

Immigration Concerns in Criminal Court

International Law Section
State Bar of California

Who We Are, Why we're here

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- ▶ Karl is available at karl@immigrantcrime.com & (415) 981-1616. He attacks convictions of foreign nationals by filing for post-conviction relief. He is private counsel for professional law corporation (Immigrant Crime & Justice) in San Francisco.

Strategy variations employed for foreign national clients

Where is the client? How can I make a difference?

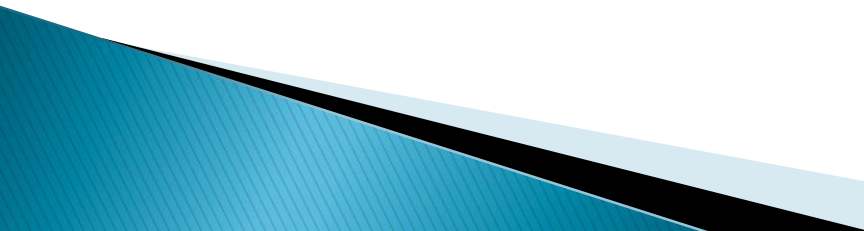
Damage control tactics to employ before & after locating client!



Impact of foreign nationality

- ▶ Accept collect calls from county jail/state prison
- ▶ Some counties need deposit for collect calls
- ▶ One Downloadable Resource: INFORMATION FOR CALIFORNIA STATE PRISONERS WITH IMMIGRATION HOLDS (revised March 2012)
- ▶ www.ice.gov “A” number search, Country of Birth

Locating the Client: State

- ▶ <http://inmatelocator.cdcr.ca.gov/>
 - ▶ state prisoner location requires CDC #, or name
 - ▶ Few day delay from court to CDC once sentenced
 - ▶ Realignment makes state prisoners serve county jail
 - ▶ If no success, call (916) 445-6713 (CDC's ID Unit)
 - ▶ For local county jail facilities—variable quality
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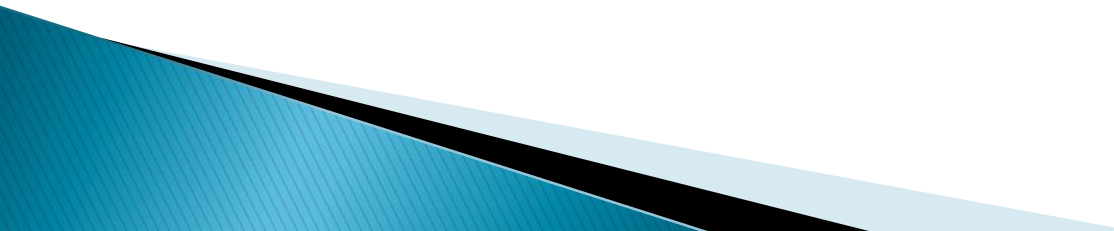
Locating the Client: County

- ▶ Check the County Website
 - Law enforcement
 - Inmate locator
 - **Example**: San Bernardino County—the following link:
 - <http://www.co.san-bernardino.ca.us/sheriff/bookingsearch/bookingsearch.aspx>

Locating in County: Example

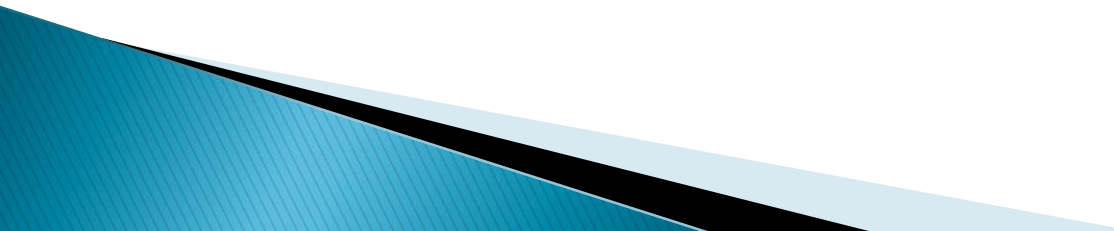
- ▶ You can Type In:
 - Inmate Name
 - Booking Number
 - Even look for persons released from custody
- ▶ Was Your Client In Custody Previously?
 - You may find the release date

ICE HOLDS/DETAINEES

- ▶ Is there an ICE hold? (A form I-247)
 - ▶ It is not a warrant.
 - ▶ It is not like a PC3056 parole hold: (many in the criminal justice system do not know this).
 - ▶ It is a request from ICE to local law enforcement.
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Contact ICE?


- ▶ Maybe.
 - Is your client provably a United States Citizen?

 - ▶ Maybe not.
 - Is ICE not yet aware of your client?
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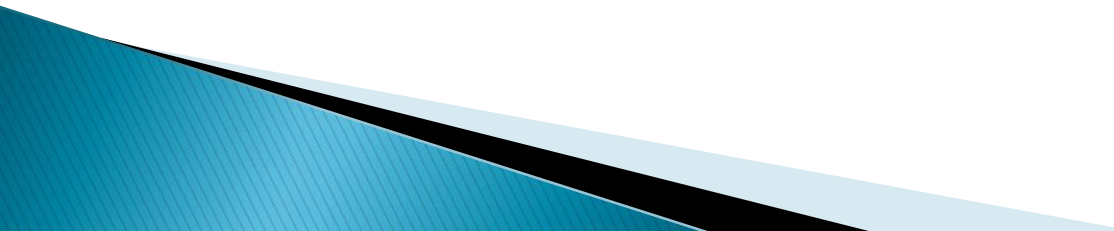
Work With Defense Counsel

- ▶ Private Counsel? Check State Bar website
- ▶ Public Defender? Most offices have web presence
- ▶ Why They Should Help
 - *Padilla v. Kentucky* has raised awareness
 - It May be retroactive! (*Chaidez v. United States*)
 - Materials you can use to assist them
 - *Vartelas v. Holder, Lafler v. Cooper, Missouri v. Fry*

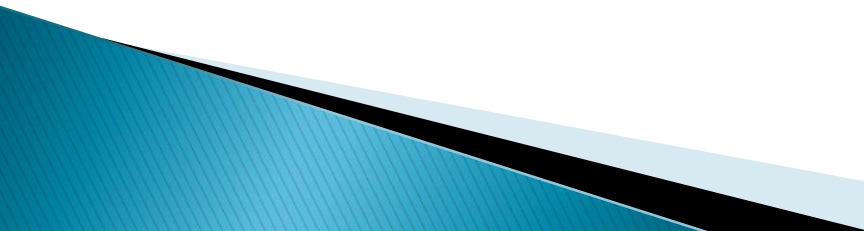
Working with Defense Counsel

- ▶ Advise Them: Tell Client Not To Speak With Ice!!
 - ▶ This may be too late
 - ▶ Ask Defense Counsel
 - Is there a detainer in place?
 - Does the client have a copy?
 - Why not?
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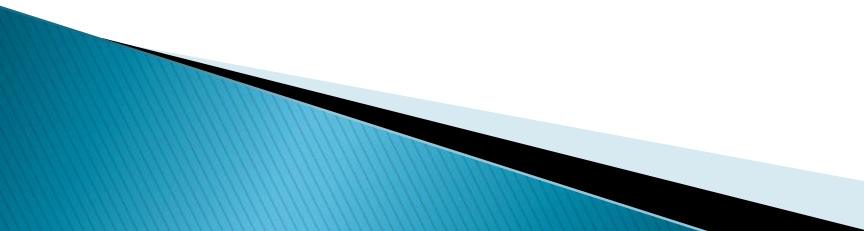
In working with Defense Counsel, try to shape the conviction #1

- ▶ The crime of conviction is what counts
 - ▶ The “rules” will be discussed in a follow-up presentation
 - ▶ The conviction can be shown by the government from the record
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In working with Defense Counsel, try to shape the conviction #2

- ▶ Keep the record clean
 - ▶ Factual basis is hard to overcome on felonies but may be damning to foreign national client
 - ▶ It can be a sticking point for DA and Judge
 - ▶ Move to continue for investigation of immigration consequences per PC 1016.5(b)
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Factual Basis

- ▶ Penal Code section 1192.5: “. . . The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea.”
 - ▶ This code section applies to felony pleas: no similar statutory language for misdemeanor pleas.
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Factual Basis (Continued)

- ▶ *People v. McGuire* (1991) 1 Cal.App.4th 281: The court asked defense and prosecution attorneys if they would stip to a factual basis, they answered “so stipulated.” Not likely to be followed today.
- ▶ *People v. Willard* (2007) 154 Cal.App.4th 1329
- ▶ Disagrees with *McGuire*
- ▶ A bare stip by counsel without reference to documents containing factual support not sufficient
- ▶ A reference to documents that do not exist within the record does not suffice

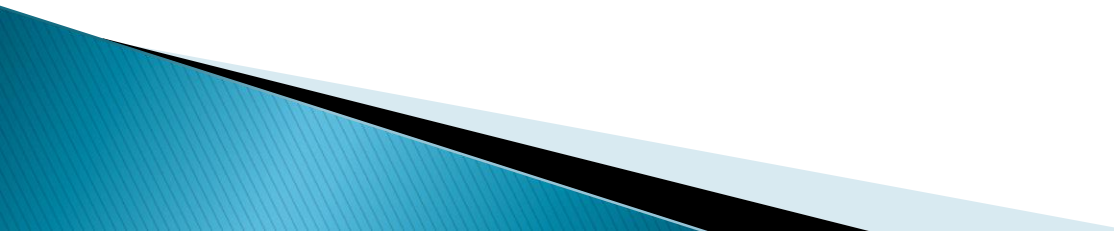
Factual Basis (continued)

- ▶ *People v. Holmes* (2004) 32 Cal.4th 432
- ▶ The court asked: “did you do what the complaint says you did?” Defendant says “yes.”
- ▶ *People v. French* (2008) 43 Cal.4th 36, 51.
- ▶ Stipulation: “I believe the People have witnesses lined up for this trial that will support what the D.A. read in terms of the factual basis, and that’s what they’ll testify to.”
- ▶ The thrust: “Indeed, counsel was careful to state that she agreed that witnesses would testify to the facts as recited by the prosecutor; she did not stipulate that the prosecutor’s statements were correct. Under the circumstances of this case, defense counsel’s stipulation to the factual basis cannot reasonably be construed as an admission by defendant.”

What Defense Counsel Should Do

- ▶ 1. Add a new count without ugly language
- ▶ 2. Plead to count, dismiss the original count
- ▶ 3. Plead to safe prong of a divisible statute
- ▶ 4. Leave out any mention of the name of the drug, a victim, use of violence or force, etc.
- ▶ 5. Utilize no-contest plea pursuant to *People v. West*—no stip to police reports please

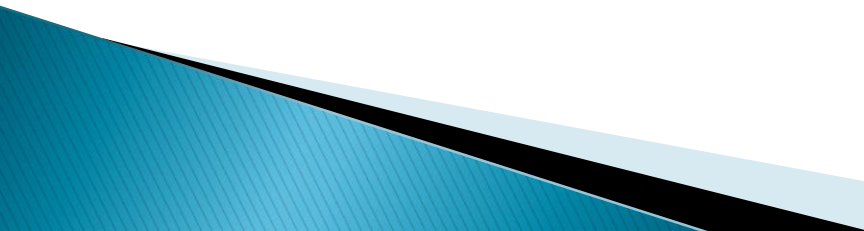
People v. West (1970) 3 Cal.3d 595

- ▶ Vastly misunderstood. Why do I say this?
 - ▶ Nobody's read it in years
 - ▶ Your criminal defender uses it regularly but likely hasn't read it recently either
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People v. West holding

- ▶ The court may accept a bargained plea of guilty or *nolo contendere* to any lesser offense “reasonably related” to the offense charged.
- ▶ Why?: Plea bargaining permits the courts to treat the defendant as an individual, to analyze his emotional and physical characteristics, and to adapt the punishment to the facts of the particular offense.
- ▶ Why?: In some cases, only the *bargained reduction in the charge* can enable the judge to exercise his discretion as to *meaningful* sentencing alternatives.

People v. West

- ▶ In this case, the defendant was charged with possession of marijuana and faced one to ten years in prison (absent an allegation of a prior narcotics offense).
 - ▶ He pled to a charge that allowed jail or prison (what we now know as a “wobbler”).
 - ▶ No facts in the police reports suggested guilt of the charge to which he pled.
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People v. West

- ▶ “Reasonably related”:
- ▶ They looked to the ABA standard:
 - (1) when the defendant pleads to the same type of offense as that charged OR
 - (2) when he pleads to an offense which he may have committed during the course of conduct which led to the charge.
- ▶ The second prong opens the door to a great deal of creativity in plea bargaining, as we have witnessed over the forty years since this case hit the books.

The rationale saves the client

- ▶ The same type of offense:
 - H&S11350 (straight felony)—H&S11377(a) (wobbler)
 - H&S11379(a) (st. felony)—H&S11377(a) (wobbler)
 - PC12021 (now PC29800) vs. PC417
 - PC529 (wobbler) vs. PC148.9 (misdemeanor)
- ▶ May have committed during course:
 - PC459 1st degree burg vs. PC459 comm. burg
 - PC459 vs. PC602 series
 - PC245(a)(2) vs. PC245(a)(4)
 - PC273.5(a) vs. PC136.1(b)(1)

Does factual basis stipulation require claim of factual innocence?

- ▶ *West* plea is statutory (1192.5 PC), so there's no need for a defendant to claim factual innocence.
- ▶ Factual innocence claim is relevant to plea under *North Carolina v. Alford* (1970) 400 U.S. 25; 91 S. Ct. 160, as factual basis animates Constitutional rights: "Ascertaining the existence of a factual basis assumes particular importance to the constitutional standard when the defendant's plea of guilty is coupled with a contradictory claim of innocence." *People v. Hoffard* (1995) 10 Cal. 4th 1170, 1183 n.11.

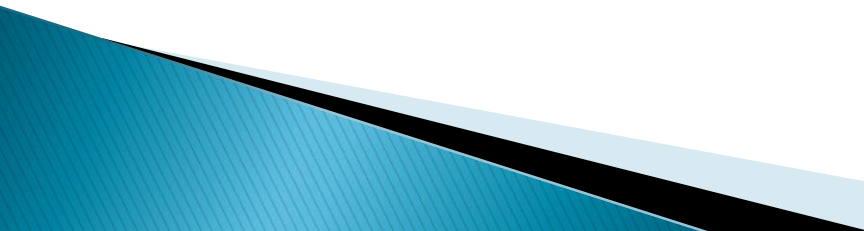
Do This

- Stip to factual basis per *People v. West* (also cite *People v. Holmes* and *North Carolina v. Alford* as commented upon by Hoffard if necessary)
- Argue more than that does not make sense in conjunction with a “no contest” plea.
 - A no contest plea means “I’m not contesting those facts,” not “I agree those are the facts”
- Factual Allocution—written or oral. Satisfies *Holmes* requirement, keep it bare bones.

And This

- Clean record
- Plead to the “safe prong” where statute divisible and where possible
 - “Offensive touching” vs. “force or violence”
 - “under the influence of alcohol” vs. “under influence of drug”
 - “avoid initial arrest” vs. “escape from trial, conviction, or punishment”
- Add new, clean count, plead to that
 - “Possessed controlled substance” vs. “possessed meth”
- Dismiss original count
- *People v. West*, no contest
- Limited factual basis—no police reports

Conclusion

- ▶ Find the client in the criminal justice system
 - Web, local public defender or conflict panel office, the State Bar
 - ▶ Contact defense counsel early on
 - Some cases plead at the first appearance!
 - ▶ Provide defense counsel with reasons to cooperate
 - ▶ With the above materials you can speak the lingo
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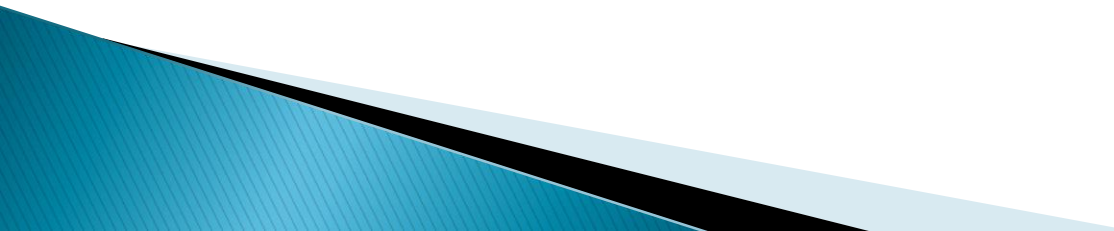
All of our contact information

If you're bored, or really care about a client, then reach out to one of us:

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Questions?

- ▶ Your input means a lot to us!
 - ▶ Even constructive criticism for going too fast.
 - ▶ Thinking out loud is allowed...
 - ▶ Thank you!
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Now the conclusion:

- The end