. Chavez*, 163 Wn.2d 262, 267-68 (2008); *see* RCW 13.40.010.

jurisdictions' decisions should exercise care to not conflict with Washington law. ICE's focus on removal of noncitizens is not necessarily aligned with these goals.

- **Whether Disclosure of Immigration Status and Citizenship Information To Immigration Officials Is Permitted Under RCW 13.50**

RCW 13.50.050 specifically limits the dissemination of information relating to juvenile offenders.[40] Although the statute contains some exceptions to its general prohibition against disclosure, these exceptions do not expressly include disclosure of a juvenile's immigration or citizenship information to immigration authorities. It is important for local jurisdictions to determine whether such disclosure is authorized by the statute.

Assuming some degree of release of information is permitted, the question becomes under what circumstances? Do immigration officials qualify for confidentiality exceptions listed at RCW 13.50.050 and RCW 13.50.10(8)? If not, or if only partially, must a court order be obtained first?

- **Does the proposed local policy comport or conflict with other State and Federal Laws?**

At least two other laws should be considered in adopting local policies. 8 U.S.C. § 1373 provides that federal, state, and local entities and officials may not prohibit or restrict such entities or officials from sending or receiving information regarding citizenship or immigration status to or from immigration authorities. RCW 10.70.140 requires state and local penal facilities to identify and report to immigration officials the noncitizens who have been committed to their facilities. Whether and how they apply are open legal questions in general. Local officials should address these questions in the context of crafting and implementing local policy.

- **How Does Any Proposed Local Policy Impact Public Safety, Access to Justice and Potential Exposure to Civil Liability?**

As highlighted in Chapter Two, policies and practices of local collaboration with immigration enforcement actions can have implications for community cooperation with law enforcement, impact the perceptions of immigrant communities that they can access justice in the courts, and open local jurisdictions to civil liability.

[40] RCW 13.50.050.

CHAPTER NINE

Vienna Convention Issues

Table of Contents

9.1 OVERVIEW

Chapter Nine provides an overview of non-citizen rights under Article 36 of the Vienna Convention on Consular Relations (VCCR), which requires a foreign consulate to be notified when one of its citizens is being detained by foreign governmental authorities and the best practices for ensuring compliance with the VCCR. It also addresses the separate but related bilateral treaties between the U.S. and individual nations. As highlighted here, developments in the past decade, including decisions from the International Court of Justice (ICJ) and the U.S. Supreme Court, have brought attention to issues regarding compliance with VCCR and related treaty obligations.

Additionally, this chapter highlights issues and suggests best practices for facilitating compliance with these obligations without jeopardizing other rights of noncitizens. Notification of VCCR rights should be given by law enforcement officers upon arrest of all defendants. However, since this is not always standard practice, some prosecutors and courts have implemented practices that require or encourage a non-citizen to disclose information about their citizenship, nationality and/or immigration status. Non-citizens are a particularly vulnerable

group within the criminal justice system.[1] While exercising the right to talk to consular officials might be beneficial for some non-citizens, disclosing citizenship information risks exposing a non-citizen to immigration authorities and possible deportation. The rights embodied in the VCCR are important and useful. However those rights must be administered and exercised in such a manner as to not violate or foreclose other equally important rights and protections.

9.2 RECOMMENDED BEST PRACTICES TO ENSURE CONSULAR NOTIFICATION OBLIGATIONS AND RECOGNIZE DEFENDANTS' FIFTH AMENDMENT RIGHTS

Article 36 requires that the consular notification rights be exercised in accordance with U.S. law. It is not difficult to establish a procedure that harmonizes Article 36 and bilateral agreement notification requirements. In short, defendants can be informed of the consular notification requirements pursuant to Article 36 and the bilateral agreements and the parties can make a record of having done so without an improper inquiry into citizenship or immigration status in court.

In 2006, King County prosecutors and defenders came together and established the following process that is the recommended best practice for courts throughout Washington to consider adopting.

- **At arraignment, every defendant is provided with the form titled "Vienna Convention and Bilateral Treaty Notification, Acknowledgement and Waiver or Request". See Appendix N for a sample form.**

This form has one place to request consular notification (by affixing a signature) and a second signature line that permits the defendant to acknowledge receipt of information regarding the consular notification option but to decline to disclose citizenship information and waive any consular notification right at that time. It also permits the defendant to request consular notification at a later time should she choose to do so.

Even if a defendant desires to have her consulate notified, s/he should not have to go through the judge and the prosecutor to invoke consular contact. As the State Department recommends, the jail authorities detaining her should simply fax the form provided in Appendix N to the consulate in question. Additionally, defense counsel can also facilitate contact with consulates on behalf of detained non-citizens. The Washington Defender Association Immigration Project provides assistance on contacting foreign consulates.

[1] *See, e.g.*, *Matter of Hammermaster*, 139 Wn.2d 211, 244, 985 P.2d 924, 941 (1999).

9.3 WHAT ARE THE VIENNA CONVENTION AND THE BILATERAL TREATIES?

The Vienna Convention on Consular Relations (VCCR) is an international treaty to which the United States adhered in 1969.[2] The treaty mainly deals with the establishment and duties of consular relations between states. While its preamble states that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States," Article 36 of the VCCR guarantees free communication between nationals of a "sending state" and consular officials.

Article 36(1)(b) applies to noncitizen defendants. In particular, this section requires the "receiving state" (e.g. the United States government) to inform a foreign consulate if one of their nationals is "arrested or committed to prison or to custody pending trial or is detained in any other manner...Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action."

In addition to Article 36 of the VCCR, there are a series of bilateral treaties on consular relations between the United States and individual nations. Some of the agreements include a mandatory requirement that the two countries notify each other when their nationals are detained. The State Department's advisory material emphasizes that the notification in these cases is mandatory, regardless of the desires of the non-citizen.[3]

Although the notification is an obligation of one State to another, neither the bilateral treaties nor the VCCR create an affirmative individual legal obligation by a non-citizen to reveal information that she does not otherwise need or want to reveal, especially where that would violate legal protections to which he or she has a right. The starting point for the bilateral treaties is that a foreign national's status has become known, and that once that is known the notification is obligatory. The purpose of the bilateral consular notification treaties is to facilitate consular functions, one of which is protection of foreign nationals; but not to subject them to additional legal penalties or ferret them out against their will.

Like the VCCR's voluntary consular notification requirement, the bilateral treaties' mandatory consular notification requirement is best served by informing all defendants of the treaty obligations, without subjecting them to an unnecessary judicial inquiry into citizenship status, prohibited by RCW §10.40.200(1),[4] and the Fifth Amendment.[5]

---

[2] Vienna Convention on Consular Relations, Dec. 24, 1969, 21 U.S.T. 77, 596 U.N.T.S. 261 (hereinafter "VCCR").

[3] *Consular Notification and Access Manual*, DEPARTMENT OF STATE (2010), *available at* http://travel.state.gov/pdf/cna/CNA_Manual_3d_Edition.pdf.

[4] RCW §10.40.200(1) (1983).

[5] U.S. Const. amend IV.

9.4 WHO IS RESPONSIBLE FOR ENSURING COMPLIANCE WITH THE VCCR AND BILATERAL TREATIES?

The primary obligation for treaty compliance rests with the Department of State (DOS). Neither the VCCR nor the bilateral treaties make state courts responsible for compliance. When the U.S. signed the VCCR it also signed an "Optional Protocol" making the ICJ the forum for resolving disputes about the VCCR.[6] In *Avena*, a 2004 case brought by Mexico against the U.S. before the ICJ concerning over 50 Mexicans on death row, the ICJ found the U.S. to be in violation of VCCR Article 36's consular notification requirement and required the U.S. to "provide, by means of its own choosing, review and reconsideration of the conviction and sentence, so as to allow full weight to be given to the violation of the rights set forth in the Convention."[7] The ICJ finding is specifically put in the context of those individuals sentenced to "severe penalties."[8]

Subsequent to the *Avena* decision, the President then issued a memorandum stating that the U.S. would discharge its international obligations under the ICJ's *Avena* judgment by "having State courts give effect to the ICJ decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision."[9] The U.S. then immediately withdrew from the Optional Protocol.

The State Department has historically worked directly with law enforcement authorities to facilitate compliance with the VCCR, efforts that were stepped up following the *Avena* decision.[10] According to the State Department, "[t]he law enforcement officers who actually make the arrest or who assume responsibility for the alien's detention ordinarily should make the notification. . . .Because they do not hold foreign nationals in custody, judicial officials and prosecutors are not responsible for notification."[11] However, to promote compliance, the State Department encourages judges and prosecutors to ask whether consular notification has been complied with. As noted below, however, this suggestion by the State Department can run afoul of a non-citizen's right to not disclose her status and does not take into consideration the immigration consequences that can flow from exposing herself to apprehension by immigration authorities.

In a 2000 en banc decision, the Ninth Circuit overturned its prior precedent holding that Article 36 notification was an individual right that could be remedied via a motion to suppress and noted,

> [t]he addition of a judicial enforcement mechanism contains the possibility for conflict between the respective powers of the executive and judicial branches. … Moreover, the fact that the State Department is willing to and in fact does work directly with law enforcement to ensure compliance detracts in this

[6] *Optional Protocol*, 21 U.S.T. 325 (entered into force by the U.S., Dec. 24, 1969; U.S. withdraws, Mar. 7, 2005).
[7] *Avena and Other Mexican Nationals* (Mexico v. U.S.), 2004 I.C.J. 12, ¶ 151 (March 31).
[8] *Id.*
[9] George W. Bush, Memorandum for the Attorney General (Feb. 28, 2005).
[10] *Consular Notification and Access Manual*, *supra* n.3.
[11] *Id*. at *15.

instance from the traditional justification for the exclusionary rule: that it is the only available method of controlling police misconduct.[12]

9.5 WHAT ARE THE CONSEQUENCES AND REMEDIES FOR VIOLATIONS OF THE VCCR?

In recent years, the U.S. Supreme Court addressed issues regarding rights under Article 36 of the VCCR in two decisions: *Sanchez-Llamas v. Oregon*[13] and *Medellin v. Texas*.[14] The essence of these decisions is as follows:

- **Individual Enforceable Right Undecided**: The Court stopped short of directly deciding if Article 36 creates individual rights enforceable in domestic courts. "…[W]e thus assume, without deciding, that Article 36 grants foreign nationals 'an individually enforceable right to request that their consular officers be notified of their detention, and an accompanying right to be informed by authorities of the availability of consular notification.'"[15]

- **No Fourth Amendment Suppression Claim**: Suppression of evidence via the exclusionary rule is not an appropriate remedy for an Article 36 violation for failure to notify.[16] A defendant can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police.[17]

- **No Stand-Alone Sixth Amendment Ineffective Assistance of Counsel Claim**: An ineffective assistance claim cannot be based on the VCCR alone: "…[A]n attorney's lack of knowledge does not excuse the defendant's default, unless the attorney's overall representation falls below what is required by the Sixth Amendment."[18]

Neither the Ninth Circuit, nor any Washington Court, has issued rulings on Article 36 claims subsequent to the *Sanchez-Llamas* and *Medellin* decisions.

9.6 DO NONCITIZENS HAVE THE RIGHT TO NOT DISCLOSE CITIZENSHIP STATUS?

Below is a brief summary of the rights of noncitizens to not disclose citizenship or immigration status information in the context of their criminal proceedings. The information in Chapter Three outlines in more detail the right of noncitizens to not disclose their citizenship or immigration status and the importance of having the court recognize these rights in the course of conducting these proceedings. As a practical matter, in light of expanded immigration

[12] *U.S. v Lombera-Camorlinga,* 206 F.3d 882, 887 (9th Cir. 2000).
[13] *Sanchez-Llamas v. Or.,* 548 U.S. 331 (2006).
[14] *Medellin v. Texas,* 552 U.S. 491 (2008) (also referred to as Medellin II).
[15] *Id*. at 506 n.4.
[16] *Sanchez-Llamas*, 548 U.S. at 350.
[17] *Id*.
[18] *Sanchez-Llamas* at 357 n.6.

enforcement efforts, inquiries by the court or prosecutor in open court risk chilling the desire to actually seek consular consultation.

- **Washington State Law Prohibits Requiring a Person to Identify His Immigration Status**

Washington State's statute on potential immigration consequences requires that defendants be told that a guilty plea may have potential immigration consequences, but also unambiguously prohibits requiring that *any* defendant "…at the time of the plea… be required to disclose his or her legal status to the court."[19]

- **Noncitizen Defendants Have a Fifth Amendment Right to Not Disclose Their Legal Status**[20]

The Fifth Amendment applies to non-citizens, even if they are undocumented.[21] The privilege against self-incrimination applies at all times, not just after arrest.[22] It applies in any proceeding: civil or criminal, administrative or judicial, investigatory or adjudicatory. [23] Its protections continue even through sentencing.[24] The privilege extends to disclosure of any fact which might constitute an essential link in a chain of evidence by which guilt can be established.[25] Moreover, that link may be provided not simply by use of the response itself as evidence,[26] but also by its use as an investigatory lead to other evidence that could lend support to a prosecution.[27]

Numerous federal crimes contain either nationality or current immigration status as elements of the offense. Given these possibilities of criminal exposure, the threat that this privilege protects against is "real and appreciable." As such, a non-citizen has the right to invoke the Fifth Amendment and may refuse to answer any questions about his/her alienage, nationality or citizenship posed by prosecutors or judges in open court.

---

[19] RCW §10.40.200(1) (1983).

[20] Wash. Const. art. I, § 9; *State v. Moore*, 79 Wn.2d 51, 57, 483 P.2d 630, 634 (1971) (The "Washington constitutional provision against self-incrimination envisions the same guarantee as that provided in the federal constitution.").

[21] "There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. . . Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection." *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

[22] The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976).

[23] *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

[24] *Estelle v. Smith*, 451 U.S. 454, 467 (1981).

[25] *Kastigar*, 406 U.S. at 469.

[26] *Brown v. Walker*, 161 U.S. 591, 599-600 (1896).

[27] *See Albertson v. Subversive Activities Ctrl. Bd.*, 382 U.S. 70, 78 (1965) (investigatory leads are sufficient); *Kastigar*, 406 U.S. at 444.

APPENDICES

APPENDIX A
ICE Memo 6/3010 Re: Civil Immigration Enforcement Priorities

APPENDIX B
ICE Memo 6/17/11 Re: Exercising Prosecutorial Discretion to Not Remove

APPENDIX C
ICE Memo 6/17/11 Re: Exercising Prosecutorial Discretion Regarding Victims and Witnesses

APPENDIX D
ICE Form I-205: Administrative Warrant for Deportation

APPENDIX E
King County Superior Court Policy Limiting ICE Enforcement Actions in Courtrooms

APPENDIX F
ICE Form I-247: Immigration Hold Request/ Immigration Detainer

APPENDIX G
ICE Memo 8/2/10: Interim Detainer Guidance

APPENDIX H
ICE Memo 12/23/12 Re: Updated Detainer Guidance

APPENDIX I
Sample Immigration Colloquies for Judges

APPENDIX J
Sample Immigration-Safe SOC Agreements

Appendix K
"Immigration Safe" King County Drug Court Agreement

APPENDIX L
"Vienna Convention and Bilateral Treaty Notification, Acknowledgement and Waiver or Request"

Policy Number: 10072.1
FEA Number: 601-14

Office of the Assistant Secretary

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: All ICE Employees

FROM: John Morton
Assistant Secretary

SUBJECT: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum outlines the civil immigration enforcement priorities of U.S. Immigration and Customs Enforcement (ICE) as they relate to the apprehension, detention, and removal of aliens. These priorities shall apply across all ICE programs and shall inform enforcement activity, detention decisions, budget requests and execution, and strategic planning.

A. Priorities for the apprehension, detention, and removal of aliens

In addition to our important criminal investigative responsibilities, ICE is charged with enforcing the nation's civil immigration laws. This is a critical mission and one with direct significance for our national security, public safety, and the integrity of our border and immigration controls. ICE, however, only has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States. In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency's highest enforcement priorities, namely national security, public safety, and border security.

To that end, the following shall constitute ICE's civil enforcement priorities, with the first being the highest priority and the second and third constituting equal, but lower, priorities.

Priority 1. Aliens who pose a danger to national security or a risk to public safety

The removal of aliens who pose a danger to national security or a risk to public safety shall be ICE's highest immigration enforcement priority. These aliens include, but are not limited to:

- aliens engaged in or suspected of terrorism or espionage, or who otherwise pose a danger to national security;
- aliens convicted of crimes, with a particular emphasis on violent criminals, felons, and repeat offenders;
- aliens not younger than 16 years of age who participated in organized criminal gangs;
- aliens subject to outstanding criminal warrants; and
- aliens who otherwise pose a serious risk to public safety.[1]

For purposes of prioritizing the removal of aliens convicted of crimes, ICE personnel should refer to the following new offense levels defined by the Secure Communities Program, with Level 1 and Level 2 offenders receiving principal attention. These new Secure Communities levels are given in rank order and shall replace the existing Secure Communities levels of offenses.[2]

- Level 1 offenders: aliens convicted of "aggravated felonies," as defined in § 101(a)(43) of the Immigration and Nationality Act,[3] or two or more crimes each punishable by more than one year, commonly referred to as "felonies";
- Level 2 offenders: aliens convicted of any felony or three or more crimes each punishable by less than one year, commonly referred to as "misdemeanors"; and
- Level 3 offenders: aliens convicted of crimes punishable by less than one year.[4]

Priority 2. Recent illegal entrants

In order to maintain control at the border and at ports of entry, and to avoid a return to the prior practice commonly and historically referred to as "catch and release," the removal of aliens who have recently violated immigration controls at the border, at ports of entry, or through the knowing abuse of the visa and visa waiver programs shall be a priority.

Priority 3. Aliens who are fugitives or otherwise obstruct immigration controls

In order to ensure the integrity of the removal and immigration adjudication processes, the removal of aliens who are subject to a final order of removal and abscond, fail to depart, or intentionally obstruct immigration controls, shall be a priority. These aliens include:

[1] This provision is not intended to be read broadly, and officers, agents, and attorneys should rely on this provision only when serious and articulable public safety issues exist.
[2] The new levels should be used immediately for purposes of enforcement operations. DRO will work with Secure Communities and the Office of the Chief Information Officer to revise the related computer coding by October 1, 2010.
[3] As the definition of "aggravated felony" includes serious, violent offenses and less serious, non-violent offenses, agents, officers, and attorneys should focus particular attention on the most serious of the aggravated felonies when prioritizing among level one offenses.
[4] Some misdemeanors are relatively minor and do not warrant the same degree of focus as others. ICE agents and officers should exercise particular discretion when dealing with minor traffic offenses such as driving without a license.

- fugitive aliens, in descending priority as follows:[5]
  - fugitive aliens who pose a danger to national security;
  - fugitives aliens convicted of violent crimes or who otherwise pose a threat to the community;
  - fugitive aliens with criminal convictions other than a violent crime;
  - fugitive aliens who have not been convicted of a crime;
- aliens who reenter the country illegally after removal, in descending priority as follows:
  - previously removed aliens who pose a danger to national security;
  - previously removed aliens convicted of violent crimes or who otherwise pose a threat to the community;
  - previously removed aliens with criminal convictions other than a violent crime;
  - previously removed aliens who have not been convicted of a crime; and
- aliens who obtain admission or status by visa, identification, or immigration benefit fraud.[6]

The guidance to the National Fugitive Operations Program: Priorities, Goals and Expectations, issued on December 8, 2009, remains in effect and shall continue to apply for all purposes, including how Fugitive Operation Teams allocate resources among fugitive aliens, previously removed aliens, and criminal aliens.

B. Apprehension, detention, and removal of other aliens unlawfully in the United States

Nothing in this memorandum should be construed to prohibit or discourage the apprehension, detention, or removal of other aliens unlawfully in the United States. ICE special agents, officers, and attorneys may pursue the removal of any alien unlawfully in the United States, although attention to these aliens should not displace or disrupt the resources needed to remove aliens who are a higher priority. Resources should be committed primarily to advancing the priorities set forth above in order to best protect national security and public safety and to secure the border.

C. Detention

As a general rule, ICE detention resources should be used to support the enforcement priorities noted above or for aliens subject to mandatory detention by law. Absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are

[5] Some fugitives may fall into both this priority and priority 1.
[6] ICE officers and special agents should proceed cautiously when encountering aliens who may have engaged in fraud in an attempt to enter but present themselves without delay to the authorities and indicate a fear of persecution or torture. *See* Convention relating to the Status of Refugees, art. 31, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. In such instances, officers and agents should contact their local Office of the Chief Counsel.

primary caretakers of children or an infirm person, or whose detention is otherwise not in the public interest. To detain aliens in those categories who are not subject to mandatory detention, ICE officers or special agents must obtain approval from the field office director. If an alien falls within the above categories and is subject to mandatory detention, field office directors are encouraged to contact their local Office of Chief Counsel for guidance.

D. Prosecutorial discretion

The rapidly increasing number of criminal aliens who may come to ICE's attention heightens the need for ICE employees to exercise sound judgment and discretion consistent with these priorities when conducting enforcement operations, making detention decisions, making decisions about release on supervision pursuant to the Alternatives to Detention Program, and litigating cases. Particular care should be given when dealing with lawful permanent residents, juveniles, and the immediate family members of U.S. citizens. Additional guidance on prosecutorial discretion is forthcoming. In the meantime, ICE officers and attorneys should continue to be guided by the November 17, 2000 prosecutorial discretion memorandum from then-INS Commissioner Doris Meissner; the October 24, 2005 Memorandum from Principal Legal Advisor William Howard; and the November 7, 2007 Memorandum from then-Assistant Secretary Julie Myers.

E. Implementation

ICE personnel shall follow the priorities set forth in this memorandum immediately. Further, ICE programs shall develop appropriate measures and methods for recording and evaluating their effectiveness in implementing the priorities. As this may require updates to data tracking systems and methods, ICE will ensure that reporting capabilities for these priorities allow for such reporting as soon as practicable, but not later than October 1, 2010.

Policy Number: 10075.1
FEA Number: 306-112-0026

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

June 17, 2011

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge
All Chief Counsel

FROM: John Morton
Director

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency's immigration enforcement resources are focused on the agency's enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered.

This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following:

- Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); and
- John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

The following memoranda related to prosecutorial discretion are rescinded:

- Johnny N. Williams, Executive Associate Commissioner (EAC) for Field Operations, Supplemental Guidance Regarding Discretionary Referrals for Special Registration (October 31, 2002); and
- Johnny N. Williams, EAC for Field Operations, Supplemental NSEERS Guidance for Call-In Registrants (January 8, 2003).

Background

One of ICE's central responsibilities is to enforce the nation's civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency's enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise "prosecutorial discretion" if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement[1]. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.

In the civil immigration enforcement context, the term "prosecutorial discretion" applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;

[1] The Meissner memorandum's standard for prosecutorial discretion in a given case turned principally on whether a substantial federal interest was present. Under this memorandum, the standard is principally one of pursuing those cases that meet the agency's priorities for federal immigration enforcement generally.

- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director[2] and may be exercised, with appropriate supervisory oversight, by the following ICE employees according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal Operations (ERO) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;

- officers, special agents, and their respective supervisors within Homeland Security Investigations (HSI) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;

- attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in immigration removal proceedings before the Executive Office for Immigration Review (EOIR); and

- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or USCIS charging official about the decision. In the event there is a dispute between the charging official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

[2] Delegation of Authority to the Assistant Secretary, Immigration and Customs Enforcement, Delegation No. 7030.2 (November 13, 2004), delegating among other authorities, the authority to exercise prosecutorial discretion in immigration enforcement matters (as defined in 8 U.S.C. § 1101(a)(17)).

Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

- the agency's civil immigration enforcement priorities;
- the person's length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person's ties and contributions to the community, including family relationships;
- the person's ties to the home country and conditions in the country;
- the person's age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person's spouse is pregnant or nursing;
- whether the person or the person's spouse suffers from severe mental or physical illness;
- whether the person's nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE's enforcement priorities.

That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE's enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien's advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer's, agent's, or attorney's initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing

communication with represented individuals[3] and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

[3] For questions concerning such rules, officers or agents should consult their local Office of Chief Counsel.

Policy Number: 10076.1
FEA Number: 306-112-002b

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

JUN 17 2011

U.S. Immigration and Customs Enforcement

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge
All Chief Counsel

FROM: John Morton
Director

SUBJECT: Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs

Purpose:

This memorandum sets forth agency policy regarding the exercise of prosecutorial discretion in removal cases involving the victims and witnesses of crime, including domestic violence, and individuals involved in non-frivolous efforts related to the protection of their civil rights and liberties. In these cases, ICE officers, special agents, and attorneys should exercise all appropriate prosecutorial discretion to minimize any effect that immigration enforcement may have on the willingness and ability of victims, witnesses, and plaintiffs to call police and pursue justice. This memorandum builds on prior guidance on the handling of cases involving T and U visas and the exercise of prosecutorial discretion.[1]

Discussion:

Absent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime. In practice, the vast majority of state and local law enforcement agencies do not generally arrest victims or witnesses of crime as part of an investigation. However, ICE regularly hears concerns that in some instances a state or local law enforcement officer may arrest and book multiple people at the scene of alleged domestic violence. In these cases, an arrested victim or witness of domestic violence may be booked and fingerprinted and, through the operation of the Secure

[1] For a thorough explanation of prosecutorial discretion, see the following: Memorandum from Peter S. Vincent, Principal Legal Advisor, Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal (Sept. 25, 2009); Memorandum from William J. Howard, Principal Legal Advisor, VAWA 2005 Amendments to Immigration and Nationality Act and 8 U.S.C. § 1367 (Feb. 1, 2007); Memorandum from Julie L. Myers, Assistant Secretary of ICE, Prosecutorial and Custody Discretion (Nov. 7, 2007); Memorandum from William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (Oct. 24, 2005); Memorandum from Doris Meissner, Commissioner, Immigration and Naturalization Service, Exercising Prosecutorial Discretion (Nov. 17, 2000).

Communities program or another ICE enforcement program, may come to the attention of ICE. Absent special circumstances, it is similarly against ICE policy to remove individuals in the midst of a legitimate effort to protect their civil rights or civil liberties.

To avoid deterring individuals from reporting crimes and from pursuing actions to protect their civil rights, ICE officers, special agents, and attorneys are reminded to exercise all appropriate discretion on a case-by-case basis when making detention and enforcement decisions in the cases of victims of crime, witnesses to crime, and individuals pursuing legitimate civil rights complaints. Particular attention should be paid to:

- victims of domestic violence, human trafficking, or other serious crimes;
- witnesses involved in pending criminal investigations or prosecutions;
- plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and
- individuals engaging in a protected activity related to civil or other rights (for example, union organizing or complaining to authorities about employment discrimination or housing conditions) who may be in a non-frivolous dispute with an employer, landlord, or contractor.

In deciding whether or not to exercise discretion, ICE officers, agents, and attorneys should consider all serious adverse factors. Those factors include national security concerns or evidence the alien has a serious criminal history, is involved in a serious crime, or poses a threat to public safety. Other adverse factors include evidence the alien is a human rights violator or has engaged in significant immigration fraud. In the absence of these or other serious adverse factors, exercising favorable discretion, such as release from detention and deferral or a stay of removal generally, will be appropriate. Discretion may also take different forms and extend to decisions to place or withdraw a detainer, to issue a Notice to Appear, to detain or release an alien, to grant a stay or deferral of removal, to seek termination of proceedings, or to join a motion to administratively close a case.

In addition to exercising prosecutorial discretion on a case-by-case basis in these scenarios, ICE officers, agents, and attorneys are reminded of the existing provisions of the Trafficking Victims Protection Act (TVPA),[2] its subsequent reauthorization,[3] and the Violence Against Women Act (VAWA).[4] These provide several protections for the victims of crime and include specific provisions for victims of domestic violence, victims of certain other crimes,[5] and victims of human trafficking.

Victims of domestic violence who are the child, parent, or current/former spouse of a U.S. citizen or permanent resident may be able to self-petition for permanent residency.[6] A U nonimmigrant visa provides legal status for the victims of substantial mental or physical abuse as

---

[2] Pub. L. No. 106-386, §§101-113, 114 Stat. 1464, 1466 (codified as amended in scattered sections of the U.S.C.).
[3] William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 1464, 1491 (codified as amended in scattered sections of the U.S.C.).
[4] Pub. L. No. 106-386, §§1001-1603, 114 Stat. 1464, 1491 (codified as amended in scattered sections of the U.S.C.).
[5] For a list of the qualifying crimes, see INA §101(a)(15)(U)(iii).
[6] *See* INA §101(a)(51).

a result of domestic violence, sexual assault, trafficking, and other certain crimes.[7] A T nonimmigrant visa provides legal status to victims of severe forms of trafficking who assist law enforcement in the investigation and/or prosecution of human trafficking cases.[8] ICE has important existing guidance regarding the exercise of discretion in these cases that remains in effect. Please review it and apply as appropriate.[9]

Please also be advised that a flag now exists in the Central Index System (CIS) to identify those victims of domestic violence, trafficking, or other crimes who already have filed for, or have been granted, victim-based immigration relief. These cases are reflected with a Class of Admission Code "384." When officers or agents see this flag, they are encouraged to contact the local ICE Office of Chief Counsel, especially in light of the confidentiality provisions set forth at 8 U.S.C. § 1367.

No Private Right of Action

These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

---

[7] *See* INA §101(a)(15)(U).
[8] *See* INA §101(a)(15)(T).
[9] *See* Memorandum from John P. Torres, Director, Office of Detention and Removal Operations and Marcy M. Forman, Director, Office of Investigations, Interim Guidance Relating to Officers Procedure Following Enactment of VAWA 2005 (Jan. 22, 2007).

US. Department of Justice
Immigration and Naturalization Service

Warrant of Removal/Deportation

File No: _____

Date: _____

To any officer of the United States Immigration and Naturalization Service:

_____,
(Full name of alien)

who entered the United States at _____ (Place of entry) on _____ (Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- ☐ an immigration judge in exclusion, deportation, or removal proceedings
- ☐ a district director or a district director's designated official
- ☐ the Board of Immigration Appeals
- ☐ a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:
Section 241(a)(5) of the Immigration and Nationality Act(Act), as amended.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his or her direction, command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of the appropriation. "Salaries and Expenses Immigration and Naturalization Service 2002," including the expense of an attendant if necessary.

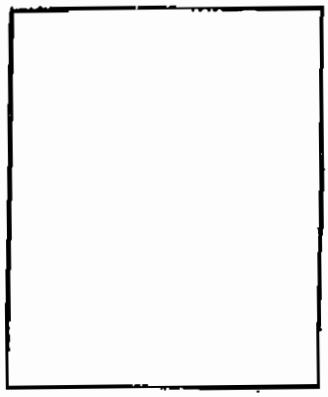
_____
(Signature of INS official)

_____
(Title of INS official)

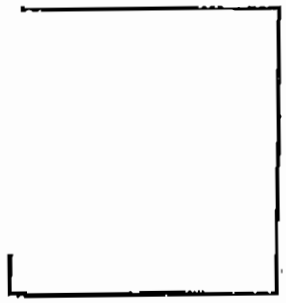
_____
(Date and office location)

To be completed by service officer executing the warrant:
Name of alien being removed:

Port, date, and manner of removal:



Photograph of alien removed



Right index fingerprint of alien removed

(Signature of alien being fingerprinted)

(Signature and title of INS official taking print)

Departure witnessed by:

(Signature and title of INS official)

If actual departure is not witnessed, fully identify source or means of verification of departure:

If self-removal (self-deportation), pursuant to 8 CFR 241.7, check here. ☐

Departure Verified by:

(Signature and title of INS official)

Court Policy: No Courtroom Arrests Based on Immigration Status

The King County Superior Court judges affirm the principle that our courts must remain open and accessible for all individuals and families to resolve disputes under the rule of law. It is the policy of the King County Superior Court that warrants for the arrest of individuals based on their immigration status shall not be executed within any of the King County Superior Court courtrooms unless directly ordered by the presiding judicial officer and shall be discouraged in the King County Superior Court courthouses unless the public's safety is at immediate risk. Each judicial officer remains responsible for enforcing this policy within his or her courtroom. This policy does not prohibit law enforcement from executing warrants when public safety is at immediate risk.

In adopting this policy, the Superior Court recognizes that cooperation with other branches of government, including law enforcement agencies, is essential. The judges respectfully request that the county executive, in cooperation with the other branches of government, initiate a dialogue with the appropriate law enforcement agencies to develop a protocol implementing the policy which: 1) respects the dignity of the courtroom and the proceedings occurring in each of the courtrooms; and 2) discourages arrests inside of the courthouses.

Approved by the King County Superior Court Judges: April 22, 2008.

DEPARTMENT OF HOMELAND SECURITY

IMMIGRATION DETAINER - NOTICE OF ACTION

Subject ID: Event #:	File No: Date:

TO: (Name and Title of Institution - OR Any Subsequent Law Enforcement Agency)	FROM: (Department of Homeland Security Office Address)

MAINTAIN CUSTODY OF ALIEN FOR A PERIOD NOT TO EXCEED 48 HOURS

Name of Alien: _____

Date of Birth: _____ Nationality: _____ Sex: _____

THE U.S. DEPARTMENT OF HOMELAND SECURITY (DHS) HAS TAKEN THE FOLLOWING ACTION RELATED TO THE PERSON IDENTIFIED ABOVE, CURRENTLY IN YOUR CUSTODY:

☐ Initiated an investigation to determine whether this person is subject to removal from the United States.

☐ Initiated removal proceedings and served a Notice to Appear or other charging document. A copy of the charging document is attached and was served on _____.
(Date)

☐ Served a warrant of arrest for removal proceedings. A copy of the warrant is attached and was served on _____.
(Date)

☐ Obtained an order of deportation or removal from the United States for this person.

This action does not limit your discretion to make decisions related to this person's custody classification, work, quarter assignments, or other matters. DHS discourages dismissing criminal charges based on the existence of a detainer.

IT IS REQUESTED THAT YOU:

☐ Maintain custody of the subject for a period **NOT TO EXCEED 48 HOURS**, excluding Saturdays, Sundays, and holidays, beyond the time when the subject would have otherwise been released from your custody to allow DHS to take custody of the subject. This request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency "shall maintain custody of an alien" once a detainer has been issued by DHS. **You are not authorized to hold the subject beyond these 48 hours.** As early as possible prior to the time you otherwise would release the subject, please notify the Department by calling _____ during business hours or _____ after hours or in an emergency. If you cannot reach a Department Official at these numbers, please contact the Immigration and Customs Enforcement (ICE) Law Enforcement Support Center in Burlington, Vermont at: (802) 872-6020.

☐ Provide a copy to the subject of this detainer.

☐ Notify this office of the time of release at least 30 days prior to release or as far in advance as possible.

☐ Notify this office in the event of the inmate's death, hospitalization or transfer to another institution.

☐ Consider this request for a detainer operative only upon the subject's conviction.

☐ Cancel the detainer previously placed by this Office on _____.
(Date)

_____ _____
(Name and title of Immigration Officer) (Signature of Immigration Officer)

TO BE COMPLETED BY THE LAW ENFORCEMENT AGENCY CURRENTLY HOLDING THE SUBJECT OF THIS NOTICE:

Please provide the information below, sign, and return to the Department using the envelope enclosed for your convenience or by faxing a copy to _____. You should maintain a copy for your own records so you may track the case and not hold the subject beyond the 48-hour period.

Local Booking or Inmate # _____ Date of latest criminal charge/conviction: _____

Last criminal charge/conviction: _____

Estimated release date: _____

Notice: Once in our custody, the subject of this detainer may be removed from the United States. If the individual may be the victim of a crime, or if you want this individual to remain in the United States for prosecution or other law enforcement purposes, including acting as a witness, please notify the ICE Law Enforcement Support Center at (802) 872-6020.

_____ _____
(Name and title of Officer) (Signature of Officer)

NOTICE TO THE DETAINEE

The Department of Homeland Security (DHS) has placed an immigration detainer on you. An immigration detainer is a notice from DHS informing law enforcement agencies that DHS intends to assume custody of you after you otherwise would be released from custody. DHS has requested that the law enforcement agency which is currently detaining you maintain custody of you for a period not to exceed 48 hours (excluding Saturdays, Sundays, and holidays) beyond the time when you would have been released by the state or local law enforcement authorities based on your criminal charges or convictions. **If DHS does not take you into custody during that additional 48 hour period, not counting weekends or holidays, you should contact your custodian** (the law enforcement agency or other entity that is holding you now) to inquire about your release from state or local custody. **If you have a complaint regarding this detainer or related to violations of civil rights or civil liberties connected to DHS activities, please contact the ICE Joint Intake Center at 1-877-2INTAKE (877-246-8253). If you believe you are a United States citizen or the victim of a crime, please advise DHS by calling the ICE Law Enforcement Support Center toll free at (855) 448-6903.**

NOTIFICACIÓN A LA PERSONA DETENIDA

El Departamento de Seguridad Nacional (DHS) de EE. UU. ha emitido una orden de detención inmigratoria en su contra. Mediante esta orden, se notifica a los organismos policiales que el DHS pretende arrestarlo cuando usted cumpla su reclusión actual. El DHS ha solicitado que el organismo policial local o estatal a cargo de su actual detención lo mantenga en custodia por un período no mayor a 48 horas (excluyendo sábados, domingos y días festivos) tras el cese de su reclusión penal. **Si el DHS no procede con su arresto inmigratorio durante este período adicional de 48 horas, excluyendo los fines de semana o días festivos, usted debe comunicarse con la autoridad estatal o local que lo tiene detenido** (el organismo policial u otra entidad a cargo de su custodia actual) para obtener mayores detalles sobre el cese de su reclusión. **Si tiene alguna queja que se relacione con esta orden de detención o con posibles infracciones a los derechos o libertades civiles en conexión con las actividades del DHS, comuníquese con el Joint Intake Center (Centro de Admisión) del ICE (Servicio de Inmigración y Control de Aduanas) llamando al 1-877-2INTAKE (877-246-8253). Si usted cree que es ciudadano de los Estados Unidos o que ha sido víctima de un delito, infórmeselo al DHS llamando al Centro de Apoyo a los Organismos Policiales (Law Enforcement Support Center) del ICE, teléfono (855) 448-6903 (llamada gratuita).**

Avis au détenu

Le département de la Sécurité Intérieure [Department of Homeland Security (DHS)] a émis, à votre encontre, un ordre d'incarcération pour des raisons d'immigration. Un ordre d'incarcération pour des raisons d'immigration est un avis du DHS informant les agences des forces de l'ordre que le DHS a l'intention de vous détenir après la date normale de votre remise en liberté. Le DHS a requis que l'agence des forces de l'ordre, qui vous détient actuellement, vous garde en détention pour une période maximum de 48 heures (excluant les samedis, dimanches et jours fériés) au-delà de la période à la fin de laquelle vous auriez été remis en liberté par les autorités policières de l'État ou locales en fonction des inculpations ou condamnations pénales à votre encontre. **Si le DHS ne vous détient pas durant cette période supplémentaire de 48 heures, sans compter les fins de semaines et les jours fériés, vous devez contacter votre gardien** (l'agence des forces de l'ordre qui vous détient actuellement) pour vous renseigner à propos de votre libération par l'État ou l'autorité locale. **Si vous avez une plainte à formuler au sujet de cet ordre d'incarcération ou en rapport avec des violations de vos droits civils liées à des activités du DHS, veuillez contacter le centre commun d'admissions du Service de l'Immigration et des Douanes [ICE - Immigration and Customs Enforcement] [ICE Joint Intake Center] au 1-877-2INTAKE (877-246-8253). Si vous croyez être un citoyen des États-Unis ou la victime d'un crime, veuillez en aviser le DHS en appelant le centre d'assistance des forces de l'ordre de l'ICE [ICE Law Enforcement Support Center] au numéro gratuit (855) 448-6903.**

AVISO AO DETENTO

O Departamento de Segurança Nacional (DHS) emitiu uma ordem de custódia imigratória em seu nome. Este documento é um aviso enviado às agências de imposição da lei de que o DHS pretende assumir a custódia da sua pessoa, caso seja liberado. O DHS pediu que a agência de imposição da lei encarregada da sua atual detenção mantenha-o sob custódia durante, no máximo, 48 horas (excluindo-se sábados, domingos e feriados) após o período em que seria liberado pelas autoridades estaduais ou municipais de imposição da lei, de acordo com as respectivas acusações e penas criminais. **Se o DHS não assumir a sua custódia durante essas 48 horas adicionais, excluindo-se os fins de semana e feriados, você deverá entrar em contato com o seu custodiante** (a agência de imposição da lei ou qualquer outra entidade que esteja detendo-o no momento) para obter informações sobre sua liberação da custódia estadual ou municipal. **Caso você tenha alguma reclamação a fazer sobre esta ordem de custódia imigratória ou relacionada a violações dos seus direitos ou liberdades civis decorrente das atividades do DHS, entre em contato com o Centro de Entrada Conjunta da Agencia de Controle de Imigração e Alfândega (ICE) pelo telefone 1-877-246-8253. Se você acreditar que é um cidadão dos EUA ou está sendo vítima de um crime, informe o DHS ligando para o Centro de Apoio à Imposição da Lei do ICE pelo telefone de ligação gratuita (855) 448-6903**

THÔNG BÁO CHO NGƯỜI BỊ GIAM GIỮ

Bộ Quốc Phòng (DHS) đã có lệnh giam giữ quý vị vì lý do di trú. Lệnh giam giữ vì lý do di trú là thông báo của DHS cho các cơ quan thi hành luật pháp là DHS có ý định tạm giữ quý vị sau khi quý vị được thả. DHS đã yêu cầu cơ quan thi hành luật pháp hiện đang giữ quý vị phải tiếp tục tạm giữ quý vị trong không quá 48 giờ đồng hồ (không kể thứ Bảy, Chủ nhật, và các ngày nghỉ lễ) ngoài thời gian mà lẽ ra quý vị sẽ được cơ quan thi hành luật pháp của tiểu bang hoặc địa phương thả ra dựa trên các bản án và tội hình sự của quý vị. **Nếu DHS không tạm giam quý vị trong thời gian 48 giờ bổ sung đó, không tính các ngày cuối tuần hoặc ngày lễ, quý vị nên liên lạc với bên giam giữ quý vị** (cơ quan thi hành luật pháp hoặc tổ chức khác hiện đang giam giữ quý vị) để hỏi về việc cơ quan địa phương hoặc liên bang thả quý vị ra. **Nếu quý vị có khiếu nại về lệnh giam giữ này hoặc liên quan tới các trường hợp vi phạm dân quyền hoặc tự do công dân liên quan tới các hoạt động của DHS, vui lòng liên lạc với ICE Joint Intake Center tại số 1-877-2INTAKE (877-246-8253). Nếu quý vị tin rằng quý vị là công dân Hoa Kỳ hoặc nạn nhân tội phạm, vui lòng báo cho DHS biết bằng cách gọi ICE Law Enforcement Support Center tại số điện thoại miễn phí (855) 448-6903.**

对被拘留者的通告

美国国土安全部（DHS）已发出对你的移民监禁令。移民监禁令是美国国土安全部用来通告执法当局，表示美国国土安全部意图在你可能从当前的拘留被释放以后继续拘留你的通知单。美国国土安全部已经向当前拘留你的执法当局要求，根据对你的刑事起诉或判罪的基础，在本当由州或地方执法当局释放你时，继续拘留你，为期不超过 48 小时（星期六、星期天和假日除外）。**如果美国国土安全部未在不计周末或假日的额外 48 小时期限内将你拘留，你应该联系你的监管单位**（现在拘留你的执法当局或其他单位），询问关于你从州或地方执法单位被释放的事宜。**如果你对于这项拘留或关于美国国土安全部的行动所涉及的违反民权或公民自由权有任何投诉，请联系美国移民及海关执法局联合接纳中心（ICE Joint Intake Center），电话号码是 1-877-2INTAKE (877-246-8253)。如果你相信你是美国公民或犯罪被害人，请联系美国移民及海关执法局的执法支援中心（ICE Law Enforcement Support Center），告知美国国土安全部。该执法支援中心的免费电话号码是 (855) 448-6903。**

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

INTERIM Policy Number 10074.1: Detainers

Issue Date: 08/02/2010
Effective Date: 08/02/2010
Superseded: LESC LOP 005-09 (September 23, 2009)
Federal Enterprise Architecture Number: 111-601-001-a

1. **Purpose/Background.** This directive establishes the interim policy of U.S. Immigration and Customs Enforcement (ICE) regarding the issuance of civil immigration detainers.

2. **Definitions.** The following definitions apply for purposes of this directive only.

2.1. A **detainer** (Form I-247) is a notice that ICE issues to Federal, State, and local law enforcement agencies (LEAs) to inform the LEA that ICE intends to assume custody of an individual in the LEA's custody. An immigration detainer may serve three key functions—

- notify an LEA that ICE intends to arrest or remove an alien in the LEA's custody once the alien is no longer subject to the LEA's detention;
- request information from an LEA about an alien's impending release so ICE may assume custody before the alien is released from the LEA's custody; and
- request that the LEA maintain custody of an alien who would otherwise be released for a period not to exceed 48 hours (excluding Saturdays, Sundays, and holidays) to provide ICE time to assume custody.

2.2. An **Immigration officer** includes an officer or an agent who is authorized to issue detainers pursuant to 8 C.F.R. § 287.7(b), or who a state, local, or tribal officer or agent who is delegated such authority pursuant to § 287(g) of the Immigration and Nationality Act.

3. **Policy.**

3.1. Only immigration officers may issue detainers.

3.2. Immigration officers shall issue detainers only after an LEA has exercised its independent authority to arrest the alien for a criminal violation.

4. **Procedures.**

4.1. Immigration officers shall not issue a detainer unless an LEA has exercised its independent authority to arrest the alien. Immigration officers shall not issue detainers for aliens who have been temporarily detained by the LEA (i.e., roadside or *Terry* stops)

but not arrested. This policy, however, does not preclude temporary detention of an alien by the LEA while ICE responds to the scene.

4.2. If an immigration officer has reason to believe that an individual arrested by an LEA is subject to ICE detention for removal or removal proceedings, and issuance of the detainer otherwise comports with this policy and appears to advance the priorities of the agency, the immigration officer may issue a detainer (Form I-247) to the LEA.

4.3. If the alien is the subject of an administrative arrest warrant, warrant of removal, or removal order, the immigration officer who issues the detainer should attach the warrant or order to the detainer, unless impracticable.

4.4. Immigration officers are expected to make arrangements to assume custody of an alien who is the subject of a detainer in a timely manner and without unnecessary delay. Although a detainer serves to request that an LEA temporarily detain an alien for a period not to exceed 48 hours from the time the LEA otherwise would have released the alien (excluding Saturdays, Sundays, and holidays) to permit ICE to assume custody of the alien, immigration officers should avoid relying on that hold period. If at any time after a detainer is issued, ICE determines it will not assume custody of the alien, the detainer should be withdrawn or rescinded and the LEA notified.

4.5. ICE shall timely assume custody of the alien if ICE has opted to lodge a detainer against an alien in any of the following categories—

- aliens who are subject to removal based upon certain criminal or security-related grounds set forth in INA § 236(c);
- aliens who are within the "removal period," as defined in INA § 241(a)(2); and
- aliens who have been arrested for controlled substance offenses under INA § 287(d).

4.6. Immigration officers shall take particular care when issuing a detainer against a lawful permanent resident (LPR) as some grounds of removability hinge on a conviction, while others do not [eg. removability pursuant to INA § 237(a)(4) and INA § 237(a)(1)(E).] Although in certain instances ICE may hold LPRs for up to 48 hours to make charging determinations, immigration officers should exercise such authority judiciously and seek advice of counsel for guidance if the LPR has not been convicted of a removable offense.

4.7. Immigration officers should consult their supervisors or local chief counsel office with all inquiries, questions, or concerns regarding this policy.

5. Authorities/References.

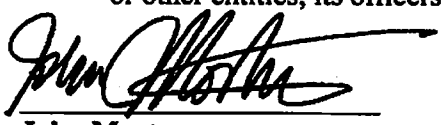
5.1. INA §§ 103(a)(3), 236, 241, 287.

5.2. 8 C.F.R. §§ 236.1, 287.3. 287.5, 287.7, 287.8, 1236.1.

6. Attachments.

6.1. Form I-247: Immigration Detainer - Notice of Action.

7. No Private Right Statement. This Directive is an internal policy statement of ICE. It is not intended to, and does not create any rights, privileges, or benefits, substantive or procedural, enforceable by any party against the United States; its departments, agencies, or other entities; its officers or employees; contractors or any other person.



John Morton
Director
U.S. Immigration and Customs Enforcement

Office of the Director

U.S. Department of Homeland Security
500 12th Street, SW
Washington, D.C. 20536

U.S. Immigration and Customs Enforcement

DEC 21 2012

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge
All Chief Counsel

FROM: John Morton
Director

SUBJECT: Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems

Purpose

This memorandum provides guidance on the use of U.S. Immigration and Customs Enforcement (ICE) detainers in the federal, state, local, and tribal criminal justice systems. This guidance applies to all uses of ICE detainers regardless of whether the contemplated use arises out of the Criminal Alien Program, Secure Communities, a 287(g) agreement, or any other ICE enforcement effort. This guidance does not govern the use of detainers by U.S. Customs and Border Protection (CBP). This guidance replaces Sections 4.2 and 4.5 of the August 2010 *Interim Guidance on Detainers* (Policy Number 10074.1) and otherwise supplements the remaining sections of that same guidance.

Background

In the memorandum entitled *Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens*, issued in June 2010,[1] ICE set forth clear priorities that guide its civil immigration enforcement. These priorities ensure that ICE's finite enforcement resources are dedicated, to the greatest extent possible, to individuals whose removal promotes public safety, national security, border security, and the integrity of the immigration system.

As ICE's implementation of these priorities continues, it is of critical importance that ICE remain focused on ensuring that the priorities are uniformly, transparently, and effectively pursued. To that end, ICE issues the following guidance governing the use of detainers in the nation's criminal justice system at the federal, state, local, and tribal levels. This guidance will ensure that the agency's use of detainers in the criminal justice system uniformly applies the

[1] As amended and updated by the memorandum of the same title issued March 2, 2011.

principles set forth in the June 2010 memorandum and is consistent with the agency's enforcement priorities.

National Detainer Guidance

Consistent with ICE's civil enforcement priorities and absent extraordinary circumstances, ICE agents and officers should issue a detainer in the federal, state, local, or tribal criminal justice systems against an individual only where (1) they have reason to believe the individual is an alien subject to removal from the United States and (2) one or more of the following conditions apply:

- the individual has a prior felony conviction or has been charged with a felony offense;
- the individual has three or more prior misdemeanor convictions;[2]
- the individual has a prior misdemeanor conviction or has been charged with a misdemeanor offense if the misdemeanor conviction or pending charge involves—
  - violence, threats, or assault;
  - sexual abuse or exploitation;
  - driving under the influence of alcohol or a controlled substance;
  - unlawful flight from the scene of an accident;
  - unlawful possession or use of a firearm or other deadly weapon;
  - the distribution or trafficking of a controlled substance; or
  - other significant threat to public safety;[3]
- the individual has been convicted of illegal entry pursuant to 8 U.S.C. § 1325;
- the individual has illegally re-entered the country after a previous removal or return;
- the individual has an outstanding order of removal;
- the individual has been found by an immigration officer or an immigration judge to have knowingly committed immigration fraud; or
- the individual otherwise poses a significant risk to national security, border security, or public safety.[4]

---

[2] Given limited enforcement resources, three or more convictions for minor traffic misdemeanors or other relatively minor misdemeanors alone should not trigger a detainer unless the convictions reflect a clear and continuing danger to others or disregard for the law.

[3] A significant threat to public safety is one which poses a significant risk of harm or injury to a person or property.

[4] For example, the individual is a suspected terrorist, a known gang member, or the subject of an outstanding felony arrest warrant; or the detainer is issued in furtherance of an ongoing felony criminal or national security investigation.

Revised Detainer Form

To ensure consistent application of this guidance, ICE will revise the DHS detainer form, Form I-247. The revised detainer form, which should be used in all cases once it is issued, will specifically list the grounds above and require the issuing officer or agent to identify those that apply so that the receiving agency and alien will know the specific basis for the detainer. The changes to the form will make it easy for officers and agents to document the immigration enforcement priorities and prosecutorial discretion analysis they have completed leading to the issuance of the detainer.

Prosecutorial Discretion

This guidance identifies those removable aliens in the federal, state, local, and tribal criminal justice systems for whom a detainer may be considered. It does not require a detainer in each case, and all ICE officers, agents, and attorneys should continue to evaluate the merits of each case based on the June 2011 memorandum entitled *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* and other applicable agency policies.

Six-Month Review

ICE Field Office Directors, Chief Counsel, and Special Agents in Charge should closely evaluate the implementation and effect of this guidance in their respective jurisdictions for a period of six months from the date of this memorandum. Based on the results of this evaluation, ICE will consider whether modifications, if any, are needed.

Disclaimer

This guidance does not create or confer any right or benefit on any person or party, public or private. Nothing in this guidance should be construed to limit ICE's power to apprehend, charge, detain, administratively prosecute, or remove any alien unlawfully in the United States or to limit the legal authority of ICE or its personnel to enforce federal immigration law. Similarly, this guidance, which may be modified, superseded, or rescinded at any time, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

This guidance does not cover or control those detainers issued by officers and agents of CBP. Detainers issued by CBP officers and agents shall remain governed by existing CBP policy, and nothing in this guidance is intended to limit CBP's power to apprehend, charge, detain, or remove any alien unlawfully in the United States.

Colloquy Regarding Immigration Consequences Required by Padilla and Sandoval

Notice at Arraignment re: Immigration Consequences

Court to Defendant: You are not required to disclose your immigration or citizenship status to the court. But if you are not a citizen of the United States you should tell your lawyer, even if you do not have legal immigration status to be here, because you have the right to receive advice from your lawyer about the specific consequences and risks that your case may have on your immigration status. Depending on the facts of your case, a plea of guilty or a conviction at trial can result in your deportation and may have other negative immigration consequences, such as preventing you from gaining citizenship or lawful status to remain in the United States. In some cases, if you are convicted, detention and deportation will be required. Defense counsel must advise a noncitizen client of adverse immigration consequences.

Colloquy for the Beginning of Trial re: Immigration Consequences

Court to Defendant: You are not required to disclose your immigration or citizenship status to the court. If you are not a citizen of the United States, whether or not you have lawful immigration status, a conviction may result in detention, deportation, exclusion from the United States, or denial of naturalization or other immigration benefits, depending on the specific facts and circumstances of your case. In some cases, detention and deportation will be required. Immigration law is a complex area of law and any changes in the law could affect the consequences of a conviction. Your lawyer must advise you about these issues. You are not entitled to an immigration lawyer at public expense.

Or For a Self-Represented Individual (proceeding pro se)

(This advisement should also be given when the court grants a waiver of right to counsel.)

Court to Defendant: You are not required to disclose your immigration or citizenship status to the court. But if you are not a citizen of the United States, you have the right to receive advice from a lawyer about the specific consequences and risk that your case may have on your immigration status. You are not entitled to an immigration lawyer at public expense. Depending on the facts of your case, a plea of guilty or a conviction at trial can result in your deportation and may have other negative immigration consequences, such as preventing you from gaining citizenship or lawful status to remain in the United States. In some cases, if you are convicted, detention and deportation will be required. This is a complicated area of law and if applicable, I strongly advise you to talk with an attorney. Do you wish to set this over so that you can consult with an attorney?

Court: *Counsel, the Court wishes to ensure that you have complied with your obligations to advise your client of any adverse immigration consequences that may follow from this plea. I am not asking you to disclose anything about your client's citizenship or immigration status. Do you need any additional time to discuss this issue with your client*?

Colloquy for Entering a Plea re: Immigration Consequences

Court to Defendant: You are not required to disclose your immigration or citizenship status to the court. If you are not a citizen of the United States, whether or not you have lawful immigration status, your plea or admission of guilt [or entry of an *Alford* plea] may result in detention, deportation, exclusion from the United States, or denial of naturalization or other immigration benefits, depending on the specific facts and circumstances of your case. In some cases, detention and deportation will be required. Immigration law is a complex area of law and any changes in the law could affect the consequences of a conviction. Your lawyer must advise you about these issues. You are not entitled to an immigration lawyer at public expense.

Court: *Counsel, the Court wishes to ensure that you have complied with your obligations to advise your client of any adverse immigration consequences that may follow from a conviction. I am not asking you to disclose anything about your client's citizenship or immigration status. Do you need any additional time to discuss this issue with your client*?

Or For a Self-Represented Individual (proceeding pro se)

(This advisement should also be given when the court grants a waiver of right to counsel.)

Court to Defendant: You are not required to disclose your immigration or citizenship status to the court. If you are not a citizen of the United States, whether or not you have lawful immigration status, your plea or admission of guilt [or entry of an *Alford* plea] may result in detention, deportation, exclusion from the United States, or denial of naturalization or other immigration benefits, depending on the specific facts and circumstances of your case. In some cases, detention and deportation will be required. Immigration law is a complex area of law and any changes in the law could affect your plea. You have a right to seek advice from a lawyer about these issues before you take a plea or admit guilt to any offense. You are not entitled to an immigration lawyer at public expense. Upon request, the court will allow you additional time to consider the appropriateness of the plea in light of this notice. Do you wish to have additional time to talk with a lawyer?

Contact the Washington Defender Association Immigration Project for advice and assistance.
Website: www.defensenet.org
Telephone: 206-623-4321

This project is supported by the
Washington State Supreme Court Gender and Justice Commission and the
Washington State Supreme Court Minority and Justice Commission
with funding from the State Justice Institute Grant (SJI-10-E-096)

Court of Washington for	
_____ Plaintiff, vs. _____ Defendant.	**No**. **Stipulated Order of Continuance**

1. My true name is _____.
2. My age is _____.
3. I went through the _____ grade.
4. ***I Have Been Informed and Fully Understand that:***
   (a) I have the right to representation by a lawyer and if I cannot afford to pay for a lawyer, one will be provided at public expense.
   (b) I am charged with:

Count	Crime	RCW or Ordinance (with subsection)
1.		
2.		
3.		
4.		

[ ] In count(s) _____, it is alleged that I committed the offense against another family or household member as defined in RCW 10.99.020.

The elements are:
[ ] as set out in the charging document(s).
[ ] as follows:_____
_____
_____
_____
_____.

The crime with which I am charged carries a maximum sentence of _____ days in jail and a $_____ fine.

5. This Stipulated Order of Continuance continues this case for _____ months from the date it is entered. The period of continuance for domestic violence and Driving Under the Influence /Physical Control cases shall not be greater than 60 months; the period of continuance shall not be greater than 24 months in all other cases.
6. ***I Understand that I have the Following Important Rights, and I give them all up by Entering this Stipulated Order of Continuance:***
   (a) I give up the right to a speedy trial and waive my speedy trial rights for the length of this agreement plus 90 days; my new speedy trial commencement date shall be the end date of this agreement;
   (b) If the judge determines that I have violated this agreement, I give up the right to contest and object to the evidence presented against me at a future hearing.

(c) I, as well as the State/City, give up the right to a public trial by an impartial jury in the county where the crime is alleged to have been committed.
(d) I give up the right to remain silent before and during the trial, and the right to refuse to testify against myself;
(e) I give up the right at trial to hear and question the witnesses who testify against me;
(f) I give up the right at trial to testify and to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

7. ***I Understand that I Retain the Following Rights:***

(a) I have the right to be represented by an attorney of my own choosing, and if I cannot afford one, one will be appointed for me at public expense if I am qualified;
(b) I am presumed innocent unless my guilt is proven beyond a reasonable doubt at a future hearing; I am not admitting guilt by entering into this agreement;
(c) I may appeal a future finding of guilt entered after a trial.

8. ***I Agree to Comply with the Following Conditions by the following dates:***

(a) _____
_____.
(b) _____
_____.
(c) _____
_____.
(d) _____
_____.
(e) _____
_____.
(f) _____
_____.
(g) _____
_____.

9. All of the above conditions shall be stated with specificity and shall contain start and completion dates when appropriate.

10. [ ] This agreement will be monitored by Compliance Monitoring for _____ months. Pay compliance monitoring fees in the amount of $_____ per year; or
[ ] This agreement will be monitored by [ ] King County [ ] Bellevue Probation for _____ months. Pay probation fees as set by Probation Department guidelines; or
[ ] This agreement will be monitored by the City/State; or
[ ] This agreement will be monitored by judicial review.

11. I understand that all fees are due within 30 days of entry of this Stipulated Order of Continuance unless I enter a time pay agreement.

12. **Compliance or Revocation:**
I understand that that, at the end of the time period specified in this agreement, the court may either revoke the agreement absent full and complete compliance with all of the terms of the agreement or may find compliance upon a showing of substantial compliance with the terms of the agreement. If the court finds that I have complied with the terms and conditions set forth above, the State/City must move to:
[ ] 1. Dismiss all charges;
[ ] 2. Dismiss the charge(s) of _____;
[ ] 3. Amend the charge of _____ to the civil infraction of _____ with a penalty of _____.
[ ] 4. Amend the charge of _____ to the criminal charge of _____ with no further sanction imposed. I understand that the court will hold a trial based upon the stipulated evidence referenced in paragraph 12(b) and that the court will enter a finding of guilty to the amended charge if the evidence supports a conviction for either the original or the amended charge. The

City/State waives its presence at the trial and waives its right to a sentencing hearing on any such amended charge. _____By initialing here, I (the defendant) waive my presence for the court's determination of my guilt on the amended criminal charge and I waive my right to a sentencing hearing.

(a) I understand that if at any time during the term of this agreement it is alleged that I have failed to comply with any of the terms and conditions set forth above, the court may hold a revocation hearing. At that hearing I will have the right to present evidence on my behalf as to whether I have violated this agreement. I understand that at that hearing the court may either revoke the agreement absent full and complete compliance with all of the terms of the agreement or may find compliance up to that time based upon a showing of substantial compliance with the terms of the agreement.

(b) This Stipulated Order of Continuance and the agreements contained herein is not an admission of guilt. However, if the court revokes this agreement, I agree to submit the above charge(s) on the record. I understand this means that, should I be found at a future hearing to have violated the terms of this agreement, the judge will review the police report(s) for the charge(s) listed in Section 4, including all witness statements and other evidence included in those police reports, as well as other materials specified below. These police reports and other specified materials are identified as follows:
Incident Report #: _____ Police Agency: _____
Number of pages: _____
Including witness statements of: _____ _____
_____ _____ _____
Additional materials and/or evidence is identified as follows:
_____
_____
_____.

(c) I understand that the police reports listed above and any other specified materials listed above, for administrative purposes only, may be marked as exhibits. These documents will be filed in the court file but they will not be admitted into evidence at this time. Should I violate this Stipulated Order of Continuance I hereby waive any objection to their admission into evidence at a future hearing.

(d) I understand that no determination has been made by the judge as to whether this evidence is sufficient to support a finding of guilty. However I also understand and agree that in the event I violate this Stipulated Order of Continuance, the judge will review the evidence listed above, and based only upon this evidence, the judge will decide if I am guilty of the crime(s) listed in Section 4 above.

(e) I understand that if, following revocation of this agreement, I am found guilty:
    1. The prosecuting authority may recommend any sentence, up to the maximum.
    2. The judge does not have to follow anyone's recommendation as to the sentence. The judge can impose any sentence up to the maximum authorized by law no matter what the prosecuting authority or anyone else recommends.
    3. The judge may place me on probation for up to five (5) years if I am sentenced for a domestic violence offense or for Driving Under the Influence/Physical Control, or up to two (2) years for all other offenses. The judge may impose conditions of probation, and if the court orders me to appear at a hearing regarding my compliance with probation and I fail to attend the hearing, the term of probation will be tolled until I appear before the court on the record.
    4. In addition to the fees already paid under this Stipulated Order of Continuance, the judge may require me to pay fines, costs, fees and assessments authorized by law. The judge may also order me to make restitution to any victims who lost money or property as a result of crimes I committed. The maximum amount of

restitution is double the amount of the loss of all victims or double the amount of my gain.

5. If I am not a citizen of the United States, a finding of guilty for an offense punishable as a crime under state law may result in my deportation, denial of permission to be lawfully admitted or re-admitted the United States, or denial of naturalization pursuant to the laws of the United States.

13. ***I Understand that, if I am Found Guilty, the Following may Apply to me.*** (If any of the following paragraphs apply upon a finding of guilty, the box should be checked and the paragraph initialed by the defendant).

[ ] (a) The crime of _____ has a mandatory minimum sentence of _____ days in jail and a mandatory minimum fine of $_____ plus costs and assessments. The law does not allow any reduction of this sentence.

[ ] (b) The crime of prostitution, indecent exposure, permitting prostitution and patronizing a prostitute has a mandatory assessment of $_____. The court may reduce up to two-thirds of this assessment if the court finds that I am not able to pay the assessment. RCW 9A.88.120.

[ ] (c) Because this crime involves a sexual offense, prostitution, or a drug offense associated with hypodermic needles, I will be required to undergo testing for the human immunodeficiency (HIV/AIDS) virus.

[ ] (d) My driving license or privilege will be suspended by the Department of Licensing for a minimum period of _____, or longer based upon my record of conviction. This period may not include a suspension or revocation based on other matters.

[ ] (e) I may not possess, own, or have under my control any firearm unless my right to do so is restored by a superior court in Washington State, and by a federal court if required. I must immediately surrender any concealed pistol license. RCW 9.41.040.

[ ] (f) This crime involves a violation of Title 77 RCW, and the Department of Fish and Wildlife may, and in some cases shall, suspend or revoke my privileges.

[ ] (g) This crime involves a drug offense and my eligibility for state and federal education benefits will be affected. 20 U.S.C. § 1091(r).

[ ] (h) A finding of guilty is considered a conviction under RCW 46.25.010 and I will be disqualified from driving a commercial motor vehicle. RCW 46.25.090. I am required to notify the Department of Licensing and my employer of a finding of guilty within 30 days. RCW 46.25.030.

[ ] (i) This case involves Driving While Under the Influence of alcohol and/or being in actual Physical Control of a vehicle while under the influence of alcohol and/or drugs, I have been informed and understand that I will be subject to:

[ ] the penalties described in the "DUI" Attachment.

OR

[ ] these penalties: The mandatory minimum sentence of _____ days in jail, _____ days of electronic home monitoring and a $_____ monetary penalty. The court will require me to apply for an ignition interlock driver's license and to drive only with a functioning ignition interlock device or, if the court waives those requirements, to submit to alcohol monitoring for ____ year(s). I may also be required to drive only motor vehicles equipped with an ignition interlock device as imposed by the Department of Licensing and/or the court. My driving privilege will be suspended or revoked by the Department of Licensing for the period of time stated in paragraph 13(c). In lieu of the minimum jail term, the judge may order me to serve _____ days in electronic home monitoring. If I do not have a dwelling, telephone service, or any other necessity to operate electronic home monitoring, if I live out of state, or if the judge determines I

would violate the terms of electronic home monitoring, the judge may waive electronic home monitoring and impose an alternative sentence which may include additional jail time, work crew or work camp.

[ ] (j) If this case involves reckless driving and the original charge was driving while under the influence of alcohol and/or being in actual physical control of a vehicle while under the influence of alcohol and/or drugs and I have one or more prior offenses, as defined in RCW 46.61.5055(14), within 7 years; or if the original charge was vehicular homicide (RCW 46.61.520) or vehicular assault (RCW 46.61.522) committed while under the influence of intoxicating liquor or any drug, I have been informed and understand that I will be subject to the penalties for Reckless Driving described in the "DUI" Attachment.

[ ] (k) If this case involves negligent driving in the first degree, and I have one or more prior offenses, as defined in RCW 46.61.5055(14), within 7 years, I have been informed and understand that I will be subject to the penalties for Negligent Driving – 1st Degree described in the "DUI" Attachment.

[ ] (l) This crime involves sexual misconduct with a minor in the second degree, communication with a minor for immoral purposes, or attempt, solicitation or conspiracy to commit a sex offense, or a kidnapping offense involving a minor, as defined in RCW 9A.44.128. I will, therefore, be required to register with the county sheriff as described in the "Offender Registration" Attachment.

[ ] (m) Pursuant to RCW 43.43.754, this crime is an offense which requires sex or kidnapping offender registration, or is one of the following offenses: assault in the fourth degree with sexual motivation, communication with a minor for immoral purposes, custodial sexual misconduct in the second degree, failure to register, harassment, patronizing a prostitute, sexual misconduct with a minor in the second degree, stalking, or violation of a sexual assault protection order granted under chapter 7.90 RCW. I will, therefore, be required to have a biological sample collected for purposes of DNA identification analysis.

[ ] (n) ***Travel Restrictions:*** I will be required to contact my probation officer, the probation director or designee, or the court if there is no probation department, to request permission to travel or transfer to another state if I am placed on probation for one (1) year or more and this crime involves: (i) an offense in which a person has incurred direct or threatened physical or psychological harm; (ii) an offense that involves the use or possession of a firearm; (iii) a second or subsequent misdemeanor offense of driving while impaired by drugs or alcohol; (iv) a sexual offense that requires the offender to register as a sex offender in the sending state. I understand that I will be required to pay an application fee with my travel or transfer request.

14. I enter into this Stipulated Order of Continuance freely and voluntarily.
15. No person has threatened harm of any kind to me or to any other person to cause me to enter this agreement.
16. No person has made promises of any kind to cause me to enter this agreement except as set forth in this agreement.

Date: _____ _____

Defendant

I have read and discussed this agreement with the defendant and believe that the defendant is competent and fully understands the agreement.

_____ _____

Prosecuting Authority Defendant's Lawyer

Type or Print Name WSBA No.	Type or Print Name WSBA No.

The foregoing agreement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that (check the appropriate box):

[ ] (a) The defendant had previously read; or
[ ] (b) The defendant's lawyer had previously read to him or her; or
[ ] (c) An interpreter had previously read to the defendant the entire agreement above and that the defendant understood it in full.

Interpreter Declaration: I am a certified or registered interpreter, or have been found otherwise qualified by the court to interpret in the _____ language, which the defendant understands. I have translated this document for the defendant from English into that language. I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at (city) _____, (state) _____, on (date) _____.

Interpreter	Print Name

I find the defendant's entry into the Stipulated Order of Continuance to be knowingly, intelligently and voluntarily made. The defendant understands the charges and the consequences of the agreement.

Dated: _____

Judge/Court Commissioner/Pro Tem

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff vs. Defendant CCN_____	No. **DRUG DIVERSION COURT** **WAIVER AND AGREEMENT** CLERK'S ACTION REQUIRED (AG)

DRUG DIVERSION COURT WAIVER OF RIGHTS AND AGREEMENT OF THE PARTIES

- **I have been informed and fully understand that I have the following important rights.**
- **I understand that I give up the following important rights by entering Drug Diversion Court:**

1. The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;

2. The right to remain silent before and during trial, and the right to refuse to testify against myself;

3. The right at trial to testify and to hear and question the witnesses who testify against me;

4. The right to have witnesses testify for me at trial. These witnesses can be made to appear at no expense to me.

5. With respect to this/these charge(s), I understand that I have a right to contest and object to evidence that the State may present against me and to present evidence on my own behalf. With respect to this/these charge(s), I give up the right to contest and object to any evidence presented against me and to present evidence on my own behalf as to my guilt or innocence. I understand and agree that if I do not comply with the conditions of this agreement, a hearing will be held at which the State will present evidence related to this/these charge(s) including but not limited to the police report and the results of any law enforcement field test. I stipulate that the field test used in this case was accurate and reliable, and is admissible. This stipulation is not an admission of guilt, and is not sufficient, by itself, to warrant a finding of guilt. I understand that the judge will review the evidence presented by the State and will decide if I am guilty or not guilty of this charge based solely on that evidence. I waive my right under Criminal Rule 6.1(d) to written findings of fact and conclusions of law.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

STATE OF WASHINGTON, Plaintiff vs. Defendant CCN_____	No. **DRUG DIVERSION COURT** **WAIVER AND AGREEMENT** CLERK'S ACTION REQUIRED (AG)

DRUG DIVERSION COURT WAIVER OF RIGHTS AND AGREEMENT OF THE PARTIES

- **I have been informed and fully understand that I have the following important rights.**
- **I understand that I give up the following important rights by entering Drug Diversion Court:**

1. The right to a speedy and public trial by an impartial jury in the county where the crime is alleged to have been committed;

2. The right to remain silent before and during trial, and the right to refuse to testify against myself;

3. The right at trial to testify and to hear and question the witnesses who testify against me;

4. The right to have witnesses testify for me at trial. These witnesses can be made to appear at no expense to me.

5. With respect to this/these charge(s), I understand that I have a right to contest and object to evidence that the State may present against me and to present evidence on my own behalf. With respect to this/these charge(s), I give up the right to contest and object to any evidence presented against me and to present evidence on my own behalf as to my guilt or innocence. I understand and agree that if I do not comply with the conditions of this agreement, a hearing will be held at which the State will present evidence related to this/these charge(s) including but not limited to the police report and the results of any law enforcement field test. I stipulate that the field test used in this case was accurate and reliable, and is admissible. This stipulation is not an admission of guilt, and is not sufficient, by itself, to warrant a finding of guilt. I understand that the judge will review the evidence presented by the State and will decide if I am guilty or not guilty of this charge based solely on that evidence. I waive my right under Criminal Rule 6.1(d) to written findings of fact and conclusions of law.

6. I agree to complete the treatment program as instructed by the Court. I agree that I will not change treatment programs without first getting approval of the Court.

7. I agree to sign a waiver allowing the treatment provider to release information regarding my treatment to the Court, defense counsel, prosecuting attorney, and Drug Diversion Court Services staff. This information shall only be used to monitor compliance in this case and for no other purpose.

8. I understand and agree that I am responsible for obtaining a Participant Handbook from the Court and for knowing **all** of the rules and procedures contained in it, including any future amendments of which I am provided written notice.

9. I agree that I will not knowingly associate with any person possessing or using illegal drugs. I also agree that I will refrain from loitering in any area known for drug trafficking, and if ordered by the court, will stay out of specific areas associated with drug trafficking.

10. I understand and agree that I may not possess or use any firearm while I am in Drug Diversion Court.

11. I agree that I will not work with any police agency on any criminal cases or on any case where I may come into contact with illegal drugs. Nothing in this agreement shall prevent me from voluntarily providing information to a police agency regarding my past involvement with illegal drugs.

12. I agree to pay a $100 participation fee on a schedule set by the Court **OR**, in the alternative, to complete 24 community service hours done only for the purpose of satisfying this participation fee. Funds paid are not refundable. (I understand that no one is excluded from participation in Drug Court because of inability to pay participant fees.)

13. I agree to pay any and all restitution owing as a result of the crimes encompassed in these case number(s). I understand that I will not be allowed to graduate from Drug Court or have my case(s) dismissed, unless restitution is paid in full. I further understand that my progress in Drug Court will be affected by my progress in restitution payments. I acknowledge and accept that I may be terminated from Drug Court if I do not satisfy my restitution obligation in a timely manner, whether the failure to pay is willful or not.

    ☐ **No restitution owed** ☐ **Restitution order attached**

14. I understand and agree that any violation of Drug Court requirements such as dirty urinalysis tests, missing treatment sessions, any failure to abide by the terms of this agreement, or commission of a new crime, may result in modification of the treatment program, imposition of a sanction, revocation of my conditional release, and/or termination from the program.

15. **In considering the consequences of my entry into this waiver and agreement I understand that if I am terminated from Drug Diversion Court:**

COUNT I_____

The crime with which I am charged carries a sentencing range of ____to____ months with a maximum penalty of five/ten (5/10) years in prison and a $10,000/$20,000 fine. Disputed

COUNT II_____

The crime with which I am charged carries a sentencing range of ____to____ months with a maximum penalty of five/ten (5/10) years in prison and a $10,000/$20,000 fine. □ Disputed

COUNT III_____

The crime with which I am charged carries a sentencing range of ____to____ months with a maximum penalty of five/ten (5/10) years in prison and a $10,000/$20,000 fine. □ Disputed

a. I believe that the standard range(s) as set forth above, unless otherwise noted, accurately reflect(s) my criminal history known at this time. If I am convicted of any additional crimes between now and the time I am sentenced on this charge, I am required to tell the sentencing judge about those new convictions. If I am convicted of any new crimes before sentencing, or if any additional criminal history is discovered, both the standard sentence range and the prosecuting attorney's recommendation may increase. Even so, this agreement is binding on me and I cannot change my mind even though the standard sentencing range and prosecuting attorney's recommendation may increase.

b. In addition to sentencing me to confinement for the standard time, the judge will order me to pay $500 to a victim's compensation fund. If this crime resulted in injury to any person or damage to or loss of property, the judge will order me to make restitution, unless extraordinary circumstances exist which make restitution inappropriate. The judge may also order that I pay a fine, court costs, and incarceration, lab, and attorney fees. In addition, the judge may place me on community supervision, community placement or community custody, impose restrictions on my activities, require rehabilitative programs, treatment requirements, or other conditions, and order me to perform community service.

c. The judge does not have to follow anyone's recommendation as to sentence. The judge must impose a sentence within the standard range unless the judge finds substantial and compelling reasons not to do so. If the judge goes outside the standard range, either the State or I can appeal the sentence.

d. In addition to confinement, the judge will sentence me to a period of community supervision, community placement or community custody:

- For crimes committed prior to July 1, 2000, the judge will sentence me to: community supervision for a period of up to one year; or

- to community placement or community custody for a period of up to three years or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge. _____

- For crimes committed on or after July 1, 2000, the judge will sentence me to the community custody range which is from _____ months to _____ months or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2), whichever is longer, unless the judge finds substantial and compelling reasons to do otherwise. During the period of community custody I will be under the supervision of the Department of Corrections, and I will have restrictions and requirements placed upon me. My failure to comply with these conditions will result in the Department of Corrections transferring me to a more restrictive confinement status or imposing other sanctions. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge. _____

e. The judge may sentence me as a first time offender instead of imposing a sentence within the standard range if I qualify under RCW 9.94A.030. This sentence may include as much as 90 days of confinement and up to two years community supervision if the crime was committed prior to July 1, 2000, or up to two years of community custody if the crime was committed on or after July 1, 2000, plus all of the conditions described in paragraph 15.b.The judge may also require me to undergo treatment, to devote time to a specific occupation, and to pursue a prescribed course of study or occupational training. [If not applicable, this paragraph should be stricken and initialed by the defendant and the judge. _____

f. The judge may sentence me under the special drug offender sentencing alternative (DOSA) if I qualify under former RCW 9.94A.120(6) (for offenses committed before July 1, 2001) or RCW 9.94A.660 (for offenses committed on or after July 1, 2001). (Effective for sentences imposed on or after October 1, 2005, the court may sentence me to a prison based alternative.) This sentence could include a period of total confinement in a state facility for one-half of the midpoint of the standard range plus all of the conditions described in paragraph 15.b.. During confinement, I will be required to undergo a comprehensive substance abuse assessment and to participate in treatment. The judge will also impose community custody of at least one-half of the midpoint of the standard range. Effective for sentences imposed on after October 1, 2005, the judge may sentence me to a residential chemical dependency treatment-based alternative. This sentence could include a term of community custody for one-half of the midpoint of the standard range or two years, whichever is greater, on the condition that I enter and remain in residential chemical dependency treatment for three to six months, plus all of the conditions described in paragraph 15.b. During community custody, I will be required to undergo substance abuse assessment and participate in treatment as provided by the Department of Corrections. At a treatment termination hearing scheduled three months before the expiration of the term of community custody, the judge could impose a term of total confinement equal to one-half of the midpoint of the standard sentence range followed by a term of community custody. During confinement, I would be required to undergo substance abuse assessment and participate in treatment as provided by the Department of Corrections. Any term of community custody imposed upon me under the special drug offender sentencing alternative must include appropriate substance abuse treatment, a condition not to use illegal controlled substances, and a requirement to submit to urinalysis or other testing to monitor that status. Additionally, the judge could prohibit me from using alcohol or controlled substances, require me to devote time to a specific employment or training, stay out of certain areas, pay $30.00 per month to offset the cost of monitoring and require other conditions, including affirmative conditions.

g. If I am not a citizen of the United States, I understand that a finding of guilty on this/these offense(s) is grounds for deportation. I also may not be allowed to enter the United States, or be denied naturalization according to the laws of the United States.

h. If found guilty, I understand that I may not possess, own, or have under my control any firearm unless my right to do so is restored by a court of record and that I must immediately surrender any concealed pistol license. RCW 9.41.040.

i. If found guilty, I understand that I will be ineligible to vote until that right is restored in a manner described in RCW 10.64 [2005 Wash. Laws 246 1] If I am registered to vote, my voter registration will be cancelled. Wash. Const. art. VI, 3, RCW 29A.04.079, 29A.08.520.

j. If I am found guilty of a drug offense that involves a motor vehicle, I understand that my driver's license or privilege to drive will be suspended or revoked.

k. If I am found guilty of a violation of the state drug laws, I understand that my eligibility for state and federal food stamps, welfare, housing, and education benefits will be affected. 20 U.S.C. 1091 (r) and 21 U.S.C. 862a.

16. I freely and voluntarily enter into this agreement.

17. No one has threatened to harm me or any other person to get me to enter into this agreement.

18. No person has promised me anything to get me to sign this agreement except as written in this document.

19. Upon successful completion of Drug Court, Including the full satisfaction of any restitution obligation, all criminal charges pending against me under this (these) cause number(s) will be dismissed with prejudice.

My lawyer and I have reviewed and discussed all of the above paragraphs 1 through 19.I understand them all and do hereby knowingly give up these rights and enter into these agreements with the State

Dated: _____ _____
Deputy Prosecuting Attorney

_____ _____
Defendant Attorney for Defendant

I am fluent in the _____language, and I have translated this entire document for the Defendant from English into that language. The Defendant has acknowledged his/her understanding of both the translation and the subject matter of this document. I certify under penalty of Perjury, under the laws of the State of Washington, that the foregoing is true and correct.

_____
Interpreter

APPENDIX 9A - SAMPLE FORMS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,	)	
Plaintiff,	)	
vs.	)	No.
	)	
	)	**VIENNA CONVENTION AND**
Defendant,	)	**BILATERAL TREATY**
	)	**NOTIFICATION,**
	)	**ACKNOWLEDGEMENT AND**
	)	**WAIVER OR REQUEST**
	)	

Pursuant to Article 36(1)(b) of the Vienna Convention on Consular Relations, if you are a non-U.S. citizen who is being arrested or detained, you are entitled to have your country's consular representatives here in the United States notified of your situation. A consular official from your country may be able to help you to obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want your country's consular officials notified, you may request this notification now, or at any time in the future.

In addition, the United States has entered into treaties that require notification to a consular representative of a treaty country if one of their citizens has been arrested or detained. If you are a foreign national of any of the following countries, the King County Prosecuting Attorney's Office is prepared to notify your country's consular officials as soon as possible. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things.

Algeria	Guyana	Saint Kitts and Nevis
Antigua and Barbuda	Hong Kong	Saint Lucia
Armenia	Hungary	Saint Vincent/Grenadines
Azerbaijan	Jamaica	Seychelles
Bahamas, The	Kazakhstan	Sierra Leone
Barbados	Kiribati	Singapore
Belarus	Kuwait	Slovakia
Belize	Kyrgyzstan	Tajikistan
Brunei	Malaysia	Tanzania
Bulgaria	Malta	Tonga
China (not R.O.C.)	Mauritius	Trinidad and Tobago
Costa Rica	Moldova	Tunisia

Cyprus	Mongolia	Turkmenistan
Czech Republic	Nigeria	Tuvalu
Dominica	Philippines	Ukraine.
Fiji	Poland	United Kingdom
Gambia, The	Romania	U.S.S.R.
Georgia	Russia	Uzbekistan
Ghana	Zambia	
Granada	Zimbabwe	

Defendant's Acknowledgement and
Waiver of Immediate Consular Notification

I acknowledge the above notification and understand it. I do not wish to provide citizenship information and I waive any right to consular notification at this time. I understand that my refusal to provide information will release United States authorities from their notification obligations under the Vienna Convention or bilateral treaties. If I change my mind and wish to have a consulate representative notified, I will request my defense attorney to notify the King County Prosecuting Attorney's Office or, if I am pro se, I will ask the Court to notify the King County Prosecuting Attorney's Office.

Date: _____

_____
DEFENDANT

Defendant's Acknowledgement and
Request for Immediate Consular Notification

I acknowledge the above notification and understand it. I choose not to waive my right to notification and I ask that you notify my country, _____, of my arrest or detention.

Date: _____

_____
DEFENDANT