

EVALUATING POSSIBLE POST-CONVICTION RELIEF WHEN SENTENCE REDUCTION IS NOT A SOLUTION

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INTRODUCTION AND GENERAL CONSIDERATIONS¹

The four necessities for success in obtaining post-conviction relief for immigrants are: (1) a new immigration-harmless disposition acceptable to the court and/or prosecution; (2) a vehicle by which to obtain it; (3) a ground of legal invalidity by which to persuade a court to vacate judgment; 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.²

WHAT NEW DISPOSITION WILL WORK

A preliminary but integral matter in evaluating post-conviction relief requires analysis of the immigration consequences of any new disposition by assuming success on a petition for writ or motion to vacate judgment. This objective-driven approach requires counsel to consider immigration consequences of various bargains within the realm of possibility, and the feasibility of exercising the right to jury trial to the extent that no immigration-safe plea bargain proves available.

REASONABLENESS OF THE ANTICIPATED SOLUTION

Immigration practitioners are better equipped than criminal defense counsel to speculate about alternative plea bargains that might mitigate immigration consequences. The trenches of immigration law practice do not necessarily prepare counsel to evaluate the reasonableness of a given disposition from a criminal justice standpoint. Collaboration with criminal defense counsel may well provide immigration counsel with insight into the likelihood that a given prosecutor would offer a specific charge bargain, a sentence bargain, both, or neither based on the charges originally filed.

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¹ 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 <http://criminalandimmigrationlaw.com/~crimwcom/index.php>.

² See N. Tooby, *Evaluating the Chances of Obtaining Post-Conviction Relief*, in <http://criminalandimmigrationlaw.com/~crimwcom/index.php> (free resources).

DISTINGUISHING CHARGE BARGAINS FROM SENTENCE BARGAINS

A charge bargain is a deal to add counts and/or dismiss or amend counts already on file. A sentence bargain is a negotiation that may contemplate custody credits, an order granting or denying probation, and the like. While charge bargains sound transparent, counsel is frequently confounded in negotiations by the mandate for counts consistent with the factual basis. Counsel has an obligation to research lesser-included offenses that may provide the prosecution with the incentive to agree to substitute them for several more substantial counts. A stronger record of conviction as well as unavailability of witnesses and staleness of evidence may influence the prosecution to negotiate.

With regard to a sentence bargain, counsel may similarly anticipate mitigation of some immigration consequences by avoiding a stayed prison sentence. This option is often achieved in California by bargaining for probation granted imposition of sentence suspended (ISS). However, the heinousness of the charged offense or priors sometimes leads the trial court to find a client unsuitable for an order granting probation ISS. To the extent that a client was subject to a stayed sentence (probation with execution of sentence suspended in California) and complied with the terms of probation, post-conviction relief that vacates the stayed sentence may provide the defense with leverage to negotiate for waiver of custody credits and a second term of probation without a stayed sentence.

SAFE HAVENS

A safe haven is an alternative disposition of the criminal case that does not trigger the adverse immigration consequences. Such a disposition 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 on a claim of ineffective assistance of counsel.

(2) It is also necessary to obtain a safe haven now. The two safe havens may well be, 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.

PROCEDURAL VEHICLE

A procedural vehicle must have the immigration effect necessary to prevent the particular adverse immigration consequences with which the client is threatened.³ The procedural vehicle must provide an appropriate means to reduce the sentence in the case.⁴ The requirements for the vehicle must be present in the case.⁵ The vehicle must be capable of being successful quickly enough to avoid the immigration consequences.⁶

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 judgment or reducing the sentence. A motion to reduce a felony to a misdemeanor may be sufficient to avert a crime of violence aggravated felony if the conviction is a felony and falls within the ambit of 18 USC §16(b).⁷ 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 mandatory immigration detention and buy time to plan a more durable strategy.⁸ The

³ See N. Tooby & J. Rollin, *Criminal Defense of Immigrants* §11.34 (2007).

⁴ See *id.* §11.35.

⁵ See *id.* §11.36.

⁶ See *id.* §11.37.

⁷ This type of motion can be made at any time in states such as California and Arizona.

⁸ See Tooby's *Guide* at §3.5(B)(7).

mere filing of a request for post-conviction relief, other than a direct appeal of right, does not undermine the finality of the conviction⁹ or disable the 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 so long as jurisdiction exists to raise the claim. 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.¹⁰

Counsel must ensure that the chosen vehicle is an appropriate one to raise the grounds for relief presented in the case, and that the ground may be raised by the chosen vehicle. For example, habeas corpus requires actual or constructive custody. Habeas corpus has been held to be an appropriate way of raising the claim of ineffective assistance of counsel, but if custody or other restraint (constructive custody) has expired, habeas cannot be used.

As an example, former counsel may have overlooked a mental defect that was not presented and that would have provided the client with a defense. So long as the client is in custody or subject to other restraint (constructive custody), successor counsel may argue the client's equities with an emphasis on treatment and rehabilitation and submit a psychiatric diagnosis in support of a habeas petition attacking counsel's errors.

The client must be able to satisfy the requirements for the chosen vehicle. For example, if the vehicle requires actual or constructive custody, it can be used only 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 unless equitable tolling applies to the statute of limitations.

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 affect the finality of the sentence or conviction for immigration purposes or delay the time at which the government may initiate removal proceedings.¹¹ 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.¹² 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 – VACATING A CONVICTION

In order to eliminate a conviction for immigration purposes, counsel must vacate a conviction on a ground of legal invalidity that existed at the time the conviction first occurred.¹³

One of the most important grounds of legal invalidity of convictions is ineffective assistance of counsel. The United States Supreme Court recognized in *Padilla v. Kentucky*¹⁴ that the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution require criminal defense attorneys to investigate the federal immigration consequences of a plea, give accurate advice to the client on the subject, and attempt if possible to negotiate an immigration-safe disposition. *Padilla* did not discuss the prejudice requirement of a claim of ineffective assis-

⁹ *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).

¹⁰ See, e.g., California Penal Code §1016.5.

¹¹ See, e.g., *Aguilera-Enriquez v. INS*, 516 F.2d 565 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

¹² 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).

¹³ *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

¹⁴ *Padilla v. Kentucky*, 559 U.S. ___, 2010 WL 1222274 (2010).

tance of counsel under the second prong of *Strickland v. Washington*.¹⁵ The Court did not reach this issue because the Kentucky courts had held that under no circumstances could affirmative misadvice constitute ineffective assistance of counsel, because the immigration consequences were collateral, not direct.

The United States Supreme Court not only held that affirmative misadvice about the immigration consequences of a plea could constitute ineffective assistance of counsel, but that a failure to advise was also a violation of counsel's duty. The Supreme Court did so on the basis that deportation consequences have, since 1996, become inextricably intertwined with the criminal consequences. In order to determine the immigration consequences of a plea, defense counsel must investigate them. If they are clear, counsel must communicate *this information* to the client. If after investigation they are not clear, counsel must communicate *this information* to the client.

Once the defendant establishes counsel's deficient performance, he or she must then establish prejudice to obtain a reversal of the conviction. The Supreme Court implied that the prejudice inquiry related to whether a decision to reject the plea bargain would have been rational under the circumstances. The Supreme Court remanded to the Kentucky courts on the question of prejudice in the first instance.

There are many potential grounds of legal invalidity on which convictions can be vacated.¹⁶

Vacating Sentences as Legally Invalid

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 of legal invalidity exist on which to vacate a sentence.¹⁷

Many grounds of legal invalidity may apply to sentence, rather than conviction. For example, where defense counsel did not request a Judicial Request Against Deportation (JRAD) before the Immigration Act of 1990 repealed the JRAD, such error may well have undermined the sentence rather than the plea.¹⁸ Failure to comply with a state advisal statute may have led the immigrant defendant to forego discussion of immigration consequences with counsel. Such a violation of a state advisal statute may cause immigration damage that flows from the sentence, rather than the conviction. On one hand, an order vacating judgment also vacates the associated sentence.¹⁹ On the other hand, the logical remedy in such case is to vacate the sentence rather than the conviction.

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 it cannot be resisted.

INFORMANTS AND CRIME VICTIMS

Counsel may already have ties to law enforcement that are untapped resources. The client may have played a role as an informant in the same case in which he or she was prosecuted as a co-defendant. Or the client may have provided testimony as a crime victim in support of another prosecution. Such relationships, to the extent that law enforcement officers made any representations about assistance in the immigration realm, might lead these officers to support a petition for writ. A given prosecutor or law enforcement agent with whom counsel has worked in gaining previous orders for post-conviction relief may prove the ideal person to approach for post-conviction relief.

¹⁵ *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984).

¹⁶ See generally, N. Tooby, *Post-Conviction Relief for Immigrants* (2004) (discussing over 40 different constitutional grounds on which guilty pleas may be vacated).

¹⁷ See *id.* §§ 7.65–7.119; Cafone, "Vacation of Illegal Sentences," Chap. 46, in *Criminal Defense Techniques* (2003).

¹⁸ *People v. Barocio*, 216 Cal. App.3d 99 (1989).

¹⁹ See N. Tooby, *Post-Conviction Relief for Immigrants* § 7.71 (2004).

CONCLUSION

Unless the client anticipates exercise of the right to jury trial and counsel evaluates this approach as feasible, counsel needs to ask what disposition will solve the immigration problem without defying the reasonable expectations of the trial court and prosecution. Once this critical preliminary question has been resolved, then developing the theory of the case is essential. No theory is complete without a vehicle for PCR, the anticipated arguments for legal invalidity, and equities that may influence the judge and prosecution to do justice.