

## POST-CONVICTION RELIEF FROM CRIMINAL SENTENCES

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This article discusses two topics:

- (1) The immigration value of reducing criminal sentences; and
- (2) Evaluating the chances of reducing the sentence.

### SENTENCE MODIFICATIONS

If a criminal sentence triggers adverse immigration consequences, a sentence modification may be available to avoid the ordeal of seeking an order vacating judgment.<sup>1</sup> An order waiving one day of custody credits may completely avoid deportability for certain criminal convictions and may establish grounds to move for termination of any proceedings. Alternatively, such a waiver may establish prima facie eligibility for relief from removal, such as cancellation of removal. For example, a lawful permanent resident (LPR) is an aggravated felon<sup>2</sup> if he or she suffered a conviction for petty theft with a sentence imposed of 365 days of custody, whether or not the sentence was suspended. An order reducing the sentence by one day results in a sentence of 364 days and eliminates the aggravated felony.<sup>3</sup>

In order to vacate a conviction for immigration purposes, it is necessary to do so on the basis of a ground of legal invalidity.<sup>4</sup> On the other hand, an order amending a sentence need not identify a statutory or constitutional deficiency in the original sentence. The Board of Immigration Appeals (BIA) has made it clear that *Matter of Pickering* does not apply to sentences. The final sentence is what controls for immigration purposes, regardless of the reason for the sentence reduction.<sup>5</sup>

Depending on the state, seeking a sentence modification may prove a great deal easier than trying to vacate judgment. The chances for sentence reduction improve if counsel uses equitable arguments about preventing injustice and presents strong documentation in support. Examples include diagnoses about the remission of symptoms; reports of other treatment providers about any other rehabilitation that renders recurrence of criminal misconduct unlikely; and affidavits of clergy or nonprofit workers about any contributions of the

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<sup>1</sup> *Matter of Song*, 23 I&N Dec. 173 (BIA 2001).

<sup>2</sup> INA §101(a)(43)(G); 8 USC §1101(a)(43)(G) (2010).

<sup>3</sup> INA §240A; 8 USC §1229b (2010).

<sup>4</sup> *Matter of Pickering*, 23 I&N Dec. 173 (BIA 2001), *rev'd*, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006).

<sup>5</sup> *Matter of Cotas-Vargas*, 23 I&N Dec. 849 (BIA 2005).

client to the community and the consequent impact on the community if the trial court does not grant the requested relief.

While presentation of mitigating evidence concerning the underlying crime may be useful, counsel should take care to avoid admissions of previously uncharged crimes, or including police reports that might increase the client's exposure under *Matter of Silva-Trevino*<sup>6</sup> if the court considers evidence beyond the record of conviction.

### Utility of a Sentence Modification

Many grounds for removal, including grounds of deportation and inadmissibility, grounds for mandatory detention, as well as many forms of relief from removal and bars to eligibility for immigration benefits, turn on sentences and whether the conviction is considered to be a felony. A reduction of a state felony conviction to a misdemeanor sometimes avoids the adverse immigration consequences of a felony conviction. For example, a reduction may eliminate an element of the offense that would otherwise lead to the state offense qualifying as a felony under the federal felony definition that governs for immigration purposes.<sup>7</sup>

### Unique Definition of Sentence

Immigration counsel has a duty to calculate the sentence imposed or entered as a condition of probation under the immigration law definition of "sentence imposed."<sup>8</sup> The Immigration and Nationality Act (INA), rather than state or federal criminal law, governs this determination. In many instances, criminal defense strategies that might avoid a sentence or a felony under state law will have no effect on these questions for immigration purposes.<sup>9</sup> For example, stayed sentences count toward calculating the length of the sentence for immigration purposes. If the damage comes from a one-year sentence imposed, neither reduction of the level of an offense from a felony to a misdemeanor nor expungement can avoid its adverse immigration consequences. Further, if probation was granted and a prison sentence was imposed with "execution of sentence suspended,"<sup>10</sup> the stayed prison sentence will still be considered part of the sentence imposed for immigration purposes and will cause damaging immigration consequences, even though the execution of the prison sentence was suspended. Immigration counsel may wish to educate criminal defense counsel about the immigration definition of "sentence imposed," so the criminal lawyer can use sentencing techniques as leverage to advance the immigration goals of a mutual client.<sup>11</sup>

<sup>6</sup> *Matter of Silva-Trevino*, 24 I&N Dec. 687, 696 (AG 2008).

<sup>7</sup> Such sentence reductions are handy tools to avoid an aggravated felony crime of violence under subsection (b) of section 16 of title 18 of the United States Code, which only applies to *felony* offenses. 18 USC §16(b); *see also* INA §101(a)(43)(F). A sentence reduction is also useful to qualify the client for the petty offense exception of INA §212(a)(2)(A)(ii)(II) and 8 USC §1182(a)(2)(A)(ii)(II) when he or she has only been convicted of one crime involving moral turpitude ever and the trial court conditioned probation on confinement of no more than six months or otherwise imposed such confinement.

<sup>8</sup> INA §101(a)(48)(B); 8 USC §1101(a)(48)(B) (defining "sentence" to include the length of confinement and even suspended time where imposition or execution of sentence is delayed). Where concurrent sentences are ordered, the sentence is the length of the longest sentence. *Matter of Fernandez*, 14 I&N Dec. 24 (BIA 1972), *Matter of J*, 6 I&N Dec. 562 (AG 1956). Consecutive sentences are added together to arrive at the total sentence imposed. *Matter of Fernandez*, 14 I&N Dec. 24 (BIA 1972). The length of an indeterminate sentence is the length of the greatest possible sentence. *Burr v. Edgar*, 292 F.2d 593 (9th Cir. 1961), *Petsche v. Clingan*, 273 F.2d 688 (10th Cir. 1960), *Kiobge v. Day*, 42 F.2d 716 (S.D.N.Y. 1992), *Matter of S*, 8 I&N Dec. 344 (BIA 1959) (one-year sentence was recognized where offender had possibility of parole after six months). *But see Contra Holzapfel v. Wyrsh*, 157 F. Supp. 43 (D.N.J. 1957), *aff'd on other grounds*, 259 F.2d 890 (3d Cir. 1958) (five-year indeterminate sentence with immediate possibility of parole was not a sentence of longer than one year; pre-1996 law).

<sup>9</sup> The BIA does not generally recognize state rehabilitative statutes to render convictions innocuous. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999). Even in the Ninth Circuit, application of such statutes only cures the immigration problem in a narrow set of convictions for first-offense simple possession and lesser includes. *Lujan-Armendariz v. INS*, 222 F.3d 728, 741–43, 749–50 (9th Cir. 2000). Most circuits have rejected the Ninth Circuit approach. *See Andrade, M.*, "Avoiding Deportation Before Conviction in a World of Uncertainty: Tips for Working with Defense Counsel," 14-13 *Bender's Immigr. Bull.* 2, nn.6, 4 (2009).

<sup>10</sup> This is the California state criminal law term of art; the term will vary depending on the state.

<sup>11</sup> *See generally* Andrade, *supra* (collecting circuit court cases).

To evaluate the options for relieving immigration damage by reducing sentences, both criminal and immigration counsel should focus upon a variety of factors that come into play, as follows: (1) the number of days of confinement the trial court ordered; (2) the maximum sentence applicable under the particular statute; and (3) the actual time that the individual spent in custody. Each of these three factors may cause certain forms of immigration damage.

*Practice Tip:* Look for the illegal sentence. Believe it or not, many individuals serve illegal sentences. Many states permit the correction of an illegal sentence at any time.<sup>12</sup> Generally speaking, a sentence is illegal if it is imposed by a court lacking jurisdiction or is in excess of the punishment permitted by law. Be careful not to confuse this concept with a sentence that is imposed in an illegal manner (such as a failure to comply with procedural rules that do not prejudice the client), as state law may treat the two situations differently.<sup>13</sup> Familiarity with the rules, statutes, and case law in the particular jurisdiction is critical, as state schemes vary significantly.

### Sentence Modifications May Eliminate Some Aggravated Felonies

An aggravated felony subjects a foreign national to many severe immigration consequences, such as ineligibility for naturalization and most forms of relief from removal.<sup>14</sup> A foreign national with an aggravated felony conviction will be subject to mandatory detention while his or her removal case is pending.<sup>15</sup> If the client cannot vacate the conviction itself on a ground of legal invalidity, the client may seek a sentence reduction as protection against imminent removal proceedings and pretermission of most forms of relief in immigration court.

Certain aggravated felony categories turn on imposition or probation conditioned on 365 days in custody.

A one-year sentence defines 10 aggravated felony categories.<sup>16</sup> Among these aggravated felonies, the definition of a “crime of violence” in 18 USC §16 is perhaps the aggravated felony most frequently alleged. While a felony offense may constitute a “crime of violence” under 18 USC §16(b) (risk that force will be used) and an aggravated felony if a sentence of 365 days is imposed, regardless of whether the convicting court stays all or part of this term, a misdemeanor conviction can never constitute a crime of violence under 18 USC §16(b).

Three categories of offenses become aggravated felonies based upon the maximum *possible* sentence: a violation of 18 USC §1962 relating to Racketeer-Influenced Corrupt Organizations Offenses with a possible one-year sentence;<sup>15</sup> conviction of a very narrow category of offenses involving failure to appear to answer to a felony with a possible two-year term;<sup>16</sup> and conviction of failure to appear for sentencing for an offense with a possible five-year sentence.<sup>17</sup>

<sup>12</sup> *E.g.*, Alaska R. Crim. Proc. 35(a) (2010), Fla. R. Crim. P. 3.800 (2010), *id.* R. Crim. Pro. 35 (2009).

<sup>13</sup> *See, e.g.*, *Winn v. State*, 716 A.2d 975 (Del. 1998).

<sup>14</sup> An aggravated felony renders a foreign national ineligible for naturalization unless the conviction was entered before November 29, 1990, and the foreign national resides within the jurisdiction of the Federal Court of Appeals for the Ninth Circuit. *Lopez-Castellanos v. Gonzales*, 437 F.3d 848 (9th Cir. 2006).

<sup>15</sup> INA §236(c); 8 USC §1126(c).

<sup>16</sup> Offenses that are aggravated felonies if the sentence is one year or longer include:

1. crime of violence
2. theft offenses including receipt of stolen property
3. burglary offenses
4. falsifying or forgery of a U.S. passport in violation of 18 USC §1543
5. offenses related to commercial bribery and counterfeiting
6. forgery
7. trafficking in vehicles if the vehicle identification number has been altered
8. obstruction of justice
9. subornation of perjury
10. bribery of a witness.

<sup>15</sup> INA §101(a)(43)(J); 8 USC §1101(a)(43)(J).

<sup>16</sup> INA §101(a)(43)(T); 8 USC §1101(a)(43)(T). “The subsection includes any offense ‘relating to’ the following elements: (1) a failure to appear before a court; (2) pursuant to a court order; (3) to answer to or dispose of a charge of a felony; (4) where the felony was one for which a sentence of two years’ imprisonment or more may be imposed.” *Renteria-Morales v. Mukasey*, *continued*

*Practice Tip:* State statutes define the maximum penalty to which a conviction subjects the client. The maximum sentence for a misdemeanor of one year applies in many, but not all, states. Many state misdemeanors have maximum sentences of six months even on “wobblers,” *i.e.*, offenses that can be prosecuted either as felonies or misdemeanors. Reduction of such a “wobbler” to a misdemeanor may qualify the client for the Petty Offense Exception to Inadmissibility for a conviction of a crime involving moral turpitude, or mitigate the aggregate sentence to avoid certain immigration consequences.<sup>19</sup>

### **Inadmissibility and Detention: Sentence Sensitivity**

A sentence modification may well help to ensure that a person is not statutorily barred from obtaining LPR status. Avoiding criminal grounds of inadmissibility triggered by a sentence or potential sentence may also prevent mandatory detention.<sup>20</sup>

- An individual is inadmissible if the person has more than one conviction and the sentences imposed add up to five years or longer.<sup>17</sup>
- An individual is inadmissible unless the Petty Offense Exception or another waiver applies. The Petty Offense Exception requires a maximum possible sentence of one year, and a sentence imposed of six months or less.<sup>18</sup>

### ***Sentence-Sensitive Mandatory Detention—Crimes of Moral Turpitude***

- A foreign national is subject to mandatory detention if he or she is convicted of one crime involving moral turpitude and the court has imposed a sentence of one year or more in duration.

### ***Sentence-Sensitive Ineligibility for Relief and Immigration Benefits***

- Good Moral Character: A noncitizen who has been confined for 180 actual days or longer during the requisite window of time for good moral character (GMC), which certain forms of relief require, is subject to a statutory bar on establishing GMC until the custody falls outside the window.<sup>19</sup>
- Continuous Residence: An offense that renders a person inadmissible will “stop the clock” of continuous residence from running for cancellation of removal.<sup>20</sup>
- LPRs convicted of offenses for which they actually served a sentence of five years or longer are ineligible for INA §212(c) relief.<sup>21</sup>
- Conviction of an aggravated felony or multiple aggravated felonies will deprive a noncitizen of eligibility for withholding of removal if he or she has been sentenced to an aggregate period of five years or longer on the basis that the offense is presumed to be a “particularly serious crime.”<sup>29</sup>

551 F.3d 1076 (9th Cir. 2008). The Ninth Circuit emphatically distinguished misdemeanors from the category, which presumably means that state convictions only “relate to” this category if they fit the federal definition of a felony, which applies to the aggravated felony definition of INA §101(a)(43)(B) and 8 USC §1101(a)(43)(B). *Lopez v. Gonzales*, 549 U.S. 47 (2006).

<sup>17</sup> INA §101(a)(43)(Q); 8 USC §1101(a)(43)(Q).

<sup>19</sup> INA §237(a)(2)(A)(i); 8 USC §1227(a)(2)(A)(i) (conviction of a crime involving moral turpitude for which the maximum possible sentence is at least one year and it was committed within five years of admission).

<sup>20</sup> INA §236(c)(1)(A); 8 USC §1226(c)(1)(A).

<sup>17</sup> INA §212(a)(2)(B); 8 USC §1182(a)(2)(B).

<sup>18</sup> INA §212(a)(2)(A)(ii)(II); 8 USC §1182(a)(2)(A)(ii)(II).

<sup>19</sup> INA §101(f)(7). (Note that this is not a question of the length of the sentence ordered by the court, but the number of actual days spent in custody.)

<sup>20</sup> INA §240A(d)(1); 8 USC §1229b(d)(1). This is true even if the noncitizen has been admitted and is only subject to the grounds of removal listed in §237.

<sup>21</sup> 8 CFR §212.3(f)(4).

<sup>29</sup> INA §241(b)(3)(B)(ii); 8 USC §1231(b)(3)(B)(ii). Note that an offense that is neither an aggravated felony nor has a five-year minimum sentence can still be a “particularly serious crime,” *Matter of N–A–M–*, 24 I&N Dec. 336 (BIA 2007).

**Sentence Modification Compared to Vacating a Conviction.** In contrast to post-conviction relief vacating a conviction, a sentence reduction does not change the original conviction. Since the conviction remains intact, prosecutors often do not view motions to modify sentence as a significant threat. An explanation of the client's equities and the severe (and likely unanticipated) immigration consequences improves the chance of gaining the prosecution's cooperation and prevailing on a sentence modification.

**Youthful Offenders.** While a juvenile disposition is not a conviction for immigration purposes,<sup>30</sup> an adult disposition is considered to be a conviction for immigration purposes even if the foreign national was a juvenile at the time of the offense. If jurisdiction was inappropriate in adult court, then an order vacating judgment may be available.

**Double Jeopardy Protections Apply to Sentence Reductions.** A sentence reduction does not provide the prosecution with an opportunity to reinstate the original charges, so the client bears no risk of conviction of more counts or more serious offenses than were contained in the original disposition. In contrast, an order vacating a prior judgment subjects the client to the prospect of renewed prosecution. Sentence reductions eliminate risks and sources of stress that apply to orders vacating judgment.

While exercise of the right to jury trial may prove successful, given the possibility of stale or lost evidence, many defendants fear the prospect of a vindictive prosecution. While a negotiated charge and sentence bargain may better satisfy the client's immigration goals in the context of an order vacating judgment, a desirable plea bargain may be unavailable to fulfill this agenda.

**The Reason for the Sentence Reduction is Irrelevant.** Unlike a petition to vacate the plea, counsel seeking a sentence modification can use the opportunity to educate judges and prosecutors about the immigration consequences of various sentencing schemes. Because the new sentence controls for immigration purposes, regardless of the reason for the modification, counsel can often make compelling arguments in favor of reduction by highlighting the client's equities and explaining the irrational or excessive immigration consequences that a particular sentence will trigger.

**Seeking Timely Relief in Criminal Court.** Statutes of limitation often set deadlines that begin to run from the date of a certain disposition.<sup>31</sup> They include: when the trial court enters judgment, when the trial court releases the client from a restraint, or when the trial court revokes probation. These statutes thereafter deprive trial courts of jurisdiction to modify a sentence by statute or criminal rule.<sup>32</sup> In some states, the statute does not begin to run for several months after the entry of judgment. If the trial court, for instance, retains jurisdiction on the case while the defendant has time to complete class or drug treatment or any other conditions of sentence or probation, the statute may not run so a sentence reduction will remain timely until the trial court issues an order releasing the defendant from the restraint.<sup>33</sup>

**Seemingly Adverse Orders May Create Sentence Reduction Opportunities.** Where a trial court issues an order revoking probation, counsel may have an opportunity to move for a sentence modification. The district attorney will first file a petition to seek an additional condition of probation, another form of punishment, or imposition of an alternative sentence that was suspended so long as the defendant complied with probation. For example, in Idaho, counsel has 14 days from the date of the order revoking probation to file the motion for a sentence modification.

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<sup>30</sup> *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000). To determine whether an act resolved at the state level is a conviction for immigration purposes or a non-conviction delinquency finding, the state juvenile proceedings are compared to the Federal Juvenile Delinquency Act. *Matter of DeLaNues*, 18 I&N Dec. 140 (BIA 1981).

<sup>31</sup> *Id.* R. Crim. Pro. 35.

<sup>32</sup> Alaska R. Crim. Proc. 35(b)(2) (2010) (180 days from judgment); Conn. Gen. Stat. §53a-39 (2010) (tied to length of sentence); *id.* R. Crim. Pro. 35(b) (120 days from judgment imposing sentence or release of retained jurisdiction, 14 days after probation revocation) (2009).

<sup>33</sup> *Id.* R. Crim. Pro. 35(b) (2009).

*Practice Tip:* Sentence reduction may extend the statute for seeking post conviction relief. The sentence reduction is, in some states, considered the “last act” of an ongoing case, and may further extend the statute of limitations.

**Restriction on Successive Motions.** Like motions to reopen, the client may be limited to one motion for a sentence reduction.<sup>34</sup> Statutes and caselaw often contain clear direction about this number limitation. Arguably, a continuing deprivation of fundamental rights may justify equitable tolling of the statute of limitations based on the “interests of justice.”<sup>35</sup>

**Grounds for Sentence Reduction.** In addition to seeking to modify a sentence to correct an illegal sentence, state law articulates different reasons that a sentence can be modified. In some states, a defendant can seek sentence reduction “for good cause.”<sup>36</sup> Other states broadly authorize sentence reductions to correct any violation of a constitutional right.<sup>37</sup> In contrast, a few states deprive the trial court of jurisdiction to waive custody credits absent the prosecution’s stipulation to do so.<sup>38</sup>

## EVALUATING THE CHANCES OF REDUCING THE SENTENCE<sup>22</sup>

The four necessities for success in obtaining post-conviction relief for immigrants are: (1) a vehicle by which to obtain it; (2) a ground of legal invalidity by which to persuade a court to vacate or reduce the sentence; (3) a new immigration-harmless sentence acceptable to the court and/or prosecution; and (4) equities or favorable factors that can be used to persuade the judge and prosecution that the noncitizen merits post-conviction relief, and that they are doing the right thing by granting it.<sup>23</sup>

### Procedural Vehicle

Ideas for possible procedural vehicles have been given above. To be successful, a procedural vehicle must have the immigration effect necessary to prevent the particular adverse immigration consequences with which the client is threatened.<sup>24</sup> The procedural vehicle must be an appropriate way to establish the reason for reducing the sentence in the case.<sup>25</sup> The requirements for the vehicle must be present in the case.<sup>26</sup> The vehicle must be capable of being successful quickly enough to avoid the immigration consequences.<sup>27</sup>

*The procedural vehicle must be appropriate to the case and capable of having the necessary effect.* For example, if the sentence imposed is transforming a crime of violence into an aggravated felony, counsel must find a vehicle capable of vacating or reducing the sentence. If the conviction is a felony, then a motion to reduce a felony to a misdemeanor may be sufficient to avert the aggravated felony under 18 USC §16(b) for a crime of violence.<sup>28</sup> If time is needed to assess the situation, it may be possible to file a direct appeal from the conviction, in order to avoid a “final” conviction and thus in many circuits obtain the client’s release from

<sup>34</sup> Alaska R. Crim. Proc. 35 (limited to one) (2010), *id.* R. Crim. Pro. 35(b) (limited to one) (2009), NY CLS CPL §440.20.2-.3 (2010) (limited to one absent retroactive law change on controlling issue).

<sup>35</sup> The Federal Court of Appeals for the Ninth Circuit has also addressed the subject of equitable tolling in the context of petitions for writ. *United States v. Battles*, 362 F.3d 1195, 1196 (9th Cir. 2004).

<sup>36</sup> Conn. Gen. Stat. §53a-39(a) (2010) (reduction permissible “for good cause shown”).

<sup>37</sup> Colo. R. Crim. Pro. 35 (2008) (reduction permissible to correct violation of Constitutional right).

<sup>38</sup> *People v. Segura*, 44 Cal. 4th 921, 935 (2008).

<sup>22</sup> This section of the article has been adapted from N. Tooby, *Tooby’s Guide to Criminal Immigration Law* (2008) (hereinafter *Tooby’s Guide*). Norton Tooby 2010. All rights reserved. A complimentary download of the entire book is available without charge at [www.NortonTooby.com](http://www.NortonTooby.com).

<sup>23</sup> See N. Tooby, *Evaluating the Chances of Obtaining Post-Conviction Relief*, in [www.NortonTooby.com](http://www.NortonTooby.com) (free resources).

<sup>24</sup> See N. Tooby & J. Rollin, *Criminal Defense of Immigrants* §11.34 (2007).

<sup>25</sup> See *id.* at §11.35.

<sup>26</sup> See *id.* at §11.36.

<sup>27</sup> See *id.* at §11.37.

<sup>28</sup> This type of motion can be made at any time in states such as California and Arizona.

mandatory immigration detention and buy time to plan a more durable strategy.<sup>29</sup> The mere filing of a request for post-conviction relief, other than a direct appeal of right, does not destroy the finality of the conviction<sup>30</sup> or prevent immigration authorities from initiating removal proceedings.

*The procedural vehicle must match the ground for relief.* Some forms of post-conviction relief are general in nature, such as habeas corpus, and can be used to raise virtually any ground of legal invalidity. Other forms of post-conviction relief, such as a statutory motion to vacate a conviction for violation of a state advisal requirement, are limited to the specific statutory grounds.<sup>31</sup>

Counsel must ensure that the chosen vehicle is an appropriate way to raise the grounds for relief present in the case, and that the ground may be raised by the chosen vehicle. The client must be able to satisfy the requirements for the chosen vehicle. For example, a vehicle that requires actual or constructive custody can only be used if the client is still incarcerated or still on probation or parole. If the vehicle requires a certain ground of relief, and that ground is not present in the case, the client cannot be successful using that vehicle in that particular case. Some vehicles have statutes of limitations, and become unavailable if the deadline has passed. For example, a federal habeas corpus petition or motion pursuant to 28 USC §2255 must be filed within one year after the federal conviction has become final.

Counsel must choose a vehicle that can be successful quickly enough to avert the immigration damage, since the mere filing of a petition for post-conviction relief does not delay the time at which the government may initiate removal proceedings.<sup>32</sup> For example, the immigration courts may not take a post-conviction order reducing a sentence into account if it was not presented to the immigration courts prior to the removal order based on that conviction.<sup>33</sup> Where a noncitizen has been removed before the post-conviction order could be obtained, it is far more difficult to reopen the removal proceedings to present the new evidence.

### Grounds for Relief

While an immigrant need not vacate the original sentence on a ground of legal invalidity in order to eliminate it for immigration purposes, sometimes the criminal court or prosecutor will not agree unless the sentence is legally invalid. Many potential grounds to vacate a sentence exist.<sup>34</sup>

All grounds to vacate a conviction also have the effect of vacating the associated sentence.<sup>35</sup> Moreover, discretionary or rehabilitative orders vacating or reducing a sentence are effective to eliminate the immigration consequences of the original sentence.<sup>36</sup>

Many grounds of legal invalidity may apply to a sentence, rather than a conviction. For example, where defense counsel rendered ineffective assistance by failing to request a judicial recommendation against deportation (JRAD) (before Immigration Act of 1990 repealed the JRAD), this error logically invalidates the sentence, rather than the plea.<sup>37</sup> Where a state advisal statute is violated, and the immigration damage flows from the sentence, rather than the conviction, the logical remedy is to vacate the sentence rather than the conviction.

<sup>29</sup> See Tooby's *Guide* at §3.5(B)(7).

<sup>30</sup> *Okabe v. INS*, 671 F.2d 863 (5th Cir. 1982) (motion for status conference to reduce sentence); *Morales-Alvarado v. INS*, 655 F.2d 172 (9th Cir. 1981) (possibility of obtaining approval of discretionary appeal to state highest court does not impair finality of conviction; this ruling was *dictum* since petition for review was dismissed as moot because conviction was affirmed by state high court after BIA decision relying on it); *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975).

<sup>31</sup> See, e.g., California Penal Code §1016.5.

<sup>32</sup> See, e.g., *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

<sup>33</sup> See, e.g., *Lukowski v. INS*, 279 F.3d 644 (8th Cir. 2002), citing 8 USC §1252(b)(4)(A) (refusing to consider a resentencing order that had not been presented in the immigration proceedings, and was thus not a part of the administrative record).

<sup>34</sup> All extensive list of 45 grounds of legal invalidity is given in N. Tooby, *Post-Conviction Relief for Immigrants* §§7.65-7.119 (2004); Cafone, "Vacation of Illegal Sentences," Chap. 46, in *Criminal Defense Techniques* (2003).

<sup>35</sup> See N. Tooby, *Post-Conviction Relief for Immigrants* §7.71 (2004).

<sup>36</sup> See *id.* at §7.68.

<sup>37</sup> *People v. Barocio*, 216 Cal. App. 3d 99 (1989).

Many other potential statutory and constitutional grounds of legal invalidity can eliminate a criminal conviction for immigration purposes. There are at least 40 federal constitutional grounds for setting aside convictions based on guilty pleas that can be used in any jurisdiction.<sup>38</sup> These can often be adapted to vacate or reduce a sentence, or counsel can attack the conviction itself, and offer to negotiate an immigration-harmless sentence in return for abandoning this attack.

### *Safe Havens*

A safe haven is an alternative disposition of the criminal case that does not trigger the adverse immigration consequences. A safe haven is often necessary to successful post-conviction relief, for two reasons:

(1) A safe haven is what original defense counsel should have obtained in the first place. It is necessary to show it in order to establish prejudice from counsel's error in a claim of ineffective assistance of counsel.

(2) It is also necessary to obtain a safe haven now. The two safe havens may well, but need not, be the same. For example, if defense counsel should have obtained a judicial recommendation against deportation in the first place, the court may vacate the sentence on grounds of ineffective counsel for failing to do so. The JRAD, however, has been abolished, effective November 29, 1990, so it is not possible to obtain one now. Therefore, a different safe haven must now be obtained in order to avoid removal.

### **Equities**

The client's equities will have a profound impact on the chances of obtaining post-conviction relief. If the equities are insufficient, the post-conviction effort will be hopeless unless the ground of legal invalidity is so strong that it cannot be resisted.

### **CONCLUSION**

Criminal justice strategies sometimes solve immigration catastrophes. Sentence modifications are among the applicable strategies that mitigate certain immigration problems. On one hand, trial courts may be receptive to resentencing orders. On the other hand, sentence reductions can occur in orders waiving custody credits or orders reducing felonies to misdemeanors in the context of "wobbler" statutes. Sentence reductions are valid even if based on immigration consequences alone. Counsel's duty includes articulation of these consequences and citation to appropriate vehicles for any anticipated sentence modification.

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<sup>38</sup> See N. Tooby, "Grounds for Vacating the Conviction," *Post-Conviction Relief for Immigrants* at chap. 6 (2004).