1986

Strategies for Ameliorating the Immigration Consequences of Criminal Convictions: A Guide for Defense Attorneys

Maryellen Fullerton
Brooklyn Law School, maryellen.fullerton@brooklaw.edu

Noah Kinigstein

STRATEGIES FOR AMELIORATING THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: A GUIDE FOR DEFENSE ATTORNEYS

Maryellen Fullerton*
and Noah Kinigstein**

I. INTRODUCTION

Aliens who become involved in criminal proceedings are vulnerable to deportation, irrespective of their immigration status.[1] Congress has provided that even lawful permanent residents who have lived in the United States for decades may be deported if convicted of certain crimes.[2] Aliens who are in the United States as temporary visitors and aliens who did not enter the United States lawfully, may also be deported based on criminal convictions.[3] In some circumstances, the deportation of aliens can result from activities that bring the alien into the criminal justice system, but that do not necessarily result in a conviction.[4] The immigration consequences of criminal activity can be severe, with both immediate and long-term effects on an alien's life.

This article will acquaint criminal defense counsel with some of the potential risks a client who is an alien faces when he comes into contact with the criminal justice system. The article will first explain how the Immigration and Naturalization Service, the federal agency charged with enforcing the immigration laws of the United States, discovers that an alien has become involved in criminal proceedings. The article will then discuss the immigration consequences of criminal proceedings under the current law. Lastly, and most importantly, the article will discuss various strategies that may be pursued to ameliorate the immigration consequences of criminal convictions. This article will acquaint the criminal defense attorney with those criminal convictions that are most likely to lead to deportation for his or her client and will suggest strategies to avoid the immigration consequences of a criminal conviction. Some courts have held that failure to inform a defendant of the potential immigration consequences of criminal convictions

---

* Professor of Law, Brooklyn Law School. J.D. Antioch School of Law, 1978; B.A. Duke University, 1968.

** Member, New York Bar. J.D. Temple University School of Law, 1980; B.A. Hunter College, City University of New York, 1977.

1. 8 U.S.C. § 1251 (1982).
2. *Id.*
3. *Id.*
4. *Id.*

constitutes ineffective assistance of counsel.[5] Although most states have not yet adopted this standard in assessing claims of ineffective assistance of counsel,[6] all criminal defense attorneys should be well-versed in the special immigration-related risks that alien defendants are likely to face.

II. NOTIFICATION OF THE IMMIGRATION AND NATURALIZATION SERVICE

The Investigation Division of the Immigration and Naturalization Service (INS) assigns immigration investigators to work with state law enforcement personnel in an effort to seek out aliens who have been identified as individuals engaged in criminal activity.[7] These investigators serve as a liason between the INS and local police departments, as well as between the INS and the courts. The liason system has been designed to insure that there are three different stages during most state criminal proceedings when the INS will be informed that an alien has run afoul of the law: when arrested by the police, when prosecuted by the district attorney, and when investigated by the probation officers. In addition, immigration investigators often go to local detention facilities at the request of the wardens and interview inmates who are thought to be aliens.

Although some aliens slip through, the liaison system has proved very effective in terms of providing INS investigators with information about the alienage of individuals who are arrested by the police. The police procedures regarding the treatment of aliens may vary from jurisdiction to jurisdiction, so the individual practitioner would be well advised to check the procedures of the specific jurisdiction. For example, the Police Department of New York City has issued a directive requiring all officers who are aware that they have arrested someone who is not a United States citizen to inform the INS of the arrest and of the alien's identity.[8] Although police officers appear to be diligent in reporting this information, when an alien is arrested, he will often claim to be a citizen of the United States. Therefore, the police officer will not notify the INS that an alien has been arrested. In such cases, the INS will generally learn about the individual later when the prosecutor or probation officer reports on the suspect's alienage.

While the New York City District Attorney's Office has not issued a directive similar to that of the Police Department, the assistant district attorneys regularly

---

5. Commonwealth v. Wellington, 305 Pa. Super. 24, 451 A.2d 223 (Pa. Super. Ct. 1982). *See* Edwards v. State, 393 So. 2d 597 (Fla. 1981) (failure of counsel to inform defendant of potential deportation constitutes ineffective assistance of counsel and renders guilty plea involuntary); People v. Correa, 108 Ill. 2d 541, 485 N.E.2d 307 (1985) (defense counsel's failure to inform client that guilty plea in narcotics case could result in deportation proceeding constitutes ineffective assistance of counsel); *cf.* Lyons v. Pearce, 298 Or. 554, 694 P.2d 969 (1985) (failure of counsel to request judicial recommendation against deportation constitutes ineffective assistance of counsel).

6. *E.g.*, People v. Garcia, 53 Misc. 2d 303, 307, 279 N.Y.S.2d 288, 292 (N.Y. Sup. Ct. 1967).

7. Telephone interview with Steven R. Abrams, Chief Legal Officer, New York District, Immigration and Naturalization Service, in New York City (Feb. 13, 1985). The authors wish to thank Mr. Abrams for his description of the liaison between the INS and state and federal criminal law enforcement personnel.

8. New York City Police Department Directive issued Nov. 1980 by Police Commissioner Robert McGuire.

notify the INS of aliens who are undergoing prosecution, and often bring the fact of alienage to the attention of the presiding judge. The prosecutors are aware that an alien charged with a crime may be facing deportation, and frequently take the likelihood of deportation into account in determining whether to suggest a plea bargain or to prepare the case for trial.[9] The judges also are generally alert to a suspect's citizenship and are interested in the immigration proceedings that are underway, or may be commenced, against an alien.[10]

In an informal arrangement similar to that between the district attorney and the INS, the probation investigators in New York City notify the INS if they discover that an individual is an alien. Information about alienage is also included in the probation reports submitted to the courts.[11]

The INS investigators assigned to the various courts keep in regular communication with prosecutors and probation officers in order to maximize the chances of discovering aliens who have been or are about to be convicted of crimes in the United States. If an individual's alienage does remain unknown throughout the trial and probation investigation, he still may be identified as an alien by the INS at a later time. An individual who is convicted but whose alien status has escaped detection may face immigration investigators while he is incarcerated. If information indicating that a prisoner is an alien comes to the attention of prison officials, the officials notify the INBS investigators who come to the detention facility and interview the suspected alien.

At the federal level, the INS notification process is similar to the arrangements developed in the state court system; although the process is different at the initial stage. A new federal statute requires federal officers to contact the INS whenever they apprehend an individual believed to be an alien who is not a lawful permanent resident.[12] The statute authorizes federal agents to detain the individual for up to ten days without indicting him while his alienage is investigated.[13] If an individual is not suspected of being an alien at the time of arrest, but is later discovered to be an alien, the federal prosecutors report this information to the INS.[14] Similarly, when federal probation officers discover information, in the course of their investigations, about the alienage of convicted criminals this information is conveyed to the INS.[15]

III. THE IMMIGRATION CONSEQUENCES UNDER CURRENT LAW

A. The Consequences

The immediate hardship of deportation is often greater than that inflicted by denaturalization, which does not, immediately at least,

---

9. Telephone interview with Steven R. Abrams, *supra* note 7.

10. *Id.*

11. *Id.*

12. 18 U.S.C. § 3142(d) (1982).

13. *Id.*

14. *See supra* note 7 and accompanying text (discussing liaison between INS and criminal law enforcement personnel).

15. *Id.*

> result in expulsion from our shores. And many resident aliens have lived in this country longer and established stronger family, social, and economic ties than some who have become naturalized citizens.[16]

The immediate consequence for an alien convicted of a crime may be expulsion or deportation.[17] An alien can be deported if convicted of certain types of criminal offenses such as crimes involving moral turpitude or narcotics, or crimes involving the possession of particular types of weapons.[18] Certain status offenses do not require conviction, merely being charged with such an offense may result in deportation. Aliens receiving drug addiction treatment, aliens having multiple arrests for prostitution, and aliens involved in the smuggling of other aliens into the United States risk deportation under this notion of status offenses.[19]

16. Woodby v. INS, 385 U.S. 276, 286 (1966).

17. 8 U.S.C. § 1251 (1982).

18. 8 U.S.C. § 1251 provides in part:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who . . . .
>
> . . . .
>
> (4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial;
>
> . . . .
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation or opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate;
>
> . . . .
>
> (14) at any time after entry, shall have been convicted of possessing or carrying in violation of any law any weapon which shoots or is designed to shoot automatically or semi-automatically more than one shot without manual reloading, by a single function of the trigger, or a weapon commonly called a sawed-off shotgun. . . .

Id.

19. 8 U.S.C. § 1251 also provides:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who . . . .
>
> . . . .
>
> (11) is, or hereafter at any time after entry has been, a narcotic drug addict
>
> . . . .
>
> (12) by reason of any conduct, behavior or activity at any time after entry became a member of any of the classes specified in paragraph (12) of section 1182(a) of this title; or is or at any time after entry has been the manager, or is or at any time after entry has been connected with the management, of a house of prostitution

Criminal convictions can also have long-term consequences. Criminal proceedings may result in the future exclusion of an alien. An alien may be excluded from the United States if convicted of crimes of moral turpitude,[20] narcotics offenses,[21] or if he has been involved in smuggling aliens into the United States.[22] An alien convicted of any of these crimes is not eligible to become a permanent resident of the United States.[23] Also, certain immigration privileges that require good moral character may later be withheld.[24]

B. Effect of Guilty Pleas

The courts generally view deportation as a "collateral" rather than as a "direct" consequence of a guilty plea.[25] Most courts are not affirmatively required to inform an alien defendant that a guilty plea may result in deportation.[26] If an alien defendant pleads guilty to a crime without knowledge that such a plea could lead to deportation, the resulting deportation will not invalidate the guilty plea.[27] Relief from deportation ordinarily will not be provided, even when an alien has clearly relied on the erroneous advice of an attorney.[28]

> or any other immoral place;
>
> (13) prior to, or at the time of any entry, or at any time within five years after entry, shall have, knowingly and for gain, encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law. . . .

Id.

20. 8 U.S.C. § 1182(a)(9) (Supp. I 1983).

21. 8 U.S.C. § 1182(a)(23) (Supp. I 1983).

22. 8 U.S.C. § 1182(a)(31) (Supp. I 1983).

23. 8 U.S.C. § 1255(a) (Supp. I 1983).

24. 8 U.S.C. § 1254(a) (Supp. I 1983); 8 U.S.C. §1427(a) (Supp. I 1983).

25. United States v. Gavilan, 761 F.2d 226, 228 (5th Cir. 1985) (deportation collateral consequence of conviction); United States v. Parrino, 212 F.2d 919, 921 (2d Cir.) (same), *cert. denied*, 348 U.S. 840 (1954).

26. Downs-Morgan v. United States, 765 F.2d 1534, 1538 (11th Cir. 1985) (court accepting guilty plea need not advise defendant of collateral consequences); Cuthrell v. Director, Patuxent Inst., 475 F.2d 1364, 1366 (4th Cir.) (same), *cert. denied*, 414 U.S. 1005 (1973). *See also* Joseph v. Esperdy, 267 F. Supp 492, 494 (S.D.N.Y. 1966) (anticipating and explaining collateral consequences would impose onerous and absurd burden on judge).

Several states have enacted legislation that requires courts to inform alien defendants of the immigration consequences of criminal convictions. *See, e.g.*, CAL. PENAL CODE § 1016.5 (West 1985) (advisement concerning status as alien, reconsideration of plea, effect of noncompliance); CONN. GEN. STAT. ANN. § 54-1j (West 1985) (court instruction on possible immigration and naturalization ramifications of guilty or nolo contendere plea); MASS. GEN. LAWS ANN. ch. 278, § 29D (West 1981) (conviction upon plea of guilty or nolo contendere; motion to vacate); OR. REV. STAT. § 135.385 (1985) (defendant to be advised by court); WASH. REV. CODE ANN. § 10.40.200 (Supp. 1986) (deportation of aliens upon conviction; advisement; legislative intent).

27. *See* Zinnanti v. INS, 651 F.2d 420, 421 (5th Cir. 1981) (no collateral attack on conviction based on alleged neglect by counsel to advise of deportation consequences of guilty plea).

28. United States v. Gavilan, 761 F.2d at 228; United States v. Parrino, 212 F.2d at 921.

C. *Narcotics Offenses*

Although a detailed analysis of narcotics offenses and their immigration consequences is beyond the scope of this article, some fundamental points should be examined. An alien convicted of a single narcotics-related offense can be subject to deportation[29] and exclusion.[30] There is virtually no amelioration of such convictions, and exceptions to the consequences that attach to such convictions are very restricted.[31] Even a situation in which the alien is a lawful resident alien who has spent his entire life in the United States will not mitigate against the effect of a narcotics conviction.[32] Deportation is not predicated upon the imposition of any minimum sentence of confinement.[33] Commitment to a treatment facility will not defeat deportation.[34]

Recent policies and practices of the INS have diminished the harshness of the consequences of certain convictions for marijuana possession. The present administrative policy is not to deport permanent residents who are convicted of possession, importation, or distribution of less than 100 grams of marijuana.[35] In cases involving marijuana possession, recent legislative changes may permit applicants who were formerly not eligible for permanent residence status to receive a waiver of excludability.[36]

The judicial recommendation against deportation, a useful avenue of judicial post-conviction relief, is generally not available in narcotics convictions.[37] Nevertheless, there are several extremely limited avenues available to ameliorate the consequences of a narcotics conviction.

First, in *Rehman v. INS,*[38] the Second Circuit created an exception to the general principle that narcotics convictions are not eliminated by general expungements. The *Rehman* court held that a certificate of relief from disabilities under a state statute[39] negates the deportation consequences of a drug

---

29. 8 U.S.C. § 151(a)(11) (1983). *See supra* note 18 (giving relevant text of § 1251(a)(11)).

30. 8 U.S.C. § 1182(a)(23).

31. *See* Bronsztejn v. INS, 526 F.2d 1290, 1292 (2d Cir. 1975) (review of congressional intent to create stringent deportation policy regarding drug offenders); Matter of A.F., 8 I. & N. Dec. 429, 445-46 (1959) (attorney general enforcing congressional intent to strengthen deportation laws dealing with alien narcotic offenders).

32. Sierra-Reyes v. INS, 585 F.2d 762, 764 (5th Cir. 1978) (deportation statutes applicable to lifelong resident alien who has married United States citizen).

33. Matter of L.R., 8 I. & N. Dec. 269, 270 (1959) (conviction exists for deportation purposes after judicial finding of guilt and case termination regardless of sentence).

34. *Id.* at 270-71.

35. C. GORDON & H. ROSENFIELD, IMMIGRATION LAW AND PROCEDURE, 23-486.6 (rev. ed. 1985) (containing Immigration & Naturalization Service Operations Instruction 242.1(a)(26)).

36. *See* 8 U.S.C. § 1182(h) (Supp. 1985) (to avoid deportability, alien must present proof of extreme hardship to alien's lawfully admitted spouse, parent or child).

37. *See infra* notes 119-130 and accompanying text (discussing judicial recommendation against deportation).

38. 544 F.2d 71 (2d Cir. 1976).

39. The statute involved in *Rehman* was N.Y. CORRECT. LAW § 701 (McKinney 1968) (amended 1985).

offense for which such a certificate is obtained.[40] The holding in *Rehman* is limited to instances in which there is state judicial relief that is clearly intended to prevent mandatory deportation, and expungement of a federal conviction would have been available in an analogous federal criminal case.

Second, drug convictions expunged under the Federal Youth Corrections Act[41] and its state counterparts, or discharge and dismissal dispositions under the Drug Control Act[42] and its state counterparts, cannot be used as a basis for charges of deportability under section 1251(a)(11) of title 8 of the United States Code.[43]

Third, in *Francis v. INS*,[44] the Second Circuit recognized one other limited exception to the immigration consequences of a narcotics conviction.[45] An individual may be able to obtain a waiver from the consequences of convictions if he is a lawful permanent resident of the United States, has resided continuously in the United States for seven years, and can demonstrate evidence of rehabilitation.[46]

Finally, an alien who has been in the United States for a continuous period of ten years following conviction for a narcotics offense may be eligible to seek the suspension of his deportation. Under section 1254(a)(2) of title 8, the alien must meet the following requirements to qualify for this relief: ten years continuous presence in the United States, good moral character during the ten years, and the alien's deportation would have to cause exceptional and extremely unusual hardship to the alien, or to his spouse, parent, or child who is a citizen or lawful permanent resident of the United States. An alien who satisfies these conditions is not automatically entitled to relief; instead, aliens who satisfy these three requirements are eligible for the descretionary relief of suspension of deportation.[47]

D. Crimes of Moral Turpitude

The crimes that most frequently result in immigration consequences (i.e., expulsion or deportation) are crimes of moral turpitude.[48] Section 1251(a)(4) of title 8 provides:

---

40. Rehman v. INS, 544 F.2d at 75.

41. 18 U.S.C. § 5021 (1970) (repealed 1984).

42. 21 U.S.C. § 844(b)(1) (1970) (repealed effective Nov. 1, 1986) (Supp. 1985).

43. *See supra* note 18 (giving relevant text of § 1251). *See* Matter of Carillo, Interim Decision 2965 (1984) (expungement of marijuana conviction pursuant to Texas statute does not eliminate conviction for purposes of deportation because statute not state counterpart to federal first offender statute); Matter of Forstner, 18 I. & N. Dec. 374 (1983) (distinguishing between expungement statutes that remove stigma of conviction after penalty fulfilled and statutes providing discharge without conviction upon successful completion of probation; state statute not state counterpart to federal first offender statute).

44. 532 F.2d 268 (2d Cir. 1976).

45. *Id.* at 273.

46. Matter of Marin, 16 I. & N. Dec. 581, 588-9 (1978) (if waiver sought for criminal activity, alien must show rehabilitation).

47. Kimm v. Rosenberg, 363 U.S. 405, 408 (1960); Hintopoulos v. Shaughnessy, 353 U.S. 72, 77 (1957); Parcham v. INS, 769 F.2d 1001, 1004 (4th Cir. 1985).

48. 8 U.S.C. § 1251(a)(4) (Supp. I 1983). *See supra* note 18 (giving relevant text of § 1251).

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who

. . . .

(4) is convicted[50] or a crime[51] involving moral turpitude[52] committed within five years after entry[53] and either sentenced to convinement[54] or confined therefor for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme[55] of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial. . . .[56]

The courts have developed three standards for determining whether a crime is one of moral turpitude. The traditional view requires that the crime as charged

---

49. An alien is any person not a citizen or national of the United States. 8 U.S.C. § 1101(a)(3) (1970). This definition includes ex-citizens who have lost their citizenship through expatriation or denaturalization. 8 U.S.C. § 1451 (1970); 8 U.S.C. § 1481 (Supp. 1985). The alien must have had that status at the time of conviction. Costello v. INS, 376 U.S. 120 (1964).

50. A final conviction is required. Pino v. Landon, 349 U.S. 901 (1955); *See also* Rehman v. INS, 544 F.2d at 74 (deportation pursuant to § 1251(a)(11) contingent on drug-related conviction).

51. A crime refers to an act adjudicated in a criminal proceeding, not a civil proceeding. Juvenile delinquency is not a crime. Therefore, if the alien is tried and treated as a juvenile there is no crime. But if the alien is tried as an adult, even though he is a minor, there is a crime. Morasch v. INS, 363 F.2d 30, 31 (9th Cir. 1966).

Although all *malum in se* crimes are included, not all *malum prohibitum* crimes are included. *See* Castle v. INS, 541 F.2d 1064, 1066 (4th Cir. 1976) (examination of extenuating factors not permitted in crimes *mala in se*). Finally, *mens rea* is usually required. United States *ex rel.* Meyer v. Day, 54 F.2d 336, 337 (2d Cir. 1931). Attempted crimes are also included within this definition. *Id.*

52. In Ng Sui Wing v. United States, 46 F.2d 755 (7th Cir. 1931), the term "moral turpitude" was defined as "the act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." *Id.* at 756. Attempts to challenge the vagueness of the term "moral turpitude" as unconstitutional have been unsuccessful. Jordan v. DeGeorge, 341 U.S. 223, 232 (1951).

53. *See* 8 U.S.C. § 1101(a)(13) (1970) (no "entry" for purposes of immigration laws if alien with permanent residence can show that departure from United States was unexpected or involuntary, and not occasioned by legal process). *See also* Rosenberg v. Fleuti, 374 U.S. 449, 462 (1963) ("entry" language of Act only applies where alien's prior departure was intended to be "meaningfully interruptive" of permanent residency).

54. Confinement refers to detention in a prison or correctional institution or in a public health service hospital. United States *ex rel.* Abbenante v. Butterfield, 112 F. Supp. 324, 326-27 (E.D. Mich. 1953), *aff'd per curiam*, 212 F.2d 794 (6th Cir. 1954). *But see* Holzapfel v. Wyrsch, 259 F.2d 890, 893 (3d Cir. 1958) (where sentence limited to psychiatric evaluations, alien has not been "sentenced to confinement" as required by Act). Commitment under the Federal Youth Corrections Act (or a state equivalent) is not confinement within the meaning of the statute. Matter of N, 8 I. & N. Dec. 660, 663 (1960).

55. In the absence of all evidence to the contrary, complete crimes committed on different dates or in different places are considered separate and distinct crimes. Nason v. INS, 394 F.2d 223, 227 (2d Cir. 1968); Sawkow v. INS, 314 F.2d 34, 38 (3d Cir. 1963); Chanan Din Khan v. Barber, 253 F.2d 547, 549 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958). *See also* Jeronimo v. Murff, 157 F. Supp. 808, 815 (S.D.N.Y. 1957) ("single scheme of misconduct" must be interpreted in light of totality of circumstances). All doubts concerning a single scheme are to be resolved in favor of the alien. Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

56. 8 U.S.C. § 1251(a)(4) (footnotes added).

must involve moral turpitude under all possible sets of circumstances before the alien can be deported. This rule prevents consideration of the circumstances under which the crime was in fact committed.[57] Administrative convenience provides the rationale for this rule.[58]

One minority view asks instead whether the crime "generally" or "commonly" is regarded as involving moral turpitude.[59] This standard relies more on community standards and public perception than on a strict construction of the statute.

Another minority view analyzes whether any particular conviction involves moral turpitude in the precise circumstances of the case.[60] While this standard would give the courts the added burden of examining the actual facts, it would presumably result in deporting only those aliens who have actually acted with moral turpitude.

E. Examples of Crimes of Moral Turpitude

Crimes can be grouped generally into the following seven categories for the purpose of analyzing moral turpitude.[61] While some crimes are consistently held to involve moral turpitude and are rarely discussed, other crimes may or may not be deemed to involve moral turpitude, depending upon the wording of the statute under which the defendant was convicted.[62]

First, crimes against the person involve moral turpitude whenever a malicious intent is required by the statutory definition of the crime.[63] Such crimes include:

---

57. Okabe v. INS, 671 F.2d 863, 865 (5th Cir. 1982); United States *ex rel.* Robinson v. Day, 51 F.2d 1022, 1023 (2d Cir. 1931).

58. United States *ex rel.* Robinson v. Day, 51 F.2d at 1023.

59. Marciano v. INS, 450 F.2d 1022, 1028 (8th Cir. 1971) (Eisele, J., dissenting) (distinguishing Pino v. Nicholls, 215 F.2d 237, 245 (1st Cir. 1954), *rev'd on other grounds sub nom.* Pino v. Landon, 349 U.S. 901 (1955)).

60. Marciano v. INS, 450 F.2d at 1028.

61. This article identifies seven categories of crime for the purpose of determining the presence of moral turpitude: 1) crimes against the person; 2) sexual offenses; 3) crimes against property; 4) crimes against government; 5) crimes involving fraud; 6) regulatory violations; and 7) weapons offenses. This list is not intended to be exhaustive, but is merely illustrative of the major areas that have been examined by the courts. For an alternative, and more detailed categorization of crimes involving moral turpitude, *see* PATEL'S DIGEST OF ADMINISTRATIVE DECISIONS UNDER IMMIGRATION AND NATIONALITY LAWS § 7.08 (1985) (listing numerous categories of crimes that have been examined by Board of Immigration Appeals and determined to involve moral turpitude).

62. For example, in Matter of B, 3 I. & N. Dec. 278 (1948), the Board of Immigration Appeals held that a French conviction for passing bad checks did not involve moral turpitude because the French statute did not require intent to defraud as an element of the crime. However, in Matter of Khalik, 17 I. & N. Dec. 518 (1980), the Board held that passing bad checks did involve moral turpitude where the statute required such an intent.

63. In Matter of Awaijane, 14 I. & N. Dec. 117, 118 (1972), the Board, in holding that a Lebanese conviction for attempted murder involved moral turpitude, stated, "[M]alicious intention or what is equivalent to such intention is the broad boundary between crimes involving moral turpitude and those which do not." *See also* C. GORDON, IMMIGRATION AND NATIONALITY LAW § 4.14 (1985) (major crimes against person involve moral turpitude if "evil or predatory intent") [hereinafter cited as GORDON].

murder,[64] voluntary manslaughter,[65] kidnapping,[66] assault with intent to kill,[67] assault with intent to rob,[68] and assault with intent to rape.[69] Crimes that have been held not to involve moral turpitude include: involuntary manslaughter,[70] simple assault,[71] and attempted suicide.[72]

Second, aggravated sexual offenses generally involve moral turpitude, but minor sexual offenses, which are often not even perceived as criminal by the community, generally do not.[73] Aggravated sexual offenses include: rape,[74] sexual misconduct with a minor,[75] and prostitution.[76] Vagrancy (charged in lieu of prostitution),[77] maintaining a nuisance,[78] and fornication[79] are examples of minor sexual offenses.

---

64. *See, e.g.*, Matter of S, 2 I. & N. Dec. 559, 562–64 (1946) (though involuntary manslaughter found not to be crime of moral turpitude, by implication murder does involve moral turpitude).

65. *See, e.g.*, De Lucia v. Flagg, 297 F.2d 58, 60–61 (7th Cir. 1961) (Italian conviction for voluntary manslaughter with grave provocation involved moral turpitude because intent to kill required); Matter of Rosario, 15 I. & N. Dec. 416, 417 (1975) (Puerto Rican conviction for voluntary manslaughter involved moral turpitude despite absence of "malice" requirement).

66. *See, e.g.*, Matter of Nakoi, 14 I. & N. Dec. 208, 209 (1972) (kidnapping involves moral turpitude).

67. *See, e.g.*, Matter of C, 5 I. & N. Dec. 370, 375 (1953) (assault with intent to murder involves moral turpitude).

68. *See, e.g.*, Matter of Quadara, 11 I. & N. Dec. 457, 458 (1966) (assault with intent to commit robbery involves moral turpitude).

69. *See, e.g.*, Matter of Beato, 10 I. & N. Dec. 730 (1964) (assault with intent to commit carnal abuse and rape involves moral turpitude).

70. *See, e.g.*, Tutrone v. Shaughnessy, 160 F. Supp. 433, 435 (S.D.N.Y. 1958) (government conceded conviction for unarmed manslaughter in second degree not crime of moral turpitude); United States *ex rel.* Mangiovi v. Karnuth, 30 F.2d 825, 826 (W.D.N.Y. 1929) (second degree manslaughter under New York statute not crime of moral turpitude). *But see* Matter of Wojtkow, 18 I. & N. Dec. 111, 112 (1981) (second degree manslaughter under New York law involved moral turpitude when committed with criminal recklessness).

71. *See, e.g.*, Matter of B, 5 I. & N. Dec. 538, 541 (1953) (simple assault does not necessarily involve moral turpitude).

72. *See, e.g.*, Matter of D, 4 I. & N. Dec. 149, 153 (1950) (Canadian conviction for attempting suicide did not involve moral turpitude because not generally considered criminal).

73. *See* GORDON, *supra* note 63 (moral turpitude attaches to most aggravated sexual offenses). *See also* Matter of R, 6 I. & N. Dec. 444, 454 (1954) (because community standards do not require punishment of fornication, no moral turpitude).

74. *Cf.* Matter of Dingena, 11 I. & N. Dec. 723, 728–29 (1966) (statutory rape involves moral turpitude despite lack of defense for mistake). *See also* Matter of Beato, 10 I. & N. Dec. 730, 733 (1964) (assault with intent to commit carnal abuse and rape involves moral turpitude).

75. *See, e.g.*, Matter of Imber, 16 I. & N. Dec. 256, 258 (1977) (Israeli conviction for sexual misconduct with minor involved moral turpitude).

76. *See, e.g.*, Matter of W, 4 I. & N. Dec. 401, 402 (1951) (violation of city prostitution ordinance involved moral turpitude).

77. *See, e.g.*, Matter of V.S., 2 I. & N. Dec. 703, 706 (1946) (Canadian conviction for vagrancy did not involve moral turpitude, even though charges brought against prostitute).

78. *See, e.g.*, Matter of A, 3 I. & N. Dec. 168, 170 (1948) (maintaining nuisance did not involve moral turpitude even though nuisance was though house of prostitution).

79. *See, e.g.*, Matter of R, 6 I. & N. Dec. at 454 (because community standards do not require punishment of fornication, no moral turpitude).

Third, crimes against property involve moral turpitude whenever an intent to deprive, defraud, or destroy is required.[80] Thus, blackmail,[81] forgery,[82] robbery,[83] burglary,[84] larceny,[85] extortion,[86] embezzlement,[87] and malicious destruction of property[88] have been held to involve moral turpitude, while the opposite conclusion has been reached in cases of unlawful entry[89] and damaging private property.[90]

Fourth, crimes against the government are generally considered to involve moral turpitude.[91] Such crimes include: counterfeiting,[92] perjury,[93] willful tax evasion,[94] bribery,[95] and impersonating a government official.[96] If the statute that defines

---

80. *See* GORDON, *supra* note 63 (major crimes against property involve moral turpitude if "evil or predatory intent" present). *See also supra* note 62 (conflicting determinations of moral turpitude in two different convictions for passing bad checks because only one required intent to defraud).

81. In Lahmann v. Carson, 353 U.S. 685 (1957), the Supreme Court accepted without discussion that blackmail is a crime of moral turpitude.

82. *See, e.g.*, Matter of Seda, 17 I. & N. Dec. 550, 552 (1980) (forgery involves moral turpitude). *Cf.* Matter of Flores, 17 I. & N. Dec. 225, 230 (1980) (conviction for uttering or selling false or counterfeit paper relating to registry of aliens involves moral turpitude because intent to defraud required).

83. *See, e.g.*, Matter of Martin, 18 I. & N. Dec. 226, 227 (1982) (robbery involves moral turpitude).

84. *See, e.g.*, Matter of Frentescu, 18 I. & N. Dec. 244, 245 (1982) (burglary involves moral turpitude); Matter of De La Nues, 18 I. & N. Dec. 140, 145 (1981) (burglary involves moral turpitude notwithstanding fact that burglary was motivated by economic hardship). *But see* Matter of M, 2 I. & N. Dec. 721, 722-25 (1946) (conviction for third degree burglary under New York statute did not involve moral turpitude where entry not in furtherance of other crime of moral turpitude).

85. *See, e.g.*, Chiaramonte v. INS, 626 F.2d 1093 (2d Cir. 1980) (larceny involves moral turpitude).

86. *See, e.g.*, Matter of F, 3 I. & N. Dec. 361, 362 (1949) (Canadian conviction for extortion involved moral turpitude). *Cf.* Matter of C, 5 I. & N. Dec. 370, 376 (1953) (criminal statute in nature of extortion involved moral turpitude).

87. *See, e.g.*, Delgado-Chavez v. INS, 765 F.2d 868, 869 (9th Cir. 1985) (embezzlement involves moral turpitude).

88. *See, e.g.*, Matter of M, 3 I. & N. Dec. 272, 274 (1948) (malicious destruction of property involved moral turpitude because perpetrator "vile and vicious"). *But see* Matter of N, 8 I. & N. Dec. 466, 468 (1959) (conviction for destruction of property did not involve moral turpitude because malicious intent not required).

89. *See, e.g.*, Matter of M, 2 I. & N. Dec. at 722-25 (conviction for third degree burglary under New York statute did not involve moral turpitude where entry not in furtherance of other crime of moral turpitude).

90. *See, e.g.*, Matter of N, 8 I. & N. Dec. at 468 (conviction for destruction of property did not involve moral turpitude because malicious intent not required).

91. *See* GORDON, *supra* note 63 (moral turpitude involved in many crimes defying government authority).

92. *See, e.g.*, Matter of Lethbridge, 11 I. & N. Dec. 444, 445 (1965) (uttering counterfeit obligation with intent to defraud involves moral turpitude); *see also* Matter of Flores, 17 I. & N. Dec. at 230 (conviction for uttering or selling false or counterfeit paper relating to registry of aliens involves moral turpitude because intent to defraud required).

93. *See, e.g.*, United States *ex rel.* Boraca v. Schlotfeldt, 109 F.2d 106, 108 (7th Cir. 1940) (perjury involves moral turpitude).

94. *See, e.g.*, Chanan Din Khan v. Barber, 253 F.2d 547, 549 (9th Cir.) (willful evasion of taxes involves moral turpitude because intent to defraud government required), *cert. denied*, 357 U.S. 920 (1958); Matter of W, 5 I. & N. Dec. 759, 764 (1954) (same).

95. *See, e.g.*, Okabe v. INS, 671 F.2d at 865 (offering bribe involves moral turpitude because "corrupt mind" required).

96. *See, e.g.*, Matter of Gonzalez, 16 I. & N. Dec. 134, 135 (1977) (impersonating federal officer involves moral turpitude).

the crime is overly broad or lacks a sufficient intent requirement, the crime does not involve moral turpitude. Consequently, escape from prison,[97] failure to report for induction,[98] and desertion[99] have been held not to involve moral turpitude.

Fifth, crimes that require fraud or intent to defraud always involve moral turpitude.[100] Courts have consistently held that such crimes are sufficient to justify deportation.

Sixth, regulatory violations are generally not crimes of moral turpitude.[101] Gambling[102] and immigration violations[103] are examples of regulatory violations.

Finally, weapons offenses involve moral turpitude when committed with an otherwise malicious intent, but not when committed passively.[104] Thus, moral turpitude is involved when a weapon is used in the commission of crime,[105] but is not involved in the carrying of a concealed weapon.[106]

Conspiracy to commit a crime is regarded as a crime of moral turpitude only if the underlying offense is a crime of moral turpitude.[107] Similarly, a conviction based on the attempt to commit a crime or a conviction as an accessory to a crime involves moral turpitude only if the underlying offense involves moral turpitude.[108]

---

97. *See, e.g.*, Matter of J, 4 I. & N. Dec. 512 (1951) (conviction for escape did not involve moral turpitude because no intent required).

98. *See, e.g.*, Matter of S, 5 I. & N. Dec. 425, 428-29 (1953) (listing numerous reasons why failure to report for induction is not a crime of moral turpitude).

99. *See, e.g.*, Matter of S.B., 4 I. & N. Dec. 682, 683 (1952) (although punishable by death, desertion in time of war does not involve moral turpitude because not "commonly regarded as manifestation of personal depravity or baseness").

100. Jordan v. DeGeorge, 341 U.S. 223 (1951). *See, e.g.*, McNaughton v. INS, 612 F.2d 457 (9th Cir. 1980) (Canadian conviction for conspiracy to affect public market price of stock with intent to defraud); Matter of Squires, 17 I. & N. Dec. 561 (1980) (Canadian conviction for obtaining currency by a false pretense with intent to defraud). The *Jordan* Court stated, "Without exception, federal and state courts have held that a crime in which fraud is an ingredient involves moral turpitude." Jordan v. DeGeorge, 341 U.S. at 227.

101. *See* GORDON, *supra* note 63 (moral turpitude not involved in violations of regulatory laws).

102. *See, e.g.*, Matter of G, 1 I. & N. Dec. 59, 62 (1941) (gambling conviction did not involve moral turpitude because gambling *malum prohibitum*, not *malum in se*).

103. *See, e.g.*, Matter of G, 1 I. & N. Dec. 73, 76 (1941) (illegal entry into Canada not crime of moral turpitude where not accompanied by perjury).

104. The immigration statute expressly states that conviction for possession or carrying an automatic weapon or a sawed-off shotgun is a ground for deportation by itself. 8 U.S.C. § 1251(a)(14) (Supp. I 1983). In such a case, it is not necessary to determine whether the conviction involved moral turpitude.

105. *See, e.g.*, Matter of Logan, 17 I. & N. Dec. 367, 368-69 (1980) (interference with law enforcement officer involved moral turpitude where knife used to threaten officer); Matter of Medina, 15 I. & N. Dec. 611, 612-14 (1976) (when committed with deadly weapon, assault involves moral turpitude, even if only criminally reckless).

106. *See, e.g.*, Matter of Granados, 16 I. & N. Dec. 726, 728 (1979) (conviction for possession of concealed shotgun did not involve moral turpitude).

107. *See, e.g.*, McNaughton v. INS, 612 F.2d at 459 (conspiracy to affect public market price by deceit); Matter of Flores, 17 I. & N. Dec. at 228 (conspiracy to commit offense involves moral turpitude if underlying substantive offense is crime of moral turpitude).

108. *See, e.g.*, Matter of Westman, 17 I. & N. Dec. 50 (1979) (attempted grand larceny by passing bad checks); Matter of Katsanis, 14 I. & N. Dec. 266 (1973) (attempted fraud); Matter of Awaijane, 14 I. & N. Dec. 117 (1972) (attempted murder); Matter of Sanchez-Marin, 11 I. & N. Dec. 264 (1965) (accessory after fact to manslaughter).

F. Other Crimes

Various other crimes frequently lead to expulsion or deportation although they do not necessarily involve moral turpitude. Such offenses would include: marriage fraud,[109] smuggling aliens,[110] and helping aliens to enter the United States illegally for gain.[111]

IV. STRATEGIES FOR AMELIORATING THE IMMIGRATION CONSEQUENCES OF CRIMINAL PROCEEDINGS

To avoid or ameliorate the immigration consequences of criminal proceedings, defense counsel must determine whether an alien is vulnerable to deportation. Counsel should initially ascertain whether, at the time of the arrest, his client was an undocumented alien or whether his client's presence in the United States was authorized by a valid non-immigrant visa, by possession of permanent resident status, or by a pending application seeking such status. Assuming the client was legally present in the United States, counsel should then determine if the alien has been charged with a crime of moral turpitude or a narcotics offense. When representing clients who are aliens, criminal defense attorneys should be particularly careful because they may have the inclination to avoid imprisonment of the client as their primary goal; however, such a goal may not always be in the best interests of the client. If conviction cannot be avoided, a short jail term may be preferable to a conviction for a crime involving narcotics or a crime of moral turpitude that does not impose a jail term, but does expose the client to deportation or expulsion. Plea bargaining may be crucial to achieving the best outcome for the client.

A. Plea Bargaining To Avoid Immigration Consequences

In negotiating a plea bargain for a client who is an alien, an attorney should be mindful of several factors. Only an actual sentence of imprisonment for a year or more, or the suspended execution of such a sentence will suffice for deportation.[112] Therefore, in jurisdictions that permit the suspension of imposition of a sentence, defense counsel may wish to plea bargain to suspend the imposition

---

109. *See* 8 U.S.C. § 1182(a)(19) (Supp. I 1983) (aliens who procure visa or enter United States by fraud or willful misrepresentation ineligible for visas and to be excluded from admission).

110. *See* 8 U.S.C. § 1324(a) (1981) (any person who brings aliens into United States in violation of immigration laws, transports aliens within the United States in furtherance of such violations, conceals aliens who have committed such violations, or induces such violations is guilty of felony).

111. *See* 8 U.S.C. § 1182(a)(31) (Supp. I 1983) (aliens who, for gain, assist or induce other aliens to enter United States illegally ineligible for visas and to be excluded from admission).

112. *See* Okoroha v. INS, 715 F.2d 380, 382 (8th Cir. 1983) (conviction and sentence of three years imprisonment with suspended sentence satisfies requirement of "sentence of confinement"). In Velez-Lozano v. INS, 463 F.2d 1305, 1307 (D.C. Cir. 1972), the court stated, "the essential element with reference to the [Immigration and Nationality] Act is the imposition of sentence rather than the actual serving of sentence."

of a sentence, rather than to suspend the execution of a sentence, in order to protect the client from deportation.[113]

The place of and basis for confinement are also important. An alien committed to a mental institution or committed under the Federal Youth Corrections Act (or the state equivalent) is not sentenced to confinement within the meaning of the immigration statute.[114] To avoid deportation, defense counsel may wish to explore such alternatives.

Attorneys should be careful to avoid recommending that an alien plead guilty to two crimes that do not arise out of a single scheme. Even an alien who has been in the United States more than five years is deportable if he commits two crimes of moral turpitude.[115] As long as the crimes fall within a single scheme, however, deportation predicated on the conviction of two crimes is defeated.[116]

An alien accused of assault with a deadly weapon and possession of a deadly weapon may wish to try to plead down to possession. Possession does not automatically constitute a reason for deportation.[117] A plea to a violation, as opposed to a misdemeanor or a felony, does not constitute conviction of a crime and cannot be a basis for deportation.[118]

Serious consideration should be given to the pretrial diversion programs that have been developed as alternatives to convictions. Generally, the pretrial diversion programs are sponsored by or run in cooperation with the local district attorney's office. Individuals accused of nonviolent crimes, including drug-related offenses, are often eligible for these programs. Because the programs vary, defense counsel should contact the district attorney's office in the county in which the alien has been charged in order to investigate the pretrial alternatives to convictions.

B. Judicial Recommendation Against Deportation

If it is impossible to avoid a conviction that can be a basis for deportation, then the judicial recommendation against deportation should be explored.[119] This

---

113. Matter of L.R., 7 I. & N. Dec. 318 (1957) (suspended imposition of sentence effective to avoid deportation).

114. *See supra* note 54 (discussing requirement that confinement be in prison or correctional institution). An alien involved in criminal proceedings may be committed to a mental institution for observation, testing, or treatment. This confinement does not constitute grounds for deportation under 8 U.S.C. § 1251(a)(4) (1982) as long as no criminal conviction has occurred.

115. 8 U.S.C. § 1251(a)(4).

116. *See supra* note 55 (discussing interpretation of "single scheme").

117. Conviction of possession of a deadly weapon is not an express ground for deportation. If the crime is considered one of moral turpitude, however, deportation could be based on 8 U.S.C. § 1251(a) (1982).

118. *But see* Babouris v. Esperdy, 269 F.2d 621 (2d Cir.) (aliens convicted of disorderly conduct violations for soliciting men for lewd purposes were deported under 8 U.S.C. § 1251(a)(4) despite fact that offense was only violation under New York law), *cert. denied*, 362 U.S. 913 (1959).

119. 8 U.S.C. § 1251(b)(2) (1982) provides:

> The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply if the court sentencing such alien for such

is a useful and underutilized statutory form of relief. A timely recommendation against deportation obtained from the sentencing court will preclude the INS from using the conviction as a basis for deportation. The INS has no discretion to deport an alien on the basis of a conviction for which a recommendation against deportation has been secured.[120] The recommendation against deportation also bars the INS or the immigration court from denying discretionary relief (e.g., voluntary departure or suspension of deportation) for failure to establish good moral character.[121]

The recommendation against deportation has limited applicability. Although available for crimes of moral turpitude, it is not applicable to narcotics offenses.[122] Furthermore, the recommendation against deportation is restricted to crimes of moral turpitude, and is not applicable to deportations based on other offenses listed in the statute as grounds for deportation.[123]

The statutory provision for invoking the recommendation against deportation sets forth two basic requirements. First, the recommendation against deportation must be obtained at the time of the imposing of sentence or the entering of judgment, or within thirty days thereafter.[124] Second, notice that a recommendation against deportation has been requested must be given to representatives of the interested state, the INS, and the prosecutor's office, who are permitted to make representations in the matter.[125] Failure to comply with these requirements renders the recommendation against deportation null and void.[126] The sentencing court, however, may still consider the INS representations despite the inadequate notice.[127]

The thirty day requirement is strictly applied. The fact that the motions are filed in a timely manner and a hearing concerning a recommendation against deportation is held within thirty days of sentencing is not sufficient.[128] A *nunc*

> crime shall make, at the time of first imposing judgment or passing sentence, or within thirty days thereafter, a recommendation to the Attorney General that such alien not be deported, due notice having been given prior to making such recommendation to representatives of the interested State, the Service, and prosecution authorities, who shall be granted an opportunity to make representations in the matter. The provisions of this subsection shall not apply to any alien who is charged with being deportable from the United States under subsection (a)(11) [narcotics offenses] of this section.

Id.

120. Velez-Lozano v. INS, 463 F.2d at 1308.

121. Giambanco v. INS, 531 F.2d 141 (3d Cir. 1976).

122. 8 U.S.C. § 1251(b)(2).

123. Jew Ten v. INS, 307 F.2d 832 (9th Cir. 1962) (no recommendation against deportation when deportation based on ground other than crime of moral turpitude), *cert. denied*, 371 U.S. 968 (1963); United States v. George, 534 F. Supp 570 (S.D.N.Y. 1982) (no recommendation against deportation when deportation based on overstay).

124. 8 U.S.C. § 1251(b)(2).

125. *Id.*; 8 C.F.R. § 241.1 (1985).

126. Matter of I, 6 I. & N. Dec. 426 (1954).

127. Haller v. Esperdy, 397 F.2d 211 (2d Cir. 1968). *See* Cerujo v. INS, 570 F.2d 1323 (7th Cir. 1978) (judge's recommendation effective even though no notice to INS because INS can still make representations to sentencing judge).

128. Matter of Tafoya-Gutierrez, 13 I. & N. Dec. 342 (1969).

pro tunc order is ineffective, despite unawareness of the time limit on the part of the sentencing court, the counsel, or the defendant.[129] These rules vary from state to state.[130]

C. *Waiver of Deportability*

Although federal and state courts are generally sympathetic to requests for judicial recommendations against deportation, there is no guarantee that a recommendation against deportation will be granted. If a recommendation against deportation is denied, a waiver of deportability[131] may be necessary. Although this waiver initially applied only to expulsion cases, the Second Circuit in *Francis v. INS*[132] applied the waiver to deportation cases as well. Aliens convicted of crimes are eligible for waiver of deportability if they are lawful permanent residents of the United States,[133] have been domiciled in the United States for seven consecutive years,[134] and have rehabilitated themselves.[135] Unlike the recommendation against deportation, a waiver of deportablity is available to aliens convicted of narcotics offenses.[136] The only crime for which this waiver[137] is unavailable is a conviction for possession of a shotgun or automatic weapon.[138] The denial of a waiver of deportability is appealable.[139]

---

129. Velez-Lozano v. INS, 463 F.2d at 1308.

130. *See* United States *ex rel.* Piperkoff v. Esperdy, 267 F.2d 72 (2d Cir. 1959) (recommendation against deportation not valid if entered in response to post-conviction writ of error *coram nobis*, when sole basis for vacation of earlier judgment is to cure omissions of recommendation against deportation). *But see* Haller v. Esperdy, 397 F.2d at 213 (where sentencing court assumed burden of giving notice of recommendation against deportation to the INS, but failed to do so, conviction cannot be used as basis for deportation until INS is given opportunity to present opposing views and court reconsiders its recommendation against deportation decision).

131. 8 U.S.C. § 1182(c) (1982) provides in part:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful, unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of this section.

Id.

132. 532 F.2d 268 (2d Cir. 1976).

133. 8 U.S.C. § 1182(c).

134. *Id.*

135. Matter of Marin, 16 I. & N. Dec. 581, 588-89 (1978) (if waiver is sought for criminal activity, alien must show rehabilitation).

136. *Id.*

137. Similar to the waiver of excludability in 8 U.S.C. § 1182(c) is the waiver provision found in 8 U.S.C. § 1182(h) (1982). Only aliens with close family ties to the United States can qualify for § 1182(h) waivers. Furthermore, § 1182(h) does not offer relief to narcotics offenders.

138. Matter of Grandos, 16 I. & N. Dec. 726 (1979) held that the decision in Francis v. INS, 532 F.2d 268 (2d Cir. 1976), did not expand discretionary relief under 8 U.S.C. § 1182(c) to persons convicted of sawed-off shotgun charges.

139. 8 C.F.R. §§ 3.1, 103.1, & 212.7 (1985).

D. *The Clayton Motion*

One option that defense counsel should always consider is a motion to dismiss in the interest of justice,[140] commonly known as a *Clayton* motion. As discretion is curtailed in the area of plea bargaining, judges are granting *Clayton* motions more frequently. The chances of success are greatly increased if the alien can present sympathetic facts to the court, and is not charged with a major offense.[141]

E. *Adjournment in Contemplation of Dismissal*

An alien with no prior record and a generally sympathetic case may obtain an adjournment in contemplation of dismissal.[142] The adjournment in contemplation of dismissal eliminates any immigration consequences of a criminal conviction.

F. *Deferred Prosecution*

The deferred prosecution is a rarely granted remedy that should be used only in the most sympathetic cases. The prosecution of the defendant may be deferred because it is likely that the alien will ultimately be removed from the United States, because the case will probably be protracted, and/or because the case may result in adverse publicity.[143]

G. *Certificate of Relief From Disabilities*

A certificate of relief from disabilities is an effective statutory remedy.[144] It has been used, for example, to prevent the deportation of a non-immigrant student found with hashish in his possession.[145] If the alien pleads guilty to a relatively minor possession charge, the court can issue a certificate of relief to ensure that the conviction does not trigger immigration consequences.[146] In *Rehman v. INS*,[147] the Second Circuit upheld this use of the statutory remedy to avoid deportation. The *Rehman* opinion held that the use of a certificate of relief from disabilities precludes deportation as long as the certificate is issued by a state judicial officer; the certificate is issued with the intent to prevent mandatory deportation; and the expungement of a federal conviction would be available in an analogous federal case.[148]

---

140. N.Y. CRIM. PROC. LAW § 210.40 (McKinney 1982); People v. Clayton, 41 A.D.2d 204, 342 N.Y.S.2d 106 (1973).

141. N.Y. CRIM. PROC. LAW § 210.40(a)-(h) (McKinney 1982) (statute lists ten factors to consider when deciding whether or not to grant motion).

142. N.Y. CRIM. PROC. LAW § 170.55 (McKinney 1982).

143. United States v. Birdman, 602 F.2d 547 (3d Cir. 1979).

144. N.Y. CORRECT. LAW § 701 (McKinney 1986).

145. Rehman v. INS, 544 F.2d 71, 72 (2d Cir. 1976).

146. *Id.* at 75.

147. 544 F.2d 71 (2d Cir. 1976).

148. *Id.* at 75.

H. Statutory Relief for Youthful Offenders and First Offenders

In some states anyone under the age of 16 who commits a crime may be considered a juvenile delinquent and tried in family court.[149] The family court disposition is not a criminal conviction.[150] Therefore, the disposition does not constitute a basis for deportation.[151] Furthermore, any individual between the ages of 16 and 18 may be granted youthful offender status upon conviction.[152] The record of a youthful offender is sealed and there is deemed not to be a criminal conviction; consequently, there are no immigration consequences.[153]

Under federal law a young adult sentenced under the Federal Youth Corrections Act,[154] or an equivalent state law, can have his conviction expunged and eliminated for immigration purposes.[155] Until November 1, 1986, similar relief is available to first-time offenders through the Federal First Offender Statute.[156] The statute also provides that a first offender, who is 21 or under at the time the crime was committed, is restored to the status he held before the offense; the arrest is treated as though it never occurred.[157] This provision is particularly useful when attempting to defend a client charged with a narcotics offense.[158]

I. Other Post-Conviction Remedies

A full and unconditional pardon by the President of the United States, the governor of a state, or any other supreme authority will prevent deportation for crimes of moral turpitude.[159] A pardon will not bar deportation for a narcotics

---

149. N.Y. FAM. CT. ACT § 301.2(1) (McKinney 1983). *Cf.* FLA. STAT. ANN. § 39.01(7) (West 1985) (person is considered child through age 18).

150. N.Y. FAM. CT. ACT § 781 (McKinney 1983).

151. 8 U.S.C. § 1251(a)(4). *See supra* note 18 (reciting text of § 1251).

152. N.Y. CRIM. PROC. LAW § 720.10(1) (McKinney 1984).

153. N.Y. CRIM. PROC. LAW § 720.35 (McKinney 1984). *See* 8 U.S.C. § 1251(a)(4).

154. The Federal Youth Corrections Act, 18 U.S.C. § 5005-26 (1982), was repealed in 1984 by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 218(a)(8), *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS (98 STAT.) 1837, 2027. Although the repeal took effect on October 12, 1984, sections 5017-20 of the Federal Youth Corrections Act, 18 U.S.C. § 5017-5020, will remain in effect until 1989 for individuals convicted of an offense or adjudicated to be a juvenile delinquent before the effective date of the repeal, assumning the sentence was imposed before the repeal date. Comprehensive Crime Control Act of 1984, Pub. L. NO. 98-473, 98 Stat. 1837, 2032.

155. Mestre-Morera v. INS, 462 F.2d 1030, 1032 (1st Cir. 1972).

156. 21 U.S.C. § 844(b)(1) (1982). This section has been repealed, effective November 1, 1986, by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 218(a)(8), 235(a)(1)(A), 98 Stat. 1837, 2027, 2031.

157. 21 U.S.C. § 844(b)(2) (1982). This section has also been repealed, effective November 1, 1986, by the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 218(a)(8), 235(a)(1)(A), 98 Stat. 1837, 2027.

158. 21 U.S.C. § 844(b)(2).

159. 8 U.S.C. § 1251(b) (1982) provides:

> The provisions of subsection (a)(4) of this section respecting the deportation of an alien convicted of a crime or crimes shall not apply (1) in the case of any alien who has subsequent to such conviction been granted a full and unconditional pardon by the President of the

offense.[160] If an alien is convicted of an offense for which there is no pardoning authority under state or federal law, then the conviction cannot be used to deport the alien.[161]

Motions to vacate a judgment[162] are rarely granted.[163] This form of statutory relief contains significant limitations on the circumstances in which a court can vacate a judgment.[164] A successful motion to vacate a judgment can obviate the conviction and eliminate the conviction's immigration consequences.[165]

A writ of error *coram nobis* is a non-statutory remedy that also is very rarely granted; the petitioner has the heavy burden of showing new facts that are so significant that they warrant overturning the conviction.[166] In the immigration

---

United States or by the Governor of any of the several States.

Id. See also Matter of S, 7 I. & N. Dec. 370 (1956) (pardon of prostitution conviction prevents INS from using arrest, conviction, or pardon records as evidence of prostitution for purposes of deportation).

While the statute refers to pardons granted by the President or a state governor, in certain instances pardons granted by another executive official are deemed effective. *See, e.g.*, Matter of Tajer, 15 I. & N. Dec. 125 (1974) (state board of pardons and paroles); Matter of K, 9 I. & N. Dec. 336 (1961) (U.S. High Commissioner); Matter of C. R., 8 I. & N. Dec. 59 (1958) (mayor).

160. Matter of Lindner, 15 I. & N. Dec. 170, 171 (1975).

161. Matter of Cevallos, 12 I. & N. Dec. 750 (1968).

162. N.Y. CRIM. PRO. LAW § 440.10 (McKinney 1982).

163. *See* People v. Garcia, 53 Misc. 2d 303, 307, 279 N.Y.S.2d 288, 291 (N.Y. Sup. Ct. 1967) (remedy unavailable despite presentation of new facts that might have warranted recommendation against deportation if presented timely).

164. N.Y. CRIM. PRO. LAW § 440.10(2), (3) (McKinney 1982). This statute provides in part:

> 2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate judgment when:
>
> (a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or
>
> (b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with repect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or
>
> (c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him; or
>
> (d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

Id.

165. Aguilera-Enriquez v. INS, 516 F.2d 565, 571 (6th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

166. Cohen, *Post-Conviction Relief in the New York Court of Appeals: New Wine and Broken Bottles*, 35 BROOKLYN L. REV. 1, 6 (1968).

The courts have defined the writ as follows:

context, such a writ may be available in several states to vacate the judgment against an alien defendant, if the judgment was rendered when the defendant had no knowledge of the immigration consequences or was ineffectively apprised of such consequences by his attorney.[167] Significantly, a trial court's failure to personally advise an alien defendant that a conviction could result in deportation does not render a guilty plea involuntary.[168] Moreover, an alien defendant cannot collaterally attack the legitimacy of his state criminal conviction in the deportation proceedings.[169]

J. Expungement

Relief from some convictions can be obtained by means of an expungement.[170] When a conviction is expunged, it is erased and the offender is restored to his

---

> The writ lies to vacate or correct a judgment where no other remedy exists. It is granted when a petitioner shows that, through no fault of his, a fact was not presented at trial, that presentation of the fact would have prevented the rendition of judgment that the fact does not go to the merits of the issues tried, and that he could not, in the exercise of due diligence, have discovered the fact at any time substantially earlier than the time of his motion for the writ.

Matter of Sirhan, 13 I. & N. Dec. 592, 597 (1970).

167. *See* Edwards v. State, 393 So. 2d 597, 599 (Fla. 1981) (counsel's failure to advise defendent of possible deportation consequences renders plea involuntary); People v. Correa, 108 Ill. 2d 541, 485 N.E.2d 307 (1985) (granting post conviction relief when alien petitioner relied upon attorney's representation that his marriage to U.S. citizen would bar deportation despite guilty plea); Commonwealth v. Wellington, 305 Pa. Super. 24, 28, 451 A.2d 223, 224-25 (Pa. Super. Ct. 1982) (counsel has duty to alien client to advise of possible deportation consequences of plea). *Cf.* Lyons v. Pearce, 298 Or. 554, 564-68, 694 P.2d 969, 978 (1985) (setting aside judgment based on failure of counsel to request judicial recommendation against deportation); State v. Malik, 37 Wash. App. 414, 416-17, 680 P.2d 770, 772 (Wash. Ct. App. 1984) (post conviction relief denied to alien whose trial counsel advised him that deportation might be consequence of guilty plea). *Contra* People v. Garcia, 53 Misc. 2d at 307, 279 N.Y.S.2d at 292 (rejecting alien defendant's contention that ignorance of possible deportation renders guilty plea involuntary).

Different types of post conviction relief may also be available in other states. In California, for example, defendants who plead guilty in certain circumstances may be placed on probation and have the imposition of judgment suspended. A defendant may later be allowed, at the discretion of the trial court, to withdraw his guilty plea because of his ignorance at the time of the plea that deportation would be a collateral consequence of his plea. People v. Giron, 11 Cal. 3d 793, 798, 523 P.2d 636, 639, 114 Cal. Rptr. 596, 599 (1974).

168. *See* Fruchtman v. Kenton, 531 F.2d 946, 949 (9th Cir.) (not duty of district court to inform alien defendant of collateral consequences flowing from guilty plea), *cert. denied,* 429 U.S. 895 (1976); Michel v. United States, 507 F.2d 461, 465 (2d Cir. 1974) (same); Joseph v. Esperdy, 267 F. Supp. 492, 494 (S.D.N.Y. 1966) (same). Similarly, the state appellate courts have not imposed a duty on the trial court to inform an alien defendant of the many possible collateral consequences of his guilty plea. *See, e.g.*, Edwards v. State, 393 So. 2d at 598; Lyons v. Pearce, 298 Or. at 563, 694 P.2d at 971; Commonwealth v. Wellington, 305 Pa. Super. at 27, 451 A.2d at 224.

169. Zinnanti v. INS, 651 F.2d 420, 421 (5th Cir. 1981). *See also* Brown v. INS, 775 F.2d 383, 385 (D.C. Cir. 1985) (validity of state conviction not subject to attack in deportation proceeding); Ocon-Perez v. INS, 550 F.2d 1153, 1154 (9th Cir. 1977) (same).

170. Grough, *Expungement of Records,* 1966 WASH. U.L.Q. 147, 162-68 (1966) (surveying state expungement laws).

status before the adjudication occurred.[171] While there is no statutory authority in the Immigration and Nationality Act regarding the expungement of convictions, the use of expungements to ameliorate the deportation consequences of criminal conviction for offenses that are not drug-related has evolved through case law.[172] There are limits to the effectiveness of expungements in the immigration context. Narcotics offenses expunged under the Federal Youth Corrections Act do not trigger immigration consequences.[173] Otherwise, narcotics convictions cannot be expunged to defeat deportability.[174]

Defense counsel should be certain to advise a client that even though criminal proceedings have been expunged, the incident is likely to be raised if the client applies for United States citizenship.[175] Despite an expungement, an alien who has been arrested should answer in the affirmative if asked whether he has ever been arrested. Denial of an arrest may be deemed an intentionally false statement that shows the applicant lacks good moral character, one of the statutory requirements for citizenship.[176]

V. CONCLUSION

Defense attorneys must educate themselves about the immigration consequences for an alien involved in criminal proceedings. Otherwise, the results could be drastic.[177] This article attempts to acquaint counsel with some of the fundamental immigration issues. Since this article provides only an overview of the topic, the criminal defense practitioner who faces an issue relating to the immigration consequences of a criminal proceeding should thoroughly investigate the possible options available to his client.

---

171. *Id.* at 149.

172. *See* Matter of Sirhan, 13 I. & N. Dec. 592, 595 (1970) (relying on expungement rather than modified order).

173. Matter of Andrade, 14 I. & N. Dec. 621 (1974). *See supra* note 154 (regarding repeal of Federal Youth Corrections Act).

174. Tsimbidy-Rochu v. INS, 414 F.2d 797, 798 (9th Cir. 1969). *See also* De La Cruz-Martinez v. INS, 404 F.2d 1198, 1200 (9th Cir. 1968) (with regard to narcotics conviction, deportation is punishment independent from any imposed by state), *cert. denied,* 394 U.S. 995 (1969); Garcia-Gonzales v. INS, 344 F.2d 804, 810 (9th Cir. 1964) (California statute cannot release alien defendant from penalties or disabilities imposed by federal law), *cert. denied,* 382 U.S. 840 (1965); Matter of A.F., 8 I. & N. Dec. 429, 445-46 (1959) (Congress did not intend that aliens convicted of narcotic violations should escape deportation).

175. Petition of De La Cruz, 565 F. Supp. 998, 998-99 (S.D.N.Y. 1983). In this case, the INS attempted to reopen the alien defendant's petition for citizenship based on information that she had been arrested for shoplifting and fined $250.00. *Id.*

176. *Id.* at 999.

177. *See generally* Wexler & Neet, *The Alien Criminal Defendant: An Examination of Immigration Law Principles for Criminal Law Practice,* 10 CRIM. L. BULL. 289, 289-92 (1974) (three examples of harmful effects of attorney's unfamiliarity with immigration consequences of criminal proceedings).