

# *Defending Illegal Reentry Cases A - Z*

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## **1. Innocence issues**

### *a. citizenship*

Needless to say, if your client is a United States citizen, she is not subject to prosecution. A client may “derive” citizenship from a parent who naturalizes, or may “acquire” citizenship at birth from a United States citizen parent or potentially even grandparent. This is one reason why it is critical to do an adequate social history interview, to determine if the client had parents or grandparents who might have been United States citizens. USCIS publishes charts showing how citizenship is acquired or derived during what time periods (eligibility depends on birth date of the child or parent), which are attached to these materials.<sup>1</sup> To acquire citizenship if one parent is a citizen and the other is not, the citizen parent must have been physically present for a period of time after age fourteen and prior to the client’s birth (the period depends on when the client was born; see charts). The only limit on how to prove this residency is the creativity of the family and the legal team.<sup>2</sup> Even if your client has been deported<sup>3</sup> previously, collateral estoppel is no impediment

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<sup>1</sup> also available at <http://www.ilrc.org/resources/naturalization-quick-reference-charts> (last accessed April 2, 2015)

<sup>2</sup> In a criminal case, of course the government has the burden of proof. However, documentary evidence to back up a claim of citizenship may be essential, notwithstanding the burden of proof, and is necessary in the immigration context, where the burden is on the applicant. The United States Embassy in Amsterdam has the following suggestions, as starting points: *There are several ways to prove your physical presence in the U.S. Documents that show physical presence over time are ideal. Certified high school, college or university transcripts, military records and official vaccination records are often excellent documents to present. Other types of documents are also acceptable if they have the cumulative effect of showing presence over time. A high school diploma, for example, does not necessarily show presence over time. When combined, however, with report cards, yearbooks or evidence from extracurricular activities, it can help you present a strong case. Employment and court records (including incarceration records) can also be used to prove physical presence. A Social Security statement can be helpful, but because income can be earned while outside the U.S., it should be supported by other evidence.* <http://amsterdam.usconsulate.gov/proof2.html> (last accessed April 2, 2015)

Personal records such as baptismal records, envelopes addressed to the citizen at US addresses over time, photographs over time clearly taken in the U.S., newspaper clippings mentioning the citizen,

to raising this defense. *United States v. Smith-Baltiher*, 424 F.3d 913 (9<sup>th</sup> Cir. 2004).

**b. no attempt to enter**

A client who presents himself at a port of entry has not attempted to enter. While there is some case law arguably to the contrary, *see, eg, United States v. Alba*, 38 Fed.Appx. 707, 2002 WL 522819, 2002 U.S. App. LEXIS 6477 (3d Cir. 2002),<sup>4</sup> the majority of the case law requires that a defendant *not* present himself at a port of entry, or that if he does, that he do so with deception, in order to be guilty of a violation of 8 U.S.C. § 1326. *United States v. Morales-Tovar*, 37 F. Supp. 2d 846; (W.D. Tex. 1999); *United States v. Marte*, 356 F.3d 1336 (11th Cir. 2004).

The *mens rea* required for illegal entry or being found in the United States is general intent, *United States v. Hernandez-Hernandez*, 519 F.3d 1236, 1239 (10th Cir. 2008); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir.), *cert. denied*, 492 U.S. 924 (1989), *United States v. Flores-Martinez*, 677 F.3d 699 (5th Cir. 2012) not strict liability, (*but see, United States v. Gracidas-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000) holding reentry is specific intent.) A mistake of fact may provide a defense to the crime, if the person did not realize he was entering United States territory.<sup>5</sup> *United States v. Carlos-Colmenares*, 253 F.3d 276 279, (7th Cir. 2001) suggests that an involuntary return would qualify as a defense, and that the crime is not strict liability. In *United States v. Barajas-Bandt*, 150 Fed.Appx. 658, 2005 WL 2445926 (9th Cir. 2005) however, a delusional belief that he was being summoned across the border could not qualify as a mistake of fact. (The opinion noted that this may support a diminished capacity defense, although this is a sentencing and not a trial defense issue, *see* 18 U.S.C. § 17; USSG § 5K2.13.) In *United States v. Smith-Galtiher*, 424 F.3d 913 (9th Cir. 2005), the court held that mistaken belief as to citizenship is not a defense. Courts have routinely rejected defenses based on mistaken beliefs as to the legality of an entry, *see United States v. Leon-Leon*, 35 F.3d 1428, 1432-33 (9th Cir.1994), but the decisions all appear to discuss whether one is a citizen or has permission to enter, which is more a mistake of law, rather than of the fact of whether one had crossed the border.

Many circuits hold that *attempt* to reenter requires specific intent, just as most other attempted crimes. *United States v De Leon*, 270 F.3d 90 (1st Cir. 2001); *United States v. Torres-*

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and in our modern day and age, social media posts, may also constitute proof.

<sup>3</sup> The terms “deport” and “remove” are synonymous and are used interchangeably throughout these materials.

<sup>4</sup> Alba did not appeal the issue of his being charged with entry as opposed to *attempted* entry, so while he was convicted when he presented himself for inspection at a port of entry without any deceit, whether this conduct constitutes an entry was not the subject of the appeal.

<sup>5</sup> For example, on the outskirts of Ciudad Juarez / El Paso, there is a portion of the border marked only by a series of boulders: no fence, no river, no signs. Only the locals are aware that this marks the border.

*Echavarría*, 129 F.3d 692 (2d Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998); *United States v. Smith-Baltiher*, 424 F.3d 913 (9th Cir. 2005); *United States v. Barajas-Bandt*, 150 Fed.Appx. 658, 2005 WL 2445926 (9th Cir. 2005); *but see*, *United States v. Rodriguez*, 416 F.3d 123, 125-127 (1st Cir. 2005); *United States v. Garcia*, 288 Fed.Appx. 888, 2008 WL 3065641 (4th Cir. 2008), holding that attempt is a general intent crime.

**c. official restraint**

If the client was spotted by immigration officers before crossing the border, and the officers apprehended him immediately, the client was in constructive custody and official restraint prior to the crossing, and never “entered,” as the immigration laws define that term. “[F]or the purposes of § 1326, ‘enter’ has a narrower meaning than its colloquial usage. An alien has not entered the United States under § 1326 unless he does so ‘free from official restraint.’” *United States v. Lombera-Valdovinos*, 429 F.3d 927, 928 (9<sup>th</sup> Cir. 2005). “An alien who is under official restraint from the moment of crossing, and who never intended to avoid or change that status, cannot therefore have the necessary intent to be guilty of attempted illegal reentry.” *Id.* at 930. *See also*, *United States v. Pacheco-Medina*, 212 F.3d 1162 (9<sup>th</sup> Cir. 2000), where the doctrine was applied when Pacheco-Medina was spotted by infrared equipment approaching the border, and the border patrol was waiting for him when he crossed, without his voluntarily approaching the agent as did Lombera-Valdovinos (“The doctrine is premised on the theory that the alien is in the government’s constructive custody at the time of physical entry. By contrast, when an alien is able to exercise his free will subsequent to physical entry, he is not under official restraint. . . He was observed by government agents as he began his attempt to cross the border, and he never left their sight. In fact, just as he dropped onto our soil an agent was physically on the scene to seize him. His two companions were seized by two other agents, who also arrived immediately. It is true that Pacheco made a desperate attempt to get away, but he was caught within seconds. He was in the clutches of the authorities the whole time and had no opportunity to get free of them.” *Id.* at 1165) *see also*, *United States v. Kavazanjian*, 623 F.2d 730, 736–37 (1st Cir. 1980); *Correa v. Thornburgh*, 901 F.2d 1166, 1172 (2d Cir. 1990); *United States v. Vasilatos*, 209 F.2d 195, 197 (3d Cir. 1954); *Vitale v. INS*, 463 F.2d 579, 581-82 (7th Cir. 1972).

One reason this can help a client is because 8 U.S.C. § 1326 defines three different, non-interchangeable offenses: being found in the US, entering the US, and attempting to enter the US. *United States v. Pacheco-Medina*, 212 F.3d 1162, 1165 (9th Cir. 2000); *United States v. Crounsset*, 403 F. Supp. 2d 475, 478 (E.D. Va. 2005). If the government mischarges an attempted entry as an entry or as being found in the US, one might win a Rule 29 judgment of acquittal. Another benefit is that if there is a conviction, under USSG § 2X1.1, there may be a three level guideline reduction for an attempt.

**d. improper deportation**

An improper deportation can be collaterally attacked in a § 1326 prosecution. Sacramento Federal Public Defender Heather Williams has written an excellent and comprehensive step by step

guide to analyzing whether a prior deportation can be attacked.<sup>6</sup> Below are fourteen questions one should ask in determining whether the deportation might be subject to attack.

*i. Can the client show prejudice?*

“No harm, no foul” rules in this context as many others. With no status or right to obtain legal status in the US, there can be no harm from almost any defect in the prosecution. Unless there might have been a different result - *i.e.*, unless the client might have been eligible for some form of relief from removal, a collateral attack will fail.

There are two prongs to this question. First, would the result have been different, to some degree of probability? In most circuits, the test is whether there is a reasonable likelihood that absent the error(s), the non-citizen would not have been removed.<sup>7</sup> However in the Ninth Circuit, only plausible grounds for relief must be shown.<sup>8</sup> Second, did the client demonstrate prejudice? This includes equities and “tugging at heartstrings” matters.

*ii. Was client not advised of the right to appeal?*

The client must either appeal or have an invalid waiver of appeal in order to be able to collaterally attack the deportation. *United States v. Arrieta*, 224 F.3d 1076 (9th Cir. 2000); 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 240.42. “We hold that for a section 1326 defendant to successfully prevent his underlying deportation from being used to prove an element of a criminal offense, the defendant must first show that the deportation hearing effectively foreclosed his right to direct judicial review of the deportation order. Second, he must show that the deportation hearing was fundamentally unfair. In other words, he must show that he was prejudiced by the Immigration Judge's failure to inform him of his rights to seek a suspension of deportation or to appeal, because an informed exercise of those rights would have yielded him relief from deportation. If he cannot make either one of these showings, the deportation order may be used to establish an element of a criminal offense.” *United States v. Espinoza-Farlo*, 34 F.3d 469, 471 (7th Cir. 1994).

ICE regulations require immigration judges to do the following:

1. Advise the non-citizen of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the

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<sup>6</sup> Attached to these materials, along with a sample collateral attack motion.

<sup>7</sup> *See, e.g., United States v. Loaisiga*, 104 F.3d 484, 487 (1st Cir. 1997); *United States v. Copeland*, 376 F.3d 61 (2d Cir. 2004); *United States v. Garcia-Jurado*, 281 F. Supp. 2d 498, (E.D.N.Y. 2003) (collecting cases on subject); *United State v. Benitez-Villafuerte*, 186 F.3d 651 (5gh Cir. 1999); *United States v. Aguirre-Tello*, 353 F.3d 1199 (10<sup>th</sup> Cir. 2004)

<sup>8</sup> *See, eg., United States v. Muro-Inclán*, 249 F.3d 1180 (9<sup>th</sup> Cir. 2001); *United States v. Jimenez-Marmolejo*, 104 F.3d 1083, 1086 (9th Cir.1996).

- proceedings, and require him to state then and there whether he desires representation;
2. Advise the non-citizen of the availability of free legal services programs<sup>9</sup> qualified under the law and organizations recognized pursuant to law located within the district where the deportation hearings are held;
  3. Ascertain the non-citizen has received a list of such programs and a copy of Form I-618, Written Notice of Appeal Rights;
  4. Advise defendant he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence on his own behalf and to cross-examine the Government's witnesses against him;
  5. Place the non-citizen under oath;
  6. Read the factual allegations and the charges in the order to show cause to the non-citizen and explain them in nontechnical language, and enter the order to show cause as an exhibit in the record;
  7. If the non-citizen admits the factual allegations and admits his deportability under the charges, made a determination the deportability as charged has been established by defendant's admissions;
  8. Notify the non-citizen that if he is finally deported, his deportation will be to the country designated by him and give him the opportunity to make such designation;
  9. Render an oral or written decision, including a discussion of the evidence and findings as to deportability;
  10. Notify the non-citizen of the decision, either by mail, if a written decision, or in his presence orally, if an oral decision was made; and
  11. Advise the non-citizen of his right to appeal the deportation order.

8 C.F.R. §§ 1240.10, 1240.11, 1240.13.

- iii. *Did any of these procedures take place, any of which can lead to record problems and problems with due process: mass deportation hearing? reinstatement? administrative removal?*

There can be major record problems with mass deportation hearings which can lead to involuntary and unknowing waivers. “We conclude mass silent waiver impermissibly ‘presumes acquiescence’ in the loss of the right to appeal and fails to overcome the ‘presumption against waiver.’ See *Barker*, 407 U.S. at 525. We reach the same conclusion in *United States v. Gonzalez-Mendoza*, 985 F.2d 1014 at 1017 (9th Cir. 1993), also decided today.” *United States v. Lopez-Vasquez*, 1 F.3d 751, 755 (9<sup>th</sup> Cir. 1993). *see also*, *United States v. Ahumada-Aguilar*, 295

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<sup>9</sup> CIS’ list of such programs is available here: <http://www.justice.gov/eoir/probono/states.htm>; Immigration Advocates’ list is available here: <http://www.immigrationadvocates.org/nonprofit/legaldirectory/>

F.3d 943, 949 (9<sup>th</sup> Cir. 2002); *Chacon-Corral v. Weber*, 259 F. Supp. 2d 1151 (D. Col 2003); *United States v. Andrade-Partida*, 110 F. Supp. 2d 1260, 1263 (N.D. Cal. 2000) (“Even if the immigration judge explains the right to appeal to the aliens as a group, the waiver is insufficient unless the judge asks each deportee individually whether he wants to waive his appellate rights..”)

In administrative deportation hearings, the non-citizen may not even realize that he has been ordered deported (“They never brought me before an immigration judge.”) While the caselaw is not great on due process violations from administrative deportations, *see e.g.*, *United States v. Benitez-Villafuerte*, 186 F.3d 651, 660 (5<sup>th</sup> Cir. 1999) (“It is clear to us that the administrative deportation procedures of § 1228 afforded [the non-citizen] the unimpeded opportunity to claim all the procedural due process to which he was constitutionally entitled,”) counsel should consider making and preserving this argument regardless, because as a factual matter, these hearings lack the record and likely the protections that judicial deportations have.

ICE can also reinstate a prior deportation order with no hearing. 8 U.S.C. § 1252(a)(5).<sup>10</sup> Caselaw has held that when the removal is carried out in conformity with 8 CFR § 241.8<sup>11</sup> that there

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<sup>10</sup> “*Reinstatement of removal orders against aliens illegally reentering.*- If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this Act, and the alien shall be removed under the prior order at any time after the reentry.”

<sup>11</sup> 8 CFR § 241.8 *Reinstatement of removal orders.*

(a) *Applicability.* An alien who illegally reenters the United States after having been removed, or having departed voluntarily, while under an order of exclusion, deportation, or removal shall be removed from the United States by reinstating the prior order. The alien has no right to a hearing before an immigration judge in such circumstances. In establishing whether an alien is subject to this section, the immigration officer shall determine the following:

- (1) *Whether the alien has been subject to a prior order of removal.* The immigration officer must obtain the prior order of exclusion, deportation, or removal relating to the alien.
- (2) *The identity of the alien*, i.e., whether the alien is in fact an alien who was previously removed, or who departed voluntarily while under an order of exclusion, deportation, or removal. In disputed cases, verification of identity shall be accomplished by a comparison of fingerprints between those of the previously excluded, deported, or removed alien contained in Service records and those of the subject alien. In the absence of fingerprints in a disputed case the alien shall not be removed pursuant to this paragraph.
- (3) *Whether the alien unlawfully reentered the United States.* In making this determination, the officer shall consider all relevant evidence, including statements made by the alien and any evidence in the alien's possession. The immigration officer shall attempt to verify an alien's claim, if any, that he or she was lawfully admitted, which shall include a check of Service data systems available to the officer.

(b) *Notice.* If an officer determines that an alien is subject to removal under this section, he or she shall provide the alien with written notice of his or her determination. The officer shall advise the alien that he or she may make a written or oral statement contesting the determination. If the alien wishes to make such a statement, the officer shall allow the alien to do so and shall consider whether the alien's statement

is no due process violation. *Morales-Izquierdo v. Gonzales*, 486 F.3d 484 (9th Cir. 2007). Presumably, if the regulation was not followed, a challenge could be raised. If the original deportation order was defective and violated due process, a reinstatement is also defective and cannot serve as the predicate for a § 1326 prosecution. *United States v. Villa-Anguiano*, 727 F.3d 873 (9th Cir. 2013).

iv. *Was the client advised of the right to counsel & legal services agencies?*

See 8 CFR § 1240.10. In the absence of this advisement, the underlying deportation may be subject to attack.

v. *Was the client advised of the right to relief?*

As most immigrants being deported are uncounseled, the immigration judge must protect their rights. The judge must ascertain whether any basis for removal may exist, and must advise the client thereof. 8 CFR § 1240.11. Following are the more common statutory bases for relief from deportation: § 212(c),<sup>12</sup> 212(h),<sup>13</sup> 212(i),<sup>14</sup> cancellation of removal,<sup>15</sup> voluntary departure,<sup>16</sup>

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warrants reconsideration of the determination.

(c) *Order*. If the requirements of paragraph (a) of this section are met, the alien shall be removed under the previous order of exclusion, deportation, or removal in accordance with section 241(a)(5) of the Act.

(d) *Exception for applicants for benefits under section 902 of HRIFA or sections 202 or 203 of NACARA*. If an alien who is otherwise subject to this section has applied for adjustment of status under either section 902 of Division A of Public Law 105–277, the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), or section 202 of Public Law 105–100, the Nicaraguan Adjustment and Central American Relief Act (NACARA), the provisions of section 241(a)(5) of the Immigration and Nationality Act shall not apply. The immigration officer may not reinstate the prior order in accordance with this section unless and until a final decision to deny the application for adjustment has been made. If the application for adjustment of status is granted, the prior order shall be rendered moot.

(e) *Exception for withholding of removal*. If an alien whose prior order of removal has been reinstated under this section expresses a fear of returning to the country designated in that order, the alien shall be immediately referred to an asylum officer for an interview to determine whether the alien has a reasonable fear of persecution or torture pursuant to §208.31 of this chapter.

(f) *Execution of reinstated order*. Execution of the reinstated order of removal and detention of the alien shall be administered in accordance with this part.

<sup>12</sup> Abolished by ADEPA, but for convictions prior to that date (4-24-96) may still be an option. *See infra*, p. 11. Requires LPR status, 7 years unrelinquished domicile, favorable equities.

<sup>13</sup> Requirements for 212(h) (8 U.S.C. § 1182(h)):

- alien who is spouse/parent/child of USC or LPR (including adopted minor child)
- extreme hardship to such family
- admission of alien not contrary to nat'l welfare/security
- A.G. consents as matter of discretion
- applies to convictions for:
  - crime of moral turpitude

asylum,<sup>17</sup> and the Convention Against Torture (CAT).<sup>18</sup> In addition, the CFR permits a discretionary stay of removal,<sup>19</sup> and by executive order, the DACA (Deferred Action for Childhood Arrivals<sup>20</sup>) and

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- 2 or more convictions where term aggregate term was 5 yrs or more
  - prostitution-related offenses
  - drug offenses involving 30 grams or less of mj
  - n/a to aggravated felons who are LPR's; available to non-LPR agg felons (*perhaps a drafting glitch, but if so, it hasn't ever been fixed*)

- <sup>14</sup> Requirements for 212(i) (8 U.S.C. § 1182(i)):
- extreme hardship to USC/LPR spouse or parent (*previously, also to a child*)
  - basis of removability is listed visa fraud violations (only)
  - discretionary for AG

<sup>15</sup> Requirements for Cancellation of Removal, 8 U.S.C. §1229b:  
For LPR's:

- LPR at least 5 years
- domiciled in U.S. at least 7 years
- no agg felonies

For non-LPR's, no agg felonies, and 10 years' good moral character. If client's conviction is that old, consult the statute for additional requirements, applicability.

- <sup>16</sup> Requirements for voluntary departure, §240B, 8 U.S.C. § 1229c(a)
- physically present in U.S. for one year or more
  - good moral character for five years prior to application
    - (Aggregate 180 days in jail precludes GMC)
  - no previous voluntary departure grants
  - no agg felony conviction
  - agg felony convictions before 11/18/88 don't count
  - clear & convincing evidence that defendant will and can leave

<sup>17</sup> 8 U.S.C.S. § 1158(b)(1), 1101(a)(42)(A), generally, any person who . . . [has] a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

<sup>18</sup> 1465 U.N.T.S. 85, 23 I.L.M. 1027, see also 8 CFR 208.16 ("The burden of proof is on the applicant for withholding of removal under this paragraph to establish that it is more likely than not that he or she would be tortured if removed to the proposed country of removal.")

<sup>19</sup> 8 CFR § 241.6

- <sup>20</sup> To be eligible for the expanded DACA program, you must:
- Have come to the United States before your sixteenth birthday.
  - Have continuously lived in the U.S. since January 1, 2010.
  - Have been present in the U.S. on June 15, 2012, and on every day since August 15, 2012.
  - Have graduated or obtained a certificate of completion from high school, have obtained a general education development (GED) certificate, or "be in school" on the date that you submit your deferred action application. See our DACA FAQ for more information about meeting the "be in

DAPA (Deferred Action for Parents of Americans and Lawful Permanent Residents<sup>21</sup>) programs may provide relief. The implementation of these two programs was enjoined, however, on February 16 (by a federal judge on President's Day; a federal holiday – no message there!). The Attorney General sought a stay of that injunction in *Texas v. United States*, No. 15-40238 (5<sup>th</sup> Cir.) on March 12. As of the date these materials are due, there is no resolution of this issue and the DAPA and DACA programs remain in limbo.

In the Ninth and Second Circuits, collateral attacks are more viable. But in *United States v. Aguirre-Tello*, 353 F.3d 1199, 1205 (10th Cir. 2004) (en banc) the Tenth Circuit stated that "there is no constitutional right to be informed of the existence of discretionary relief for which a potential deportee might be eligible," collecting cases. This argument should still be pursued, arguing that *Aguirre-Tello* fundamentally flawed and inconsistent with *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987) and *Padilla v. Kentucky*, 559 U.S. 356 (2010) (*Padilla* on the theory that federal law imposes on an immigration judge the duty to safeguard the rights of persons who appear before her, just as the constitution imposes on defense attorneys).

vi. *Did the client appeal administratively, or does the client have a good reason for not appealing?*

8 U.S.C. §1326(d) requires that a defendant show he exhausted all administrative remedies before he can collaterally attack a deportation. Ninth Circuit law is particularly favorable to noncitizens on this point, holding there is no valid waiver of appeal where the alien was not properly advised of his right to relief. *See, eg., United States v. Leon-Paz*, 340 F.3d 1003 (9th Cir. 2003).

*United States v. Aguirre Tello*, 353 F.3d 1199 (10th Cir. 2004) stated that a judge has no obligation to inform an alien of the right to discretionary relief, and the failure to do so does not

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school" requirement.

- Have not been convicted of certain criminal offenses. See our DACA FAQ for more information.

<sup>21</sup> To be eligible for deferred action under DAPA, you must:

- Be the parent of a U.S. citizen or lawful permanent resident.
- Have continuously lived in the U.S. since January 1, 2010.
- Have been present in the U.S. on November 20, 2014. It's also likely that you will need to be present in the U.S. every day from Nov. 20, 2014, until you apply for DAPA.
- Not have a lawful immigration status on November 20, 2014. To meet this requirement, (1) you must have entered the U.S. without papers, or, if you entered lawfully, your lawful immigration status must have expired before November 20, 2014; and (2) you must not have a lawful immigration status at the time you apply for DAPA.
- Have not been convicted of certain criminal offenses, including any felonies and some misdemeanors.

deprive the alien of a meaningful opportunity to appeal. However, that did not happen in *Aguirre Tello*. There, the judge advised the alien he might be eligible for 212(c) relief if he waited one more day (by which time he would have accrued the necessary seven years' residency) using the term “*perdón*” to describe 212(c) relief.<sup>22</sup> The alien declined, said he just wanted to be deported, got his wish, reentered, and claimed that he was not *adequately* advised of the availability of discretionary relief. A complete failure to advise or misadvice were not an issue before the court. While the issue is arguably *dicta* in *Aguirre-Tello*, in *United States v. Varela-Cias*, 425 Fed.Appx. 756, 2011 WL 2259123 (10th Cir. 2011). the issue of affirmative misadvice was squarely before the Court, and it again held that there was no due process violation and that his deportation proceedings did not deprive him of the opportunity for judicial review where: the immigration judge wrongly told him he was convicted of an aggravated felony (DWI, pre-*Leocal*), that therefore he was ineligible for any relief, where ICE moved him from the 9<sup>th</sup> Circuit with its favorable caselaw to the 10<sup>th</sup>, with its unfavorable case law, and where INS removed him before he received the letter from his lawyer telling him that he had lost his appeal and asking him whether he wanted to further pursue the matter. Arguably, the *Aguirre-Tello* and *Varela-Cias* decisions are irreconcilable with *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), because they erect barriers to collateral attacks inconsistent with the *Mendoza-Lopez* holding.

vii. *Did the client appeal judicially, or was he deprived of a meaningful opportunity to appeal?*

In *United States v. Lopez*, 445 F.3d 90 (2nd Cir. 2006) [then] Judge Sotomayor noted that the opportunity is a *realistic* one: “We turn to the question of whether judicial review was realistically available to Lopez—that is, whether defects in the administrative proceeding otherwise foreclosed judicial review. . . in *Gonzalez-Roque* together, we held that ‘where habeas review is technically available, judicial review will be deemed to have been denied if resort to a habeas proceeding was not realistically possible.’ ” 445 F.3d at 96. [Then] Judge Sotomayor went on,

The IJ [immigration judge] and BIA's [Board of Immigration Appeals] affirmative misstatements to Lopez that he was not eligible for any relief from deportation functioned as a deterrent to seeking relief. [footnote omitted] Given the misinformation supplied to Lopez by both the IJ and the BIA, there is no reasonable basis on which to distinguish this case from our holding in *Copeland* and, accordingly, we find that Lopez was denied a realistic opportunity for judicial review within the meaning of § 1326(d)(2).

*Lopez*, 445 F.3d at 99-100.

As [now] Justice Sotomayor noted in *Lopez*, “The fact that an administrative body told him that no such relief existed is a powerful deterrent from seeking judicial relief.” 445 F.3d at 98. *See*

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<sup>22</sup> *Perdón* is a perfectly adequate way to describe 212(c) relief, and is likely more comprehensible than *desagraviación* or some other more technical term.

also, *United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (finding that the defendant “was deprived of exactly the same opportunity [to apply for discretionary relief from deportation], and thus was denied due process and a meaningful opportunity for judicial review”); *United States v. Sosa*, 387 F.3d 131 (2d Cir. 2004) (failure to inform of potential 212(c) relief deprived Sosa of a meaningful opportunity for judicial review).

viii. *Is the client St. Cyr eligible?*

*INS v. St. Cyr*, 533 U.S. 289 (2001) is a relatively complex case holding that where a person plead guilty prior to the elimination of § 212(c) relief, in reliance upon getting that relief, then that relief must still be made available to the client. See Heather Williams’ excellent discussion of this relief, *Collaterally Attacking a Prior Removal Order*, for more details. This is only available to clients with convictions predating 4-24-96; after that 212(c) relief didn’t exist and a non-citizen could not reasonably have relied upon getting it. While this relief has not been extended to non-citizens who went to trial in general, it has been extended to non-citizens who went to trial but waived their appeal rights in objective reliance on § 212(c) relief. *Hem v. Maurer*, 458 F.3d 1185 (10<sup>th</sup> Cir. 2006).

ix. *Was the judge bigoted?*

Did he make remarks that indicate that the client was not given a “full and fair hearing”? (You can request a copy of the removal hearing tape from the prosecutor). In *Peravic v. AG of the United States*, (unpublished) (naturally) 188 Fed. Appx. 107; 2006 WL 2034377, 2006 U.S. App. LEXIS 18098, (3d Cir. 2006), the court held that the immigration judge violated the appellant’s due process rights in an asylum hearing by being impatient, abrupt, and belligerent towards the appellant, who, as a result, could not testify comprehensively about alleged abuse he suffered in his native land. Material details may have been omitted that could have justified relief from deportation.

Consider interpreter issues here as well. In *Amadou v. INS*, 226 F.3d 724, 727 (6th Cir. 2000), the court found Amadou’s due process rights had been violated where a translator prevented an Immigration Judge from understanding the evidence presented.

x. *Was the NTA sent to home address when ICE knew client was in prison?*

The Notice to Appear, the notice commencing a removal proceeding, must be sent to the client’s last known address. 8 U.S.C. § 1229(c). Usually, it is the client’s responsibility to keep immigration informed of his whereabouts, however there might be an instance where ICE knows a client is in prison, but sends the NTA to a former home address instead. Be aware of a possible defense based on this.

*xi. Was the departure witnessed?*

There is a place on the warrant of deportation for an immigration agent to sign saying s/he witnessed the alien leaving the country, and specifying the place and means of departure. If the warrant is not completed, the government cannot prove that the client was deported.

Departed at Port of <u>NOGALES</u> (port of departure from the U.S.)	on <u>MAY 12, 1998</u> (date of departure)
Departure not witnessed – Cannot prove deportation!	
<u>AFOOT</u> ; identify airline or ship; if other, state: afoot, car, etc	
Departure witnessed by: _____ (signature and title of officer)	
If actual departure <u>not</u> witnessed, fully identify source or means of departure verification: _____ <u>PLACED ON V-R RUN FOLLOWING HIS</u> <u>RELEASE FROM COCONINO CO. JAIL</u>	

*xii. Is there a separate Constitutional attack on the right to confront witnesses?*

Typically, in an illegal reentry prosecution, the government will introduce a certificate of non existence of record, as proof that the defendant did not seek and/or was not granted permission to reenter the country. Historically, attacks on establishing an element of the offense by affidavit failed, *eg., United States v. Oris*, 598 F.2d 428, 430 (5th Cir. 1979), *United States v. Mateo-Mendez*, 215 F.3d 1039 (9th Cir. 2000), *cert. denied*, 531 U.S. 983 (2000). In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the Court held that there was no confrontation violation in using records of prior convictions to subject a defendant to the enhanced penalties of § 1326.

In recent years, however, the Supreme Court has reaffirmed defendants' rights to confront their accusers. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004) the Court held that the admission of out-of-court statements violated Crawford's right to confront his accuser. Then in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Court found that the introduction of a lab report in lieu of the analyst's testimony violated the right to confront witnesses. Subsequent to *Crawford* and *Melendez-Diaz*, many courts held that the right to confrontation was violated by the introduction of these certificates of non-existence. *United States v. Martinez-Rios*, 595 F.3d 581 (5th Cir. 2010), found the admission of a certificate of non-existence to violate the defendant's confrontation rights (but that it was essentially harmless error in light of other evidence of lack of consent). Similarly, *United States v. Orozco-Acosta*, 607 F.3d 1156 (9th Cir. 2010) recognized *Melendez-Diaz*' holding. But in *United States v. Lorenzo-Lucas*, 775 F.3d 1008 (8th Cir. 2014) and *United States v. Burgos*, 539 F.3d 641 (7th Cir. 2008), the courts found a admission of signed warrant of deport did not violate the Confrontation Clause. This tactic should not be overlooked, as it can hardly be said that the government's entire proof as to one element of the offense is not

testimonial.

*xiii. Is there a separate constitutional attack on underlying deportation proceedings?*

It has long been recognized that an alien in the United States has a Fifth Amendment right to due process, including the right to a full and fair hearing at any deportation proceeding. *Burgos-Abril v. INS*, 58 F.3d 475, 476 (9th Cir. 1995); *Cuadras v. INS*, 910 F.2d 567, 573 (9th Cir. 1990); *Mohsseni Behbahani v. INS*, 796 F.2d 249, 250-51 (9th Cir. 1986); *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1239 (9th Cir. 1979), *cert. denied*, 449 U.S. 828 (1980). *Accord*, *The Japanese Immigrant Case*, 189 U.S. 86, 101-100, 23 S. Ct. 611, 47 L. Ed. 721 (1903) (holding that an alien within the United States entitled to the full benefits of procedural due process under the aegis of the Fifth Amendment).

Prior to the enactment of § 1326(d), in *United States v. Mendoza-Lopez*, 481 U.S. 828 (1986), the United States Supreme Court held that due process considerations precluded a criminal prosecution predicated on a deportation proceeding deprived the non-citizen of fundamental fairness and a meaningful opportunity to be heard.

While § 1326(d) purports to legislatively enact *Mendoza Lopez*, it imposes additional requirements not set out in *Mendoza Lopez*, such as exhaustion of administrative remedies and the *realistic* opportunity for review. This separate and independent ground should be argued in a motion to dismiss as well. Attached is a sample motion attacking an underlying deportation.

*xiv. Can you attack the underlying predicate conviction?*

Enhancements may be susceptible to attack under the *Padilla v. Kentucky*, 559 U.S. 356 (2010) decision. Attached to these materials, with permission of the author, is an advisory prepared by Dan Kessellbrenner of the National Immigration Project, offering guidance on post conviction use of *Padilla*. Many other practice advisories on *Padilla* are available on the fd.org website.<sup>23</sup>

***e. affirmative defenses***

With the border violence, more and more clients are fleeing to the United States to save their lives. This may give rise to a necessity or duress defense. Typically, a client must present himself to the authorities at the first opportunity once out of danger. *See, United States v. Portillo-Vega*, 478 F.3d 1194 (10th Cir. 2007), *cert. denied*, 552 U.S. 1232 (2008) requiring a defendant to “proffer evidence of a bona fide effort to surrender . . . as soon as the claimed duress . . . had lost its coercive force,” *i.e.*, as soon as he reached safety, to successfully raise a duress defense *Id.* at 1201.

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<sup>23</sup> <http://www.fd.org/navigation/select-topics-in-criminal-defense/immigration-consequences-of-conviction/subsections/obligation-to-advise-on-immigration-consequences>

Related to the common law defense is the customary international law concept of *non-refoulement*. Under customary international law as well as UNITED NATIONS PROTOCOL RELATING TO THE STATUS OF REFUGEES,<sup>24</sup> humans have the right to “flee flying bullets.” It is a right to temporarily stay in a host country while the danger exists. See, *INS v. Cardoza-Fonseca*, 480 U.S. 421, 440 (1987):

In *Stevic*, we dealt with the issue of withholding of deportation, or *nonrefoulement*, under § 243(h). This provision corresponds to Article 33.1 of the Convention. Significantly though, Article 33.1 does not extend this right to everyone who meets the definition of “refugee.” Rather, it provides that “[n]o Contracting State shall expel or return (‘refouler’) a *refugee* in any manner whatsoever to the frontiers or territories *where his life or freedom would be threatened* on account of his race, religion, nationality, membership or a particular social group or political opinion.” 19 U.S.T., at 6276, 189 U.N.T.S., at 176 (emphasis added).

While this is a concept related to asylum, there is no reason it could not be raised in an appropriate case, though a westlaw search does not reveal any reported cases where it has been attempted.

## 2. Charging issues

*Almendarez-Torres v. United States*, 523 U. S. 224 (1998) is the pre-*Booker* case which held that the fact of a prior conviction is not an element of the offense of illegal reentry, and need not be charged in an indictment. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) specifically excepted from its ruling the fact of a prior conviction. Justice Thomas, concurring, noted, “Even though it is arguable that *Almendarez-Torres* was incorrectly decided, and that a logical application of our reasoning today should apply if the recidivist issue were contested, *Apprendi* does not contest the decision’s validity and we need not revisit it for purposes of our decision today.” In his statement concerning the denial of *certiorari* in *Rangel-Reyes v. United States*, 547 U.S. 1200 (2006), Justice Stevens wrote, “While I continue to believe that *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), was wrongly decided, that is not a sufficient reason for revisiting the issue. The denial of a jury trial on the narrow issues of fact concerning a defendant’s prior conviction history, unlike the denial of a jury trial on other issues of fact that give rise to mandatory minimum sentences, see *Harris v. United States*, 536 U.S. 545 (2002), will seldom create any significant risk of prejudice to the accused.” 547 U.S. 1200.

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<sup>24</sup> UNITED NATIONS PROTOCOL RELATING TO THE STATUS OF REFUGEES, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577 “*Article 33.-Prohibition of Expulsion or Return (‘refoulement’)*” “1. No Contracting State shall expel or return (‘*refouler*’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

In a case where the fact of a prior conviction is not a foregone conclusion, such as a diversionary disposition or an impropriety in obtaining the conviction, this issue should be raised. Justice Thomas, dissenting from the denial of certiorari in *Rangel-Reyes*, wrote, “Petitioners, like many other criminal defendants, have done their part by specifically presenting this Court with opportunities to reconsider *Almendarez-Torres*. It is time for this Court to do its part.”

### 3. Suppression issues

There are whole treatises on suppression issues, but here is an extremely brief outline of suppression issues near the border:<sup>25</sup>

#### *a. away from border/roving patrols*

*United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) holds that a roving-patrol **stop** need not be justified by probable cause and may be undertaken if the stopping officer is "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that a vehicle contains undocumented non-citizens. *Id.* at 884 Analysis of scope and purpose of the stop is the same as for other suppression situations; see *Breathing Life* for a good discussion of different factors immigration agents often rely upon; see also, *United States v. Cortez*, 449 U.S. 411, 421 (1981), *United States v. Jones*, 149 F.3d 364, 367 (5th Cir. 1998) for a listing of factors giving rise (and not) to reasonable suspicion; *United States v. Lopez-Valdez*, 178 F.3d 282, 288 (5th Cir. 1999) (proximity to the border and a number of persons in a vehicle alone do not give reasonable suspicion).

In *Almeida-Sanchez v. United States*, 413 U.S. 266, 268 (1973), the Supreme Court held that **searches** by roving patrols impinged so significantly on Fourth Amendment privacy interests that a search could be conducted without consent only if there was probable cause to believe that a car contained undocumented non-citizens. See also, *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-2 (1975).

#### *b. at the border and its functional equivalent*

If a non-citizen is spotted crossing the border, immigration agents have more than reasonable suspicion to stop and arrest. There are times non-citizens attempt to enter through a port of entry. Here also, there is no expectation of privacy, and no reasonable suspicion is needed to search. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) holds that at the border, "routine searches of the persons and effects of entrants are not subject to any requirement of reasonable suspicion." Intrusive searches, however, such as x-rays and body cavity exams are subject to a

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<sup>25</sup> This analysis is condensed from Shari Allison, Margaret Katze, and Chuck McCormack, *Breathing Life into the Fourth Amendment in Immigration Cases*, attached.

reasonable suspicion standard. *Id.*

Automotive travelers may be stopped at fixed checkpoints near or at the border without individualized suspicion even if the stop is based largely on ethnicity, *United States v. Martinez-Fuerte*, 428 U.S. 543, 562-563 (1976). Boats on inland waters with ready access to the sea may be hailed and boarded with no suspicion whatever. *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983).

The functional equivalent of the border includes very nearby areas. *United States v. Mejias*, 452 F.2d 1190, 1193 n.1 (9th Cir. 1971) ("The term 'border' logically includes the check point at the point of entry as well as a reasonable extended geographic area in the immediate vicinity of any entry point.").

### ***c. at checkpoints***

Agents at a fixed checkpoint may only question the passengers briefly (and request documentation) about their immigration status absent reasonable suspicion of illegal activity that arises before the immigration status of the passengers has been verified. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 87 L. Ed. 2d 381, 105 S. Ct. 3304 (1985); *United States v. Villamonte-Márquez*, 462 U.S. 579, 587 (1983).

At a fixed checkpoint having the primary purpose of identifying illegal immigrants, vehicles may be briefly detained in furtherance of that purpose and their occupants questioned, all without either a warrant or any individualized reasonable suspicion, but "checkpoint searches are constitutional only if justified by consent or probable cause to search" and "[a]ny further detention . . . must be based on consent or probable cause." *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

*Extended* border searches take place "a greater spatial and temporal distance from the border than a search at the functional equivalent of the border" and therefore require reasonable suspicion. *United States v. Cardona*, 769 F.2d 625, 628 (9<sup>th</sup> Cir. 1985); *see also United States v. Espericueta-Reyes*, 631 F.2d 616, 619-21 (9th Cir. 1980).

### ***d. Identity***

It is well established that an alien's identity cannot be suppressed in a *civil* immigration hearing, even if the government learned of the person's identity through illegal means. However, in a criminal case, a different result is reached. *See, United States v. Olivares-Rangel*, 458 F.3d 1104 (10th Cir. 2006); *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). Attached is a sample motion seeking to suppress evidence of identification obtained from an illegal stop.

## 4. Sentencing issues

### *a. A through Z, except C and Mc*

The first task a judge has at sentencing is to get the guideline calculation right, which includes, of course, any enhancements (or lack of enhancements). *Kimbrough v. United States*, 552 U.S. 85 (2007); *United States v. Kieffer*, 681 F.3d 1143, 1164 (10th. Cir. 2012). The categorical approach is used to determine whether a predicate conviction can be used to enhance a sentence, and if so, by how much. This approach ignores the facts of an offense and looks to the elements of the offense as set out in the statute or jury instructions. *Descamps v. United States*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2276 (2013).

*Descamps* authorizes an additional examination of other matters of record only if a statute is divisible. “Divisibility exists only when an element of the crime of conviction contains alternatives, one of which is an element of its federal analogue.” 133 S.Ct. at 2283–84. This is called the modified categorical approach, and authorizes a court to look at judicially-found facts, admissions in plea agreements and the plea and sentencing hearings, to determine under which alternative a person has been sentenced.

A final, fact-specific approach is available only if the criminal statute does not require proof of an element which the immigration statute requires. In *Nijhawan v. Holder*, 557 U.S. 29 (2009) the immigration statute made fraud an aggravated felony only if the fraud was over \$30,000, but the criminal statute did not rely on an amount. Under this circumstance, it was permissible to look at the facts of the offense.

A full discussion of the categorical and modified categorical approach is beyond the scope of these materials, but excellent and extensive articles on the subject are available at the fd.org website.

### *b. Fast Track*

On February 15th, 2012, Attorney General Holder created a nationwide fast track policy for immigration offenses.<sup>26</sup> Prior to that, some districts had had no policy and others had policies different from other districts. Now, there is a nationwide fast track policy (although to be sure, interpretation of that policy and in particular “the nature of the defendant's criminal history and prior immigration offenses [which] will be considered and may form a basis for exclusion from the program in the U.S. Attorney's sole discretion” for example, still varies). Assuming a defendant is offered the fast track, s/he will receive a four level departure from the adjusted offense level if s/he has no prior violent felonies, and a two level departure if s/he does have such priors.

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<sup>26</sup> <http://www.fd.org/docs/select-topics---sentencing/Fast-Track-Policies.pdf>

The fast track is a F.R.Cr.P. 11(c)(1)(C) agreement, the only arguments which can be presented are those of the correctness of the guideline calculation, and appeal and habeas (except IAC) must be waived.

Normally, this will result in a sentence far more favorable to a defendant who has a prior record than pleading guilty without a plea agreement would provide. However, the choice is always the defendant's. I often provide my analysis of his exposure under various options so that he can see the effect of the fast track compared to other alternatives, both on a guidelines chart and in an analysis such as this one:

Opción	Descripción	Nivel delictivo	Se puede pedir menos?	Cálculo preliminar de meses de cárcel***
1	Juicio	12	sí	12-18
2	Declaración de culpable sin renunciar otros derechos	10	sí	8-14
4	Declaración de culpable con resolución rápida	6	<b>NO</b>	1-7

\*\*\* OJO: Este cálculo se basa en lo que ahora sé de sus antecedentes penales. Si la información que tengo es incorrecto o incompleto, este cálculo cambiará.

*c. Attacks on Criminal History*

*i. Remoteness*

On November 1, 2011, an amendment to the illegal reentry guideline took effect which lessens the impact of remote prior serious convictions. Under the new guideline, the offense severity levels change if the conviction is sufficiently remote so that it does not count under USSG Chapter 4 for criminal history:

<b>Predicate offense</b>	<b>old OSL<sup>27</sup></b>	<b>new OSL</b>
crimes of violence, drug trafficking > 13 months, alien smuggling, etc.	24	20
drug trafficking < 13 months	20	16

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<sup>27</sup> "OSL" - Offense Severity Level

aggravated felony	16	16
non-agg felony, 3 violent or drug misdemeanors	12	12

Disparities will emerge from this amendment. Persons convicted of less serious felonies will derive *no* benefit from the fact that they have remained crime-free for a decade or more, whereas those who were convicted of more serious crimes will get a sentencing break. 18 U.S.C. § 3553(a)(6) seeks both to avoid unwarranted disparities and unwarranted equal treatment. *See, Gall v. United States*, 552 U.S. 38, 55 (2007), noting that the district court “also considered the need to avoid unwarranted similarities among other co-conspirators who were not similarly situated.” Citing caselaw (there is an abundance of cases on remoteness predating this amendment), one can argue that those with +4 or +8 enhancements also merit consideration for the staleness of their convictions. Strong arguments will also exist for variances with “almost old enough” cases, at any offense severity level. A CHC<sup>28</sup> I defendant with a 120 month old crime of violence faces a 33-41 month range. A CHC I defendant with a 119 month old crime of violence faces a 51-63 month sentence. Is an offense committed one month earlier worth additional eighteen months in prison?? “The staleness of the conviction does not affect the Guidelines calculation, but it does affect the § 3553(a) analysis.” *United States v. Amezcua-Vasquez*, 567 F.3d 1050, 1056 (9th Cir. 2009). In *United States v. Chavez-Suarez*, 597 F.3d 1137 (10th Cir. 2010), *cert. denied*, 131 S. Ct. 286 (2010), the Tenth Circuit discussed *Amezcua-Vasquez* and “agree[d] with the Ninth Circuit that the staleness of an underlying conviction may, in certain instances, warrant a below-Guidelines sentence.” 597 F.3d at 1138. *See also, United States v. Vasquez-Alcaez*, 647 F.3d 983 (10th Cir. 2011). The Fifth Circuit, has been more hostile to staleness arguments. *See, eg, United States v. Rodriguez*, 660 F.3d 231, 233 (5th Cir. 2011).

The staleness argument will work most successfully for clients with little or no subsequent/recent criminal history. For example, in *United States v. Vargas Maya*, 426 Fed.Appx. 320, 2011 WL 1990837 (5th Cir. 2011) the conviction leading to the 16 level increase was ten years old, committed when Vargas Maya was 19. “The district court considered Vargas–Maya’s [subsequent] criminal trespass and firearms convictions in the context of weighing the factors of danger to the community and promotion of respect for the law, *noting that Vargas–Maya had continued to break the law after his burglary conviction* and had a loaded firearm in a vehicle (which was under his seat and which he reached for when the police stopped the vehicle). Vargas–Maya has not shown that the district court’s balancing of these factors ‘represents a clear error of judgment.’” 426 Fed. Appx. at 321 (emphasis added).

In the same way, courts have dispensed with cultural assimilation arguments (*See* USSG § 2L1.2 App. Note 8) on the ground that the person has an extensive criminal background. *See, eg., United States v. Hernandez Mejia*, 426 Fed.Appx. 825, 2011 WL 1835266 (11th Cir. 2011)

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<sup>28</sup> “CHC” = Criminal History Category

(“Hernandez's criminal history included several serious offenses such as battery and aggravated assault on police officers, aggravated fleeing from law enforcement, and possession of a firearm by a convicted felon. The district court specifically stated that a low-range sentence was necessary to provide just punishment and serve as an adequate deterrence, and the court was permitted to ‘attach great weight’ to these factors.”). Counsel should emphasize the lack of criminality on behalf of clients with extensive backgrounds in the United States but minimal criminal history, and distinguish cases such as *Hernandez Mejia* in support of a cultural assimilation argument. Moreover, for a person who grew up in the United States and is a citizen in all ways but the happenstance of his birth place, a criminal history does not indicate a failure to assimilate; Application Note 8 presumes that a person grew up abroad, and so should not be applied to a person who grew up in the United States and who is acculturated to no other country or culture.

ii. *Uncounseled misdemeanors - Faretta*

The background comment to USSG § 4A1.2, definitions and instructions, says, “Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.” While this means in all likelihood prior uncounseled misdemeanors with probationary sentences will count for criminal history, it opens the door to over representation. Was the defendant detained until sentencing due to an immigration hold, resulting in a two or three point conviction whereas a citizen would have received probation and only one point? Was there a defense but he just plead guilty to get out of jail?

Few *pro se* misdemeanor dispositions included the full inquiry required by *Faretta v. California*, 422 U.S. 806, 834-36 (1975).

When exercised, the right of self-representation ‘usually increases the likelihood of a trial outcome unfavorable to the defendant.’ *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) As a result, the ‘denial [of the right to counsel] is not amenable to ‘harmless error’ analysis. The right is either respected or denied; its deprivation cannot be harmless.’ *Id.*; accord *United States v. Baker*, 84 F.3d 1263, 1264 (10th Cir. 1996). To invoke the right, a defendant must meet several requirements. First, the defendant must ‘clearly and unequivocally’ assert his intention to represent himself. *United States v. Floyd*, 81 F.3d 1517, 1527 (10th Cir. 1996). Second, the defendant must make this assertion in a timely fashion. *United States v. McKinley*, 58 F.3d 1475, 1480 (10th Cir. 1995). Third, the defendant must ‘knowingly and intelligently’ relinquish the benefits of representation by counsel. [*United States v. Boigegrain*, 155 F.3d 1181, 1189 (10th Cir. 1998).] To ensure that the defendant’s waiver of counsel is knowing and intelligent, the trial judge should ‘conduct a thorough and comprehensive formal inquiry of the defendant on the record to demonstrate that the defendant is aware of the nature of the charges, the range of allowable punishments and possible defenses, and is fully informed of the risks of proceeding *pro se.*’ *United States v. Willie*, 941 F.2d 1384, 1388 (10th Cir. 1991).

*United States v. Mackovich*, 209 F.3d 1227, 1236 (10<sup>th</sup> Cir. 2000).

Do not leave unchallenged a PSR's statement that counsel was waived. Order the tape or transcript of the plea hearing. It is the defense's burden to prove that the client was denied counsel. *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938), *United States v. Cruz-Alcala*, 338 F.3d 1194, 1197 (10th Cir. 2003). This burden can be met with the client's testimony or affidavit, or better, with evidence from the hearing, as the affidavits in particular are frequently dismissed as self-serving and inconsequential. In one case I handled, the tape showed the judge literally screaming at the client to intimidate him into waiving counsel.

*iii. over representation*

It is not uncommon for a person to spend a term in prison, including for another reentry, and turn around and immediately return, earning four to five points for that prior reentry. This is the epitome of over representation, particularly considering the non-violent, victim-less nature of illegal reentries. USSG § 4A1.3(e) provides, "The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category . . . and therefore consider a downward departure from the guidelines."

Another important amendment to the sentencing guidelines took effect on November 1, 2011, which could ameliorate this result. USSG § 5D1.1 was amended to add the following:

*"(c) The court ordinarily should **not** impose a term of supervised release in a case in which supervised release is not required by statute and the defendant is a deportable alien who likely will be deported after imprisonment."*

(emphasis added.) The Sentencing Commission explains that supervision is unnecessary, and that *"If such a defendant illegally returns to the United States, the need to afford adequate deterrence and protect the public ordinarily is adequately served by a new prosecution should the offender return illegally."*<sup>29</sup>

Marjorie Meyers, Federal Public Defender for the Southern District of Texas, writing on behalf of the federal defender organization to the Sentencing Commission in its *Public Comment on USSC Notice of Proposed Priorities for Cycle Ending May 1, 2011*, wrote,

[T]he Commission should extinguish the term of supervision upon deportation. "Congress intended supervised release to assist individuals in their transition to community life." "It is not meant to be punitive." Given that purpose, it makes no sense for defendants who will be deported to face terms of supervised release. . . . For these defendants, supervised release simply provides a means of additional punishment should they return. In addition to the draconian multiple counting of the prior reentry conviction in any new prosecution, the defendant will face a revocation of his supervised release term and a

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<sup>29</sup> USSG § 5D1.1(c), App. Note 5.

consecutive sentence of imprisonment under §7B1.3(f).<sup>30</sup>

The rationale for the amendment as set out in its commentary and as elaborated by Ms. Meyers applies to and can be argued at sentencing of offenders who are on supervised release for one illegal reentry when they commit another.

Frequently, our § 1326 clients pick up points for offenses where citizens might not, such as for not understanding conditions of probation and not reporting, or for having warrants issued for them because they were deported and not here to report. Or, they pick up additional points under USSG § 4A1.1(b) or (c), getting two or three points for offenses which would be one-pointers for citizens, due to an inability to make bond set high or set at no bond due to an immigration request to detain or notify (previously considered a "hold"). Or, they pick up the points due to utter ignorance about our system. I once had a § 1326 client spend six months in pretrial detention for a (prior) DWI, without a single court appearance! He didn't know it *wasn't* supposed to happen that way, and there was a discrepancy between his name as booked into the jail and on the criminal complaint, so the court never figured out he was in custody. Had his family not approached the consulate to ask about when he might have court, he might still be there!

*United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005), an illegal reentry case, the court substantially reduced the defendant's sentence from what the guideline range indicated, noting that pre-*Booker* it would have granted a downward departure for over representation of criminal history due to several DWI's causing the defendant to be in criminal history category V. The court noted, "[his offense of conviction] does not involve the same level of culpability as the crimes of violence that form the basis of the steep increase in sentence under the Guidelines." 355 F. Supp. 2d at 1031. In *United States v. Harfst*, 168 F.3d 398 (10th Cir. 1999), the court departed downward where it found that *two* misdemeanor convictions, resulting in a criminal history level of II, significantly over represented Harfst's criminal history. The government did not appeal this determination, so the issue was not addressed on appeal.

A subset of over representation of criminal history occurs where the client is "found" by ICE in a county jail and a request for notification<sup>31</sup> is put on him, some complaints may claim the person was "found" when the person was transferred into federal custody, and not on the date that the

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<sup>30</sup> *Defender Comment Re: USSC Proposed Priorities for Cycle Ending 5/1/11* at 42-43 (footnotes deleted).

<sup>31</sup> Previously, ICE requests were treated as mandatory holds, the same as an arrest warrant. Increasingly, however, counties are recognizing that there is no legal authority for such requests to detain, and have been refusing to honor such requests. The former practice was costly to counties as they continued to house immigrants at their own expense, and it exposed them to illegal detention lawsuits. See, Lauren Villagran, *Detentions put counties, ICE at odds*, Albuquerque Journal April 5, 2015, available at: <http://www.abqjournal.com/565004/news/immigrant-detention-policy-puts-ice-counties-at-odds.html> (last accessed April 6, 2015). ICE is increasingly framing these requests as requests for notification rather than for detention.

request was placed. Frequently, the person is not under a criminal justice sentence at the time the request is placed, but is at the time s/he is transferred to ICE custody. This results in the person getting two criminal history points for “being under a criminal justice sentence at the time the new offense was committed,” under USSG § 4A1.1(d). In *United States v. Jimenez-Borja*, 378 F.3d 853, 858 (9<sup>th</sup> Cir.), *cert. denied* 543 U.S. 1030 (2004), the “[defendant] could have been charged with having been ‘found in’ the United States on October 5, 2001 when he was found in Escondido, California by local police (as he was), or on March 14, 2002 when he was discovered by the INS, or on any date in between -- but not after March 14, 2002. On that date, having been discovered by the INS, Jimenez-Borja's continuing violation ended.” Insist that the charging document your client pleads to has the “found” date as the date the client was discovered by ICE, otherwise you may be held to have waived the issue, or plead the client to the approximate date of entry, not the “found in” date. In addition, if ICE finds a person serving a lengthy prison sentence and lodges a request, but takes no further action, the statute of limitations may run. 18 U.S.C. § 3282. Illegal reentry is a continuing offense, but ends when the person is “found” by ICE. *United States v. Jimenez-Borja*, 378 F.3d at 85; *United States v. Ruiz-Gea*, 340 F.3d 1181 (10<sup>th</sup> Cir. 2003); *United States v. Lopez-Flores*, 275 F.3d 661, 663 (7<sup>th</sup> Cir.2001) (collecting cases); *accord United States v. Mendez-Cruz*, 329 F.3d 885, 889 (D.C. Cir.2003).

*iv. finality*

Note that while for many purposes, a conviction is final once “the judgment of conviction [has been] rendered, the availability of appeal exhausted, and the time for petition for certiorari . . . elapsed.” *Teague v. Lane*, 489 U.S. 288, 295, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989) (*citing Allen v. Hardy*, 478 U.S. 255, 258 n.1 (1986) (per curiam)), all that is needed for a case to count for criminal history points is that guilt be established, whether by plea or verdict, § 4A1.2(a)(1), (3). But for increases under § 2L1.2, (offense severity), the narrower definition applies. If the client is facing unresolved state charges, try to avoid a plea (and therefore criminal history points) before a federal sentence.

*vi. ineffective assistance of counsel*

A final way to mitigate a prior sentence may be through ineffective assistance of counsel. It is a sad reality that Gideon's Promise is not being kept in many states. *See*, ABA, GIDEON'S BROKEN PROMISE (2004):<sup>32</sup>

Overall, our hearings support the disturbing conclusion that thousands of persons are processed through America’s courts every year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some cases the inclination to provide effective representation. All too often, defendants plead guilty,

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<sup>32</sup> Available at: [http://search.americanbar.org/search?q=gideon%27s+broken+promise&client=default\\_frontend&proxystylesheet=default\\_frontend&site=default\\_collection&output=xml\\_no\\_dtd&oe=UTF-8&ie=UTF-8&ud=1](http://search.americanbar.org/search?q=gideon%27s+broken+promise&client=default_frontend&proxystylesheet=default_frontend&site=default_collection&output=xml_no_dtd&oe=UTF-8&ie=UTF-8&ud=1) (last accessed April 6, 2015)

even if they are innocent, without really understanding their legal rights or what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not adequately understand English. The fundamental right to a lawyer that Americans assume apply to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.

I have seen too many clients who credibly explained how they were not guilty of their predicate offenses, and just plead guilty because it was the only way they could perceive to get out of custody; otherwise, they would be sent back to jail until the next hearing. Thus, ineffective assistance and innocence might be argued in mitigation of a prior offense. In *United States v. Crippen*, 961 F.2d 882 (9th Cir.), *cert. denied*, 506 U.S. 965 (1992), the court held that one could not depart (in the pre-*Booker* era) based on facts that did not bear on the seriousness of the crime committed or the defendant's level of culpability. Presumably, if facts did bear on these matters, a departure (or now variance) could be sought. *United States v. Duran-Benitez*, 110 F. Supp. 2d 133 (E.D.N.Y. 2000), a drug case, the court held that where the defense lawyer had a conflict of interest because he was paid by third party to encourage defendant not to inform on a third party, so the defendant did not cooperate, a § 2255 analysis applied at sentencing, and Duran-Benitez was granted the 6-level downward departure he would have received had he cooperated and secured a §5K1.1 motion from the government. *But see, United States v. Basalo*, 258 F.3d 945 (9th Cir. 2001), holding that ineffective assistance cannot be a mitigating factor (although this holding is questionable in light of *Booker*).

vi. *mistake of law*

Frequently, clients report that the immigration agent told them they were deported for a certain number of years. That's what sticks in their mind rather than the sheafs of paper immigration handed them, written either in a language they do not speak and/or at a level they cannot understand. This is basically a mistake of law, and normally would not constitute a defense. However, in *United States v. Idowu*, 105 F.3d 728 (D.C. Cir. 1997) the court of appeals reversed the district court's refusal to allow Idowu to withdraw his guilty plea:

At the very least, § 1182(a)(6)(B) gave Idowu what potentially could be a complete defense to the § 1326 charge. It is true that he did not cite the five-year statute to the district court, but we think he did enough to raise the defense. He told the court that he thought the five-year lapse between his deportation and reentry relieved him of the need for the Attorney General's permission. Whether Idowu is correct poses an interpretative question we need not finally resolve. The record is too thin and the INS may have more to offer on the subject. At this stage it is enough to say that Idowu presented a "fair and just reason" to allow him to withdraw his plea. Fed.R.Crim.P. 32(e). *See United States v. Cray*, 47 F.3d 1203, 1206-07 (D.C. Cir. 1995). Confusion about the effect of the five-year rule on § 1326(a) provided a substantial reason for Idowu's initial plea of guilty and his later motion to retract it.

**d. Concurrent State and Federal Sentences**

On November 1, 2014, the § 2L1.2 guideline was amended to add a new application note suggesting a departure where immigration authorities find a non-citizen who is in state custody:

8. *Departure Based on Time Served in State Custody.*—In a case in which the defendant is located by immigration authorities while the defendant is serving time in state custody, whether pre- or post-conviction, for a state offense, the time served is not covered by an adjustment under §5G1.3(b) and, accordingly, is not covered by a departure under §5K2.23 (Discharged Terms of Imprisonment). See §5G1.3(a). In such a case, the court may consider whether a departure is appropriate to reflect all or part of the time served in state custody, from the time immigration authorities locate the defendant until the service of the federal sentence commences, that the court determines will not be credited to the federal sentence by the Bureau of Prisons. Any such departure should be fashioned to achieve a reasonable punishment for the instant offense.

Such a departure should be considered only in cases where the departure is not likely to increase the risk to the public from further crimes of the defendant. In determining whether such a departure is appropriate, the court should consider, among other things, (A) whether the defendant engaged in additional criminal activity after illegally reentering the United States; (B) the seriousness of any such additional criminal activity, including (1) whether the defendant used violence or credible threats of violence or possessed a firearm or other dangerous weapon (or induced another person to do so) in connection with the criminal activity, (2) whether the criminal activity resulted in death or serious bodily injury to any person, and (3) whether the defendant was an organizer, leader, manager, or supervisor of others in the criminal activity; and (C) the seriousness of the defendant's other criminal history.

Because pursuant both to the guidelines quoted in this application note and 18 U.S.C. § 3585 a defendant will not receive credit for time credited to another sentence, a departure lessening the federal sentence is necessary to achieve the equivalent of credit for the time that an immigration request was pending. For non-violent offenses, a departure or variance should be urged for clients in this situation.

Another extremely important consideration is that the only truly viable way to obtain concurrent state and federal time is for the feds to have primary custody of a defendant. If he has been writted over from the state, the state has primary custody. Absent some very specific language in a judgment, BOP will not credit any time served on another sentence, meaning they will let a

defendant sit out his state sentence before picking him up to begin his federal sentence.<sup>33</sup> It is imperative for state and federal counsel to coordinate with each other if the client faces both state and federal charges.

*e. 18 U.S.C. § 3553 Factors*

*i. social history*

*United States v. Booker*, 543 U.S. 220 (2005) and 18 U.S.C. § 3553(a)<sup>34</sup> establish that a client's background is an absolutely necessary consideration in determining what sentence is sufficient, but not greater than necessary, to carry out the sentencing purposes of just punishment, deterrence, protection, rehabilitation, and avoiding unwarranted disparities.

It is critical, therefore, to obtain a detailed social history of the client. Mitigating factors are limited only by counsel's imagination, and her ability to learn enough about the client to know what there is in the client's life story that is mitigating.

At a bare minimum, the social history should cover the following:

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<sup>33</sup> See, Interaction of State and Federal Sentences, <http://www.bop.gov/resources/pdfs/ifss.pdf>

<sup>34</sup> (a) *Factors To Be Considered in Imposing a Sentence*. - The court shall impose a sentence **sufficient, but not greater than necessary**, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider -

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed -
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for -
  - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; . . .
  - (5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;
  - (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

- facts, role in, and mitigation of prior offense
- family situation - health, economic
- attempts to avoid returning
- unusual harm suffered by this arrest
- what client understood re right to return
- unusual harm suffered by future incarceration
- reason for return
- evidence of good character
- acculturation; time in US
- mental status/condition
- dangers faced at home

One of my first federal appeals concerned a young man who had made his way from southern Mexico alone to New York City as a young teen. After only a month, he was abandoned by his relatives there and left to fend for himself. He found work and housing, and was making it, but got crosswise in a gang fight (he himself was not a gang member) and was prosecuted for assault. He was deported across the border with no way to make it back to his home in southern Mexico. He worked for a few weeks in a church in Juárez, but still didn't have the money for a bus fare. He determined to cross back to the US just to earn enough for his bus fare home. The rest is history. The problem is that his first attorney *never* interviewed his client, *never* took a social history and *never* learned any of this. Astonishingly, the visiting sentencing judge said (pre-*Booker*) that he didn't want to have to give this youth so much time, and asked the defense attorney to research to see if there wasn't some ground for a departure. Even more astonishingly, the attorney *still* did nothing; still didn't ask the client a single question about himself. Reluctantly the judge imposed the minimum guidelines sentence, and on appeal, the case went to the undersigned because of the apparent IAC claim. The window of opportunity had passed; neither the appellate court, nor the subsequent judge on the habeas felt that failure to investigate and present mitigating evidence constituted ineffective assistance. *But cf. Wiggins v. Smith*, 539 U.S. 510 (2003), finding the contrary in the capital context.

ii. *common mitigation themes*

A good starting point for brainstorming mitigation themes or drafting a sentencing memorandum is Michael Levine's "171 EASY MITIGATING FACTORS,"<sup>35</sup> a wonderful compendium of different mitigating factors with caselaw in support of each. Footnoted below is a sample of the Easy Mitigating Factors that might commonly apply to a § 1326 client.<sup>36</sup>

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<sup>35</sup> The "138 Easy Mitigating Factors" is available by googling; the "171" version is available by purchase.

<sup>36</sup> 6. Lack of knowledge or criminal intent or mens rea  
 20. The defendant's criminal history overstates his propensity to commit crimes  
 44. Defendant's conduct did not threaten the harm sought to be prevented by the law proscribing the offense—perceived lesser harm  
 84. Extraordinary family situations or responsibilities or where incarceration would have harsh effect on innocent family members  
 87. Good deeds (e.g., saving a life)  
 88. Defendant's status as war refugee and his lack of education  
 90. Diminished capacity

Another excellent source of ideas is the sentencing resource page at the Federal Defender website - [www.fd.org](http://www.fd.org).<sup>37</sup> Articles include:

- *The Fallacies Underlying Immigration Guideline §2L1.2*  
by Maureen Franco, Deputy Federal Public Defender, W.D. TX, Judy Madewell, Assistant Federal Public Defender, W.D. TX, Mike Gorman, Legal Research & Writing Assistant, W.D. TX
- *Sentencing Memo in Illegal Re-entry Case*  
(sentencing memo excerpt using statistics and other deconstruction arguments)
- *Why the Prior Conviction Sentencing Enhancements In Illegal Re-Entry Cases Are Unjust and Unjustified (and Unreasonable Too)*  
by Doug Keller, formerly an attorney with the Federal Defenders of San Diego, Inc.<sup>38</sup>

- 
91. Mental retardation or impaired intellectual functioning
  94. Defendant's extraordinary mental and emotional condition
  106. Ineffective assistance of counsel
  115. Defendant subject to extraordinary punishment not contemplated by the guidelines
  118. Defendant subject to abuse in prison
  119. Cultural heritage and sociological factors
  123. Defendant's tragic personal history
  136. Duress or coercion
  138. Disparity in sentencing
  139. Disparity in plea-bargaining policies between districts
  110. Credit for time served on INS/ICE detainer
  153. Defendant is alien facing more severe prison conditions than non-alien
  154. Alien who will be deported because of guilty plea punished too severely
  155. Alien who reentered for honorable motive or to prevent perceived greater harm
  156. Alien who consents to deportation
  157. Alien who illegally reenters and whose prior aggravated felony is not serious
  158. Alien for whom sixteen level bump for prior conviction is arbitrary and capricious and unfair because unfairly raises both guideline and criminal history and is arbitrary
  159. Alien whose criminal history score is overstated
  160. Alien who has assimilated into American culture
  161. Alien who should receive credit on INS/ICE detainer
  162. Alien in district with no fast track policy

<sup>37</sup> <http://www.fd.org/navigation/select-topics-in-criminal-defense/sentencing-resources/subsections/deconstructing-the-guidelines>

<sup>38</sup> This article is at the moment not on the fd.org website, but is available via google.

Articles on the specific guideline / statutory sentencing issues include:<sup>39</sup>

- *Challenging the Upward Bumps: The Categorical Approach and Other Sentencing Strategies for Illegal Re-Entry (8 U.S.C. §1326) Cases*  
by Francisco Morales, Assistant Federal Public Defender, S.D. TX
- *Analyzing Presentence Reports and Common Sentencing Issues in Illegal Reentry Cases*  
by Shari Allison and James Langell, Assistant Federal Public Defenders D. NM
- *Crimes of Violence Under §2L1.2*  
compiled by Anne Berton, Assistant Federal Public Defender, W.D. TX
- *A "S.A.F.E." Approach to Defending Illegal Reentry Cases*  
by Jodi Linker, Assistant Federal Public Defender, N.D. CA
- *Case List: Sentencing Issues in Reentry Cases*  
by Shari Allison, Research and Writing Specialist; and James Langell, Assistant Federal Public Defender, D. NM
- *Defending Against Sentencing Enhancements in Immigration Cases*  
by Anne Berton, Assistant Federal Defender, W.D. TX, & Mike Gorman, Staff Attorney, Office of the Federal Defender, W.D. TX.

and many others. Many of these documents make the excellent and accurate policy/deconstruction argument that the 16 level enhancement is without empirical support. *See*, Robert McWhirter and Jon Sands, "*Does the Punishment Fit the Crime?*" 8 FED. SENT. R. 275, 1996 WL 671556 (April 1, 1996):

The Commission did no study to determine if such sentences were necessary - or desirable from any penal theory. Indeed, no research supports such a drastic upheaval. No Commission studies recommended such a high level, nor did any other known grounds warrant it. Commissioner Michael Gelacak suggested the 16- level increase and the Commission passed it with relatively little discussion. The 16-level increase, therefore, is a guideline anomaly - an anomaly with dire consequences.

Unfortunately, this policy argument falls mostly on judicial deaf ears. But of all places, the Fourth Circuit reversed a case where this empirical argument was made. In *United States v. Myers*, 442 Fed. Appx. 763, 2011 WL 3468288 (4th Cir. 2011) the district court said, "I'm sitting here in the Fourth Circuit and I am not the King of the World. I cannot undo what they have done. Because I, unlike Mr. Myers, abide by the law. Now, so all of these objections or requests for some kind of

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<sup>39</sup> <http://www.fd.org/navigation/select-topics-in-criminal-defense/common-offenses/immigration-and-offenses-involving-non-citizens>

lenient treatment flowing from these arguments will be rejected by the Court.” *Id.* at \*2 Reversing the court, the Fourth Circuit held, “It is now well established that a court may consider policy objections to the Sentencing Guidelines. *See Kimbrough*, 552 U.S. at 101–07, 128 S.Ct. 558. . . . The record does not conclusively indicate that the district court was unaware of its authority to impose a variance sentence based on a disagreement with the policy behind the illegal reentry Guideline.” *Id.* at \*3.<sup>40</sup> *In Perez-Nuñez*, 368 F. Supp. 2d 1265, 1268 (D.N.M. 2005), the court noted that there was no empirical research concerning the deterrent value or any other matter. *See also, Galvez-Barrios*, 335 F. Supp. 2d 958, 962 (E.D. Wi. 2005); *United States v. Garcia-Jaquez*, 807 F. Supp. 2d 1005 (D. Col. 2011).

iii. *Situation in Mexico and Central America*

The current situations in Mexico and some Central American countries deserve special mention. Many of the border offices represent many clients who have fled deadly violence. In the 70's and 80's, many Central Americans fled violence in their countries, and eventually, Congress responded with Temporary Protected Status, and by offering asylum to the refugees. More recently, more than 50,000 women and children fled Central American gang violence and came to the U.S.

Likely because of the massive scale of the violence and the tens of millions affected by it, as well as the political relationship<sup>41</sup> between the United States and Mexico, no similar relief has been extended yet to the refugees of drug violence. It is important to educate judges on the conditions our clients are fleeing. Even those not personally touched by the violence have seen their livelihoods destroyed, as tourists stay home and businesses close due to lack of business and/or extortion by the cartel assassins.

Attached to these materials is are two sample sentencing memoranda from different states laying out the deadly border situation (among other sentencing issues). It is depressingly easy to update and customize the research for different clients' home towns. Simple online searches of the client's home town + search terms such as “cartel violence” turn up multiple articles.

Several governmental sites also provide valuable information. The Congressional Research

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<sup>40</sup> Postscript: The district court judge, having been made aware of his variance authority, resentenced Mr. Myers to the same sentence, and the sentence was upheld on appeal, although counsel filed only an *Anders* brief. 488 Fed.Appx. 665 (4<sup>th</sup> Cir. 2012).

<sup>41</sup> Extending such status or granting asylum would be a direct political/diplomatic acknowledgment that Mexico has lost control of the situation and is unable to protect its citizens from the cartel violence, although in issuing a travel warning, the United States government has pretty much done just that. “Travel Warnings are issued when long-term, protracted conditions that make a country dangerous or unstable lead the State Department to recommend that Americans avoid or consider the risk of travel to that country.” [http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_1764.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_1764.html)

Service has published an extensive report entitled “Mexico’s Drug Related Violence.”<sup>42</sup> The State Department has issued a travel warning for Mexico. This December 14, 2014 update provides much more specific information about specific border regions than previous travel warnings. It is directed to U.S. travelers, but describes the conditions under which our clients must try to live and survive.

### **General Conditions**

[T]he Mexican government has been engaged in an extensive effort to counter organized criminal groups that engage in narcotics trafficking and other unlawful activities throughout Mexico. The groups themselves are engaged in a violent struggle to control drug trafficking routes and other criminal activity. Crime and violence are serious problems and can occur anywhere. U.S. citizens have fallen victim to criminal activity, including homicide, gun battles, kidnapping, carjacking, and highway robbery. While many of those killed in organized crime-related violence have themselves been involved in criminal activity, innocent persons have also been killed. . .

Gun battles between rival criminal organizations or with Mexican authorities have taken place in towns and cities in many parts of Mexico. Gun battles have occurred in broad daylight on streets and in other public venues, such as restaurants and clubs. . . . Criminal organizations have used stolen cars, buses, and trucks to create roadblocks on major thoroughfares, preventing the military and police from responding to criminal activity. The location and timing of future armed engagements is unpredictable. We recommend that you defer travel to the areas specifically identified in this Travel Warning and exercise extreme caution when traveling throughout the other areas for which advisories are in effect.

The number of kidnappings throughout Mexico is of particular concern and appears to be on the rise. . . . While kidnappings can occur anywhere, . . . the states with the highest numbers of kidnappings [in 2013] were Tamaulipas, Guerrero, Michoacán, Estado de Mexico, and Morelos. . . . Police have been implicated in some of these incidents.

. . .

Carjacking and highway robbery are serious problems in many parts of the border region, and U.S. citizens have been murdered in such incidents. . . . While violent incidents can occur anywhere and at any time, they most frequently occur at night and on isolated roads. To reduce risk when traveling by road, we strongly urge you to travel between cities throughout Mexico only during daylight hours, to avoid isolated roads, and to use toll roads ("cuotas") whenever possible.

. . .

Since July 2010, USG employees are prohibited from driving on non-official

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<sup>42</sup> Available, among other sources, at <http://www.fas.org/sgp/crs/row/R40582.pdf>

travel from the U.S.-Mexico border to or from the interior of Mexico or Central America.

...

U.S. government personnel and their families are prohibited from personal travel to all areas to which it is advised to "defer non-essential travel". When travel for official purposes is essential, it is conducted with extensive security precautions.

### **State-by-State Assessment:**

Below is a state-by-state assessment of security conditions throughout Mexico.<sup>43</sup> Travelers should be mindful that even if no advisories are in effect for a given state, crime and violence can still occur.

...

*Baja California:* Exercise caution in the northern state of Baja California, particularly at night. Criminal activity along highways is a continuing security concern. According to the Baja State Secretariat for Public Security, from January to October 2014 Tijuana and Rosarito experienced increasing homicide rates compared to the same period in the previous year. While most of these homicides appeared to be targeted criminal organization assassinations, turf battles between criminal groups have resulted in violent crime in areas frequented by U.S. citizens. Shooting incidents, in which innocent bystanders have been injured, have occurred during daylight hours.

...

*Chihuahua:* Exercise caution in traveling to: the business and shopping districts in the northeast section of Ciudad Juarez and its major industrial parks, the central downtown section and major industrial parks in the city of Chihuahua, the town of Palomas, the urban area of the city of Ojinaga, and the towns of Nuevo Casas Grandes and Casas Grandes and their immediate environs. . . . Defer non-essential travel to other areas in the state of Chihuahua and travel between cities only on major highways and only during daylight hours. Crime and violence remain serious problems throughout the state of Chihuahua, particularly in the southern portion of the state and in the Sierra Mountains, including Copper Canyon.

*Coahuila:* Defer non-essential travel to the state of Coahuila except the city of Saltillo, where you should exercise caution. Violence and criminal activity along the highways are continuing security concerns, particularly along the northern border between Piedras Negras and Nuevo Laredo. The state of Coahuila continues to experience high rates of violent crime, including murder, kidnapping, and armed carjacking.

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<sup>43</sup> Only the advisories for border states and states from which we see substantial immigration are included here.

*Durango:* Exercise caution in the state of Durango. Violence and criminal activity along the highways are a continuing security concern. Several areas in the state continue to experience high rates of violence and remain volatile and unpredictable. U.S. government personnel may travel outside the city of Durango only during daylight hours on toll roads, and must return to the city of Durango to abide by a curfew of 1 a.m. to 6 a.m.

...

*Michoacán:* Defer non-essential travel to the state of Michoacán except the cities of Morelia and Lázaro Cardenas and the area north of federal toll road 15D, where you should exercise caution. U.S. government employees are prohibited from traveling by land in Michoacán except on federal toll road 15D during daylight hours. Flying into Morelia and Lázaro Cardenas is the recommended method of travel. Attacks on Mexican government officials, law enforcement and military personnel, and other incidents of organized crime-related violence, have occurred throughout Michoacán. Armed members of some self-defense groups maintain roadblocks and, although not considered hostile to foreigners or tourists, are suspicious of outsiders and should be considered volatile and unpredictable. Some self-defense groups in Michoacán are reputed to be linked to organized crime.

...

*Sinaloa:* Defer non-essential travel to the state of Sinaloa except the city of Mazatlan, where you should exercise caution, particularly late at night and in the early morning. One of Mexico's most powerful criminal organizations is based in the state of Sinaloa, and violent crime rates remain high in many parts of the state. Travel off the toll roads in remote areas of Sinaloa is especially dangerous and should be avoided. We recommend that any travel in Mazatlan be limited to Zona Dorada and the historic town center, as well as direct routes to/from these locations and the airport.

...

*Sonora:* Sonora is a key region in the international drug and human trafficking trades and can be extremely dangerous for travelers. Travelers throughout Sonora are encouraged to limit travel to main roads during daylight hours. The region west of Nogales, east of Sonoyta, and from Caborca north, including the towns of Saric, Tubutama, and Altar, and the eastern edge of Sonora bordering Chihuahua, are known centers of illegal activity, and non-essential travel between these cities should be avoided. Travelers should also defer non-essential travel to the eastern edge of the state of Sonora, which borders the state of Chihuahua (all points along that border east of the northern city of Agua Prieta and the southern town of Alamos), and defer non-essential travel within the city of Ciudad Obregon and south of the city of Navojoa. You should exercise caution while transiting Vicam in southern Sonora due to roadblocks that can be instituted ad hoc by local indigenous and environmental groups.

...

*Tamaulipas*: Defer non-essential travel to the state of Tamaulipas. All U.S. government employees are prohibited from personal travel to all but the central zones of Matamoros and Nuevo Laredo and on Tamaulipas highways outside of Matamoros, Reynosa, and Nuevo Laredo due to the risks posed by armed robbery and carjacking, particularly along the northern border. While no highway routes through Tamaulipas are considered safe, the highways between Matamoros-Ciudad Victoria, Reynosa-Ciudad Victoria, Ciudad Victoria- Tampico, Monterrey-Nuevo Laredo, and Monterrey-Reynosa, are more prone to criminal activity. Public and private passenger buses traveling through Tamaulipas are sometimes targeted by organized criminal groups. These groups sometimes take all passengers hostage and demand ransom payments. In Tamaulipas, U.S. government employees are subject to movement restrictions and a curfew between midnight and 6 a.m. Matamoros, Reynosa, Nuevo Laredo, and Ciudad Victoria have experienced numerous gun battles and attacks with explosive devices in the past year. Violent conflicts between rival criminal elements and/or the Mexican military can occur in all parts of the region and at all times of the day. The number of reported kidnappings for Tamaulipas is among the highest in Mexico, and the number of U.S. citizens reported to the consulates in Matamoros and Nuevo Laredo as being kidnapped, abducted, or disappearing involuntarily in 2014 has also increased.<sup>44</sup>

The *Los Angeles Times* has an ongoing series of articles on the drug war, which has archives of its articles, and one can search or filter for articles on the area of the country or other matters being researched.<sup>45</sup>

The *El Paso Times* also regularly reports on the situation.<sup>46</sup> Reporter Daniel Borunda has published a number of stories in the paper, including an interesting report on how the Santísima Muerte is revered by people from many walks of life, not just drug traffickers.<sup>47</sup>

iii. *mitigation of predicate felony*

Frequently, a client's prior felony may have mitigating factors that set it apart from other crimes in the same classification. Most common is the crime of violence category, where misdemeanors from states where the maximum sentence for a misdemeanor is over a year, and first degree murders, as well as rapes, kidnappings, and the like, all get the same sixteen level increase.

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<sup>44</sup> <http://travel.state.gov/content/passports/english/alertswarnings/mexico-travel-warning.html>

<sup>45</sup> <http://projects.latimes.com/mexico-drug-war/#/its-a-war>

<sup>46</sup> [http://www.elpasotimes.com/ci\\_12033826](http://www.elpasotimes.com/ci_12033826)

<sup>47</sup> [http://www.elpasotimes.com/ci\\_18536732?IADID=Search-www.elpasotimes.com-www.elpasotimes.com](http://www.elpasotimes.com/ci_18536732?IADID=Search-www.elpasotimes.com-www.elpasotimes.com)

In *United States v. Trujillo-Terrazas*, 405 F.3d 814 (10th Cir. 2005) the court reversed the sentence where, in a § 1326 case, Mr. Trujillo-Terrazas' sentence was substantially enhanced for a very minor prior offense, which qualified as a crime of violence:

The relatively trivial nature of Mr. Trujillo's criminal history is at odds with the substantial 16-level enhancement recommended by the Guidelines for this conduct. The state court assessed restitution of a mere \$ 35.00 for Mr. Trujillo's third degree arson conviction, suggesting a quite minor offense. The Guidelines, however, look only to the conviction itself rather than the actual conduct underlying the conviction. This blunter approach means that the Guidelines do not distinguish between tossing a lighted match through a car window, doing minor damage, and a more substantial crime of violence such as an arson resulting in the complete destruction of a building or vehicle. To punish this prior conduct in the same manner could be seen to run afoul of § 3553(a)(6), which strives to achieve uniform sentences for defendants with similar patterns of conduct.

405 F.3d at 819-20. *See also*,<sup>48</sup> *United States v. Sanchez-Rodriguez*, 161 F.3d 556) (9th Cir. 1998) (en banc) (district court acted within its discretion when it departed downward in an illegal re-entry case by 3 levels from 77 to 30 months on the grounds (1) that the prior aggravated conviction was only a \$20 heroin sale; and (2) that the delay in bringing the federal charge prejudiced the defendant's opportunity to obtain a sentence concurrent to the state sentence he was already serving); *United States v. Castillo-Casiano*, 198 F.3d 787 (9th Cir. 1999) (district court's failure to consider nature of prior felony plain error); *amended*, 204 F.3d 1257 (9th Cir. 2000); *United States v. Cruz-Guevara*, 209 F.3d 644 (7th Cir. 2000) (D's only prior felony conviction was for "aggravated criminal sexual abuse of a minor," a consensual sex act between D (age 18) and his girlfriend (age 16). He was sentenced to 116 days. The district court granted a 10-level downward departure under Note 5 and the government appealed. The Seventh Circuit disagreed with the government's argument that the extent of the departure was patently unreasonable. The court made a strong argument for the departure under Note 5, but remanded for the district court to link the degree of the departure to the structure of the guidelines); *United States v. Diaz-Diaz*, 135 F.3d 572 (8th Cir. 1998) (court upheld downward departure from 63 to 10 months because 16-level adjustment overstated the seriousness of prior which involved sale of 8.3 grams of marijuana for which D received 22 days jail); *United States v. Zapata-Trevino*, 378 F. Supp. 2d 1321(D. N.M. 2005) (in illegal reentry case where guideline was 57 -71 months, sentence of 15 months imposed because prior conviction though nominally an aggravated felony and crime of violence was relatively trivial misdemeanor of consensually kissing a girl, and for which probation was imposed); *United States v. Perez-Nunez*, 368 F. Supp.2d 1265 (D.N.M. 2005) (in illegal reentry case, where guidelines 57-71 months, 24 months imposed because prior "crime of violence" was third-degree assault arising defendant's throwing of rock at the rear window of another car whose driver had attempted to run him over defendant; the term "crime of violence" is an overly broad catchall category that "subject[s] defendants convicted of everything from murder, rape and sexual abuse of a minor to

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<sup>48</sup> This paragraph is an excerpt from Michael Levine's 171 Easy Mitigating Factors compilation #157, see fn 35 - *see what a great resource it is?!*

simple assault, to the same 16 level enhancement in calculating the proper sentencing range...which not produce uniformity but rather "produce[s] a result contrary to the spirit of the Guidelines."); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019 (D. Neb. 2005) (post *Booker*, where guideline range was 70-87 months court imposed 36 months in part because court would have granted downward departure for over-representation of criminal history in that prior occurred nearly ten years ago); *United States v. Marcos-Lopez*, 2000 WL 744131 (S.D.N.Y. June 9, 2000) (unpub.) (where only prior was sale of \$20, Application Note 5 encourages departure, so proper to depart 8 levels from 16 increase and sentence to 18 months in illegal reentry case. Court noted that the offense "did not rise beyond the level of an attempt and did not involve a large quantity of drugs." Defendant had only one other prior conviction: for "farebeating," apparently a misdemeanor); *United States v. Ortega-Mendoza*, 981 F. Supp. 694 (D.D.C. 1997) (departure downward to 30 months granted where prior aggravated felony involved sale of only .2 grams of cocaine); *United States v. Hinds*, 803 F. Supp. 675 (W.D.N.Y. 1992), *aff'd*, 992 F.2d 321 (2d Cir. 1993) (departure from 51 to 30 months granted because criminal history overstated seriousness of priors).

An additional factor to consider is age at the time of conviction. Certain states, notably Texas, prosecute younger teens as adults without considering amenability. A conviction sustained at an age when most states consider the person a child, and certainly all the psychological and medical research does, ought to count for less than an offense committed by an older person.

v. *deterrence*

The National Institute of Justice, the research, development and evaluation agency of the Department of Justice, has published a document entitled *Five Things about Deterrence*,<sup>49</sup> which notes that certainty, rather than severity, is a more effective deterrent. While this does not necessarily represent an official position of the DOJ, its research arm considered it sufficiently important to include as one of its five most salient facts. Moreover, it is consistent with modern research on the subject.

A recent report from the Sentencing Project also evaluated deterrence, and found that the research in the field finds that the *certainty*, rather than the *severity*, of punishment is what serves as a deterrent.<sup>50</sup>

One problem with deterrence theory is that it assumes that human beings are rational actors who consider the consequences of their behavior before deciding to commit a crime; however, this is often not the case.

...

Another problem in assessing deterrence is that in order for sanctions to deter, potential offenders must be aware of sanction risks and consequences before

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<sup>49</sup> Available at: <http://www.nij.gov/five-things/pages/deterrence.aspx>

<sup>50</sup> Available at [www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf](http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf)

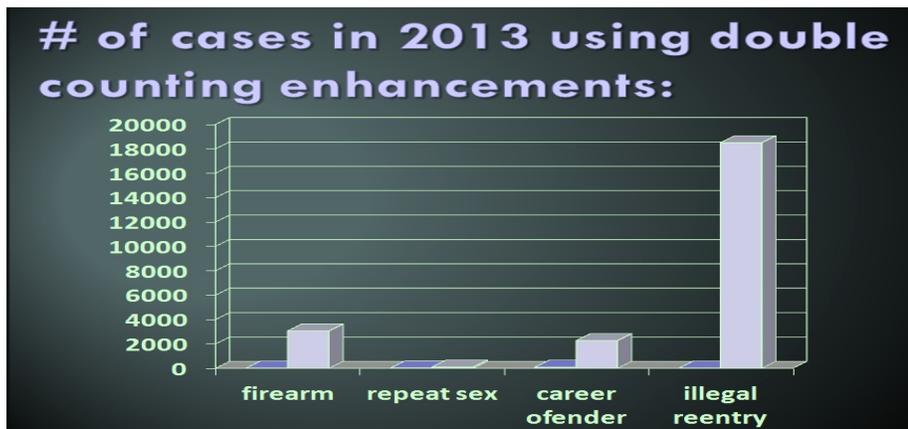
they commit an offense. In this regard, research illustrates that the general public tends to underestimate the severity of sanctions generally imposed. This is not surprising given that members of the public are often unaware of the specifics of sentencing policies. Potential offenders are also unlikely to be aware of modifications to sentencing policies, thus diminishing any deterrent effect.

*Id.* This last paragraph is particularly true of our illegal reentry clients. In the past, people caught without documents in this country were overwhelmingly simply deported or granted voluntary return. Now, there is a zero tolerance policy and many are learning the very painful lesson that it is in fact a crime to enter without inspection, one that is brutally punished if one was deported subsequent to a felony conviction. It always bears asking, because if the client did not know he was committing a crime at all, the severity of the sanction is meaningless.

*iv. Avoiding unwarranted disparities*

Sometimes the guideline is just plain ridiculous for the offense severity. *See, United States v. Santos-Núñez* 2006 WL 1409106, 6 (S.D.N.Y., May 22, 2006) (unpub.). The court considered the unfair double counting in using a prior conviction both to increase offense severity and criminal history category. “Nowhere but in the illegal re-entry Guidelines is a defendant's offense level increased threefold based solely on a prior conviction....The result of this double-counting produces a Guidelines range that is unreasonable, given the non-violent nature of the instant offense, and the fact that Santos-Núñez has not been charged with any additional crimes since his return to the United States.” *See also, United States v. Ennis* 468 F. Supp. 2d 228 (D. Mass. 2006) While this is a drug case, the court’s perspective on the absurd resultant guideline range is equally applicable to the reentry guideline that “makes absolutely no sense” given the circumstances of the case, the characteristics of the defendants, and the purposes of sentencing.

While it is true that some other guidelines also double count criminal history for offense severity as well as criminal history category, the vast, vast, majority of defendants subjected to this double counting are illegal reentry defendants:<sup>51</sup>



<sup>51</sup> USSC 2013 Statistics

It is sometimes interesting to compare what other criminal conduct places one at a level 20 or 24 offense severity.

A sentence at level 24 also does not promote equal treatment of similarly situated offenders, a factor courts are required to consider under 18 U.S.C. § 3553(a)(6). Here are some other offenses that merit level 24 under the guidelines:

Offense	Guidelines section
1 lb cocaine; 220 lbs marijuana	2D1.1
aggravated assault with a firearm, inflicting a permanent or life-threatening injury	2A2.2
criminal sexual assault of a minor under age 12	2A3.4
knowing endangerment from hazardous or toxic substances	2Q1.1
Bank robbery with death threat	2B3.1

In comparison to these offenses, reentry is in an utterly different category. Applying the same level would frustrate the goal of equal treatment under 18 U.S.C. § 3553(a)(6).

You might also distinguish your client from others facing the same charge with traditional mitigation factors such as age, border violence, family ties, age or circumstances of priors, *etc.*

## 5. Conclusion

It can be challenging and heartbreaking to represent people in § 1326 cases. You will witness U.S. immigration policy tearing families asunder and will be helpless to prevent it. You may not be able to communicate directly with your client and will rely on an interpreter; they may have utterly unrealistic expectations of our legal system both as far as how it functions and the gravity of their situation. It's important not to assume your § 1326 clients will plead guilty and get a guideline sentence; only with meticulous attention to the client's social history, and the circumstances of the offense, the deportation hearing, and the predicate offense will possible defenses come to light.

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## Chart for children of married parents

**Chart A: Determining Whether Children Born outside the U.S. Acquired Citizenship at Birth<sup>1</sup>** (if child born out of wedlock, see Chart B) -- **Please Note: A child cannot acquire citizenship at birth through an adoption.<sup>2</sup>**

STEP 1	STEP 2	STEP 3	STEP 4
Select period in which child was born	Select applicable parentage and immigration status of parents	Measure citizen parent's residence <b>PRIOR</b> to the child's birth against the requirements for the period in which child was born. The child acquired U.S. citizenship at birth if, at time of child's birth, citizen parent had already met applicable residence requirements.	Determine whether child has since lost U.S. citizenship. Citizenship was lost on the date it became impossible to meet necessary requirements—never before age 26. Individuals who have failed to meet residence requirements can regain citizenship by taking an oath of allegiance.
PERIOD	PARENTS	RESIDENCE REQUIRED OF USC PARENT	RESIDENCE REQUIRED OF CHILD <sup>3</sup>
Born prior to 5/24/34	Father or mother citizen	Citizen parent had resided in the U.S.	None
Born on/after 5/24/34 and prior to 1/14/41	Both parents citizens	One had resided in the U.S.	None
	One citizen and one alien parent	Citizen had resided in the U.S.	Either: 1) 2 years continuous physical presence <sup>4</sup> between the ages of 14 and 28, <sup>5</sup> or 2) if begun before 12/24/52, 5 years residence in U.S. or its outlying possessions between the ages 13 and 21, or 3) if begun before 10/27/72, 5 years continuous physical presence between the ages 14 and 28. <sup>6</sup> Individuals unaware of potential U.S. citizenship may fulfill the residence requirement through constructive physical presence. <sup>7</sup> No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. Individuals who failed to meet residence requirements can regain citizenship by taking an oath of allegiance. <sup>8</sup>
Born on/after 1/14/41 and prior to 12/24/52	Both parents citizens; or one citizen and one national <sup>9</sup>	One had resided in the U.S. or its outlying possessions.	None
	One citizen and one alien parent	Citizen had resided in U.S. or its outlying possessions 10 years, at least 5 of which were after age 16. If citizen parent served honorably in U.S. Armed Forces between 12/7/41 and 12/31/46, 5 of the required 10 years may have been after age 12. <sup>10</sup> If the citizen parent served honorably in U.S. Armed Services between 1/1/47 and 12/24/52, 5 of the required 10 years of physical presence may have been after age 14. <sup>11</sup>	If begun before 10/27/72, 2 or 5 years continuous physical presence <sup>12</sup> between ages 14 and 28. <sup>13</sup> If begun after 10/27/72, 2 years continuous physical presence between ages 14 and 28. Individuals unaware of potential U.S. citizenship may fulfill the residence requirement through constructive physical presence. <sup>14</sup> No retention requirements if either alien parent naturalized and child began to reside permanently in U.S. while under age 18, or if parent employed in certain occupations such as the U.S. Government. (This exemption is not applicable if parent transmitted under the Armed Services exceptions). Individuals who failed to meet residence requirements can regain citizenship by taking an oath of allegiance. <sup>15</sup>
Born on/after 12/24/52 and prior to 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possessions.	None <sup>16</sup>
	One citizen, one national parent	Citizen had been physically present in U.S or its outlying possessions for a continuous period of one year. <sup>17</sup>	None <sup>18</sup>
	One citizen, one alien parent	Citizen had been physically present in U.S. or its outlying possessions 10 years, at least 5 of which were after age 14. <sup>19 &amp; 20</sup>	None <sup>21</sup>
Born on/after 11/14/86	Both parents citizens	One had resided in the U.S. or its outlying possessions.	None <sup>22</sup>
	One citizen and one national parent	Citizen had been physically present in U.S. or its outlying possessions for continuous period of 1 year. <sup>23</sup>	None <sup>24</sup>
	One citizen, one alien parent	Citizen had been physically present in U.S. or its outlying possessions 5 years, at least 2 of which were after age 14. <sup>25</sup>	None <sup>26</sup>

Produced by the ILRC (October 2014) — Adapted from the INS Chart

**Please Note: This Chart is intended as a general reference guide and the ILRC recommends practitioners research the applicable laws and INS Interpretations for additional information. Please see notes on next page.**

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The information in these charts comes from case law, statutory language, the CIS policy manual, the Adjudicator's Field Manual, the Foreign Affairs Manual, and INS interpretations. Although the CIS policy manual supersedes previous policy memos and the Adjudicator's Field Manual, the CIS policy manual is silent on many subjects discussed at length in prior CIS policy statements and INS Interpretations. In the absence of guidance to the contrary from the CIS policy manual, the ILRC believes advocates should continue to use helpful clarification and guidance from prior CIS policy statements and INS Interpretations.

<sup>1</sup> Congress has passed many laws governing the acquisition of citizenship at birth, including the Act of May 24, 1934, the Nationality Act of 1940, the Act of March 16, 1956, and the Immigration and Nationality Amendments of 1986.

<sup>2</sup> See *Marquez-Marquez v. Gonzales*, 455 F.3d 548 (5th Cir. 2006) (holding that petitioner did not obtain citizenship at birth based on adoption by U.S. citizen since INA § 301(g) did not address citizenship through adoption); see also *Colaiani v. INS*, 490 F.3d 185 (2d Cir. 2007) (same); but see *Solis-Espinoza v. Gonzales*, 401 F.3d 1091 (9th Cir. 2005) (holding that a child acquired citizenship through biological father's wife when they were married at time of birth, father acknowledged child, and mother accepted her as her own); *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) (explaining that a child acquired U.S. citizenship at birth even though neither of his biological parents were citizens, but at the time of his birth his mother was married to a U.S. citizen).

<sup>3</sup> If an individual acquired citizenship but did not retain it, that person was a U.S. citizen until s/he failed to comply with the retention requirements. See 7 FAM 1133.2-2. If the individual regained U.S. citizenship by taking an oath of allegiance at a later date, that citizenship is not retroactive. This means that the person could not transmit citizenship to any children born between the time s/he lost citizenship and regained it. See 7 FAM 1140 App. L.

<sup>4</sup> For a discussion of continuous physical presence related to these provisions of the law, see INS Interpretations 301.1(b)(6).

<sup>5</sup> Allows for absences of fewer than 60 days in aggregate during 2-year period. Former INA 301(b), Pub. L. 92-582, 86 Stat. 1289. In 1972, Congress liberalized retention requirements, reducing the period of continuous physical presence from 5 years to 2 years. Act of Oct. 27, 1972, Pub. L. 92-582, 86 Stat. 1289. While the statute did not address retroactivity, INS Interpretations 301.1(b)(6)(vii) extended the 1972 2-year requirement to those born between 5/24/1934 and 1/13/1941. Per the interpretations, if someone lost citizenship having failed to satisfy the 5-year requirement but had satisfied the amended language for the 2-year requirement, the individual was regarded as never having lost citizenship, nor having interrupted citizenship status. INS Interpretations 301.1(b)(6)(vii).

<sup>6</sup> Allows for absences of less than 1 year in aggregate during the 5-year period. Former INA 301(b), Pub. L. 85-316, 71 Stat. 639.

<sup>7</sup> In some cases, applicants will be able to fulfill their retention requirements even though they were not physically present in the U.S. Naturalization law allows for applicants to "constructively" meet the retention requirement when they did not know earlier they had a claim to U.S. citizenship. This essentially waives the retention requirement. INS Interpretations 301.1(b)(6)(iii); see also 7 FAM 1120 App. K (detailed overview of unawareness). In order to meet this exception, the applicant must:

- Be provided with a reasonable opportunity to enter the United States after becoming aware of the claim of U.S. citizenship. *Matter of Yanez-Carrillo*, 10 I&N Dec. 366 (BIA 1963); and
- Enter the United States promptly. See *Matter of Farley*, 11 I&N Dec. 51, 53 (BIA 1965).

If the applicant satisfies these conditions, she is deemed present in the United States from a date immediately prior to her 23rd birthday (if under the 5-year requirement) or 26th birthday (if under the 2-year requirement) until her date of admission. See *Matter of Farley*, 11 I & N Dec. 51 (BIA 1965). This means that an applicant can be found to have constructive presence retroactively even if she is currently too old to fulfill the retention requirements. See *Matter of Navarrete*, 12 I.&N. Dec. 138, 141 (BIA 1967) (finding that someone over the age of 28 had had constructive presence and thus retained citizenship). The State Department also provides that constructive physical presence may apply in cases where an applicant presents a defense of impossibility of performance or official misinformation. See 7 FAM 1130 App. K; 7 FAM 1140 App. K.

<sup>8</sup> Under the 1994 Immigration and Nationality Technical Corrections Act, those who failed to meet the physical presence retention requirement may regain their citizenship by taking an oath of allegiance to the United States. See INA § 324(d)(1). This procedure does not apply citizenship retroactively for any period in which the person was not a citizen. *Id.* The person regains citizenship as of the date that the oath is taken. Since the oath does not restore citizenship, persons will be unable to transmit citizenship to their children born during the period between loss and resumption of U.S. citizenship. 61 FR 29651 (June 12, 1996).

<sup>9</sup> For a definition of "national," please see INA §§ 308 and 101(a)(29) and Chapter 4 of the ILRC's manual, *Naturalization and U.S. Citizenship: The Essential Legal Guide*.

<sup>10</sup> See INS Interpretations 301.1(b)(3)(ii) for a discussion of the residence requirements for parents who served in the Armed Forces between 12/7/41 and 12/31/46.

<sup>11</sup> INS Interpretations 301.1(b) and the Act of March 16, 1956, Public Law 84-430, 70 Stat. 50. Periods of honorable military service abroad may satisfy the physical presence requirement in the United States. 7 FAM 1133.3-3(d)INS Interpretations; § 301.1(b)(4)(ii).

<sup>12</sup> See Note 4, *supra*.

<sup>13</sup> Under the 1972 Amendment, persons who entered before October 27, 1972 were allowed to comply with the original 5-year requirement for a period extending beyond October 27, 1972 as long as the 5-year period began on or before October 26, 1972. See INS Interpretations 301.1(b)(6)(x). Individuals may prefer the longer requirement due to the more lenient absence standard: the 2-year requirement allows for absences of fewer than 60 days in aggregate; the 5-year requirement allows for absences less than 1 year in aggregate.

<sup>14</sup> See Note 7, *supra*.

<sup>15</sup> See Note 8, *supra*.

<sup>16</sup> People born on or after 10/10/52 have no retention requirements. INS Interpretations § 301.1(b)(6)(xii). Retention requirements were repealed by Act of 10/10/78 (Pub. L. 95-432, 92 Stat 1046).

<sup>17</sup> See Note 4, *supra*.

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<sup>18</sup> See Note 16, *supra*.

<sup>19</sup> See INA § 301(g) for exceptions to the physical presence requirements for people who served honorably in the U.S. military, were employed with the U.S. Government or with an intergovernmental international organization; or who were the dependent unmarried sons or daughters and member of the household of a parent in such military service or employment.

<sup>20</sup> Several recent cases have challenged the less favorable residence requirement for a married U.S. citizen parent (10 years, with 5 years after the age of 14) compared to the residence requirement for an unmarried U.S. citizen parent (1 year of previous continuous residence). The Ninth Circuit recently rejected the argument that the differing requirements violate the equal protection clause in *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008). The Supreme Court split 4-4 with Justice Kagan recused, leaving the Ninth Circuit ruling in effect. *Flores-Villar*, 559 U.S. 1005 (2011).

<sup>21</sup> See Note 16, *supra*.

<sup>22</sup> See Note 16, *supra*.

<sup>23</sup> See Note 4, *supra*.

<sup>24</sup> See Note 16, *supra*.

<sup>25</sup> See Note 20, *supra*.

<sup>26</sup> See Note 16, *supra*.

**CHART B: ACQUISITION OF CITIZENSHIP  
 DETERMINING IF CHILDREN BORN OUTSIDE THE U.S. AND  
 BORN OUT OF WEDLOCK ACQUIRED U.S. CITIZENSHIP AT BIRTH**

PART 1 — Mother was a U.S. citizen at the time of the child's birth.

PART 2 — Mother was not a U.S. citizen at the time of the child's birth and the child was legitimated or acknowledged by a U.S. citizen father.

**Please Note: A child cannot acquire citizenship at birth through an adoption.<sup>1</sup>**

**PART 1: MOTHER IS A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH**

<b>Date of Child's Birth:</b>	<b>Requirements:</b>
Prior to 12/24/52: <sup>2</sup>	Mother was a U.S. citizen who had resided in the U.S. or its outlying possessions at some point prior to birth of child. <b>EXCEPTION:</b> The child will not acquire citizenship through the U.S. citizen mother if he or she was legitimated by the father under the following circumstances: <sup>3</sup> 1. The child was born before 5/24/34; 2. The child was legitimated before turning 21; <u>AND</u> 3. The legitimation occurred before 1/13/41.
On/after 12/24/52:	Mother was U.S. citizen physically present in the U.S. or its outlying possessions for a continuous period of 1 year at some point prior to birth of child.

**PART 2: MOTHER WAS NOT A U.S. CITIZEN AT THE TIME OF THE CHILD'S BIRTH AND THE CHILD HAS BEEN LEGITIMATED OR ACKNOWLEDGED BY FATHER,<sup>4</sup> WHO WAS A U.S. CITIZEN WHEN CHILD WAS BORN<sup>5</sup>**

<b>Date of Child's Birth:</b>	<b>Requirements:</b>
Prior to 1/13/41:	1. Child legitimated at any time after birth, including adulthood, under law of father's domicile. 2. If so, use CHART A to determine if child acquired citizenship at birth.
On/after 1/13/41 and prior to 12/24/52:	1. Child legitimated before age 21 under law of father's domicile, or paternity established through court proceedings before 12/24/52. 2. If so, use CHART A to determine if child acquired citizenship at birth unless paternity established through court proceeding. <sup>6</sup>
On/after 12/24/52 and prior to 11/15/68:	1. Child legitimated before age 21 under law of father or child's domicile. <sup>7</sup> 2. If so, use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/68 and prior to 11/15/71:	<b>OPTION A:</b> 1. Child legitimated before age 21 under law of father or child's domicile. 2. If so, use CHART A to determine if child acquired citizenship at birth. <b>OPTION B:<sup>8</sup></b> 1. Child/father blood relationship established by clear and convincing evidence; <sup>9</sup> 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; <sup>10</sup> and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, <sup>11</sup> <u>or</u> father must acknowledge paternity of child in writing under oath, <u>or</u> paternity must be established by competent court. 5. If #s 1–4 are met, use CHART A to determine if child acquired citizenship at birth.
On/after 11/15/71: <sup>12</sup>	1. Child/father blood relationship established by clear and convincing evidence; <sup>8</sup> 2. Father must have been a U.S. citizen at the time of child's birth; 3. Father, unless deceased, must provide written statement under oath that he will provide financial support for child until s/he reaches 18; and 4. While child is under age 18, child must be legitimated under law of child's residence or domicile, <u>or</u> father must acknowledge paternity of child in writing under oath, <u>or</u> paternity must be established by competent court. 5. If #s 1–4 are met, use CHART A to determine if child acquired citizenship at birth. <sup>13</sup>

Produced by the ILRC (March 2014)

**Please Note: This Chart is intended as a general reference guide and the ILRC recommends practitioners research the applicable laws and INS Interpretations for additional information.**

## Endnotes for Chart B

<sup>1</sup> See *Marquez-Marquez v. Gonzales*, 455 F.3d 548 (5th Cir. 2006) (holding that petitioner did not obtain citizenship at birth based on adoption by U.S. citizen since INA § 301(g) did not address citizenship through adoption); see also *Colaiani v. INS*, 490 F.3d 185 (2d Cir. 2007) (same); but see *Scales v. INS*, 232 F.3d 1159 (9th Cir. 2000) (explaining that a child acquired U.S. citizenship at birth even though neither of his biological parents were citizens, but at the time of his birth his mother was married to a U.S. citizen); *Solis-Espinoza v. Gonzales*, 401 F.3d 1091 (9th Cir. 2005); see also 7 FAM 1131.4(a) (requiring an actual blood relationship; birth in wedlock insufficient to presume paternity for acquisition).

<sup>2</sup> A qualifying child born before 5/24/34 acquired U.S. citizenship when the Nationality Act of 1940, effective 1/13/41, bestowed citizenship upon the child retroactively to the date of birth.

<sup>3</sup> *Matter of M-*, 4 I&N Dec. 440, 443–44 (BIA 1951).

<sup>4</sup> Many of the criteria for “legitimation” look to the law of the child or father’s domicile. Note that the Fifth Circuit recently held that a child was “legitimated” under Mexican law when his father “acknowledged” him by placing his name on the child’s birth certificate. *Iracheta v. Holder*, 730 F.3d 419 (5th Cir. 2013) (reversing more than three decades of previous interpretation of Mexican requirements).

<sup>5</sup> If the child did not acquire citizenship through his or her mother, but was legitimated by a U.S. citizen father under the listed conditions, apply the acquisition law pertinent to legitimate children born in a foreign country. (CHART A) Please note that the United States Supreme Court ruled that even though the laws treat children born out of wedlock to U.S. citizen fathers differently than the laws treat children born out of wedlock to U.S. citizen mothers, those laws do not violate equal protection. See *Tuan Anh Nguyen v. INS*, 533 U.S. 53 (2001). In *United States v. Flores-Villar*, 536 F.3d 990 (9th Cir. 2008), the Ninth Circuit held that the legitimation requirements under 8 USC § 1409 for citizen fathers, but not for citizen mothers, did not offend principles of equal protection. The Supreme Court split 4-4 on the issue leaving the Ninth Circuit ruling in place. 131 S. Ct. 2312 (2011) (J. Kagan recused).

<sup>6</sup> The patchwork of amended laws in this period, some of which did not cross-reference existing laws, has produced several avenues for fulfilling the residency requirements during this period for legitimated children. In this period, if the father legitimates the child before the age of 21, the applicant can apply either the residency requirements set by § 201(g) of the Nationality Act or set by § 301(a)(7) of the former INA. 7 FAM 1134.5-3. Under the INA, one can qualify if the father has 10 years residence in the U.S., 5 of which are after the age of 16 and the child must reside in the U.S. for a period or periods totaling 5 years between the ages of 13 and 21. See 7 FAM 1134.2 (NA). (Or, if the father served honorably in the U.S. Armed Services after Dec. 7, 1941 and before December 31, 1946, then the father must have 10 years in the U.S., 5 of which after the age of 12. In this scenario the child need not be legitimated but must satisfy the INA’s retention requirements. See INA §201(i)). Under the INA, the father must have 10 years residence in the U.S., 5 after the age of 14. The child must have been in the U.S. for 5 years between ages 14 and 28. 7 FAM 1133.2-2 (former INA). However, if the paternity is established through court proceedings, he may only comply with the residence requirements of § 201(g) of the Nationality Act of 1940. Additionally, children of U.S. veterans born in this period may be eligible for citizenship under either the NA or the INA. *Y.T. v. Bell*, 478 F. Supp. 828 (W.D. Pa. 1979); 7 FAM 1134.4.

<sup>7</sup> For children born out of wedlock, legitimation under the statute in effect during this period, 8 USC § 1409(a) (1952), must be by the biological father. See *United States v. Marguet-Pillado*, 560 F.3d 1078 (9th Cir. 2009) (holding that a child born out of wedlock, neither of whose natural parents was a U.S. citizen at the time of his birth, cannot acquire citizenship at birth because of a subsequent action by a U.S. citizen); *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009) (explaining that a person born out of wedlock who claims citizenship by birth should actually share a blood relationship with U.S. citizen).

<sup>8</sup> Individuals born in this range can elect whether to establish citizenship either under Option A, “old” INA § 309, or Option B, “new” INA § 309, amended by the INAA, Pub. L. 99-653 (Nov. 14, 1986). The decision can be based on which requirements are easier for the individual to prove. See 7 FAM 1133.4-2(a)(3).

<sup>9</sup> Under the clear and convincing standard, INA § 309 does not require a blood test or any other specific type of evidence; the fact-finder must only come to “a firm belief in the truth of the facts asserted.” 7 FAM 1133.4-2; see, e.g., *Miller v. Albright*, 523 U.S. 420, 437 (1977) (noting that clear and convincing standard of proof of paternity does not require DNA evidence) (plurality opinion). Certainly DNA evidence would suffice, but it is unclear how much less convincing evidence could be and still overcome the “clear and convincing” hurdle. Practitioners would be prudent to have DNA testing conducted if possible.

<sup>10</sup> The statutory language does not technically require that the letter be written before the child was 18. See 8 USC § 1409(a)(3). Although there is no case law on point, advocates can nevertheless try to argue that a letter written by the father after the child reaches 18, coupled with proof of actual support while the child was under 18, should still satisfy this requirement. See *Miller v. Albright*, 523 U.S. 420, 432 (1998) (declining to interpret 8 USC § 1409(a)(3)); *U.S. v. Gomez-Orozco*, 188 F.3d 422 (7th Cir. Aug 05, 1999) (reversing to allow petitioner to explore claim to U.S. citizenship under, among others, 8 USC 1409(a) even where there was no written statement).

<sup>11</sup> Note that if a legitimation occurred, Option A provides the more favorable approach for acquisition of citizenship, not Option B. See Note 8, *supra*.

<sup>12</sup> If a child was already legitimated before 1986 (i.e. legitimated before age 21 under the law of the father or child’s domicile, described as Option A above), that child had already become a U.S. citizen when the new laws went into effect. Thus the more stringent laws enacted in 1986 (described as Option B above) are irrelevant to those children because they had already become U.S. citizens, and the new laws acknowledge that they cannot revoke that citizenship. Pub. L. 100-525, § 8(r), (Oct. 24, 1988).

<sup>13</sup> Note that if the child was born on or after 11/15/86, the residence requirement for the U.S. citizen father under CHART A changes.

**CHART C: DERIVATIVE CITIZENSHIP -- LAWFUL PERMANENT RESIDENT CHILDREN GAINING CITIZENSHIP THROUGH PARENTS' CITIZENSHIP<sup>1</sup>**

Date of Last Act	Requirements
Prior to 5/24/34: <sup>2</sup>	<ul style="list-style-type: none"> <li>a. Either one or both parents must have been naturalized prior to the child's 21<sup>st</sup> birthday;<sup>3</sup></li> <li>b. Child must be lawful permanent resident before the child's 21<sup>st</sup> birthday;<sup>4</sup></li> <li>c. Illegitimate child may derive through mother's naturalization only;</li> <li>d. Legitimated child must have been legitimated according to the laws of the father's domicile;<sup>5</sup></li> <li>e. Adopted child and stepchild cannot derive citizenship.</li> </ul>
5/24/34 to 1/12/41:	<ul style="list-style-type: none"> <li>a. Both parents must have been naturalized and begun lawful permanent residence in the U.S. prior to the child's 21<sup>st</sup> birthday;</li> <li>b. If only one parent naturalized and s/he is not widowed or separated, the child must have 5 years lawful permanent residence in the U.S. commencing before the 21<sup>st</sup> birthday, unless the other parent is already a U.S. citizen;<sup>6</sup></li> <li>c. Child must be lawful permanent resident before the child's 21<sup>st</sup> birthday;</li> <li>d. Illegitimate child may derive through mother's naturalization only, in which case the status of the other parent is irrelevant;</li> <li>e. Legitimated child must have been legitimated according to the laws of the father's domicile;<sup>7</sup></li> <li>f. Adopted child and stepchild cannot derive citizenship.</li> </ul>
1/13/41 to 12/23/52:	<ul style="list-style-type: none"> <li>a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen, or be deceased, or the parents must be legally separated<sup>8</sup> and the naturalizing parent must have legal custody;<sup>9</sup></li> <li>b. Parent or parents must have been naturalized prior to the child's 18<sup>th</sup> birthday;</li> <li>c. Child must have been lawfully admitted for permanent residence before the child's 18<sup>th</sup> birthday;</li> <li>d. Illegitimate child can only derive if while s/he was under 16, s/he became a lawful permanent resident and his/her mother naturalized and both of those events (naturalization of mother and permanent residence status of child) occurred on or after 1/13/41 and before 12/24/52;<sup>10</sup></li> <li>e. Legitimated child must be legitimated under the law of the child's residence or place of domicile before turning 16 and be in the legal custody of the legitimating parent;<sup>11</sup></li> <li>f. Adopted child and stepchild cannot derive citizenship.<sup>12</sup></li> </ul>
12/24/52 to 10/5/78: <sup>13</sup>	<ul style="list-style-type: none"> <li>a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,<sup>14</sup> or be deceased, or the parents must be legally separated<sup>15</sup> and the naturalizing parent must have custody;<sup>16</sup></li> <li>b. In the case of a child who was illegitimate at birth, the child must <u>not</u> be legitimated, and it must be the mother who naturalizes.<sup>17</sup> If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead;<sup>18</sup></li> <li>c. Parent or parents must have been naturalized prior to the child's 18<sup>th</sup> birthday;<sup>19</sup></li> <li>d. Child must have begun to reside permanently in U.S. (defined in most places as having been admitted for lawful permanent residence) before the child's 18<sup>th</sup> birthday;<sup>20</sup></li> <li>e. Child must be unmarried;<sup>21</sup></li> <li>f. Adopted child and stepchild cannot derive citizenship.<sup>22</sup></li> </ul>
10/5/78 to 2/26/01:	<ul style="list-style-type: none"> <li>a. Both parents must naturalize, or if only one parent naturalizes, the other parent must be either a U.S. citizen at the time of the child's birth and remain a U.S. citizen,<sup>23</sup> or be deceased,<sup>24</sup> or the parents must be legally separated<sup>25</sup> and the naturalizing parent must have legal custody;<sup>26</sup></li> <li>b. In the case of a child who was illegitimate at birth, the child must <u>not</u> be legitimated, and it must be the mother who naturalizes. If the child is legitimated, s/he can derive only if both parents naturalize, or the non-naturalizing parent is dead;<sup>27</sup></li> <li>c. Parent or parents must have been naturalized prior to the child's 18<sup>th</sup> birthday;<sup>28</sup></li> <li>d. Child must have begun to reside permanently in U.S. (defined in most places as having been admitted for lawful permanent residence) before the 18<sup>th</sup> birthday;<sup>29</sup></li> <li>e. Child must be unmarried;<sup>30</sup></li> <li>f. Adopted child may derive citizenship if the child is residing in the U.S. at the time of the adoptive parent(s)'s naturalization,<sup>31</sup> is in the custody<sup>32</sup> of the adoptive parent(s), is a lawful permanent resident and adoption occurred before s/he turned 18.<sup>33</sup> Stepchild cannot derive citizenship.<sup>34</sup></li> </ul>
Anyone who, on or after 2/27/01, meets the following requirements, is a U.S. citizen: <sup>35</sup> Another way to look at it is anyone born on/after 2/28/83 and meets the following requirements is a U.S. citizen.	<ul style="list-style-type: none"> <li>a. At least one parent is a U.S. citizen either by birth or naturalization;<sup>36</sup></li> <li>b. In the case of a child who was born out of wedlock, the mother must be the one who is or becomes a citizen<sup>37</sup> OR, if the father is a U.S. citizen through naturalization or other means then the child must have been legitimated by the father under either the law of the child's or father's residence or domicile and the legitimation must take place before the child reaches the age of 16;<sup>38</sup></li> <li>c. Child is under 18 years old;<sup>39</sup></li> <li>d. Child must be unmarried;<sup>40</sup></li> <li>e. Child is a lawful permanent resident;<sup>41</sup></li> <li>f. Child is residing in the U.S. in the legal and physical custody of the citizen parent;<sup>42</sup></li> <li>g. Adopted children qualify so long as s/he was adopted before the age of 16 and has been in the legal custody of, and has resided with, the adopting parent(s) for at least two years.<sup>43</sup> An adopted child who qualifies as an orphan under INA § 101(b)(1)(F) also will qualify for derivation.</li> </ul>

Produced by ILRC (March 2015) - This Chart is intended as a general reference guide. ILRC recommends practitioners research the applicable law.

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### Endnotes for Chart C:

The information in these charts comes from case law, statutory language, the CIS policy manual, the Adjudicator's Field Manual, the Foreign Affairs Manual, and INS interpretations. Although the CIS policy manual supersedes previous policy memos and the Adjudicator's Field Manual, the CIS policy manual is silent on many subjects discussed at length in prior CIS policy statements and INS Interpretations. In the absence of guidance to the contrary from the CIS policy manual, the ILRC believes advocates should continue to use helpful clarifications and guidance from prior CIS policy statements and INS Interpretations.

<sup>1</sup> Congress has passed many laws on derivation of citizenship, including the Act of May 24, 1934, the Nationality Act of 1940, the Immigration and Nationality Act sections 320 and 321, the Act of October 5, 1978, the Act of December 29, 1981, the Act of November 14, 1986, and the Child Citizenship Act of 2000.

<sup>2</sup> Prior to 1907 a mother could transmit citizenship only if she was divorced or widowed. See Levy, *U.S. Citizenship and Naturalization* § 5:12 (ed. 2013–14).

<sup>3</sup> It is the ILRC's position, and the ILRC believes that all advocates should argue, that the definition of "prior to the 18<sup>th</sup> birthday" or "prior to the 21<sup>st</sup> birthday" means prior to or on the date of the birthday. See *Duarte-Ceri v. Holder*, 630 F.3d 83 (2d Cir 2010); *Matter of L-M- and C-Y-C-*, 4 I&N Dec. 617 (BIA 1952) (finding that "prior to" included "prior to or on" the date with respect to retention requirements for acquisition of citizenship). Although the CIS Policy Manual is silent on the subject, CIS officers may not agree. See INS Interpretations 320.2.

<sup>4</sup> Prior to 1907 the child could take up residence in the U.S. after turning 21 years of age. See Levy, *U.S. Citizenship and Naturalization* § 5:12 (ed. 2013–14) (citing Sec. 5, Act of March 2, 1907).

<sup>5</sup> Legitimation could take place before or after the child turns 21. The child derives citizenship upon the naturalization of the parent(s) or upon the child taking up residence in the U.S. See 7 FAM 1135.3; INS Interpretations 320.1(b).

<sup>6</sup> The five-year period can commence before or after the naturalization of the parent and can last until after the child turns 21 and until after 1941. See Sec. 5, Act of March 2, 1907 as amended by Sec. 2, Act of May 24, 1934 and INS Interpretations 320.1(a)(3).

<sup>7</sup> See Note 5, *supra*.

<sup>8</sup> See *U.S. v. Casasola*, 670 F.3d 1023 (9th Cir. 2012) (rejecting equal protection challenge that "legal separation" requirement irrationally distinguished between married and legally separated parents). Circuit courts have split on what constitutes a "legal separation." See *Morgan v. A.G.*, 432 F.3d 226, 231–32 (3d Cir. 2005) (reviewing cases); 12-11 Bender's Immigr. Bull. 2 (2007). The Fourth, Fifth, and Seventh Circuits have required judicial decrees of limited or absolute divorce or separation. See *Afeta v. Gonzales*, 467 F.3d 402 (4th Cir. 2006); *Nehme v. INS*, 252 F.3d 415, 422 (5th Cir. 2001); *Wedderburn v. INS*, 215 F.3d 795, 799 (7th Cir. 2000); see also *Matter of H-*, 3 I&N Dec. 742 (BIA 1949) (requiring some sort of limited or absolute divorce through judicial proceedings). The Second, Third, and Ninth Circuits have required only a legal alteration which can occur through nonjudicial procedures. See *Lewis v. Gonzales*, 481 F.3d 125, 130–32 (2d Cir. 2007); *Bagot v. Ashcroft*, 398 F.3d 252 (3d Cir. 2005); *Minasyan v. Gonzales*, 401 F.3d 1069 (9th Cir. 2005). Where the actual "parents" of the child were never lawfully married, there could be no legal separation. For more on this topic, see *Bagot v. Ashcroft*, 398 F.3d 252 (3d Cir. 2005), and *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001). In *Henry v. Quarantillo*, 684 F. Supp. 2d 298 (E.D.N.Y. 2010), although the district court noted the possibility of "legal separation" of unwed parents according to a change to Jamaican law in 2005, it found a *nunc pro tunc* order establishing such legal separation of unwed parents insufficient to show legal custody for derivation purposes.

<sup>9</sup> See 7 FAM 1156.8. Until recently, the general rule was that if the parents have a joint custody decree (legal document), then both parents have legal custody for purposes of derivative citizenship. See Passport Bulletin 96-18 (Nov. 6, 1996). Yet, in the Ninth and Fifth Circuits, the courts of appeals ruled that the naturalizing parent must have sole legal custody for the child to derive citizenship and thus, at least in the Ninth and Fifth Circuits, a joint legal custody decree will not be sufficient to allow a child to derive citizenship. See *U.S. v. Casasola*, 670 F.3d 1023 (9th Cir. 2012); *Bustamante-Barrera v. Gonzales*, 447 F.3d 388 (5th Cir. 2006) (requiring naturalized citizen parent to have sole legal custody of the child for derivative citizenship); see also *Rodrigues v. Att'y Gen. of U.S.*, 321 Fed. App'x 166 (3d Cir. 2009).

When the parents have divorced or separated and the decree does not say who has custody of the child and the U.S. citizen parent has physical custody (meaning that the child lives with that parent), the child can derive citizenship through that parent provided all the other conditions are met. See Passport Bulletin 96-18 (Nov. 6, 1996) (referencing Passport Bulletin 93-2 (Jan. 8, 1993)). The Fifth Circuit has held that a *nunc pro tunc* order retroactively awarding the naturalized parent custody is not sufficient to show legal custody for purposes of derivation. See *U.S. v. Esparza*, 678 F.3d 389 (5th Cir. 2012). Although the CIS Policy Manual is silent on the subject, according to INS Interpretations 320.1(a)(6), in the absence of a state law or adjudication of a court dealing with the issue of legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for "derivation purposes," provided the required "legal separation" of the parents has taken place. See *Matter of M-*, 3 I&N Dec. 850 (BIA 1950). Where the actual "parents" of the child were never lawfully married, there can be no legal separation. See INS Interpretations 320.1(a)(6) (citing *In the Matter of H-*, 3 I&N Dec. 742 (BIA 1949)). Thus, illegitimate children cannot derive citizenship through a father's naturalization unless the father has legitimated the child, the child is in the father's legal custody, and the mother was either a citizen (by birth or naturalization) or the mother has died. For more on this topic, see *Bagot v. Ashcroft*, 398 F.3d 252 (3d Cir. 2005), and *Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001).

Citizenship derived through the mother by a child who was illegitimate at birth will not be lost due to a subsequent legitimation. See 7 Gordon, Mailman, and Yale-Lohr, *Immigration Law and Procedure*, § 98.03[4](e) (ed. 2012).

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The Administrative Appeals Office (AAO) has found that a Rabbinical Court decree awarding custody of a child to the child's mother can establish that the mother had legal custody of the child for purposes of INA § 321. See *Matter of [redacted]*, A18 378 029 (AAO Sept. 27, 2010); see also 87 *Interpreter Releases* 2120 (Nov. 1, 2010).

<sup>10</sup> See INS Interpretations 320.1(c).

<sup>11</sup> See INS Interpretations 320.1(a)(6) (explaining that in the absence of a state law or adjudication of a court dealing with the issue of legal custody, the parent having actual uncontested custody of the child is regarded as having the requisite legal custody for “derivation purposes,” provided the required “legal separation” of the parents has taken place); *Matter of M-*, 3 I&N Dec. 850 (BIA 1950); see also Note 9, *supra*. The only way that an illegitimate child can derive citizenship through a father's naturalization is if 1) the father legitimates the child, and 2) both parents naturalize (unless the mother is already a citizen, or the mother is dead). Under any other circumstances, an illegitimate child never derives from a father's naturalization. In 2015, the BIA found that a person born abroad to unmarried parents in a jurisdiction that has eliminated all legal distinctions between children based on the marital status of their parents or has a residence or domicile in that jurisdiction is considered a legitimate “child” under INA § 101(c)(1). *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015). The definition of a legitimate “child” under the Nationality Act of 1940, the law in effect from 1/13/41 to 12/23/52, is nearly identical to INA § 101(c)(1), and advocates should argue (when it would be beneficial) that this holding applies to the Nationality Act of 1940 as well.

<sup>12</sup> Although both CIS and the State Department take the position that adopted children during this period could not derive citizenship, an argument can be made that children who were adopted before turning 16 and who were in the custody of the adopting parent(s) could derive citizenship. See Levy, *U.S. Citizenship and Naturalization* § 5:14 (ed. 2013–14).

<sup>13</sup> Traditionally, the view has been that as long as all the conditions in this section are met before the child's 18<sup>th</sup> birthday, the child derived citizenship regardless of the order in which the events occurred. See Department of State Passport Bulletin 96-18, *New Interpretation of Claims to Citizenship Under Section 321(a) of the INA*, (Nov. 6, 1996). The BIA cited this Passport Bulletin in *In re Fuentes-Martínez*, 21 I&N Dec. 893 (BIA 1997); *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008); CIS, Dep't of Homeland Sec., Adjudicators' Field Manual, ch. 71, § 71.1(d)(2) (Feb. 2008) (“Since the order in which the requirements [of former § 321(a)] were satisfied was not stated in the statute, as long as the applicant meets the requirement of the statute before age 18 the applicant derives U.S. citizenship.”). But in *Jordon v. Att'y Gen. of the U.S.*, 424 F.3d 320 (3d Cir. 2005), the Third Circuit disagreed, finding that where the separation occurred after the parent naturalized, the child did not derive citizenship. The BIA has repeatedly criticized and declined to follow the Third Circuit, arguing that it did not matter whether the naturalized parent obtained legal custody of the child before or after naturalization, so long as the statutory requirements were satisfied before the child turned 18 years old. See *Matter of Douglas*, 26 I&N Dec. 197 (BIA 2013); *Matter of Baires-Larios*, 24 I&N Dec. 467 (BIA 2008). *Jordon* is only in effect in the Third Circuit. Levy, *U.S. Citizenship and Naturalization*, § 5:3 (ed. 2013–14); but see *Joseph v. Holder*, 720 F.3d 228 (5th Cir. 2013) (deciding without discussion that when a mother withdrew divorce decree and sole custody order before her naturalization, the child did not derive citizenship because she was not legally separated at time of her naturalization).

<sup>14</sup> See 7 FAM 1156.9 and 1156.10 for a general description of the law.

<sup>15</sup> See Note 8, *supra*.

<sup>16</sup> See Note 9, *supra*.

<sup>17</sup> In order for an illegitimate child to derive citizenship through her mother s/he must not have been legitimated prior to obtaining derivation of citizenship. See INA § 321(a)(3), as amended by Pub. L. No. 95-417. However, if the father legitimated the child before derivation, then both parents must naturalize in order for the child to qualify unless one parent is a U.S. citizen or is deceased. See INA § 321(a)(1) as amended by Pub. L. No. 95-417. If legitimation occurs after the child has derived citizenship, the child remains a U.S. citizen even if the father did not naturalize. See 7 Gordon, Mailman, and Yale-Lohr, *Immigration Law and Procedure*, § 98.03[4](e). In 2015, the BIA held in *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015) that although Jamaican law has eliminated any difference between the rights of children born in and out of wedlock, and thus all children born out of wedlock are considered “legitimate” for purposes of being a “child” in INA § 101(b)(1) and § (c)(1), “legitimation” for purposes of former INA § 321(a)(3) is defined differently. Because Jamaican law nonetheless provides a way to legitimate a child, a child will not be considered “legitimate” for former INA § 321(a)(3) absent an affirmative act by the parent. *Id.* It is unclear how this interpretation of former INA § 321(a)(3) will apply in jurisdictions that have eliminated all legal distinctions between children born in and out of wedlock where there is no way to legitimate the child.

<sup>18</sup> See INS Interpretations 320.1(c). Because the CIS Policy Manual is silent on this subject, advocates should argue that this rule still applies. Note that the Fifth Circuit recently held that a child was “legitimated” under Mexican law when his father “acknowledged” him by placing his name on the child's birth certificate. *Iracheta v. Holder*, 730 F.3d 419 (5th Cir. 2013) (reversing more than three decades of previous interpretation of Mexican requirements). In *Tavares v. AG*, 398 Fed. App'x 773 (3d Cir. 2010), the Third Circuit found that the applicant derived citizenship from his mother because he was not legitimated by his father under either Massachusetts or Cape Verde law.

<sup>19</sup> The 1952–1978 law required the naturalization of the parent(s) prior to the child's “16<sup>th</sup> birthday.” The 1978 law requiring the naturalization of the parent(s) prior to the “18<sup>th</sup> birthday” is retroactively applied to 12/24/52. See *In re Fuentes-Martínez*, 21 I&N Dec. 893 (BIA 1997) (citing Passport Bulletin 96-18).

<sup>20</sup> There is currently a circuit split on whether INA § 321(a)(5)'s requirement that a child “reside permanently” in the United States means that the child must be a lawful permanent resident. The Ninth Circuit, the Eleventh Circuit, and the BIA have all held that this language requires the child to become a lawful permanent

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resident before she turned 18 in order to obtain derivative citizenship. See *Romero-Ruiz v. Mukasey*, 538 F.3d 1057 (9th Cir. 2008); *U.S. v. Forey-Quintero*, 626 F.3d 1323 (11th Cir. 2010); *Matter of Nwozuzu*, 24 I&N Dec. 609 (BIA 2008). But the Second Circuit reversed *Nwozuzu*, holding that a child may derive citizenship if both parents naturalized while the child was still under 18 years old and was unmarried *even if the child was not a lawful permanent resident*. The Second Circuit found that “reside permanently” could include “something lesser.” *Nwozuzu v. Holder*, 726 F.3d 323 (2d Cir. 2013); see also *United States v. Juarez*, 672 F.3d 381 (5th Cir. 2012) (declining to interpret “reside permanently” but recognizing multiple interpretations).

<sup>21</sup> See INA § 101(c)(1).

<sup>22</sup> See Note 12, *supra*. In *Martinez-Madera v. Holder*, 559 F.3d 937 (9th Cir. 2009), the Ninth Circuit held that an individual could not derive U.S. citizenship from his stepfather by virtue of the state’s legitimation statute.

<sup>23</sup> See 7 FAM 1156.11 (Foreign Affairs Manual) for a general description of the law.

<sup>24</sup> “Death” includes “brain death” but not comas or persistent vegetative states. See *Ayton v. Holder*, 686 F.3d 331 (5th Cir. 2012).

<sup>25</sup> See Note 8, *supra*.

<sup>26</sup> See Note 9, *supra*.

<sup>27</sup> See Notes 11, 17 *supra*.

<sup>28</sup> See Note 19, *supra*.

<sup>29</sup> See Note 20, *supra*.

<sup>30</sup> See Note 21, *supra*.

<sup>31</sup> Adopted children must be residing in the U.S. pursuant to a lawful admission for permanent residence at the time of the adoptive parent(s)’ naturalization. See Passport Bulletin 96-18. Thus, in derivation cases for adopted children, the sequence of events can be important. This is different than the practice in derivation cases for biological children. See Note 13, *supra*.

<sup>32</sup> The 1978 amendment provided adopted children the opportunity to derive citizenship when they met the above criteria and were in the “custody” of the adoptive parent. In other amendments, Congress has specified whether the custody had to be legal, physical, or both. Given that Congress did not specify here whether legal custody or physical custody is required, advocates should argue that either should suffice. How “custody” is defined in this context will likely only come up where the adoptive parents are legally separated, or where the child has been living with someone other than the parents.

<sup>33</sup> Between 10/5/78 and 12/29/81, adopted children could only derive citizenship if adoption occurred before the child turned 16. See 12 USCIS-PM H(4)(C) n.10; INS Interp. 320.1 (d)(2).

<sup>34</sup> See *Matter of Guzman-Gomez*, 24 I&N Dec. 824 (BIA 2009) (holding that a child born outside the United States cannot obtain derivative citizenship by virtue of her relationship to a nonadoptive stepparent).

<sup>35</sup> People born between 2/27/83 and 2/26/01 may derive citizenship by satisfying the requirements of either this row or the “10/5/78 to 2/26/01” row. Note that the law is not retroactive, so individuals who are 18 years or older on February 27, 2001 do not qualify for citizenship under this law. See, e.g., *Mondaca-Vega v. Holder*, 718 F.3d 1075 (9th Cir. 2013).

<sup>36</sup> INA § 320 as amended by the Child Citizenship Act of 2000.

<sup>37</sup> See CIS, *Eligibility of Children Born out of Wedlock for Derivative Citizenship* (Sept. 26, 2003). The memo mentions only that naturalized mothers can confer citizenship upon their not yet legitimated children born out of wedlock under INA § 320. ILRC assumes that mothers who are U.S. citizens by other means also can confer citizenship under INA § 320 to such children.

<sup>38</sup> The text of INA § 320 as amended by the Child Citizenship Act of 2000 does not mention illegitimacy, but INA § 101(c)(1) excludes illegitimate children from the definition of “child,” unless legitimated by the father under either the law of the child’s domicile or the law of the father’s domicile. A person born abroad to unmarried parents in a jurisdiction that has eliminated all legal distinctions between children based on the marital status of their parents or has a residence or domicile in that jurisdiction is considered a legitimate “child” under INA § 101(c)(1). *Matter of Cross*, 26 I&N Dec. 485 (BIA 2015). In jurisdictions where legal distinctions remain, the legitimation requirement is a hurdle for two reasons. First, the legitimation must take place before the child turns 16. Once s/he turns 16, it is too late for the legitimation to count for § 320 citizenship purposes. Note that there is an argument, based on the fact that neither INA § 320 nor 8 CFR § 320.1 states the legitimation must occur before the 16<sup>th</sup> birthday, that such a legitimation could take place even between the 16<sup>th</sup> and 18<sup>th</sup> birthdays. This argument appears weak because of the definition of child found in INA §101(c), which applies to the citizenship and naturalization contexts. Second, the legitimation process can be complicated. It is important to note that the CIS Memo *Eligibility of Children Born out of Wedlock for Derivative Citizenship*, (Sept. 26, 2003), mentions only that naturalized mothers can confer citizenship upon their unlegitimated children born of wedlock under INA § 320. ILRC assumes that mothers who are U.S. citizens by other means such as birth in the U.S. also can confer citizenship under INA § 320 to such children.

<sup>39</sup> INA § 320 as amended by the Child Citizenship Act of 2000.

<sup>40</sup> INA § 320 as amended by the Child Citizenship Act of 2000.

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<sup>41</sup> INA § 320 as amended by the Child Citizenship Act of 2000. In *Walker v. Holder*, 589 F.3d 12 (1st Cir. 2009), the First Circuit held that an individual has not satisfied the requirement for “lawful admission for permanent residence” if that person obtained a green card through fraud or misrepresentation, even if the individual was a child when he first entered the United States with no control over the actions of his guardians.

<sup>42</sup> INA § 320 as amended by the Child Citizenship Act of 2000. It is the ILRC’s interpretation that for purposes of the Child Citizenship Act of 2000, CIS will presume that a child who was born out of wedlock and has not been legitimated and whose mother has naturalized or is a U.S. citizen through any other means (i.e., birth in U.S, acquisition or derivation) would be considered to be in the legal custody of the mother for § 320 citizenship. See CIS, *Eligibility of Children Born out of Wedlock for Derivative Citizenship* (Sept. 23, 2003). Additionally, 8 CFR § 320.1 sets forth several different scenarios in which CIS presumes, absent evidence to the contrary, that the parent has the necessary legal custody to apply for § 320 citizenship for her child. First, CIS will presume, absent evidence to the contrary, that both parents have legal custody for purposes of § 320 citizenship where their biological child currently resides with them and the parents are married, living in marital union, and not separated. Second, CIS will presume, absent evidence to the contrary, that a parent has legal custody for purposes of § 320 citizenship where her biological child lives with her, and the child’s other parent is dead. Third, CIS will presume, absent evidence to the contrary, that a parent has legal custody for purposes of § 320 citizenship if the child was born out of wedlock, the parent lives with the child, and the parent has legitimated the child while the child was under 16 and according to the laws of the legitimating parent or child’s domicile. Fourth, where the child’s parents are legally separated or divorced and a court or other appropriate governmental entity has legally awarded that the parents have joint custody of the child, CIS will presume, absent evidence to the contrary, that such joint custody means that both parents have legal custody of the child for purposes of § 320 citizenship. Fifth, in a case where the parents of the child have divorced or legally separated, CIS will find that for the purposes of citizenship under INA § 320 a parent has legal custody of the child where there has been an award of primary care, control, and maintenance of a minor child to a parent by a court or other appropriate government agency pursuant to the laws of the state or county of residence. Sixth, the regulations state there may be other factual circumstances under which CIS will find that a U.S. citizen parent has legal custody for purposes of § 320 citizenship. Advocates and their clients should be creative in thinking of other ways to prove that CIS should determine that a U.S. citizen parent has legal custody if the parent-child relationship does not fit into one of the categories listed above.

<sup>43</sup> INA § 320 as amended by the Child Citizenship Act of 2000 and INA § 101(b)(1).

**8 U.S.C. §1326  
PRETRIAL MOTIONS -  
COLLATERAL ATTACK ON PRIOR REMOVAL**

Heather E. Williams  
FPD, Eastern District of California  
August, 2007

What to look out for:

- Maybe client is a citizen.
- If client had status, maybe deportation is bad -
  - for failure to follow procedures.
  - *St. Cyr*.
- Possible to challenge and vacate prior in original court? (If you do and the conviction was the basis for the deport, reopen deportation proceeding.)

Other possible Pretrial motions:

- Motion to suppress identity
- Motion to suppress statements

Then, if none of the above work and your client won't plead = TRIAL:

- ▶ Was there official restraint from time of entry, making offense an attempt?
- ▶ The government can prove alienage by your client's own statements, but there must be at least 2 given under reliable circumstances. *U.S. v. Hernandez*, 105 F.3d 1330 (9th Cir. 1997).
- ▶ Use the Power of Judicial Notice, Statements Against Interest and Admissions by a Party Opponent to attack the Certificate of Non-Existence. FRE 201, 801(d)(2)(A), (C) and (D), and 804(b)(3).

# TO COLLATERALLY ATTACK PRIOR REMOVALS

## YOU WILL BE ASKING:

- (1) Client's status before removal?
- (2) Reason for removal?
- (3) St. Cyr apply?
- (4) Type of removal proceeding?
- (5) Exhaust immigration remedies?
- (6) Client prejudiced by removal?

## 1. CLIENT'S STATUS BEFORE REMOVAL?

### TYPES OF STATUS

Citizen: An alien is any person who is not a citizen or national of the United States. "National of the United States" means United States citizens, by birth or naturalization, and any "person who, though not a citizen of the United States, owes permanent allegiance to the United States." 8 U.S.C. §1101(a)(3) and (23).

*thru Department of Homeland Security, Bureau of Citizenship and Immigration Services (BCIS)*

Naturalized citizen

Derivative citizen - needs Application for Citizenship

Lawful Permanent Residency

Temporary Visitors

Temporary Protected Status

Asylum: Asylum is a form of protection that allows individuals who are in the United States to remain here, provided that they meet the definition of a refugee and are not barred from either applying for or being granted asylum, and eventually to adjust their status to lawful permanent resident.

Refugees: Every year millions of people around the world are displaced by war, famine, and civil and political unrest. Others are forced to flee their countries in order to escape the risk of death and torture at the hands of persecutors. The United States (U.S.) works with other governmental, international, and private organizations to provide food, health care, and shelter to millions of refugees throughout the world. In addition, the United States considers persons for resettlement to the U.S. as refugees. Those admitted must be of special humanitarian concern and demonstrate that they were persecuted, or have a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.

Humanitarian Parole: The Attorney General may, in his discretion, parole into the United States temporarily, under such conditions as he may prescribe on a case-by-case basis, for urgent humanitarian reasons or significant public benefit, any alien applying for admission to the United States.

*thru State Department, U.S. Consulate General*

NON-IMMIGRANT VISAS

⚙ Lawful Permanent Residency? **If "Yes," go to #2.** If "No," stop

⚙ Non-Immigrant (Temporary) Visa? **If could adjust to LPR, go to #2.** If "No," stop.

### TYPES OF TEMPORARY PERMISSION

BCIS & State Department Visas:

A – Diplomatic/Foreign Gov't Officials

B1, B2, & BCC - Business or Pleasure & VWPP

C - Aliens in transit

D – Crewmen

E1 & E2 - Treaty Traders & Treaty Investors Visas

F - Students Attending U.S. Schools (academic)

G - Foreign Officials of International Organizations

H - Temporary Workers

I - Foreign Media Representatives  
 J - Exchange Visitors  
 K - Fiancé(e) of a U.S. Citizen  
 L - Intra-Company Transferee  
 M - Students Attending U.S. Schools (vocational & language)  
 O - Temporary workers (exceptional or outstanding ability)  
 P - Workers - athletes or entertainers  
 Q - International Cultural Exchange  
 R - Religious Workers  
 S - Witness/Informant  
 T - Victim of Severe Form of Trafficking in Persons  
 TN - NAFTA  
 TWOV - Transit without Visas  
 U - Victims of Certain Crimes  
 V - Second Preference Beneficiaries

Can adjust to LAWFUL PERMANENT RESIDENT if:

- Family member
- Employment
- Physicians in underserved areas
- Investment
- Adjusting as asylee/refugee
- Diversity Lottery
- International adoption
- Violence Against Women Act (VAWA)
- Convention Against Torture (CAT) [Foreign Affairs Reform and Restructuring Act of 1998, Article III of CAT]
- "The Registry" Provision of the INA
- "Special Immigrant"
- T or U Visa holder
- Country-Specific Adjustment
  - Cuban
  - Haitian
  - Iraqi
  - Nicaraguan
  - Central American
  - Syrian
  - Vietnam, Cambodia, Laos
- Asylum
- Refugee
- Humanitarian Parole
- Protected Status:
  - Burundi
  - Nicaragua
  - El Salvador
  - Sierra Leone
  - Honduras
  - Somalia
  - Liberia
  - Sudan
  - Montserrat

⚙ Undocumented? **If could have qualified for Temporary Status, then could have qualified for LPR, go to #2.** If not, stop.

**2. IF CLIENT WAS ONCE AN LPR OR COULD HAVE ADJUSTED TO LPR STATUS, ASK THE REASON FOR REMOVAL.**

- ⊗ Any reason except conviction for aggravated felony? **If “Yes,” go to #3.**
- ⊗ Aggravated felony? If “Yes,” stop . . .  
**UNLESS** (a) conviction later determined to NOT be aggravated felony, OR  
(b) ***INS v. St. Cyr***, 533 U.S. 289 (2001), applies:

***INS v. St. Cyr***, 533 U.S. 289 (2001)                      ***Toia v. Fasano***, 334 F.3d 917 (9<sup>th</sup> Cir. 2003)  
***Calcano-Martinez v. INS***, 533 U.S. 348 (2001)        ***U.S. v. Leon-Paz***, \_\_\_ F.3d \_\_\_ (9<sup>th</sup> Cir 2003)

**St. Cyr’s Case**

1986                      St. Cyr admitted to US as LPR.  
3/8/96                    St. Cyr convicted in Connecticut of sale of controlled substance. Under §212(c) in effect at this time, St. Cyr eligible for “waiver of deportation” (now called “suspension of removal.”)  
4/24/96                   Antiterrorism and Effective Death Penalty ACT (AEDPA) enacted.  
9/30/96                   Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) enacted.  
4/10/97                   Removal proceedings started against St. Cyr.

- a. Was the change of plea (not applicable to trials because person needs to plea intending to benefit from §212(c) relief) before 4/24/96? **If “Yes,” go to B.** If “No,” stop.
- b. Was client an LPR when s/he pled guilty? **If “Yes,” go to C.** If “No,” stop.
- c. Was client in the country at least 7 years before deportation? **If “Yes,” go to D.** If “No,” stop.
- d. Was the crime pled to what was then an aggravated felony and did the client receive more than 5 years imprisonment? **If “No,” file your motions and petitions.** If “Yes,” stop.
- e. OR was the offense pled to deportable, but by removal hearing considered an aggravated felony, and did the client receive more than 5 years? **If “No,” check out #3 - The Removal Proceeding.** If “Yes,” stop.

**3. WHAT HAPPENED DURING THE REMOVAL PROCEEDING?**

- ⊗ Was alien out-of-custody and fail to receive Immigration letter with Notice of Hearing, meeting with Immigration official, or Immigration action, letter was returned to Immigration and Immigration did not try to locate alien?

- ⊗ Was there a hearing with an Immigration Judge (IJ)?
  - Request a copy of the hearing tape. Then go through this checklist.  
**Removal Hearing Checklist**

The IJ must advise each alien independently of the following:

- (1) Right to representation;
- (2) (a) Availability of free legal services programs qualified under the law and organizations recognized pursuant to law;  
(b) The defendant wanted counsel;
- (3) Received a list of such programs and a copy of Form I-618, Written Notice of Appeal Rights;

- (4) Reasonable opportunity to examine/object to evidence against him, present evidence on own behalf and to cross-examine the witnesses;
- (5) Under oath;
- (6) Read factual allegations and charges in Order to Show Cause (OSC) to defendant, explained them in nontechnical language, and entered OSC as an exhibit;
- (7) If defendant admits factual allegations and deportability, determines deportability established by admissions;
- (8) Notifies, if finally deported, deportation will be to the country designated by him;
- (9) Render decision, discussing evidence and deportability findings;
- (10) Notifies defendant of decision, either by mail, if a written decision, or in his presence orally;
- (11) Informed defendant of right to apply for withholding of deportation;
- (12) Notify of relief available: cancellation, adjustment and registry, when "apparent eligibility" in the record (length of time in U.S., U.S. citizen children/spouse/immediate family, asylum, etc.)

Also consider . . .

- Was there "Full and Fair Hearing?"
- Did the IJ
  - ▶ Fail to grant a continuance?
  - ▶ Act racist or bigoted?
  - ▶ Fail to explain about or issue subpoenas?
  - ▶ Fail to allow enough time to get a lawyer?
  - ▶ Do anything else that just didn't seem right?

**If any on checklist not done, GO TO #4.** If IJ did everything right, stop.

⊗ Was the removal expedited?

**If "Yes" client qualifies for relief and never had a chance, skip #4, GO TO #5.**

#### **4. DID CLIENT EXHAUST IMMIGRATION REMEDIES?**

⊗ Appeal? **If "Yes," GO TO #5.**

If "No," was appeal allowed or advised of?

- ▶ **If "Yes," be creative about why no review was sought and go to #5.**
- ▶ If "No," St. Cyr (#2 A-E above) apply? If "No," stop. **If "Yes," go to #5.**

#### **5. WAS CLIENT PREJUDICED?**

- ▶ Family
- ▶ Work
- ▶ Time here
- ▶ Medical problems
- ▶ Any fact which plucks the heart strings

Attorney Name  
 State Bar No. #####  
 Address  
 City, State Zip Code  
 Telephone: (###) #####  
 Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF ARIZONA

United States of America,	)	Case No. CR 00-1111-ABC
	)	MOTION TO DISMISS INDICTMENT -
Plaintiff,	)	UNLAWFUL EXCLUSION
	)	
vs.	)	<b>OR</b>
	)	Case No. CV 00-1111-ABC
ABG,	)	[Habeas from CR 99-222-EFG]
	)	MOTION TO VACATE, SET ASIDE
Defendant.	)	OR CORRECT SENTENCE
	)	[28 USC §2255]

Defendant, ABG, pursuant to the U.S. Const., Amend. V, Fed.R.Crim.Proc., Rule 11(b)(3), (d) and (e), and numerous cases, statutes and regulations, requests this Court dismiss the Indictment in this case based upon the unlawful June 6, 2000 removal on his February, 1997 exclusion order after his unlawful October, 1996 deportation, based upon the following:

**STATEMENT OF FACTS**

ABG was born in Mexico in 1970. See Attachment A - birth certificate and translation. In 1972, he entered the United States at age 2 with his mother, both undocumented, and resided in the United States continuously since that time (except when he was deported to Mexico). To the best of his recollection, age 2 was the last time before deportation he entered the United States.<sup>1</sup> At all times mentioned below, ABG spoke fluent English.

3/7/87 Mother married Stepfather, a U.S. Citizen. See Attachment C - marriage license. ABG, age 17, became eligible to be a condition permanent resident. I.N.A. §§201(b)(2)(A)(i) and 101(b)(1)(B); 8 U.S.C. §§1151(b)(2)(A)(i) and 1101(b)(1)(B). Counsel does not know if application was made then for ABG's conditional permanent residency.

5/5/87 - ABG, age 17, applied for temporary residence under amnesty, I.N.A. §245A (8  
 5/4/88 U.S.C. §1255a). See Attachment B - old statute. See also 8 C.F.R. §245a.2.<sup>2</sup>

<sup>1</sup> At ABG's deportation hearing in 1996, INS alleged an October 22, 1996 illegal entry date. This was amended to May 1, 1985, which ABG admitted. Counsel is not sure where this date. ABG would explain he admitted that date being rather confused about what was being asked and, in truth, last entered the United States when he was 2 years old.

<sup>2</sup> While eligibility required continuous residency since entry before January 1, 1982 and physical presence from November 6, 1986 through when the application was filed, eligibility was not "affected by entries to the United

- 5/2/88 ABG was granted a Temporary Resident Alien Card pursuant to I.N.A. §245A (8 U.S.C. §1255a). See Attachment D - Notice of Termination.
- 4/24/90 ABG convicted of shoplift/failure to appear, Tucson City Court, #2001497, fined \$137 and \$50, respectively. See Attachment J - chart listing prior convictions.
- 5/2/90 or 12/1/90 ABG eligible for permanent resident status.
- 3/9/91 ABG convicted of Domestic Violence/Assault, Tucson City Court, #2217869, 24 months probation and \$210 fine, concurrent with #15575 below. See Attachment J.
- 4/24/91 ABG convicted in Tucson City Court of (1) Domestic Violence/Assault, #15465, \$350 restitution, (2) Theft, #15575, \$140 restitution, (3) Domestic Violence/Assault, #15641, and (4) Shoplift, #2282115, all concurrent 24 month probation and \$210 fine, and (5) Shoplift, #5040861, 12 month probation, \$400 fine. See Attachment J.
- 12/2/91 43-month limit for filing for permanent residency expires.
- 9/8/93 ABG pled guilty in Pima County (Arizona) Superior Court to aggravated assault resulting in temporary injury or disfigurement, a Class 4 Felony, the kidnaping and dangerous nature allegations to be dismissed. See Attachment E - Presentence Report, page 1.
- 10/27/93 ABG was sentenced to 4 years in the Arizona Department of Corrections (ADOC), the presumptive term carrying parole eligibility after half time served. See Attachment F - Judgment and Conviction. By this date, ABG's mother and his stepfather had died<sup>3</sup>. See Attachment E.
- 2/4/96 U.S. Immigration and Naturalization Service (I.N.S.) sent ABG a Notice of Intent to Terminate his Temporary Residency pursuant to 8 U.S.C. §1255a(b)(2). See Attachment G. It is returned unclaimed as it was sent to ABG's mother's house, though I.N.S. knew ABG was in ADOC custody at the time because it had the commitment paper in it's a-file and it had a detainer on him at ADOC. Arizona State Department of Corrections Web Site, <http://www.adc.state.az.us/cgi-bin/IDetainerWarrant.cgi/0667090046204020915>.
- 3/7/96 I.N.S. terminates ABG's temporary resident alien status. See Attachment D.

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States subsequent to January 1, 1982 that were not documented on Service Form I-94, Arrival-Departure Record.” 8 C.F.R. §245a.2(b)(1) and (8). “Continuous residence” would occur if “(n)o single absence from the United States has exceeded forty-five (45) days, and the aggregate of all absences has not exceeded one hundred and eighty (180) days between the date the application for temporary resident status is filed, . . . ; (t)he alien was maintaining a residence in the United States; and (t)he alien's departure from the United States was not based on an order of deportation.” 8 C.F.R. §245a.2(h)(1).

Therefore, BELLO-GALLEGOS' admission in his 1996 deportation hearing of a last entry in May, 1985 would not invalidate his temporary residency nor affect his 7-year requirement for INA §212(c) (8 U.S.C. §1182(c)) relief.

<sup>3</sup> Mother died August, 1993. Counsel has not yet learned when Stepfather died.

- 4/24/96 *AEDPA becomes effective. §212(c) relief, available to legal permanent residents (LPRs) in deportation proceedings, no longer exists.*
- 9/30/96 *Date many believed IIRIRA amendments became effective. IIRIRA would render ABG's aggravated assault an aggravated felony as the definition for a "crime of violence" changed from 5 or more years imprisonment to 1 or more years. C.f. Cortez-Felipe v. INS, 245 F.3d 1054, 1057 (9<sup>th</sup> Cir. 2001).*
- 10/22/96 Order to Show Cause (OSC) regarding Deportation filed against ABG, citing entry without inspection and conviction for an aggravated felony as grounds for deportation. See Attachment H.
- 10/25/96 ABG release from ADOC to I.N.S. and detained.
- 11/4/96 ABG's deportation hearing. See Attachment I - partial transcript of deportation hearing. By this time, ABG had been in the United States 24+ years. This was a mass deportation hearing involved 15 other aliens. The Immigration Judge (I.J.) Scott Jeffries briefly mentioned the appeal right to entire group (p.1, l.42-43), but did not ask whether they had received a notice of appeal rights (p.1, l.1 - p.3, l.1).  
The I.J. questioned ABG individually in English (p.14, l.27 - p.16, l.40). The I.J. ordered deportation and asked ABG whether he wanted to accept or appeal; ABG accepted. Despite the fact the Presentence Report for his felony conviction (Attachment E) was in his A-file, including all the family information, the I.J. did not advise ABG of his right to discretionary relief.
- 11/5/96 ABG attempts to enter the United States through the Grand Avenue, Nogales, Port of Entry. See Attachment K - Form I-213. A Form I-110 for exclusion was filed that date, alleging as grounds for exclusion:  
[1] alien convicted of or admitting having committed or who admits acts for the element of a crime of moral turpitude [I.N.A. §212(a)(2)(A)(i)(I); 8 U.S.C. §1182(a)(2)(A)(i)(I)];  
[2] alien who seeks admission to United States within 5 years after a departure or removal after a failure or refusal to appear or remain at a deportation or admissibility hearing [I.N.A. §212(a)(6)(B); 8 U.S.C. §1181(a)(6)(B)];  
[3] alien who make a false claim of United States citizenship [I.N.A. §212(a)(6)(C); 8 U.S.C. §1182(a)(6)(C)]; and  
[4] alien who applies for admission to the United States without possessing the valid documents [I.N.A. §212(a)(7)(A)(i)(I); 8 U.S.C. §1182(a)(7)(A)(i)(I)].  
See Attachment L.<sup>4</sup>
- 12/23/96 ABG was charged by Information in CR 96-832-TUC-WDB with illegal reentry after deportation and pleaded guilty to the Information with a written plea agreement. See Attachment M - plea agreement. Page 3 of that agreement required ABG to stipulate to an order of deportation or exclusion. The factual basis states ABG had a lawful deportation before reentering.
- 2/28/97 Pursuant to the terms of his plea agreement, ABG was released from the U.S. Marshal's custody to attend an exclusion hearing with I.N.S. In the exclusion

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<sup>4</sup> The Form notes ABG had not applied for §212(c) discretionary relief. ABG was not advised he could.

hearing, the second ground stated above was not pursued. See Attachment N - transcript of hearing. ABG acknowledged a basis for the other three (3) grounds.<sup>5</sup> See Attachment N2-3. He was ordered excluded that date. See Attachments N4 and O.

3/10/97 ABG sentenced in Case No. CR 96-832-TUC-WDB to 46 months imprisonment, followed by 3 years supervised release. He is presently pending a revocation of his supervised release in that matter and a 28 U.S.C. §2255 motion has been filed attacking the first deportation and removal.

4/97 *IIRIRA's true effective date, rendering ABG's Aggravated Assault an aggravated felony, 7 months after his deportation hearing alleging it as an aggravated felony. Cortez-Felipe at 1057.*

6/6/00 ABG was removed from the United States. See Attachment P.

At the time of ABG's 1996 deportation hearing, ABG could have presented the following towards his §212(c) relief (each supported by Attachments Q-W):

- ABG had 3 U.S. citizen children.
- ABG had U.S. citizen fiancée who was willing to house and help support ABG.
- ABG's brother, sister and aunt were U.S. citizens.
- ABG's grandmother, an LPR, was living in Tucson, Arizona and very ill at the time. ABG wished to care for his grandfather. He died in early 1997.
- ABG's brother was willing to support ABG and provide employment for him in his landscaping company.
- ABG's entire formal education occurred in the United States. He was fluent in speaking, reading and writing English.
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### **ARGUMENT**

**ABG' Constitutional, Statutory and Regulatory Rights Were Violated in His Earlier Deportation Hearing, Rendering Any Reentry Afterwards Unnecessary and Any Exclusion Based on That Reentry, Which Would Not Have Occurred **But For** the Unlawful Deportation, Unlawful.**

#### **I.**

### **Deportation and Exclusion Can Be Reviewed in the Criminal Proceeding**

An alien may not be convicted under 8 U.S.C. §1326 unless he has previously been lawfully deported, excluded, removed or denied admission. United States v. Bejar-Matrecios, 618 F.2d 81, 82 (9th Cir. 1980). Any defendant charged under §1326 has the right to mount a collateral attack on the lawfulness of a prior deportation or exclusion order before such order may be used to prove the removal element of the charge. 8 U.S.C. §1326(d); United States v. Mendoza-Lopez, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 771 (1987); United States v. Arce-Hernandez, 163 F.3d 559, 563 (9th Cir. 1999). However, "the lawfulness of the prior deportation [or exclusion] is not an element of the offense under §1326" and, as

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<sup>5</sup> The crime of moral turpitude alleged was the aggravated assault conviction of 1993.

such, the court, not a jury, decides such lawfulness. United States v. Alvarado-Delgado, 98 F.3d 492, 493 (9th Cir. 1996), *cert. denied* 519 U.S. 1155, 117 S.Ct. 1096, 137 L.Ed.2d 228 (1997); 8 U.S.C. §1326(d).

“Even if a statute does not so provide, ‘a collateral challenge to the use of a deportation proceeding as an element of a criminal offense must be permitted where the deportation proceedings effectively eliminates the right of the alien to obtain judicial review.’”

United States v. Alvarenga-Villalobos, 271 F.3d 1169, 1173 (9<sup>th</sup> Cir. 2001)., citing Mendoza-Lopez at 839. The appellate court further quoted Mendoza-Lopez, saying:

“We note parenthetically that permitting collateral challenge to the validity of deportation orders in proceedings under §1326 does not create an opportunity for aliens to delay deportation, since the collateral challenge we recognize today is available only in criminal proceedings instituted after reentry.”

Alvarenga-Villalobos at 1173, citing Mendoza-Lopez at 839, f.17.

In Mendoza-Lopez, the Supreme Court was “troubled” by the idea the government could use an administrative proceeding to establish the element of a criminal offense. Such “bootstrapping” will only be tolerated under due process if a defendant can challenge the procedural deficiencies of the earlier proceeding.

“If the statute §1326 envisions that a court may impose penalties for *any* reentry, regardless of how violative of the rights of the alien the deportation proceeding may have been, such a statute does not comport with the constitutional requirements of due process.”

Mendoza-Lopez at 837. The Court however declined to specifically spell out “which procedural errors are so fundamental that they may functionally deprive the alien of judicial review, requiring that the result of the hearing in which they took place not be used to support a criminal conviction.” Id at 839, n.17.

Any procedural defect which “abort[s] the basic trial process” or “den[ies the adversarial process] altogether” is fundamentally unfair. Rose v. Clark, 478 U.S. 570, 578, n.6 (1986). Such an error, depriving the individual of the basic protection of the adversarial process, so eviscerates the process that the proceedings “cannot reliably serve as a vehicle for determination of guilt or innocence”. Id. Such protections are “intended to assure that ... trials lead to fair and correct judgments”. Id at 579.

Where a determination made in an administrative proceeding plays a critical role in a subsequent criminal sanction, there must be some meaningful review of the administrative proceeding. Mendoza-Lopez at 837-838. Depriving an alien of the right to have the disposition in a deportation hearing reviewed in a judicial forum requires, at a minimum, that review be made available in any subsequent proceeding in which the result of the deportation proceeding is used to establish an element of a criminal offense. Id at 838.

#### **A. NO RES JUDICATA - I.N.S. VS. CRIMINAL COURTS.**

Next, *res judicata* does not prohibit this Court from looking at the validity of a final deportation order in this criminal case. C.f. 8 U.S.C. §1252(g). While it might be final for purposes of reopening the immigration case, it is absolutely reviewable in an illegal reentry case. Alvarenga-Villalobos supra. Furthermore, while I.N.S. v. St. Cyr, 533 U.S. 289, 295-296, 121 S.Ct. 2271, 2276-2277, 150 L.Ed.2d 347 (2001), did not render its holding retroactive in immigration cases, it did not address its applicability in criminal illegal reentry cases.

Additionally, ABG is not asking this Court to review an executed deportation order for

the purpose of overturning or vacating it. ABG is only asking this Court to determine if the process leading to the deportation order followed constitutional due process under the 5<sup>th</sup> Amendment.

In this case, as in all 8 U.S.C. §1326 illegal reentry cases, the final deportation orders **must** be reviewable for the Government to establish that element of the offense. Case law and statute recognize this. Mendoza-Lopez, *supra* and 8 U.S.C. §1326(d).

Additionally, retroactivity is not a consideration because ABG is not trying to apply St. Cyr to his deportation order for the purpose of reversing it. ABG is instead requesting this Court review that proceeding to see if it satisfied due process and thereby satisfies that deportation element of the §1326 charge. Retroactivity is not an issue.

Therefore, ABG can collaterally attack his 1997 exclusion (and resulting 2000 removal) and his 1996 deportation in his subsequent criminal proceeding for illegal re-entry, because neither the exclusion nor the deportation proceedings provided him a meaningful opportunity for judicial review. United States v. Arrieta, 224 F.3d 1076, 1079 (9<sup>th</sup> Cir. 2000).

#### **B. ABG DID NOT KNOW HE HAD REMEDIES TO EXHAUST.**

8 U.S.C. §1326(d) says, for collateral attack in the criminal proceeding, the defendant must show he exhausted all administrative remedies. While the entire group in ABG's deportation hearing was advised of its right to appeal, because of his presumed aggravated felony conviction, it is unclear in the hearing if that right was explained to him. Certainly the other remedies (application for permanent residence, option of voluntary departure, §212(c) relief) were not explained to him and should have been.

Also, given the then-state of the law, had ABG understood he could file an appeal and done so, it would have been summarily denied on the basis of his then-believed ineligibility as an aggravated felon.

All administrative remedies have been exhausted. ABG can collaterally attack his 1996 deportation in a subsequent criminal proceeding for illegal re-entry, because the deportation proceedings did not provide him a meaningful opportunity for judicial review. v. Arrieta at 1079.

#### **C. ABILITY TO ATTACK DEPORTATION THROUGH EXCLUSION PROCEEDING**

When the government relies upon a subsequent immigration proceeding as the predicate removal for a §1326 prosecution, Mendoza-Lopez, with limitations, permits the defendant to demonstrate the original immigration proceeding was "so procedurally flawed that it 'effectively eliminate[d] the right of the alien to obtain judicial review,'" violating due process. Alvarado-Delgado at 493, citing Mendoza-Lopez at 840.

#### **D. SUBJECT MATTER JURISDICTION**

As this motion is a review of the exclusion and deportation proceedings **not** with the goal of reopening or overturning their decisions, subject matter jurisdiction exists, contrary to I.N.A. §242(g)/8 U.S.C. §1252(g). Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471, 484, 119 S.Ct. 936, 142 L.Ed.2d 940 (1999) (AADC). This statute took from the district court the jurisdiction to review selective enforcement claims.

If ABG was asking this Court to review his deportation for the purpose of vacating the order, this Court would not have subject matter jurisdiction. But that is not the case. This Court is being asked to look at the deportation to determine if due process was followed, making the deportation lawful and satisfying that element of the illegal reentry after deportation offense. Subject matter jurisdiction exists with this Court in this limited context.

**II.**  
**1996 Deportation Was Unlawful**

**A. SUMMARY**

Many believed the IIRIRA amendments, which changed the definition of “aggravated felony,” came into effect on September 30, 1996. I.N.S. waited to issue an OSC against ABG until after September 30, 1996, so his conviction could be classified as an aggravated felony under IIRIRA. I.N.S. purposefully delayed the initiation of proceedings to gain a tactical advantage over ABG. The I.N.S. should be estopped from taking such action.

On November 4, 1996, ABG had his deportation hearing in a group with 15 other individuals. I.J. Jeffries did not advise ABG individually of his right to appeal and did not ask him if he understood that right. I.J. Jeffries also did not inform ABG of his right to seek any form of discretionary relief. When ABG questioned the OSC because of the erroneous date of entry, the I.J. simply said the mistake had been amended. However, the amended date of May 1, 1985 was also erroneous, considering ABG last entered in 1972. Had he last entered in 1985, he would not have been eligible for the temporary resident status he was granted under amnesty in 1988. Therefore, despite ABG’s confused admission to that date, it was obviously erroneous by the A-file paperwork.

If ABG was an LPR when his deportation hearing occurred, he would have been eligible for §212(c) relief. Therefore, the ultimate questions to be decided are:

- ~ What was ABG’s status once his temporary residency was terminated?
- ~ Did the I.J. deprive ABG of due process by not affording him the opportunity to apply to be a legal permanent resident within his deportation?

Because of I.N.S.’ undue delay, it is estopped from not treating ABG as a conditional permanent resident through the marriage of ABG’s mother and stepfather, a U.S. citizen. The deportation is invalid because he was not afforded relief available to a permanent resident.

**B. REQUIREMENTS FOR LAWFUL DEPORTATION, EXCLUSION OR REMOVAL**

**1. Obligations of the Immigration Judge**

Aliens have the privilege of having counsel at their own expense at deportation hearings. 8 U.S.C. §1252(b)(2); 8 C.F.R. §240.42. Due process requires it. U.S. Const., amend. V. INS regulations require immigration judges to do the following:

1. Advise defendant of his right to representation, at no expense to the Government, by counsel of his own choice authorized to practice in the proceedings, and require him to state then and there whether he desires representation;
2. Advise the defendant of the availability of free legal services programs qualified under the law and organizations recognized pursuant to law located within the district where the deportation hearings are held;
3. Ascertain defendant has received a list of such programs and a copy of Form I-618, Written Notice of Appeal Rights;
4. Advise defendant he will have a reasonable opportunity to examine and object to the evidence against him, to present evidence on his own behalf and to cross-examine the Government's witnesses against him;
5. Place defendant under oath;
6. Read the factual allegations and the charges in the order to show cause to defendant and explain them in nontechnical language, and enter the order to show cause as an exhibit in the record;

7. If the defendant admits the factual allegations and admits his deportability under the charges, made a determination the deportability as charged has been established by defendant's admissions;
8. Notify defendant, if he is finally deported, his deportation will be to the country designated by him and give him the opportunity to make such designation;
9. Render an oral or written decision, including a discussion of the evidence and findings as to deportability;
10. Notify the defendant of the decision, either by mail, if a written decision, or in his presence orally, if an oral decision was made; and
11. Advise defendant of his right to appeal the deportation order.

8 C.F.R. §§240.42, 240.46(b) and (c), and 240.48(a); Acewicz v. INS, 984 F.2d 1056, 1062 (9th Cir. 1993). In this case, I.J. advised ABG of each of the above, though the mass advisal of appeal rights has questionable validity, as argued below.

There were other required procedures which were not followed. They include advising an alien with "apparent eligibility" of the possibility of relief. 8 C.F.R. §240.49(a); United States v. Muro-Inclan, 249 F.3d 1180, 1182 (9<sup>th</sup> Cir. 2000).

However, a defective waiver of any of the above can render the deportation order unlawful. United States v. Proa-Tovar, 975 F.2d 592, 594 (9th Cir. 1992) (*en banc*). A defective waiver can occur when an alien obviously with contacts and assimilation to the United States has not had explained the ability to seek discretionary relief. Muro-Inclan at 1182; United States v. Andrade-Partida, 110 F.Supp.2d 1260, 1268 (N.D.Cal. 2000).

I.N.A. §212(c) (8 U.S.C. §1152(c)) relief was repealed by AEDPA §440(d) effective April 24, 1996. Application for such relief would be made pursuant to 8 C.F.R. §212.3. Application was limited to (1) LPRs (2) with lawful residence in the United States for at least 7 consecutive years immediately before filing the application. 8 C.F.R. §212.3(f)(1) and (2). The other limitations from application are:

- (3) excludability under I.N.A. §212(a)(3)(A), (B), (C) or (E)(8 U.S.C. §1182(a)(3)(A), (B), (C) or (E)), none of which apply to ABG;
- (4) an aggravated felony conviction with 5 years or more of imprisonment served, and
- (5) application within 5 years of the barring act listed in I.N.A. §242B(e)(1) through (4) (struck by IIRAIRA §308(b)(6)).

8 C.F.R. §212.3(f)(3), (4) and (5). In ABG's case, application would have been made to the I.J. 8 C.F.R. §212.3(e).

## 2. Full and Fair Hearing

Additionally, the I.J. is charged with keeping proceedings fair. 8 C.F.R. §3.12. And the alien, under the Fifth Amendment, has a right to due process and a "full and fair hearing." Jacinto v. I.N.S., 208 F.3d 725, 727 (9<sup>th</sup> Cir. 2000), citing other cases. This includes the duty, as with other administrative law judges, to "fully and fairly develop the record . . ." Jacinto at 732, citing Brown v. Heckler, 713 F.2d 441, 443 (9<sup>th</sup> Cir. 1983).

"With only a small degree of hyperbole, the immigration laws have been termed 'second only to the Internal Revenue Code in complexity.' A lawyer is often the only person who could thread the labyrinth."

United States v. Ahumada-Aguilar, 295 F.3d 943, 950 (9<sup>th</sup> Cir. 2002), citing Castro-Ryan v. INS, 847 F.2d 1307, 1312 (9<sup>th</sup> Cir. 1988).

Immigration law is clearly a complex area of law, “likely to be in unfamiliar settings for the [alien], and, as the Supreme Court has noted, such procedures ‘should be understandable to the layman claimant . . . and not strict in tone and operation.’ Richardson v. Perales, 402 U.S. 389, 400, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971). When an applicant appears *pro se*, this rationale is all the stronger, and the administrative law judge must ‘scrupulously and conscientiously probe into, inquire of, and explore for all the relevant facts. [The judge] must be especially diligent in ensuring that favorable as well as unfavorable facts and circumstance are elicited.’ Key v. Heckler, 754 F.2d 1545, 1551 (9<sup>th</sup> Cir. 1985) (citations omitted).”

Jacinto at 733.

Jacinto continues on, saying, “[Aliens] . . . often appear without counsel and may not possess the legal knowledge to fully appreciate which facts are relevant. Yet a full exploration of all the facts is critical to correctly determine whether the alien [has options].” Id. In deportation proceedings, the Government is represented by an attorney well-versed in all areas of immigration law, process and procedure. Rarely is the alien so represented or as knowledgeable. In such cases, the I.J., to ensure a fair, balanced proceeding, has the authority to continue proceedings to allow an alien to obtain counsel or at least the advice of counsel and prepare for the hearing, rather than shove the respondents through in factory-like deportations. 8 C.F.R. §§3.30, 3.29 and 240.6.

In Agyeman v. INS, 296 F.3d 871 (9<sup>th</sup> Cir. 2002), appealing a removal proceeding, the I.J. failed in many ways to make the proceeding “full and fair,” violating Agyeman’s due process rights. Id. at 887. The I.J. failed to:

- Adequately explain the hearing procedures, including what he must prove to establish his basis for relief. Id. at 877.
- “(S)crupulously and conscientiously probe into, inquire of, and explore for all relevant facts.” Id.
- Advise the alien as to the reasonable means of proving what is necessary to obtain relief. Id. at 882.
- “(F)ully develop the record when an alien proceeds *pro se* by probing into relevant facts and by providing appropriate guidance as to how the alien can prove his application for relief.” Id. at 884.

No “full and fair hearing” occurs if the I.J. fails to inform or misinforms about the forms of evidence permissible to prove eligibility for relief. Id.

### 3. Group Deportations

Group deportations, as the one ABG participated in part in, have numerous problems, specifically regarding waivers of appeal or counsel. Ahumada-Aguilar at 949.

“(M)ass silent waiver impermissibly ‘presume[s] acquiescence’ in the loss of the right to appeal and fails to overcome the ‘presumption against waiver.’” Id., citing United States v. Lopez-Vasquez, 1 F.3d 751, 755 (9<sup>th</sup> Cir. 1993). The problems with mass advisals of rights and requests *en masse* for waivers of those rights include (a) the failure to obtain a “considered and intelligent” waiver, (b) the risk individuals will feel pressured to keep silent because everyone else is, and (c) the stigma of speaking up or standing alone before the I.J. who conveys through such questioning disfavor and further discussion. Ahumada-Aguilar at 949, citing Lopez-Vasquez at 754.

As stated above, the I.J. not only has the authority to continue proceedings to allow an alien to obtain counsel or at least the advice of counsel and prepare for the hearing, [8 C.F.R.

§§3.30, 3.29 and 240.6], but s/he is also obliged to require each respondent independently to “state then and there whether he desires representation.” Ahumada-Aguilar at 949; 8 C.F.R. §242.16(a). Failure to do so violates due process and renders the deportation hearing unlawful. Ahumada-Aguilar at 950. The I.J. violated ABG’s due process rights here.

#### 4. ABG’s Deportation Hearing

In the instant case, ABG’s deportation I.J., upon learning of his level of English and his Temporary Residency with a last alleged entry date 11 years earlier, should have explored more the possibility ABG could apply for permanent residency at the deportation hearing pursuant to 8 C.F.R. §240.49(a). Additionally, the I.J. should have recognized the possible conditional permanent resident eligibility, advised ABG of it and granted it during his proceedings. Id. From the Presentence Report in the A-file, he would have recognized not only the presence in the United States of every significant relative to ABG, but also realized he had a deceased stepfather with an Anglo name, at least a preliminary indication of possible permanent status eligibility.

“The respondent may apply to the immigration judge for . . . adjustment of status under section 245 of the Act. . . . In conjunction with any application for creation of status of an alien lawfully admitted for permanent residence made to an immigration judge, if the respondent is inadmissible under any provision of section 212(a) of the Act and believes that he . . . meets the eligibility requirements for a waiver of the ground of inadmissibility, he . . . may apply to the immigration judge for such waiver. **The immigration judge shall inform the respondent of his . . . apparent eligibility to apply for any of the benefits enumerated in this paragraph and shall afford the respondent an opportunity to make application therefor during the hearing.**”

8 C.F.R. §240.49(a) (emphasis added.)

The likely reason the deportation I.J. did not advise or explore offering permanent residency relief to ABG was his incorrect belief ABG had an aggravated felony conviction, as alleged in the OSC. Yet, the conviction would not be considered an aggravated felony until April the following year (1997), 7 months after the hearing. Cortez-Felipe at 1057.

Next, there is the question whether the termination of the temporary residency was lawful. First, the Notice of Termination is to be sent to the alien’s last known address. 8 C.F.R. §245a.2(u)(2)(i). ABG’s Notice of Termination was sent February 5, 1996 to his former address of Jason Vista. It was returned to INS unclaimed. Yet INS knew ABG was not at that address, as he was about 1½ years into his Arizona State Prison sentence for the aggravated assault. INS placed a detainer on ABG December 21, 1995. Arizona State Department of Corrections Web Site, <http://www.adc.state.az.us/cgi-bin/IDetainerWarrant.cgi/0667090046204020915>. (Copy attached.) They sent the Notice of Termination to an address where they knew he did not live and knew he could not respond to the Notice. There is a serious question whether the termination is valid.

### **C. ISSUE OF STATUS IF TEMPORARY RESIDENCY VALIDLY TERMINATED**

#### 1. ABG Was an LPR

In 1972, ABG, at age 2, was admitted into the United States with his mother, both with no documents. On March 7, 1987, when he was age 17, his mother married Bennie Woodall, a U.S. Citizen. At that time, ABG became eligible to be a conditional permanent resident under I.N.A. §§201(b)(2)(A)(i) and 101(b)(1)(B); 8 U.S.C. §§1151(b)(2)(A)(i) and 1101(b)(1)(B). Counsel believes no application was made out of ignorance. Between May, 1987 and May, 1988, at age 17, he applied for temporary residence under the Amnesty

program, I.N.A. §245A (8 U.S.C. §1255a) and Immigration ever explored the conditional permanent residency qualification. On May 2, 1988, ABG, now age 18, was granted his Temporary Resident Alien Card.

I.N.A. §210(a)(2)/8 U.S.C. §1160(a)(2) stated adjustment of a temporary resident alien's status "to permanent residency **shall** occur . . . (B) on the day after the last day of a 2 year period that begins the later of (I) the date granted temporary residency status<sup>6</sup>, or (II) the last date of the application period."<sup>7</sup> (Emphasis added.) The alien's temporary residency could be terminated during the period of temporary residency upon a determination the alien was deportable or if, before the alien became eligible for adjustment to permanent status, "the Attorney General **may** deny permanent residency and terminate temporary residency if . . . convicted of a felony or three or more misdemeanors. . . ." I.N.A. §210(a)(3)(A) and (B)(ii); 8 U.S.C. §1160(a)(3)(B) and (B)(ii). (Emphasis added.) Once temporary status is terminated, generally, this

"shall act to return such alien to the unlawful status held prior to the adjustment, and render him . . . amenable to exclusion or deportation proceedings under section 236 or 242 of the Act, as appropriate."

8 C.F.R. §245a.2(u)(4).

By April, 1991, ABG had accumulated 3 convictions for crime of moral turpitude. In December, 1991, the 43-month period in which to file for permanent residency expired. In October, 1993, ABG was convicted of aggravated assault, a felony, and was sentenced to four years in prison. Each of these situations rendered ABG eligible for termination of temporary residency.

However, 3 to 5 years after being eligible for termination, in March, 1996, while ABG was still in custody, I.N.S. chose to terminate his temporary residence pursuant to 8 U.S.C. §1255a(b)(2). According to 8 C.F.R. §245a.2(u)(4), once temporary residence is terminated, this

"shall act to return such alien to the unlawful status held prior to the adjustment, and render him . . . amenable to exclusion or deportation proceedings under section 236 or 242 of the Act, as appropriate."

8 C.F.R. §245a.2(u)(4). In this case, because ABG's previous status was he had been in the country without documentation, he **usually** would have reverted to being without status.

However, because ABG had an event precedent which qualified him for conditional permanent residence, once I.N.S. terminated his temporary status, he could revert instead to that status precedent: conditional permanent resident. Even though both his mother and stepfather had died by his temporary residence termination date and no one existed to file for that conditional permanent residence, I.N.S.' 7 month delay from the temporary residence termination date until filing the Order to Show Cause for Deportation was an acceptance of his presence in the United States. That translates to I.N.S. conferring upon ABG conditional permanent residence as is its option under I.N.A. §210(a)(3)(A) and (B)(ii)/8 U.S.C. §1160(a)(3)(B) and (B)(ii).

## **2. Government Estoppel -**

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<sup>6</sup> In ABG's case, May 2, 1988 was when temporary status was granted, therefore May 2, 1990 adjustment to permanent residency was possible.

<sup>7</sup> December 1, 1988 was the last date for application, therefore December 1, 1990 was the date for adjustment.

**I.N.S.' Delay in Initiating Deportation Should Not  
Work to Its Benefit and ABG's Detriment.**

In the absence of any evidence otherwise, I.N.S. should not benefit from delay in seeking to deport ABG, who should have been allowed to exercise his right to become a permanent resident and to apply for relief to remain in the United States.

The Notice of Intent to Terminate Temporary Residency was not sent until February 4, 1996, five (5) years after it first could have been terminated. It was returned to I.N.S. as "unclaimed" because it had been sent to ABG's deceased mother's address, even though I.N.S. knew ABG was in ADOC custody at the time because it had the commitment paper in its a-file and it had a detainer on ABG at ADOC. Due process required I.N.S. to take reasonable efforts to find and notify ABG of its intended action so he might fight it. Jones v. Flowers, \_\_\_ U.S. \_\_\_, 126 S.Ct. 1708, 1713-14, 164 L.Ed.2d 415 (2006).

Next, the Order to Show Cause for Deportation was not filed until October 22, 1996, more than five (5) years after ABG first could have faced removal, just after §212(c) relief was repealed, and just when many erroneously believed "aggravated felony" was redefined to include his aggravated assault conviction.

For at least five (5) years, I.N.S. condoned and accepted ABG's presence in the United States when it could have filed to remove him. Additionally, I.N.S. waited 7 months from terminating ABG's temporary residency until filing the OSC against him. It only waited until his personal situation could not be any worse, and the legal situation for I.N.S. could not have been any better before filing. No more than an alien should be able to benefit from intentional delay, neither should I.N.S. INS v. Doherty, 502 U.S. 314, 323, 112 S.Ct. 719, 724-725, 116 L.Ed.2d 823 (1992); Otarola v. INS, 270 F.3d 1271, 1276 (9<sup>th</sup> Cir. 2001).

I.N.S. apparently accepted his presence in some manner and is estopped from arguing otherwise. Because of I.N.S.' "deliberate technical decision" to delay in filing termination and for deportation, it must be estopped from rendering ABG unlawfully present when it finally decided to terminate temporary status.

"If it is improper for aliens to file [papers or pleadings] simply to secure the passage of time, then it is improper for the INS to engage in similar tactics."

Id.

" . . . [I]n a deportation proceeding, . . . , as a general matter, every delay works to the advantage of the deportable alien who wishes merely to remain in the United States." Doherty at 314, 323, 112 S.Ct. at 724-725. The Supreme Court decided, however, when nothing prevented a party to a deportation from bringing the appropriate petition or motion in the first instance available, they would later be estopped from bringing said petition or motion. Id. at 326, 328 and 329.

Doherty involved an Irish/United Kingdom national. Id. at 317. In 1980, he was tried and convicted in Northern Ireland of a British Army captain's murder. Id. He escaped from prison before the verdict and, in 1982, unlawfully entered the United States. Id. at 317-318. Found by United States Courts not to be extraditable, I.N.S. sought to deport Doherty. Id. at 318-319. In 1986, Doherty conceded deportability, designated Ireland for his country of return, and withdrew his application for asylum and withholding of deportation. Id. at 319. In 1987, Doherty moved to reopen his deportation based upon new evidence (Ireland's implementation of an extradition act) requiring him to reopen his claims for asylum and withholding of deportation. Id. at 319-320.

The Supreme Court found the initial withdrawal of Doherty's claims in the initial proceeding as a "deliberate tactical decision" and "under applicable regulations those claims

could have been submitted at that time . . .” Id. at 329. “[N]othing prevented (Doherty) from bringing evidence in support of his asylum and withholding of deportation claims at his first deportation proceeding” when “the material adduced by (Doherty) could have been foreseen or anticipated at the times of the earlier proceeding.” Id. at 328 and 326. “[A] change in the law ordinarily does not support a motion to reopen unless the change pertains to the rules of the proceeding at which the deportation was ordered.” Id. at 325.

In Otarola, the appellate court held I.N.S. filed a frivolous appeal after the I.J. granted Otarola’s application for suspension of deportation on October 25, 1996. Id. I.N.S. took the mistaken position IIRIRA was effective that date (the same date I.N.S. took custody of ABG in this matter) and thus Otarola was precluded from accruing more time towards his 7 years U.S. presence necessary for that suspension. The appellate court found:

“To allow the INS to gain access to the stricter immigration laws of IIRIRA by filing and maintaining frivolous appeals would render Congress’s six-month delay provision [making IIRIRA effective April 1, 1997] nugatory.”

Id.

In the instant matter, I.N.S. could have sought to terminate ABG’s temporary residency any time after April, 1991. But it did not; it waited instead until it felt ABG’s situation was so far removed from any possibility of being able to stay lawfully in the United States, due both to changes in the law and ABG’s personal and criminal histories, before filing to terminate. However, because of its “deliberate technical decision” to delay in filing termination and for deportation, it must be estopped from rendering ABG unlawfully present when it finally decided to terminate temporary status.

Next, one cannot excuse I.N.S. and try and suppose or guess why I.N.S. did not file to terminate residency or deport ABG earlier. There is no evidence why delay occurred. Indeed, City of Wausau v. United States, 703 F.2d 1042, 1045 (7<sup>th</sup> Cir. 1983) and the cases it cites address a governmental body’s ability to fashion its own rules of procedure, not when to implement or act on those rules.

Next, the Attorney General at his/her discretion can decline to institute proceedings or can terminate them. AADC at 484. However, in AADC, a case where deportation proceedings began in 1987 citing certain laws as bases, then the law changed in 1990 and the Attorney General alleged an additional basis pursuant to the new law, the argument was used to counter the Attorney General benefitting from yet another change in the law in 1997 concerning judicial review. The delays apparently were not caused by the Government. So the decision to take advantage of changes in the law in a pending action was upheld, as was the Congressionally specified inclusion limiting judicial review to even pending cases.<sup>8</sup>

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<sup>8</sup> The other cases quoting the “Attorney General’s discretion” language are also quite dissimilar to ABG’s.

- United States v. Camacho-Bordes, 94 F.3d 1168, 1174 (8<sup>th</sup> Cir. 1996) involved a criminal defendant trying to withdraw from his guilty plea because the Government in the agreement promised to help with §212(c) relief, but he was not eligible because he did not have the 7 years as an LPR.
- Johns v. Dept. of Justice, 653 F.2d 884, 890-892 (5<sup>th</sup> Cir. 1981) concerned a child whose deportation was stayed by I.N.S., which equaled its discretion to refuse to institute further proceedings.
- In Cervantes v. Perryman, 954 F.Supp. 1257, 1265 (N.D.Ill. 1997), illegal

However, AADC observes also:

“the determination to withhold or terminate deportation is confined to administrative discretion . . . . Efforts to challenge the refusal to exercise such discretion on behalf of specific aliens sometimes have been favorably considered by the courts, upon contentions that there was selective prosecution in violation of equal protection or due process, such as improper reliance on political considerations, on racial, religious, or nationality discriminations, on arbitrary or unconstitutional criteria, or on other grounds constituting abuse of discretion.’ Gordon, Mailman, & Yale-Loehr, *supra*, § 72.03[2][a] (footnotes omitted).”

Id. at 485.

This “equal protection” arena is the only area where attacking the Attorney General’s discretion when to begin deportation has succeeded. Pincilotti v. Reno, 1996 WL 162980 (N.D.Cal.). In Pincilotti, there was “selective non-prosecution of the INA . . . [which] violate[d] principles of equal protection by treating similarly situated aliens differently.” Id. ABG does not have information on how many and what commonalities existed within temporary residents whose time to file for permanent residency had expired, but did not face deportation for at least 5 years. However, the Attorney General has the duty to deport once the alien is deemed deportable and as expeditiously as possible. Giddings v. Chandler, 979 F.2d 1104 (5<sup>th</sup> Cir. 1992).

There is no evidence why the delay to deport in ABG’s case happened, despite several reasons for possible deportation. There are no cases found where the delay(s) mentioned extended as far as five (5) years. And there is no doubt the delay here worked greatly to I.N.S.’ benefit.

**D. CONVICTIONS DID NOT RENDER ABG INELIGIBLE FOR §212(C) RELIEF.**

I.N.S. could have terminated ABG’s temporary residency and pursued removal after each of the following:

- 3/9/91 ABG has second conviction for crime of moral turpitude.  
I.N.A. §241(a)92)(A)(ii); 8 U.S.C. §1251(a)(2)(A)(ii).
- 4/24/91 ABG has third through seventh convictions for crimes of moral turpitude.
- 12/2/91 43-month limit for filing for permanent residency expires.
- 10/27/93 ABG was sentenced 4 years imprisonment for aggravated assault, a crime of moral turpitude, but not effectively an aggravated felony until 6 months after deportation.

ABG’s second plus crimes of moral turpitude rendered ABG deportable, but did not require deportation, once permanent status was found or acquired. ABG was eligible for §212(c) relief.

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aliens tried to compel I.N.S. to start deportation proceedings against them so they then could get a suspension of deportation and be eligible for work permits.

- Cabasug v. I.N.S., 847 F.2d 1321, 1324 (9<sup>th</sup> Cir. 1998) where a man in deportation proceedings, where he did not qualify for relief, tried to compel I.N.S. to instead file exclusion proceedings, where he could qualify for relief. However, the grounds did not exist to file for exclusion.

**E. ABG HAD 7 YEARS OF LPR STATUS.**

Had the I.J. done what was required under 8 C.F.R. §240.29(a), recognized ABG’s apparently eligibility to apply in the hearing for permanent status, explained and offered that to him, as he no doubt would have accepted, the time from the filing of ABG’s application for temporary residency between May, 1987 and May 2, 1988 until the hearing in November 1996 would have combined for 7 years of §212(c) relief eligibility. Ortega de Robles v. I.N.S., 58 F.3d 1355, 1360-1361 (9<sup>th</sup> Cir. 1995).

“We conclude that a lawful permanent resident who gained such status . . . by first becoming a ‘temporary’ resident established ‘lawful domicile’ for purposes of §212(c) as of the date of his or her application for amnesty.”

Id.

Therefore, ABG further qualified for §212(c) relief.

**F. ABG’S AGGRAVATED ASSAULT CONVICTION MEETS ST. CYR STANDARDS.**

In ABG’s case, when he pled guilty to Class 4 Aggravated Assault, non-dangerous offense, the presumptive sentence was 4 years imprisonment, below the 5 year limit making crimes of violence aggravated felonies. Former I.N.A. §101(a)(43)(F); former 8 U.S.C. §1101(a)(43)(F). Also, as part of the plea bargain, a Class 2 Kidnaping and Class 4 Aggravated Assault, both with possible dangerous nature allegations, were dismissed. These charges carried possible sentences of mandatory imprisonment in a range of 7 to 21 years. Clearly, the plea benefitted any ability possible to remain lawfully in the United States.

While it is true ABG was a temporary resident when he pled, he relied, even if erroneously, that this plea, which dismissed “dangerous nature” and a Class 2 felony kidnaping allegations, and exposed him to a presumptive sentence of 4 years (not then an aggravated felony), would allow him to request immigration relief. Even if his termination of temporary residency and deportation occurred that day after said plea, if the I.J. had followed his duties, offering and granting permanent residence to ABG who had more than 7 years lawful domicile here, ABG would then have been eligible for §212(c) relief when he plead guilty to the aggravated assault. Whether that happened in 1993 or 1996, it does not matter.

Therefore, the St. Cyr right, concluded in 2001, well after the deportation and exclusion, is a reason which did not exist at the time ABG entered his plea and just grounds exist to withdraw from the plea, as well as to get beyond any waivers in his plea agreement.

Next, the court must ask whether ABG’s guilty plea to aggravated assault, even if not an aggravated felony, was a deportable offense at the time of the plea and render him eligible for §212(c) relief anyway because of that. United States v. Velasco-Medina, 305 F.3d 839, 849 (9<sup>th</sup> Cir. 2002).

First, ABG was deportable when he plead, for his conviction, aggravated assault of his girlfriend (domestic violence) causing temporary injury, might have been considered a crime of moral turpitude making him deportable under INA §241(a)(2)(A)(i) (8 U.S.C. §1251(a)(2)(A)(i)). Matter of Tran, Int.Dec. #3271 (BIA 1996).

Below is a comparison of the facts in St. Cyr, the instant matter and Velasco-Medina:

Case	<i>St. Cyr</i>	ABG	<i>Velasco-Medina</i>
Offense of conviction	Sale of a controlled substance	Aggravated assault with temporary disfigurement	2 <sup>nd</sup> degree burglary
Date pleaded guilty?	3/8/96	9/8/93	6/96

Considered aggravated felony on plea date?	Yes	No	No
Deportable on plea date?	Yes	Yes	No
§212(c) relief available when pled?	Yes	Yes	No
Removal started	4/10/97	10/22/96	1/26/00
Felony alleged as aggravated in OSC?	Yes	Yes	Yes

Unlike Velasco-Medina, ABG had “vested rights acquired under existing law(.) . . the sort of settled expectations concerning §212(c) relief that informed St. Cyr’s plea bargain and that animated the St Cyr. decision.” Velasco-Medina at 849. ABG pled to the charge expecting he would have the opportunity to obtain relief from any deportation.

**G. DEPORTATION PROCEEDINGS INVALID FOR DEPRIVATION OF STATUTORY, REGULATORY AND DUE PROCESS RIGHTS.**

Next, ABG’s deportation is invalid because of the mistakes and omissions made by the I.J. presiding over his deportation hearing, thus violating ABG’s due process rights. ABG lost the opportunity to apply for discretionary relief because the I.J. failed to advise him of his options for relief. Such failure to advise a defendant of possible eligibility for discretionary relief renders the deportation invalid. Muro-Inclan at 1182; Andrade-Partida at 1268.

For persons charged with entry without inspection or for being present having lost their lawful status, there are several types of discretionary relief available, including voluntary departure. I.N.A. §242(b); 8 U.S.C. §1252(b); 8 C.F.R §240.49(b). Voluntary departure is preferable to deportation because: (1) it avoids the seriously adverse consequences of deportation (the bars on re-entry); (2) it is more convenient to the individual because it allows him to choose the destination and schedule; and (3) it avoids the stigma of deportation. Thomas A. Elliot, *Relief from Deportation: Part I*, 88-08 Immigr. Briefings 1, 20 (1988).

If the court finds ABG did not have any type of permanent resident status at the time of his deportation hearing, ABG would have been eligible for voluntary departure because his crime should not have been considered an aggravated felony for deportation and he did not serve more than a year for any of his previous convictions for crimes of moral turpitude. I.N.A. §242(b); 8 U.S.C. §1252(b); 8 C.F.R. §§240.26(b)(1) and 240.56<sup>9</sup>. Indeed, I.N.S. should have, by virtue of its extreme delays, initiated or joined in any advisals or requests for voluntary departure. 8 C.F.R. §240.26(d).

The I.J.’s failure to advise ABG of his apparent eligibility for discretionary relief, either under §212(c) or by voluntary departure, violated his constitutional, due process rights. His subsequent deportation should be declared invalid.

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<sup>9</sup> Counsel questions the continued validity in light of St. Cyr of voluntary departure not being available for a person with an aggravated felony conviction occurring after November, 1988, as mandated by 8 C.F.R. §240.56.

## H. PREJUDICE

Prejudice as well as a defective waiver is necessary to collaterally attack a deportation hearing. Proa-Tovar at 594; United States v. Arce-Hernandez, 163 F.3d 559, 563 (9th Cir. 1999); United States v. Zarate-Martinez, 133 F.3d 1194, 1197 (9<sup>th</sup> Cir. 1998). Because (a) a judge failed to obtain a knowing and voluntary waiver of the defendant's right to appeal the deportation decision, and (b) the defendant need only show he has a "plausible ground" for relief, not that he would have received §212(c) discretionary relief, defendant was prejudiced by the invalid waiver of his right to appeal. United States v. Jimenez-Marmolejo, 104 F.3d 1083, 1086 (9th Cir. 1996).

The I.J. in ABG's deportation had every indication discretionary relief was possible: ABG was questioned and answered in English; his presence in the United States exceeded 10 years; his Presentence Report, which was in the A-file, listed on the first page all immediate relatives, a grandmother, siblings and 3 children, all in the United States, and no relatives listed who lived in Mexico. The I.J. should have advised ABG of the possibility of discretionary relief and offered to continue the hearing so that might be pursued. This was not done, rendering any waiver of appeal rights invalid.

To show prejudice, ABG would have presented the following as a basis for withholding of removal under §212(c):

- ABG had 3 U.S. citizen children.
- ABG had U.S. citizen fiancée who was willing to house and help support ABG.
- ABG's brother, sister and aunt were U.S. citizens.
- ABG's grandmother, an LPR, was living in Tucson, Arizona and very ill at the time. ABG wished to care for his grandfather. He died in early 1997.
- ABG's brother was willing to support ABG and provide employment for him in his landscaping company.
- ABG's entire formal education occurred in the United States. He was fluent in speaking, reading and writing English.

The totality of these circumstances would have been compelling enough to grant withholding or removal.

## III.

### 1997 Exclusion/2000 Removal

#### **A. ABG Would Not Have Entered the Plea Had He Known His Deportation Was Unlawful and His Waiver Is Not Valid.**

Fed.R.Crim.Proc. 11(e) permits a defendant to withdraw or set aside his guilty plea "(a)fter the court imposes sentence . . . only on . . . collateral attack." Withdrawal of a guilty plea before imposition of sentence can occur if "the defendant can show any fair and just reason." Fed.R.Crim.Proc. 11(d)(2)(B). "Any fair and just reason" includes newly discovered evidence, intervening circumstances, and **any other valid reason that did not exist when the defendant entered his plea.** United States v. Turner, 898 F.2d 705, 713 (9th Cir.1990); United States v. Rios-Ortiz, 830 F.2d 1067, 1069 (9th Cir.1987). ABG has filed a motion under 28 U.S.C. §2255 to vacate his earlier conviction, withdraw from his plea agreement and dismiss the information. See Case No. CIV 01-554-TUC-RCC.

To withdraw from a guilty plea after imposition of sentence, a defendant must show the plea proceedings were marred by (1) a fundamental defect which inherently resulted in a complete miscarriage of justice or (2) an omission inconsistent with the rudimentary demands of fair procedure. United States v. Carrington, 96 F.3d 1 (1<sup>st</sup> Cir.), *cert. denied* 520 U.S. 1150,

117 S.Ct. 1328, 137 L.Ed.2d 489 (1996).

For any plea to be valid, there must a factual basis for the plea. Fed.R.Crim.Proc., Rule 11(b)(3). In this case, though ABG stated he had a lawful deportation in 1996, it turns out under case law it may not be lawful. Lack of a factual basis precludes entry of judgment under Rule 11(b)(3) and is “a fundamental defect which inherently resulted in a complete miscarriage of justice.”

ABG, by his written plea, waived “any and all motions, defenses, probably cause determinations, and objections which defendant could assert to the information or indictment or to the Court’s entry of judgment against defendant and imposition of sentence upon defendant consistent with this agreement.” Had ABG known his deportation was unlawful, then no factual basis would have existed for the plea and ABG would not have entered the plea agreement nor pled guilty at all.

Additionally, the plea agreement goes on in the next paragraph to state what happens should the guilty plea be “rejected, withdrawn, vacated, or reversed by any court in a later proceeding.” Obviously, the Government recognized then, as it must recognize now, a plea agreement might be vacated.

Because ABG agreed under the plea agreement to not contest any deportation or exclusion, if the plea agreement is found to be invalid, his agreement not to contest exclusion must necessarily be invalid. Once the exclusion is invalid, the reentry charge in this case is without basis and must be dismissed.

Also, because the 1996 deportation was invalid yet ABG was removed, most grounds listed in support of exclusion would not have occurred **but for** the removal. The second ground (entry after failing to attend a proceeding) has no factual basis at all and was not addressed in the exclusion hearing. The other bases, relating to presence at the port of entry without documents and the false claim of citizenship in his attempted entry through the port of entry, would not have happened **but for** first unlawful removal. If the 1996 deportation is found to be unlawful, none of these facts can be considered in support of exclusion.

Lastly, the remaining ground for exclusion, the crime of moral turpitude being the aggravated assault conviction, should not have been a ground for exclusion. If ABG was unlawfully removed for that basis, in a lawful deportation proceeding affording rights to ABG, removal would have been balanced against all other equities. Once the Immigration Court granted withholding of removal based on those equities, ABG would not have been removed and there would not have been any attempted reentry, for there would have been no exit.

#### IV.

#### SUMMARY

In this case, the Indictment should be vacated on the basis that ABG’s 1997/2000 exclusion was based upon a guilty plea based on the fundamentally unfair 1996 deportation hearing because:

#### 1996 Deportation:

- I.N.S. is estopped from treating him as any status other than a permanent resident because of (1) their delays in terminating his temporary residency and filing the OSC for his deportation, (2) his conditional permanent residency qualification, and the I.J.’s failure to offer adjustment of status to permanent residency in the deportation hearing;
- the I.J. effectively denied him his right to appeal by failing to mention any possible relief, either under §212(c) or voluntary departure, and any appeal would have been denied due to the belief at the time ABG’S aggravated assault conviction then was an aggravated felony;

- the facts did not exist to support deportation based upon entry without inspection in May, 1985;
- I.N.S. is estopped from treating his felony conviction as an aggravated felony for their delay in filing the OSC for deportation.

1997 Exclusion/2000 Removal

None of the allegations in the exclusion OSC would have occurred if ABG had not pled guilty to his earlier illegal reentry based upon the unlawful 1996 deportation.

**CONCLUSION**

Therefore, Defendant ABG respectfully requests this Court grant his motion finding his 1997 exclusion and 2000 removal unlawful and dismiss the Indictment against him.

SUBMITTED: DATE.

\_\_\_\_\_  
Attorney Name  
Attorney for Defendant/Petitioner

Copy to:

Assistant United States Attorney  
City, State  
ABG

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIENT,

Defendant.

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Cause No. 10 CR xxx

**MOTION TO DISMISS INFORMATION**

CLIENT, through his undersigned counsel, respectfully moves this court for an order dismissing the Information filed against him on February 19, 2010 because the deportation proceeding upon which this prosecution is based cannot be used by the government consistent with due process to establish a violation of 8 U.S.C. § 1326(a)(2).

Specifically, Mr. CLIENT was deported based on an allegation that his felony DWI conviction constituted a "crime of violence." *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377 (2004) holds that it does not. Moreover, he was improperly told he was ineligible for relief from deportation, and the manner in which his deportation hearing and deportation took place improperly denied him of the opportunity for judicial review.

Relief is requested pursuant to a motion to dismiss, which is the means by which such relief was sought in *United States v. Mendoza-Lopez*, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1986). F.R.Crim.P. 12(b) permits a motion to dismiss if the matter can be determined without a trial of the general issue. Because there are no facts in dispute, and the

only issue is the legality of the underlying deportation, this matter is appropriate for pretrial determination. *See, United States v. Ortega-Ascanio*, 376 F.3d 879 (9th Cir. 2004), where plea was withdrawn and indictment was dismissed because the underlying deportation was fundamentally unfair.

### ***I. Factual Chronology***

1. On December 1, 1990, Mr. CLIENT was granted lawful permanent residency in this country pursuant to the seasonal agricultural worker (SAW) program, INA 210(a). *See*, attached transcript of deportation hearing.

2. On August 29, 2000, Mr. CLIENT was convicted in Idaho of felony DWI. *See*, attached judgment.

3. As of late 2000, the case law in the Ninth Circuit was at worst ambiguous, and best ambiguous, as to whether DWI was considered a crime of violence for deportation purposes. *See, United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir.2001), holding that DWI is not a crime of violence for deportation purposes, and discussing the Ninth Circuit case law leading it to that conclusion.

4. On January 19, 2001, the case law in the Tenth Circuit unambiguously considered DWI, particularly under Idaho law, to be a crime of violence. *Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001) (discussing case law leading it to that conclusion).

5. In or about early 2001, the Immigration and Naturalization Service (INS)<sup>52</sup> filed a Notice to Appear, alleging that he was deportable for having been convicted of an

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<sup>52</sup> In the wake of the 9-11 attacks, the INS was reorganized as various different agencies as part of the Department of Homeland Security, but it was operating as the INS at all times pertinent to this motion, and thus the term "INS" is used throughout this motion.

aggravated felony crime of violence, DWI. *See*, attached transcript of deportation hearing.

6. Mr. CLIENT was taken into custody in Idaho, and the INS transferred him from his home in the Ninth Circuit, to the Tenth Circuit for deportation proceedings.

7. Mr. CLIENT's family hired counsel, who moved to return venue to Mr. CLIENT's home in the Ninth Circuit. That motion was never ruled upon and the deportation proceeded out of the Tenth Circuit. *See*, attached motion to change venue.

8. On June 2, 2001, continuing on June 15 and July 6, 2001, a deportation hearing was held. At that hearing, Mr. CLIENT was found deportable and was informed by the immigration judge that he was ineligible for any sort of relief from deportation. *See*, attached transcript of deportation hearing and order of deportation.

9. On July 31, 2001, Mr. CLIENT appealed his order of deportation to the Board of Immigration Appeals (BIA), specifically arguing against case law that DWI is not a crime of violence and therefore is not an aggravated felony. *See*, attached notice of appeal and brief.

10. On October 13, 2001, the INS deported Mr. CLIENT to Mexico while his appeal was still pending. *See*, attached I-205, warrant of removal, dated November 8, 2001, but indicating Mr. CLIENT was actually removed on October 13, 2001.

11. On October 31, 2001, the BIA denied his appeal. *See*, attached order affirming deportation.

12. On November 9, 2004, the United States Supreme Court decided in *Leocal v. Ashcroft*, 543 U.S. 1, 125 S. Ct. 377 (2004) that DWI is not a crime of violence. *Leocal* is retroactively applicable to Mr. CLIENT, as it interprets the law as it has always existed.

*United States v. Rivera-Nevaras*, 418 F.3d 1104, 1107 (10th Cir. 2005), *cert. denied*, 547 U.S.

1114 (2006).

12. On February 6, 2010, Mr. CLIENT was found in this country, in Bernalillo County, New Mexico.

13. On February 10, 2010, a criminal complaint alleging a violation of 8 U.S.C. § 1326 was filed. (Doc. 1, 10 mj 344.)

14. On February 19, 2010, Mr. CLIENT plead guilty to this offense, based on a projection by the government that his sentence would be time served, or near time served. This was prior to receiving discovery in the case.

15. On February 25, discovery was forwarded counsel, and it indicated a likely defense. Mr. CLIENT received additional requested discovery on March 5, confirming that the basis of the deportation was an erroneous allegation that he was convicted of an aggravated felony, and that he was not advised of the availability of any relief from deportation.

## ***II. 8 U.S.C. § 1326(d)***

The indictment in this case purports to impose a criminal sanction based on an administrative order that was not subject to meaningful judicial review. Mr. CLIENT respectfully submits that the Fifth Amendment Due Process Clause prevents the government from basing its indictment this administrative order.

8 U.S.C. § 1326(d) provides for a collateral attack on an underlying deportation order under certain circumstances:

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

Mr. CLIENT meets all three criteria.

(1) *Mr. CLIENT exhausted any administrative remedies that may have been available to seek relief against the order.*

As demonstrated by the attached appeal to the BIA, Mr. CLIENT appealed the specific issue at issue here, whether DWI constitutes a crime of violence, and thus an aggravated felony under 8 U.S.C. § 1101(a)(43)(F).

(2) *the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review*

The manner in which INS conducted the deportation proceedings denied Mr. CLIENT of the opportunity for judicial review in a variety of ways:

a. *INS transferred venue to a circuit where the caselaw was more favorable to it and very much against Mr. CLIENT*

Mr. CLIENT lived in Idaho, and was arrested by the INS in Idaho in the Ninth Circuit, but was transferred to Colorado and the Tenth Circuit for his deportation hearing. See, Motion for Transfer of Venue, attached. This resulted in a "slam dunk" deportation hearing, whereas conducting the hearing in the original venue may well have resulted in Mr. CLIENT's winning his hearing. Counsel does not have the original Notice to Appear, which is an allegation of deportability, but from the chronology of the rest of the deportation hearings, it appears that it was likely served after the *Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001) case came down on January 19, 2001. In holding that DWI under Idaho law was a crime of

violence, the Tenth Circuit cited case law concerning analogous offenses that led to its conclusion. Meanwhile, whereas *United States v. Trinidad-Aquino*, 259 F.3d 1140, 1145 (9th Cir.2001) was finally decided on August 8, while Mr. CLIENT's deportation was under appeal, it, too, discussed prior Ninth Circuit case law concerning analogous offenses leading it to the conclusion that DWI is not a crime of violence. Clearly, had the INS not engaged in forum shopping, Mr. CLIENT would have won his deportation hearing.

b. *INS deported Mr. CLIENT before his appeal was even final*

Repeating the relevant chronology in brief:

12-1-90	Mr. CLIENT granted lawful permanent residence
8-29-00	Mr. CLIENT convicted of felony DWI
early 2001	INS issues a Notice to Appear
6-2,15, 7-6-01	Deportation hearing
7-6-01	Deportation order
7-31-01	Appeal of deportation
10-13-01	Mr. CLIENT deported
10-31-01	BIA affirms deportation
11-8-01	follow up paperwork for deportation completed

This deportation, apparently effected in error even before the order of deportation was final,<sup>53</sup> made it virtually impossible to seek relief. First of all, logistically, Mr. CLIENT was in another country and location of and consultation with counsel would be extremely difficult. Moreover, it appears that during this time period, appeal was not even available:

A significant number of aliens who were erroneously considered ineligible for section 212(c) relief between 1996 and 2001 had no statutory right to appeal their deportation orders directly to a federal court under AEDPA and the transitional rules of IIRIRA. Aliens who were statutorily barred from seeking direct judicial review could have sought habeas review. Under a

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<sup>53</sup> There is no reason to believe that the deportation paperwork is in error. However, even if the date of deportation indicated on the I-205 is false, a deportation one week after a final order was issued is extraordinarily fast and equally denies the right to judicial review.

pre-IIRIRA provision that applied under IIRIRA's transitional rules, however, former section 106 of the INA, further administrative and judicial review, including habeas review, was barred following deportation. Considering these constraints on an alien's ability to obtain judicial review, the Second Circuit has held that “where habeas review is potentially available, an opportunity for judicial review will still be deemed to have been denied where the interval between entry of the final deportation order and the physical deportation is too brief to afford a realistic possibility of filing a habeas petition.” The court thus acknowledged that “where no realistic opportunity for judicial review by way of habeas review existed, an alien's failure to seek such review will not be deemed to preclude a collateral attack on a deportation order under Section 1326(d)(2).” An alien is clearly denied the opportunity for meaningful judicial review where he has no right of direct appeal and there is no “realistic opportunity” to seek habeas relief, as analyzed by the Second Circuit.

Brent S. Wible, *The Strange Afterlife of Section 212(c) Relief: Collateral Attacks on Deportation Orders in Prosecutions for Illegal Reentry after St. Cyr*, 19 GEO. IMM. LAW J. 455, 483-484 (2005) (footnotes omitted). In several cases, aliens who were deported before having a realistic opportunity to appeal were found to have been denied the opportunity for judicial review. In *United States v. Sosa*, 387 F.3d 131, 137-8 (2nd Cir. 2004), the deportation occurred less than a month after the final order. In *United States v. Copeland*, 376 F.3d 61, 67-70 (2d Cir. 2004), again the speedy deportation and the legal uncertainty of the availability of habeas review denied Copeland the opportunity for judicial review. In *United States v. Frias Gomez*, 262 F. Supp. 2d 11 (E.D.N.Y. 2003), the § 1326 indictment was dismissed because Frias Gomez was improperly denied the opportunity to apply for § 212(c) relief and he was deported before he could contest the decision.

c. *INS advised Mr. CLIENT at the deportation hearing that appeal was futile, as he was purportedly ineligible for any relief*

*United States v. Camacho Lopez*, 450 F.3d 928 (9th Cir. 2006) is a case very much on point. There, Camacho-Lopez was erroneously alleged to be an aggravated felon due to a

conviction for vehicular homicide (pre Leocal), and deported. The court found judicial review was denied because the immigration judge erroneously advised Camacho Lopez that he was ineligible for discretionary relief. This misadvice was found to deny him meaningful review.

Because the IJ erroneously advised Camacho that he was ineligible for discretionary relief when the IJ implicitly characterized Camacho's conviction as an aggravated felony, the government also concedes that Camacho is excused from the exhaustion requirement and that Camacho was deprived of a meaningful opportunity for judicial review. *See Pallares-Galan*, 359 F.3d at 1096-98.

450 F.3d at 930.

In *United States v. Pallares Galan*, 359 F.3d 1088 (9th Cir. 2004), the accused did not validly waive his right to appeal where the immigration judge erroneously ruled that a conviction under a California statute for annoying or molesting a child was an aggravated felony.

We hold that [his underlying conviction is not an aggravated felony], and consequently, that Pallares was eligible for discretionary relief from deportation in the form of cancellation of removal (8 U.S.C. § 1229b). Because the Immigration Judge erroneously advised Pallares that he was not eligible, and because Pallares' waiver of his right to appeal the removal order was not “considered and intelligent” for that and other reasons, we conclude that his claim is not barred by the exhaustion requirement of 8 U.S.C. § 1326(d)(1), and further, that the underlying deportation order was procedurally defective. We REVERSE and REMAND with directions to the district court to consider whether Pallares suffered prejudice as a result, and, accordingly, whether the indictment should be dismissed.

359 F.3d at 1092.

*United States v. Rivera Nevarez*, 418 F.3d 1104 (10th Cir. 2005) also informs this Court's analysis. In that case as well, the alien was deported on the erroneous theory that DWI was a crime of violence and an aggravated felony. In that case, Rivera Nevarez argued that

his prior deportation was based on an incorrect interpretation of the law, arguing neither due process, as interpreted by *United States v. Mendoza-Lopez*, 481 U.S. 828, 841-42 (1987), nor § 1326(d). On reconsideration he raised both these arguments, but the district court declined to revisit its decision, not reaching the merits of those arguments, and held that the holding in *United States v. Lucio-Lucio*, 347 F.3d 1202, 1204-06 (10th Cir. 2003), that DWI was in fact not a crime of violence, was not retroactive. The Tenth Circuit disagreed with this portion of the district court decision, as *Leocal* made it clear that it was interpreting the law as it had always existed and was not creating new law. 418 F.3d at 1107.

*(3) the entry of the order was fundamentally unfair.*

Mr. CLIENT's lawful permanent residence was taken from him wrongfully, and he was ordered deported based on a mistaken interpretation of the law. The INS manipulated his ability to obtain meaningful review both through moving him from the Ninth Circuit to the Tenth Circuit, and by deporting him before he had the opportunity to seek judicial review. It is hard to imagine how this could be anything but fundamentally unfair. *See, Camacho Lopez*, 540 F.3d at 930 “Camacho was removed when he should not have been and clearly suffered prejudice. We, therefore, reverse and remand with instructions to dismiss the indictment.”

In *United States v. Pallares Gallan*, 359 F.3d 1088 (9th Cir. 2004), the court determined that Pallares Gallan had been wrongfully deported as an aggravated felon for his conviction for annoying or molesting a child. The court found the due process violation to trump the statutory restrictions, and granted relief based on the due process clause of the constitution.

Because the Immigration Judge erroneously advised Pallares that he was not eligible, and because Pallares' waiver of his right to appeal the removal order was not “considered and intelligent” for that and other reasons, we conclude that his claim is not barred by the exhaustion requirement of 8 U.S.C. § 1326(d)(1), and further, that the underlying deportation order was procedurally defective. We REVERSE and REMAND with directions to the district court to consider whether Pallares suffered prejudice as a result, and, accordingly, whether the indictment should be dismissed.

359 F.3d at 1091. The court found that his waiver of the right to appeal following the immigration judge’s erroneous advice that it would be futile because he was ineligible for any form of relief from deportation was not considered and intelligent.

Moreover, there is an additional, independent reason why Pallares is excused from meeting the exhaustion requirement of § 1326(d)(1): Because the IJ erred when she told Pallares that no relief was available, Pallares' failure to exhaust his administrative remedies cannot bar collateral review of his deportation proceeding. *See Muro-Inclan*, 249 F.3d at 1183-84. For the same reason, Pallares' waiver of his right to appeal was not “considered and intelligent” and “deprived [him] of his right to judicial review” under § 1326(d)(2). *See Leon-Paz*, 340 F.3d at 1005 (citation omitted).

359 F.3d at 1096.

*United States v. Aguirre-Tello*, 353 F.3d 1199 (10th Cir. 2004) does not compel a different result. In *Aguirre-Tello*, the immigration judge realized that the day following the deportation hearing, Aguirre Tello would be eligible for relief under § 212(c) of the INA. Rather than explaining this, the judge told Aguirre-Tello he might be eligible for a “pardon” the next day, and asked him if he wanted a continuance. Aguirre-Tello declined, and agreed to his deportation without filing any appeal, administrative or judicial. He later re-entered illegally, and claimed the mis-description of the available relief made his immigration hearing

fundamentally unfair. Disagreeing, the Tenth Circuit held (contrary to other circuits<sup>54</sup>) that “there is no constitutional right to be informed of the existence of discretionary relief for which a potential deportee might be eligible.” 353 F.3d at 1205. However, assuming arguendo that there was such a right, the Court held that the immigration judge’s question, “You are not today eligible for a pardon, *but you would be tomorrow*. Do you want your case postponed to see if you might be granted a pardon *and* allowed to remain in this country?” fulfilled that right, reasoning, “both a pardon and a § 212(c) waiver are acts of grace, left to the complete and unfettered discretion of the one from whom they are sought.” 353 F.3d at 1206. This situation has nothing to do with a situation where a defendant is told wrongfully that he is deportable, and, wrongfully, that there’s nothing he can do about it.

### ***III. Due Process***

The case of *United States v. Mendoza-Lopez*, 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987) preceded 8 U.S.C. § 1326(d), and arguably establishes a separate and independent basis for analyzing dismissal where the underlying deportation deprived the non-citizen of fundamental fairness and a meaningful opportunity to be heard.

It has long been recognized that an alien in the United States has a Fifth Amendment right to due process, including the right to a full and fair hearing at any deportation proceeding. *Burgos-Abril v. INS*, 58 F.3d 475, 476 (9th Cir. 1995); *Cuadras v. INS*, 910 F.2d

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<sup>54</sup> See eg, *United States v. Muro-Inclan*, 249 F.3d 1180, 1184 (9th Cir.), *cert. denied*, 534 U.S. 879 (2001) (“[W]hen the record before the [IJ] raises a reasonable possibility of relief from deportation under this provision, it is a denial of due process to fail to inform an alien of that possibility at the deportation hearing”); *United States v. Perez*, 330 F.3d 97, 104 (2d Cir.2003) (finding deportation proceeding fundamentally unfair when ineffective assistance of counsel resulted in an alien who was “eligible for § 212(c) relief and could have made a strong showing in support of such relief”)

567, 573 (9th Cir. 1990); *Mohsseni Behbahani v. INS*, 796 F.2d 249, 250-51 (9th Cir. 1986); *Garcia-Jaramillo v. INS*, 604 F.2d 1236, 1239 (9th Cir. 1979), *cert. denied*, 449 U.S. 828, 101 S.Ct. 94, 66 L.Ed.2d 32 (1980). *Accord*, *The Japanese Immigrant Case*, 189 U.S. 86, 101-100, 23 S. Ct. 611, 47 L. Ed. 721 (1903) (holding that an alien within the United States entitled to the full benefits of procedural due process under the aegis of the Fifth Amendment). These authorities convincingly establish that Mr. CLIENT was entitled to due process of law at his deportation hearing on June 2, June 15, and July 6, 2001.

In *United States v. Mendoza-Lopez*, 481 U.S. 828, 834, the Court evaluated "whether a federal court must always accept as conclusive the fact of the deportation order, even if the deportation hearing was not conducted in conformity with due process" in a 8 U.S.C. § 1326 unlawful reentry prosecution. Although it determined that Congress never intended to permit collateral challenges to deportation proceedings in § 1326 prosecutions, 481 U.S. at 837, the court nonetheless held that:

Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful judicial review of the administrative proceeding. This principle means that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.

481 U.S. at 837-38. (citations and footnotes omitted). Notwithstanding Congress' contrary intent, *Mendoza-Lopez* authorizes the collateral attack of deportation hearings in § 1326 unlawful reentry prosecutions.

Each defendant in *Mendoza-Lopez* contended that his deportation hearing was fundamentally unfair because the immigration judge failed to adequately explain the right to

apply for suspension of deportation and the right to appeal from an adverse ruling on their request for suspension of deportation. 481 U.S. at 832. Both the district court and the U.S. Court of Appeals for the Eighth Circuit agreed. *Id.* Because these due process errors injected fundamental unfairness into the deportation hearings, the Supreme Court affirmed the lower court analysis and ruled that the resultant deportation orders could not be used to prove § 1326 unlawful reentry after deportation violations. "If the statute envisions that a court may impose a criminal penalty for reentry after any deportation, regardless of how violative of the rights of the alien the deportation proceeding may have been, the statute does not comport with due process." 481 U.S. at 837.

In *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir.), *cert. denied*, 525 U.S. 849 (1998)<sup>55</sup> the Ninth Circuit summarized the holding of *Mendoza-Lopez* in terms directly applicable to Mr. CLIENT's case.

In a criminal prosecution under § 1326, the Due Process Clause of the Fifth Amendment requires a meaningful opportunity for judicial review of the underlying deportation. If the defendant's deportation proceedings fail to provide this opportunity, the validity of the deportation may be collaterally attacked in the criminal proceeding. *Zarate-Martinez* can succeed in this collateral challenge only if he is able to demonstrate that: (1) his due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects.

In the present case, the Immigration Judge failed to provide Mr. CLIENT with a meaningful opportunity to seek appellate review of the adverse decision. This due process violation and the resultant prejudice that flows from that violation precludes the government from relying on the July 31, 2001 removal order as a basis for this prosecution. Accordingly,

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<sup>55</sup> Implied overruling on unrelated grounds recognized in *United States v. Ballesteros Ruiz*, 319 F.3d 1101 (9th Cir. 2003)

the information must be dismissed.

#### ***IV. Conclusion***

Mr. CLIENT never should have been deported. He was not subject to deportation at all based on his DWI conviction. The immigration judge not only made a mistake in finding otherwise, but the INS manipulated the deportation proceedings in such a way to deny Mr. CLIENT meaningful review by transferring venue from Mr. CLIENT's home to a circuit where the case law favored it, and then deporting him before there was any opportunity to seek judicial review. The deportation proceedings were fundamentally unfair and the information should be dismissed.

Respectfully submitted,

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#### ***CERTIFICATE OF SERVICE***

I HEREBY CERTIFY THAT on April 11, 2015, I filed the foregoing electronically through the CM/ECF system, which caused AUSA\_\_\_ to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

I FURTHER CERTIFY THAT on such date I served the foregoing by e-mail on the following non-CM/ECF Participants:

*[Electronically filed]*



Seeking Post-Conviction Relief  
Under *Padilla v. Kentucky* After *Chaidez v. U.S.*  
February 28, 2013

On March 31, 2010, in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), the Supreme Court held that the Sixth Amendment requires criminal defense counsel to advise a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel. On February 20, 2013, however, the Court held in *Chaidez v. U.S.*, No. 11-820, slip. op. (February 20, 2013), that *Padilla* is a “new rule” that does not apply retroactively to Ms. Chaidez’ case involving a federal conviction that was final before *Padilla*. This advisory will discuss claims for post-conviction relief that can still be asserted by immigrants who were not properly advised regarding the immigration consequences of a pre-*Padilla* criminal case.

<b>Chaidez</b>	<b>Padilla</b>
<ul style="list-style-type: none"> <li>• <i>Chaidez</i></li> <li>• Even in the case of an immigrant whose conviction became final before March 31, 2010, <i>Chaidez</i> preserves the right of an immigrant to establish ineffective assistance under the Sixth Amendment—at least in certain jurisdictions— regarding immigration consequences of the criminal case</li> <li>• An immigrant may be able to raise an ineffective assistance claim relating to a pre-March 31, 2010 conviction where the such as failing to negotiate effectively to mitigate harm in the plea.</li> <li>• <i>Chaidez</i> leaves open the argument that, even for a conviction that became final before March 31, 2010, <i>Padilla</i> because such a proceeding is the equivalent of a direct appeal for purposes of an ineffective assistance claim</li> <li>• Immigrants convicted before March 31, 2010 in some states may be able to</li> <li>• Immigrants convicted in state courts may be able to <b>Padilla</b></li> <li>• <i>Padilla</i> may continue to</li> </ul>	

This advisory describes the holding of *Chaidez v. U.S.* and provides initial guidance on claims and strategies—both in federal and state cases—that may be available to noncitizens with convictions. The advisory also attaches a sample brief for arguing that, regardless of *Chaidez*, *Padilla* applies in a first post-conviction proceeding.

***Chaidez v. U.S.***

***Chaidez  
Chaidez***

\* This advisory was authored for the Defending Immigrants Partnership by Sejal Zota of the National Immigration Project and Dawn Seibert of the Immigrant Defense Project, with assistance from Dan Kesselbrenner (NIP) and Manny Vargas (IDP). The appended model brief was authored by the Stanford Supreme Court Litigation Clinic under the supervision of Professor Jeffrey L. Fisher.

In *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment requires criminal defense counsel to advise a noncitizen defendant regarding the risk of deportation arising from a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel. 559 U.S. 356 (2010).

Not long after *Padilla*, prosecutors began challenging application of the decision to criminal convictions that were final before the Supreme Court's announcement of the *Padilla* decision on March 31, 2010. They argued that immigrants whose convictions were already final could not benefit from *Padilla* because it announced a "new rule" and, thus, it could not be applied in collateral challenges to past convictions under the principles set forth in *Teague v. Lane*, 489 U.S. 288 (1989) (when the Court announces a "new rule," a person whose conviction is already final may not benefit from that decision in a habeas or similar proceeding unless the rule is a "watershed rule of criminal procedure" or a rule placing "conduct beyond the power of the [government] to proscribe"). They cited federal and state court decisions that, in the years before *Padilla*, had often found that the Sixth Amendment did not apply to so-called "collateral consequences" of a criminal conviction such as deportation, see, e.g., *Santos-Sanchez v. U.S.*, 548 F.3d 327, 334 (5<sup>th</sup> Cir. 2008); *People v. Ford*, 86 N.Y. 2d 397, 403-04 (1995), even though the Court in *Padilla* had noted that the Court itself had never applied a distinction between the direct and collateral consequences of a criminal conviction to define the scope of the constitutionally "reasonable professional assistance" required under *Strickland v. Washington*, 466 U.S. 668 (1984).

After litigation in federal and state courts on the question of the application of *Padilla* to convictions already final before that decision, a split quickly developed in both federal and state courts. Compare *United States v. Orocio*, 645 F. 3d 630 (3d Cir. 2011) (retroactive); *Commonwealth v. Clarke*, 460 Mass. 30 (2011) (retroactive); with *Chaidez v. U.S.*, 655 F. 3d 684 (7<sup>th</sup> Cir. 2011) (not retroactive); *U.S. v. Chang Hong*, 671 F.3d 1147 (10<sup>th</sup> Cir. 2011) (not retroactive); *State v. Gaitan*, 209 N.J. 339 (2012) (not retroactive). On April 30, 2012, the Supreme Court granted cert in *Chaidez v. U.S.* to resolve this growing split in both federal and state courts.

In 2009, Roselva Chaidez, a long-time lawful permanent resident, filed a petition for a federal writ of error coram nobis challenging the constitutionality of her conviction. She argued that her trial attorney's failure to advise her of the immigration consequences of pleading guilty constituted ineffective assistance of counsel under the Sixth Amendment. Her attorney had failed to advise her that her plea to mail fraud qualified as an aggravated felony under 8 U. S. C. §1101(a)(43)(M)(i) and thereby mandated her removal from the United States.

While her petition was pending – but six years after her conviction had become final—the Supreme Court issued its decision in *Padilla v. Kentucky* holding that criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas. 559 U.S. 356. The District Court granted Ms. Chaidez relief, holding that *Padilla* did not announce a "new rule," but simply applied the longstanding rule in *Strickland v. Washington*, and thus applied to Ms. Chaidez's already-final conviction. The Seventh Circuit reversed, holding that *Padilla* had declared a new rule of criminal procedure and should not apply in a collateral challenge to an already-final conviction.

The Supreme Court granted certiorari and, on February 20, 2013, in a 7-2 opinion, affirmed the Seventh Circuit and held that "under the principles set out in *Teague v. Lane*," *Padilla* is a new rule that does not retroactively apply to Ms. Chaidez's case. *Chaidez*, No. 11-820, slip op. at 1. The Court found that Ms. Chaidez could not benefit from the decision in *Padilla* even though the professional norms supporting the duty to advise of immigration consequences were firmly in place at the time of her plea, two years after that of Mr. Padilla's.

The majority found that *Padilla* was a new rule because it “broke new ground” or “imposed a new obligation” on the government. *Chaidez*, No. 11-820, slip op. at 9-10 (quoting *Teague v. Lane*, 489 U.S. at 301). Specifically, the Court found that “*Padilla* did more than just apply *Strickland*’s general standard to yet another factual situation.” Rather, the Court first considered the threshold question whether “advice about deportation was ‘categorically removed’ from the scope of the Sixth Amendment right to counsel because it involved only a ‘collateral consequence’ of a conviction, rather than a component of a criminal sentence”:

In other words, prior to asking *how* the *Strickland* test applied (“Did this attorney act unreasonably?”), *Padilla* asked *whether* the *Strickland* test applied (“Should we even evaluate if this attorney acted unreasonably?”). And as we will describe, that preliminary question about *Strickland*’s ambit came to the *Padilla* Court unsettled—so that the Court’s answer (“Yes, *Strickland* governs here”) required a new rule.

*Chaidez*, slip op. at 6.

The Court reasoned because *Padilla*’s ruling answered an open question about the Sixth Amendment’s reach in a way that altered and disrupted the law of most jurisdictions, it broke new ground.

In her dissent, Justice Sotomayor, joined by Justice Ginsburg, challenged the majority’s view. She disputed the notion of a “threshold question,” arguing that the majority’s opinion rests on a distinction—between direct and collateral consequences of a conviction—that “the Court has never embraced and that *Padilla* found irrelevant to the issue it ultimately decided.” *Chaidez*, slip op. at 7 (Sotomayor, J., dissenting). Instead, she adopted the Petitioner’s argument:

*Padilla* did nothing more than apply the existing rule of *Strickland v. Washington*, 466 U.S. 668 (1984), in a new setting, the same way the Court has done repeatedly in the past: by surveying the relevant professional norms and concluding that they unequivocally required attorneys to provide advice about the immigration consequences of a guilty plea.

*Chaidez*, slip op. at 1 (Sotomayor, J., dissenting).

In a footnote, the Court expressly declined to address petitioner’s two additional arguments because they were not adequately raised in the lower courts: 1) *Teague*’s bar on retroactivity does not apply when a petitioner collaterally challenges a *federal* conviction and 2) *Teague* notwithstanding, *Padilla* (and other new rules) apply to first post-conviction proceedings raising ineffective assistance of counsel claims because they cannot be brought on direct appeal. *Chaidez*, slip op. at 15, n. 16. Curiously, even though the *Chaidez* Court applied *Teague* for the first time in a federal case, it did so while specifically declining to decide whether *Teague* applies to federal collateral review.

Significantly, the Court reaffirmed *Padilla*’s core holding that for at least the past fifteen years, professional norms have required defense counsel to advise of immigration consequences. *Chaidez*, slip op. at 14, n. 15; slip op. at 1 (Sotomayor, J., dissenting). In fact, *Chaidez* cited to a 1968 ABA standard that instructed criminal lawyers to advise their noncitizen clients about the risks of deportation. *Chaidez*, slip op. at 14, n. 15 (citing 3 ABA Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty §3.2(b), Commentary, p. 71 (App. Draft 1968)). Thus, the Court in no way diminished the force or scope of *Padilla*’s core holding, and if anything strengthened it.

## **Chaidez**

*Padilla v. Kentucky* continues to apply to convictions that were not final before *Chaidez v. U.S.* does not in any way adversely impact those cases. There may also be claims available to noncitizens with convictions that became . This section describes some of those claims that litigants may still raise on federal post-conviction review.

A Sixth Amendment challenge based on erroneous advice is arguably not governed by *Chaidez*. The *Chaidez* Court explicitly distinguished these claims from the claim at issue in *Chaidez*, referring to a “separate rule for material misrepresentations.”<sup>2</sup> The Court articulated the rule governing such claims as devoid of connection to the type of misrepresentation: A lawyer violates the Sixth Amendment when he “affirmatively misrepresent[s] his expertise or otherwise actively mislead[s] his client on any important matter, however related to a criminal prosecution.”<sup>3</sup>

This argument has greatest force in the Second, Ninth and Eleventh Circuits, which the Court identified as recognizing this harm.<sup>4</sup> The Court’s focus was on circuits that had so held at the time of Ms. Chaidez’s plea. The Fifth Circuit held after the time of Ms. Chaidez’s plea that affirmative misrepresentations regarding immigration consequences could establish a claim for ineffective assistance.<sup>5</sup>

Practitioners within other circuits should research the case law regarding “material misrepresentations” generally to find support for this argument; in particular, the law in the area of misstatements regarding parole eligibility may provide strong support for such an argument.<sup>6</sup>

What constitutes a “material misrepresentation” or “misleading” the client is open for interpretation. In cases with no clear affirmative misstatement, practitioners can attempt to construct an argument that the attorney’s conduct, communications (or lack thereof), and/or emphasis on penal consequences as the sole consideration relative to the plea agreement constituted a “material misrepresentation” of the plea’s consequences, or operated to “mislead” the defendant into believing that there were no immigration consequences to the plea.

**Chaidez**

**Padilla**

<sup>1</sup> This is not an exhaustive list of arguments, but presents some of the stronger arguments available in federal post-conviction review.

<sup>2</sup> Op. at 13.

<sup>3</sup> *Id.* The United States has also implicitly endorsed the distinction between the claims of duty to advise and affirmative misrepresentations, stating in *Chaidez* that pre-*Padilla* lower court holdings to that effect rested “on the ground that all criminal defense attorneys have a duty not to misrepresent their expertise on any topic.” Br. at 14, n.4.

<sup>4</sup> See *United States v. Kwan*, 407 F.3d 1005 (9<sup>th</sup> Cir. 2005); *United States v. Couto*, 311 F.3d 179 (2<sup>nd</sup> Cir. 2002); *Downs-Morgan v. United States*, 765 F.2d 1534 (11<sup>th</sup> Cir. 1985).

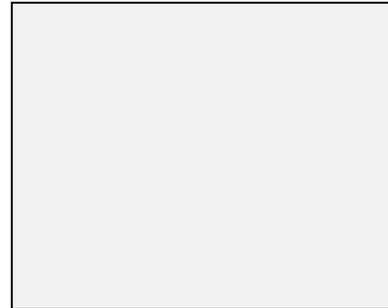
<sup>5</sup> *Santos-Sanchez v. United States*, 548 F.3d 327 (5<sup>th</sup> Cir. 2008) (acknowledging the legitimacy of *Couto* and *Kwan* but finding no affirmative misrepresentation). See also *United States v. Mora-Gomez*, 875 F. Supp. 1208, 1212 (E.D. Va. 1995) (“[T]he clear consensus is that an affirmative misstatement regarding deportation may constitute ineffective assistance”).

<sup>6</sup> See *Mora-Gomez*, 875 F.Supp. at 1212 (relying on *Strader v. Garrison*, 611 F.2d 61 (4<sup>th</sup> Cir. 1979) (erroneous advice on parole eligibility), to find that erroneous advice regarding deportation presented a Sixth Amendment claim).

Despite the lack of a remedy for *Padilla* violations pertaining to convictions that were final on March 31, 2010,<sup>7</sup> the immigration harm can provide relevant background that might favorably influence a factfinder evaluating the case for compliance with an established constitutional duty.<sup>8</sup> For a list of established claims for post-conviction relief, see generally Norton Tooby and J.J. Rollin, Post-Conviction Relief for Immigrants.<sup>9</sup>

For example, noncitizens with pre-*Padilla* final convictions should investigate a claim for ineffective assistance based on a violation of the duty to mitigate harm under *Glover v. United States*, 531 U.S. 198 (2001) or deficient plea bargaining under the duty to negotiate an effective plea bargain under *Missouri v. Frye* and *Lafler v. Cooper*.<sup>10</sup> While this argument may sound similar to that rejected by *Chaidez*, it was not presented to the Court so it is not foreclosed.<sup>11</sup>

In making a claim that defense counsel did not secure a reasonably negotiable alternative plea or sentence to limit the adverse immigration consequences, practitioners should document alternative safe pleas that would have been available for the charged offense in the respective jurisdiction; best practices that local defense counsel followed with such offenses, e.g., that



<sup>7</sup> In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the Supreme Court stated the following with regard to its retroactivity jurisprudence: “What we are actually determining when we assess the ‘retroactivity’ of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought.” *Id.* at 271. The *Danforth* Court noted that the term “retroactivity” is somewhat misleading, because it implies that the constitutional right did not exist prior to its announcement; the Court indicated that it made more sense to reference the “‘redressability’ of violations of new rules, rather than the ‘retroactivity’ of such rules.” *Id.* The Court decided to continue to use the term “retroactivity” out of concern that “it would likely create, rather than alleviate, confusion to change our terminology at this point.” *Id.* n. 5. Thus, *Chaidez* did not hold that a *Padilla* violation couldn’t exist prior to *Padilla*, it rather held that such a violation was not redressable.

<sup>8</sup> If the claim litigated requires demonstrating that the defendant was prejudiced (i.e. would have rejected the plea absent the deficient performance, conflict of interest, etc.), the immigration harm may be specifically relevant to the claim.

<sup>9</sup> <https://nortontooby.com/node/652>

<sup>10</sup> *Missouri v. Frye*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1399, 1406 (2012); *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1376, 1384. *Cf. Vartelas v. Holder*, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1479, 1492 n. 10 (2012) (“Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas’ case, e.g., possession of counterfeit securities—or exercise a right to trial.”); *United States v. Castro*, 26 F. 3d 557, 561 (5th Cir. 1994) (holding that counsel’s failure to seek judicial recommendation against deportation may amount to ineffective assistance of counsel). Also, the professional standards have long made clear that immigration consequences should inform negotiation strategy. See, e.g., National Legal Aid And Defender Assn., Performance Guidelines For Criminal Representation § 6.2 (1995) (“In order to develop an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of . . . other consequences of conviction such as deportation. . . . In developing a negotiation strategy, counsel should be completely familiar with . . . the advantages and disadvantages of each available plea according to the circumstances of the case.”); ABA Standards on Plea of Guilty, 14.3-2(b) (3d ed. 1999) (“To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by . . . the defendant in reaching a decision. Defense counsel should not recommend . . . acceptance of a plea unless appropriate investigation and study of the case has been completed.”).

<sup>11</sup> *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (finding that *stare decisis* is not applicable unless the issue was “squarely addressed” in the prior decision). See also *Webster v. Fall*, 266 U.S. 507, 511 (1925) (“Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents”) (citations omitted)

it was the norm for defense counsel to arrange for a plea to drug solicitation in a case in which the client was charged with possession with intent to sell; and existing resources available to assist trial counsel develop safe immigration pleas. *Lafler* and *Frye* are not “new rules” and should apply retroactively to pre-*Padilla* final convictions.<sup>12</sup> Practitioners should research applicable federal precedent to support the “duty to negotiate effectively.”<sup>13</sup>

***Padilla***                      ***Strickland***

Even if *Teague* applies to post-conviction review of federal convictions, practitioners should consider arguing that *Teague* does not apply to *Strickland* claims raised on the equivalent of direct review in cases final prior to March 31, 2010. As highlighted in Section II, the *Chaidez* Court declined to address the argument that *Padilla* (and other new rules) apply to a first federal post-conviction proceeding raising ineffective assistance of counsel because that claim cannot be raised on direct appeal.

The Supreme Court has ruled that ineffective assistance of counsel challenges to federal convictions—at least those that depend on evidence outside the record, as *Padilla* claims would—must be raised for the first time on post-conviction review.<sup>14</sup> Thus, *Padilla-Strickland* claims are not aired for the first time until post-conviction review, and in such cases no prior court has previously passed on the merits of such a claim and considered the relevant norms. Therefore, *Teague* concerns of finality and fairness to the lower court that has faithfully applied existing law do not apply to such initial-review collateral proceedings that are the equivalent of a defendant’s direct appeal. Applying *Teague* to federal ineffective-assistance claims would also generate significant administrative problems.

No federal court has yet ruled on this initial-review argument, which is bolstered by the Supreme Court’s decision last term in *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012) (reaffirming that “the first designated proceeding for a [defendant] to raise a claim of ineffective assistance,” is, for purposes of the procedural default doctrine, the “equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim.”). The Supreme Court’s forthcoming decision in *Trevino v. Thaler*, No. 11-10189 (argued February 25, 2013) may also impact the scope of the initial-review argument. There, the Court must decide whether it will extend *Martinez v. Ryan* to Texas proceedings, which seemingly encourage ineffective assistance claims to be brought on collateral review, but do not require it. This initial-review argument is fully developed in the Sample Brief included in the Appendix.

The *Chaidez* Court also expressly declined to address Petitioner’s broader argument that *Teague* does not apply to post-conviction filings involving federal convictions. Practitioners may consider raising this question in future litigation, as *Teague* itself involved federal collateral review of a *state* conviction, and did not address the question

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<sup>12</sup> See *Lafler*, 132 S. Ct. at 1390 (finding that *Strickland*’s application to plea negotiations, including rejected plea offers, was “clearly established” Supreme Court law); *Chaidez*, slip op. at 5, n. 4. (“[A]s we have explained, “clearly established” law is not “new” within the meaning of *Teague*.” (citing *Williams*, 529 U. S., at 412)).

<sup>13</sup> See, e.g., *United States v. Gordon*, 156 F.3d.376 (2d Cir. 1998) (defendant was denied effective assistance of counsel at plea negotiations when defense counsel grossly underestimated defendant’s potential maximum sentence); *Aeid v. Bennett*, 296 F.3d 58 (2d Cir. 2002) (defense attorney’s performance deficient where he underestimated sentencing exposure after trial, causing defendant to reject favorable plea).

<sup>14</sup> *Massaro v. United States*, 538 U.S. 500, 508 (2003).

of the whether the retroactivity principles also apply to collateral review of federal convictions.<sup>15</sup>

Further, in *Danforth v. Minnesota*, 552 U.S. 264, 279 (2008), the Court explained that the *Teague* analysis, concerned with comity, federalism and minimizing federal intrusion into state criminal proceedings “was meant to apply *only to federal courts considering habeas corpus petitions challenging state-court criminal convictions.*” Thus, the important federalism interests furthered by *Teague*’s retroactivity regime are not implicated when a federal court engages in post-conviction review of a federal, as opposed to a state, conviction. Since *Danforth*, the Sixth and Ninth Circuits have stated that *Danforth* casts serious doubt on their respective precedents applying *Teague* to federal collateral review of federal convictions.<sup>16</sup> The strength of the argument remains uncertain as the *Chaidez* Court did apply *Teague* in reviewing petitioner’s federal conviction (without expressly ruling on it, however). Also, should one convince the court of *Teague*’s inapplicability, there is still a question of what, if any, retroactivity principles should apply and whether *Padilla* applies retroactively under the alternative standard. For a discussion of broader, alternative standards adopted by state courts, see Section IV.E.

### ***Chaidez***

*Padilla v. Kentucky* continues to apply to state convictions that were not final before . There may also be claims available to noncitizens with state convictions that became . This section describes some of those claims that litigants may still raise on state post-conviction review.<sup>17</sup>

The retroactivity test and procedural default rules for post-conviction relief vary dramatically from state to state. A review of how *Chaidez* affects each of the states is beyond the scope of this advisory. Fortunately, a resource already exists that addresses state post-conviction remedies in all state jurisdictions.<sup>18</sup>

As discussed in Sec. III.A, *supra*, claims based on material misrepresentations pertaining to convictions that were final on March 31, 2010 may still be made post-*Chaidez*. Practitioners should research the case law in their jurisdiction to determine whether courts specifically recognized these claims pre-*Padilla*.<sup>19</sup> In the absence of case law directly on point, look for case law in analogous situations; one of the most common of these is misadvice in the area of parole eligibility.<sup>20</sup>

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<sup>15</sup> *Teague v. Lane*, 489 U.S. at 327 n.1 (Brennan, J., dissenting) (“The plurality does not address the question whether the rule it announces today extends to claims brought by federal, as well as state, prisoners.”); see also *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008) (reserving the question “whether the *Teague* rule applies to cases brought under 28 U.S.C. § 2255”).

<sup>16</sup> See *Duncan v. United States*, 552 F.3d 442, 444 n.2 (6th Cir. 2009); *Reina-Rodriguez v. United States*, 655 F.3d 1182, 1189-90 (9th Cir. 2011).

<sup>17</sup> This is not an exhaustive list of arguments, but presents some of the stronger arguments available in state post-conviction review.

<sup>18</sup> See D. Wilkes, *State Post-conviction Remedies and Relief Handbook* (2009) for a state-by-state summary of post-conviction vehicles and procedures

<sup>19</sup> See *Rubio v. State*, 124 Nev. 1032, 1041 (2008) (*per curiam*) (“a growing number of jurisdictions have adopted the affirmative misrepresentation exception to the collateral consequence rule”); *In re Resendiz*, 25 Cal.4<sup>th</sup> 230 (2001); *People v. Correa*, 108 Ill. 2d 541, 550–52 (1985); *People v. McDonald*, 1 N. Y. 3d 109, 113–15 (2003); *Alguno v. State*, 892 So. 2d 1200, 1201 (Fla. App. 2005) (*per curiam*); *State v. Rojas-Martinez*, 125 P.3d 930, 933-35 (Utah 2005); *In re Yim*, 139 Wash. 2d 581, 588 (1999); *Rollins v. State*, 591 S.E.2d 796, 799 (Ga. 2004); *State v. Nunez-Valdez*, 200 N.J. 129 (2009); *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987); *State v. Paredes*, 136 N.M. 533 (2004).

<sup>20</sup> See, e.g., *In re Moulton*, 158 Vt. 580, 584 (1992).

See Sec. III.B, *supra*. Practitioners should research the case law in their jurisdictions to uncover analogous case law finding a duty to negotiate effectively.<sup>21</sup> One situation that may yield helpful relevant case law is where the defense attorney conducts negotiations based on a misunderstanding of the defendant's sentencing exposure.<sup>22</sup>



For a thorough explication of this argument, see Sec. III.C, *supra*, and the Sample Brief in the Appendix.

Prior to *Padilla*, three state courts had articulated a duty to advise regarding immigration consequences as a matter of state constitutional law.<sup>23</sup> Practitioners should research their state law regarding ineffective assistance of counsel to see whether such a claim is foreclosed. If not, establishing this duty under state law will likely involve asking the court to undertake an inquiry similar to that undertaken by the *Padilla* court. Thus, practitioners will need to present evidence of the “prevailing professional norms” within their states that support a duty under the state constitution to advise regarding immigration consequences.<sup>24</sup> It is important to emphasize materials published prior to the date of the defendant's plea, although the Supreme Court included some materials dated after 2002, the date of Mr. Padilla's plea, as evidence that the norms existed in 2002.<sup>25</sup>

This argument may exist even if a state has case law specifically holding that there is no duty to advise regarding immigration consequences under the state constitution. This is particularly true if the unhelpful precedent was issued before the passage of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).<sup>26</sup> Thus, for example, if the state precedent was based on immigration law prior to 1996, practitioners can argue that the 1996 changes render that precedent



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<sup>21</sup> See *People v. Bautista*, 115 Cal.App.4th 229, 238-42 (2004) (attorney failed to “attempt to ‘plead upward,’ that is, pursue a negotiated plea for violation of a greater . . . offense” that carried less severe immigration consequences).

<sup>22</sup> See fn 13, *supra*.

<sup>23</sup> See *People v. Pozo*, 746 P.2d 523 (Colo. 1987); *State v. Paredes*, 136 N.M. 533 (2004); *People v. Soriano*, 194 Cal.App.3d 1470 (1987). Prior to *Padilla*, appellate courts in almost 30 states held that the failure to advise regarding immigration consequences did not violate the Sixth Amendment. See *Chaidez*, Op. at 7 & n.8 (compiling cases). Accordingly, appellate courts in twenty states had not addressed the issue under the federal constitution, or presumably under the state constitution.

<sup>24</sup> See *Padilla v. Kentucky*, 130 S.Ct 1473, 1482-83 (citing numerous standards, performance guides, resources, articles, and practice manuals in support of its holding that professional norms required that a defense attorney advise his client regarding immigration consequences).

<sup>25</sup> See *id.*

<sup>26</sup> Compare *People v. Ford*, 86 N.Y.2d 397 (1995) (no duty under the state constitution to advise regarding immigration consequences) with *People v. DeJesus*, 935 N.Y.S.2d 464 (Sup Ct, NY County 2011) (duty under state constitution to advise regarding immigration consequences) and *People v. Burgos*, 950 N.Y.S.2d 428 (Sup Ct, N.Y. County 2012) (same).

unavailing as to convictions entered after the effective dates of AEDPA (April 24, 1996) and IIRIRA (April 1, 1997).<sup>27</sup>

States can adopt broader retroactivity principles than those articulated in *Teague v. Lane*, 489 U.S. 288 (1989).<sup>28</sup> ~~Maryland, for example, has held that *Padilla* applies retroactively to pre-*Padilla* cases under broader state retroactivity principles.~~<sup>29</sup> The first question is whether a state has explicitly (or implicitly) adopted *Teague*. Practitioners should research state retroactivity jurisprudence to ascertain whether the court of last resort has expressly adopted *Teague*.<sup>30</sup> If a state has adopted *Teague*, it may still be possible to make the argument detailed in Sec. III.C and IV.C, *supra*, that *Teague* should not be applied in a first collateral proceeding raising an ineffective assistance of counsel claim.<sup>31</sup>

Some states have adopted *Teague* pre-*Danforth* without addressing the propriety of doing so.<sup>32</sup> If the court, for example, reasoned that federal retroactivity “govern[s]” the situation, there may be an argument that the court felt compelled to apply *Teague*. Practitioners can argue that the court should address the issue of whether *Teague* should govern the retroactivity of federal rules of constitutional procedure, in the context of state post-conviction relief, after full evidentiary development and legal briefing.

If the state has not expressly adopted *Teague* post-*Danforth*, practitioners may argue that the state should adopt the reasoning of other state courts of last resort that have diverged from *Teague*.<sup>33</sup> If the court applies a different test, one still must persuade the court that the application of that test leads to retroactive application of *Padilla*.<sup>34</sup>

In states that have diverged from *Teague*, there are at least two types of tests used to determine the retroactive application of federal rules of criminal procedure:

- (1) Some states use the pre-*Teague* “balancing test” described in *Linkletter v. Walker*, 381 U.S. 618, 636 (1965).<sup>35</sup> This test requires the court to balance three factors to determine whether a “new” rule merits retroactive application: (a) the purpose to be served by the new rule; (b) the extent of reliance on the old rule; and (c) the effect on the administration of justice of a retroactive application of the new rule.<sup>36</sup>

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<sup>27</sup> The same argument could be made regarding any major change in immigration law, for example, the Immigration Act of 1990. See *Padilla*, 130 S.Ct. at 1480.

<sup>28</sup> See *Danforth v. Minnesota*, 552 U.S. 264 (2008).

<sup>29</sup> ~~*Denisyuk v. State*, 30 A.3d 914, 924-925 (Md. 2011).~~

<sup>30</sup> Practitioners may want to research their state’s retroactivity jurisprudence pertaining to state rules of constitutional criminal procedure. State courts “generally have the authority to determine the retroactivity of their own decisions.” *People v. Mitchell*, 80 N.Y.2d 519, 526 (1992). A state may apply broader retroactivity principles for state rules of constitutional criminal procedure, which one can argue should be imported into the state retroactivity analysis for federal rules of constitutional criminal procedure.

<sup>31</sup> If your state has expressly adopted *Teague* but not in the context of a *Strickland* claim, practitioners can argue that the applicability of *Teague* to a first collateral proceeding raising an ineffective assistance of counsel claim is an issue of first impression. This allows a practitioner to make any of the non-*Teague* arguments in this advisory.

<sup>32</sup> See, e.g., *People v. Eastman*, 85 N.Y.2d 265, 275 (1995).

<sup>33</sup> See *Colwell v. State*, 118 Nev. 807, 816-21 (2003) (describing federal retroactivity jurisprudence and explaining the decision to diverge from *Teague*).

<sup>34</sup> Because of the strong systemic interest in finality of criminal convictions, these theoretically divergent tests nearly always produce the same nonretroactivity result as *Teague*.

<sup>35</sup> See, e.g., *Potts v. State*, 300 Md. 567, 578 (1984); *State v. Smart*, 202 P.3d 1130 (Alaska 2009); *Cowell v. Leapey*, 458 N.W.2d 514 (S.D. 1990); *Hernandez v. State*, 2012 WL 5869660 \* 5, \_\_\_ So.3d \_\_\_, \_\_\_ (Fla. 2012); *People v. Maxson*, 482 Mich. 385, 393 (2008).

<sup>36</sup> See *Hernandez*, at \*5.

← (reversed)

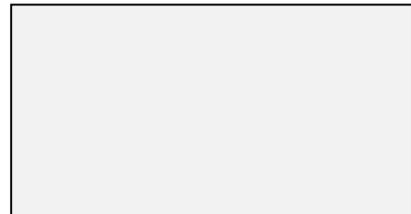
- (2) Some states have adopted *Teague* in principle but not the narrow federal interpretation of those principles.<sup>37</sup>

Practitioners should pay attention to the interaction between their state's available procedural vehicles and the retroactivity argument. In some states, depending on the date of conviction, to make a timely filing a litigant must assert that *Padilla* was "new," or a "significant change in the law."<sup>38</sup> However, the litigant may also need to assert that *Padilla* applies retroactively to a final conviction.<sup>39</sup> These arguments can contradict each other; thus, practitioners should be mindful of the limitations of the procedural vehicle as they fashion state retroactivity arguments.

If a litigant can successfully assert that his conviction was not final on March 31, 2010, *Chaidez* allows him access to a remedy for a *Padilla* violation. A conviction is considered "final" under *Teague* when "the availability of appeal [has been] exhausted, and the time for petition for certiorari ha[s] elapsed."<sup>40</sup>

Practitioners should research their state law to ascertain whether there are any arguments that the conviction was not final on March 31, 2010. One possibility exists in a rule allowing an extension of the usual time period for filing an appeal. For instance, in New York, the initial filing deadline for a direct appeal is thirty days from the date of imposition of sentence.<sup>41</sup> However, a defendant may obtain an extension of the thirty-day deadline, for a period up to one year.<sup>42</sup> In a slightly different context, the Second Circuit has held that this extension under state law does not alter the nature of the ensuing appeal.<sup>43</sup> Therefore, practitioners in New York can argue that the conviction did not become final until the deadline in NYCPL 460.30 had elapsed.

Alternatively, there may be grounds to file a direct appeal even after the deadline has expired, if defense counsel was ineffective for not filing the notice in a timely fashion.<sup>44</sup> If a defendant can get the direct appeal reinstated post-*Chaidez*, that opens up an argument that the conviction was non-final on March 31, 2010.



<sup>37</sup> See, e.g., *Danforth v. State*, 761 N.W.2d 493, 500 (Minn. 2009) (adopting *Teague* but declining to adopt the federal definition of a "watershed rule" in favor of a "fundamental fairness" inquiry); *Rhoades v. State*, 149 Idaho 130 (2010); *Colwell*, 118 Nev. 807 (2003).

<sup>38</sup> See, e.g., *In re Jagana* 2012 WL 3264948 (Wash. App. Div. 1 2012).

<sup>39</sup> See *id.*

<sup>40</sup> *Teague v. Lane*, 489 U.S. at 295 (internal quotations omitted).

<sup>41</sup> See NYCPL 460.10.

<sup>42</sup> See NYCPL 460.30.

<sup>43</sup> See *Cardenas-Abreu v. Holder*, No. 09-2439, 378 F. App'x 59 (2d Cir. May 24, 2010) (appeal filed under NYCPL 460.30 is "equivalent to any other direct appeal for the purposes of finality").

<sup>44</sup> See *Roe v. Flores-Ortega* 528 U.S. 470, 480 (2000) ("[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing"); see also *Rodriguez v. United States*, 395 U.S. 327 (1969) (failing to file a notice of appeal upon the defendant's request constitutes deficient performance). In a jurisdiction where it is fairly easy to succeed on a claim of a failure to file a notice of appeal, this strategy may present an attractive option. However, practitioners should be mindful that this argument presents a direct contradiction to the argument in sec. IV.C, *supra*.

Despite holding that *Padilla* is not generally retroactive on state collateral review,<sup>45</sup> Florida has carved out an exception for petitioners whose PCR cases were pending when *Padilla* was decided.<sup>46</sup> This exception would seem to apply regardless of the date of the conviction at issue. The *Castano* Court declined to articulate its rationale for the decision, although *Hernandez*, issued the same day, was based on non-*Teague* state retroactivity principles. Litigants whose petitions were filed by March 31, 2010 may be able to use *Castano* to argue that state retroactivity principles (see Sec. III.E, *supra*) mandate the retroactive application of *Padilla* to their cases.

1. In jurisdictions where it is possible to amend the petition, ask the court to ground the decision in state constitutional law.
  - a. If the petitioner won in the trial court but the case is now on appeal, and state law permits it:
    - i. Practitioners can file a motion to reargue/renew, asking the trial court to ground the decision in state constitutional law. This might be particularly useful if the petition raised the state constitution but the court did not address it.
    - ii. Practitioners can ask the appellate court to consider, or remand for a decision on, the state constitutional argument.
  - b. If the petitioner lost in the trial court, but raised the state constitutional claim below and the court did not address it, practitioners will need to make the strategic decision whether to press the state constitutional argument in the appellate court, or ask for a remand for the trial court to consider it.
2. If the case is in the trial court, amend the pleadings to frame the issues consistent with the points in subsections (A) thru (G) above. In some instances practitioners can amend the pleadings even after trial.<sup>47</sup>
3. In Massachusetts, New York, and New Mexico, practitioners can argue that the state should not adopt *Teague* as the retroactivity test, or the narrow federal interpretation of *Teague*, as permitted by *Danforth v. Minnesota*.<sup>48</sup>

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<sup>45</sup> See *Hernandez v. State*, 2012 WL 5869660 (Fla. 2012).

<sup>46</sup> See *Castano v. State*, 2012 WL 5869668 (Fla. 2012).

<sup>47</sup> See, e.g., V.R.C.P. 15(b).

<sup>48</sup> See *Commonwealth v. Clarke*, 460 Mass. 30 (2011), *People v. Baret*, 952 N.Y.S.2d 108 (A.D.1 2012), *People v. Rajpaul*, 954 N.Y.S.2d 249 (A.D.3 2012), and *State v. Ramirez*, 2012–NMCA–057, 278 P.3d 569, cert. granted, — NMCERT —, — N.M. —, — P.3d — (No. 33,604, June 5, 2012).

<http://immigrantdefenseproject.org/defender-work/padilla-pcr>

<http://www.ilrc.org/>

<http://www.nationalimmigrationproject.org/>

<https://nortontooby.com/node/652>

<http://defendingimmigrants.org/>

*The Defending Immigrants Partnership is staffed by the Immigrant Defense Project (IDP), the Immigrant Legal Resource Center (ILRC), and the National Immigration Project of the National Lawyers Guild (NIPNLG). Since its inception in October 2002, the Partnership has coordinated on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent noncitizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions*

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court held in *Chaidez v. United States*, 133 S. Ct. \_\_\_\_ (2013), that its earlier ruling in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), announced a “new rule” of criminal procedure and thus does not apply retroactively across the board. At the same time, the Court expressly reserved the question – and directed lower courts to consider in the first instance – whether *Padilla* applies retroactively in a particular subset of cases: those, as here, in which a defendant challenges federal conviction in a timely filed first post-conviction motions (what the Court now calls “initial-review collateral proceedings,” *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012)). See *Chaidez*, 133 S. Ct. at \_\_\_\_ n.16.

This Court should hold here that it does. The Supreme Court’s general bar on applying “new rules” retroactively derives from *Teague v. Lane*, 489 U.S. 288 (1989). This bar is based on comity and finality. But no comity interests are at stake when a federal court reviews the legitimacy of a federal, as opposed to state, conviction. And no finality considerations need to be accommodated by a separate nonretroactivity rule when – as is also the case here – the claim at issue can be brought only on collateral, as opposed to direct, review and the substantive doctrine already accounts for that reality.

Applying *Teague* to ineffective-assistance claims in first post-conviction motions would not only lack any theoretical basis, but it would also generate profound administrative problems. The Supreme Court held a decade ago in *Massaro v. United States*, 538 U.S. 500 (2003), that ineffective-assistance claims challenging federal convictions should generally be brought on collateral instead of direct review because the former provides a better setting in which to litigate such claims. Since that decision, ineffective-assistance claims challenging federal convictions that depend on evidence outside the trial record must be litigated exclusively on collateral review. When defendants have attempted to raise such claims on direct review, courts have universally declined to consider them, instead dismissing such claims *without prejudice* to defendants’ ability to present those claims on collateral review.

Holding here that *Teague* applies to ineffective-assistance claims brought in first federal post-conviction review proceedings would upend this system. Because direct review would be the only time defendants could be assured of having their claims assessed without respect to whether they were seeking new rules, criminal defense lawyers would face pressure – if not an ethical obligation – to bring all such claims on direct review. In other words, holding that *Teague* applies in this context would reintroduce all of the practical difficulties that the Supreme Court sought to prevent in *Massaro* and leave federal courts no legitimate way of mitigating the resulting inefficiencies, increased burdens, and procedural unfairness. There is no good reason for going back down that abandoned road.

## ARGUMENT

### **I. Even Though *Padilla* Is A “New Rule,” It Should Apply In The First Post-Conviction Proceeding Of A Person Challenging A Federal Conviction.**

*Teague v. Lane*, 489 U.S. 288 (1989), did not present, and the Supreme Court did not there resolve, the question whether its retroactivity regime applies to post-conviction filings challenging federal, as opposed to state, convictions. See *Teague*, 489 U.S. at 327

n.1 (Brennan, J., dissenting) (noting that the Court “does not address whether the rule it announces today extends to claims brought by federal, as well as state, prisoners”). Years later, the Supreme Court expressly reserved the issue. *Danforth v. Minnesota*, 552 U.S. 264, 269 n.4 (2008). This Court should hold, at least with respect to claims – as here – of ineffective assistance of counsel that depend on evidence outside the trial record, that *Teague* does not apply to such filings.

**A. *Teague’s Comity And Finality Concerns Do Not Apply In This Context.***

*Teague’s* bar against the retroactive application of new constitutional rules of criminal procedure rests on two bases: comity and finality. *Teague*, 489 U.S. at 308. Neither of these interests justifies applying *Teague* to a person seeking collateral relief from a federal conviction due to ineffective assistance of counsel. Comity considerations are absent when a federal court is reviewing a federal conviction, and *Strickland’s* highly deferential framework already accommodates the finality interest at stake when a court adjudicates an ineffective-assistance challenge to a federal conviction on collateral review.

1. *Comity.* *Teague’s* bar against applying new rules to cases on collateral review is motivated in part by “comity” considerations – that is, the reluctance federal courts should have to upset state convictions. *Teague*, 489 U.S. at 308; *see also Danforth*, 552 U.S. at 280 (*Teague* is intended to “minimiz[e] federal intrusion into state criminal proceedings” – that is, “to limit the authority of federal courts to overturn state convictions”); *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in part and concurring in the judgment) (emphasizing “[t]he comity interest served by *Teague*”). Federal review of state convictions is highly “intrusive” because it “forces the States to marshal resources” to keep convicted inmates locked up, even when the state trial “conformed to then-existing constitutional standards.” *Teague*, 489 U.S. at 310.<sup>49</sup>

This comity interest is not implicated when, as in this case, the challenged judgment was issued by a federal rather than a state court.

2. *Finality.* Nor do *Teague* concerns about preserving the finality of criminal judgments pertain here, where petitioner’s claim could not have been raised on direct review of her federal conviction and the constitutional law under which she seeks relief already accounts for the fact that the claim must be pressed on collateral review.

a. In *Teague*, the petitioner “repeated” – as all state habeas petitioners must – a claim that he had already raised in state court. *Id.* at 293.<sup>50</sup> In other words, the petitioner was

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<sup>49</sup> For further expressions of this comity interest, see *Stringer v. Black*, 503 U.S. 222, 235 (1992) (federalism is “one of the concerns underlying the nonretroactivity principle”); *Gilmore v. Taylor*, 508 U.S. 333, 340 (1993) (“The ‘new rule’ principle . . . fosters comity between federal and state courts.”); *Williams v. Taylor*, 529 U.S. 362, 381 (2000) (Stevens, J., concurring in part and concurring in the judgment) (“*Teague* established . . . that a federal habeas court operates within the bounds of comity and finality” if it follows the “dictated by precedent” standard); *Schriro v. Summerlin*, 542 U.S. 348, 364 (2004) (“Comity interests and respect for state autonomy” support *Teague*.).

<sup>50</sup> Of course, state prisoners sometimes try to press claims for the first time in federal habeas proceedings. But when they do so, federal courts must either dismiss those claims for failure to exhaust the prisoner’s state-court remedies or deny them as procedurally defaulted. See *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (exhaustion); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) (procedural default).

attempting to use collateral review to obtain a second bite at the judicial apple: he wanted a federal court to entertain a constitutional claim that a state court had rejected previously. The Supreme Court held that in that context, respect for the finality of state-court judgments allows federal courts to apply only “old rules” on collateral review. *Teague’s* nonretroactivity principle thus relies on a critical assumption: namely, that habeas petitioners have already had full and fair opportunities to raise their constitutional claims. 489 U.S. at 308-09; see also *Mackey v. United States*, 401 U.S. 667, 684 (1971) (Harlan, J., dissenting) (restrictions on retroactivity presume that the defendant “had a fair opportunity to raise his arguments in the original criminal proceeding”).

This assumption does not apply to initial *Padilla*-type challenges to federal convictions. In *Massaro v. United States*, 538 U.S. 500, 508 (2003), the Supreme Court instructed that ineffective-assistance challenges to federal convictions must be raised for the first time on collateral review – at least when they depend on evidence outside of the trial record. *Padilla* claims fit that mold. Specifically, trial records generally do not include evidence as to whether defense attorneys advised their clients that pleading guilty would have deportation consequences. See *Padilla*, 130 S. Ct. at 1483. Even in the rare instances in which a trial record does include such information, it does not provide the evidence necessary to show – as required by the prejudice prong of the *Strickland/Padilla* test – that if the defendant had received such advice, she would not have pleaded guilty. See *id.* Accordingly, *Padilla*-type claims must be litigated in what the Supreme Court has called “initial-review collateral proceedings.” *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012). As such, there is no basis for applying *Teague* in this context.

Indeed, the Supreme Court has already recognized that another judicially created equitable doctrine governing the availability of habeas relief, the procedural default doctrine, should not apply in these circumstances. The procedural default doctrine precludes a federal court from granting habeas relief when the defendant “fail[ed] to raise a claim on [direct] appeal.” *Murray v. Carrier*, 477 U.S. 478, 491 (1986). Just like *Teague*, this doctrine is designed to “respect the law’s important interest in the finality of judgments,” *Massaro*, 538 U.S. at 504. Yet in *Massaro*, the Court held that the procedural default doctrine does not apply to ineffective assistance challenges to federal convictions that are raised for the first time on collateral review. *Id.* at 509. And last Term in *Martinez*, the Supreme Court reaffirmed that “the first designated proceeding for a [defendant] to raise a claim of ineffective assistance,” is, for purposes of the procedural default doctrine, the “equivalent of a prisoner’s direct appeal as to the ineffective-assistance claim.” *Martinez*, 132 S. Ct. at 1317.

The same reasoning applies here. Because *Padilla*-type claims must be raised for the first time on collateral review, such “initial-review collateral proceedings” are the “equivalent of a [defendant’s] direct appeal.” As such, there is no basis for applying *Teague* in this context.

b. To be sure, some interest in repose exists respecting any federal judgment “that has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal.” *United States v. Frady*, 456 U.S. 152, 164 (1982). But

*Strickland's* constitutional formula already fully protects that interest when someone raises an ineffective-assistance claim for the first time on collateral review.

Recognizing that ineffective-assistance claims are almost always brought on collateral review, and therefore almost always implicate finality interests of the “strongest” order, 466 U.S. at 697, the Court has structured the *Strickland* test to protect legitimate finality interests. Thus, the Court has stressed that because final judgments carry a “strong presumption of reliability,” *id.* at 696, the inquiry into an attorney’s performance is “highly deferential,” *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). In particular, that inquiry turns not on whether the attorney made errors (even “significant errors,” *Lockhart v. Fretwell*, 506 U.S. 364, 379 (1993) (Stevens, J., dissenting)), but rather on “the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 696.

*Strickland's* prejudice prong is also expressly designed to protect “the fundamental interest in the finality of” convictions and “guilty pleas.” *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In contrast to typical constitutional claims, in which the prosecution bears the burden of showing that any procedural impropriety was harmless beyond a reasonable doubt, *see Chapman v. California*, 386 U.S. 18, 24 (1967), ineffective-assistance claims require the defendant to show that he was prejudiced by his counsel’s deficient performance. *Strickland*, 466 U.S. at 694.<sup>51</sup> That prejudice requirement is “highly demanding,” *Kimmelman*, 477 U.S. at 382: the defendant must show a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. Accordingly, as this Court noted in *Strickland*, the “principles governing ineffectiveness claims should apply in federal collateral proceedings” just as they would “on direct appeal.” *Id.* at 697.

The Supreme Court’s treatment of the ineffective-assistance claim in *Padilla* itself illustrates this reality. *Padilla* arose on state collateral review, and the Court expressly assumed that other similar claims would arise in “habeas proceeding[s]” or otherwise in “collateral challenges.” 130 S. Ct. at 1485-86. The Court, therefore, was careful to “give[] serious consideration” to “the importance of protecting the finality of convictions obtained through guilty pleas.” *Id.* at 1484. Yet even though Kentucky has adopted the *Teague* doctrine, *see Leonard v. Commonwealth*, 279 S.W.3d 151, 160 (Ky. 2009), and even though the Supreme Court has the authority to raise *Teague* sua sponte, *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994), the Court did not feel the need to consider whether *Teague* might bar relief. Instead, the Court simply asked whether *Padilla's* ineffective-assistance claim “surmount[ed]” *Strickland's* already “high bar.” *Padilla*, 130 S. Ct. at 1485. Finding that it did, there was no need for additional analysis.<sup>52</sup>

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<sup>51</sup> The only other frequently litigated constitutional claim that requires a demonstration of prejudice is a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), that the prosecution suppressed exculpatory evidence. *See, e.g., Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999). Such claims are also typically brought for the first time on collateral review.

<sup>52</sup> Similarly, in *Missouri v. Frye*, 132 S. Ct. 1399 (2012), another case arising on state collateral review, the Supreme Court did not consider whether *Teague* affected the availability of relief, but simply applied *Strickland* directly to respondent’s ineffective-assistance claim.

**B. Applying *Teague* In This Context Would Cause Administrative Problems And Be Fundamentally Unfair.**

Not only is there no theoretical reason to apply *Teague* to ineffective-assistance claims challenging federal convictions, but doing so would trigger serious practical difficulties and threaten profound unfairness.

“Rules of procedure should be designed to induce litigants to present their contentions to the right tribunal at the right time.” *Massaro*, 538 U.S. at 504 (quotation marks and citation omitted); see also *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). Accordingly, in *Massaro*, the Supreme Court refused to apply the procedural default doctrine to ineffective-assistance challenges to federal convictions because doing so “would have the opposite effect.” 538 U.S. at 504. Namely, “defendants would feel compelled to raise [ineffective-assistance claims] before there has been an opportunity fully to develop the factual predicate[s] for the claim[s],” and such claims “would be raised for the first time in a forum not best suited to assess those facts.” *Id.*

Since *Massaro*, ineffective-assistance claims challenging federal convictions that depend on evidence outside the trial record have been litigated exclusively on collateral review. When defendants have attempted to raise such claims on direct review and they are potentially meritorious, court decline to consider them, instead dismissing such claims “without prejudice to [defendants’] ability to present those claims properly in the future.” *United States v. Wilson*, 240 F. App’x 139, 145 (7th Cir. 2007) (quotation marks and citation omitted).<sup>53</sup> This system – just as the Supreme Court expected – has promoted the efficient disposition of direct appeals and has ensured that federal defendants are treated fairly because, as the Government itself said in *Massaro*, defendants raising ineffective-assistance claims for the first time on collateral review are able to obtain “the same relief” that they could have obtained had the claims been adjudicated on direct review, U.S. Br. 34, *Massaro v. United States*, available at 2002 WL 31868910.

Applying *Teague* to ineffective-assistance claims brought in first federal post-conviction review proceedings would upend this system, reintroducing all of the administrative difficulties that this Court sought to prevent in *Massaro*. Direct review would become the only setting in which a defendant could be assured of having a legal argument adjudicated on its merits without regard to whether the claim might be considered “new.” Under such a regime, criminal defense lawyers would face pressure – if not an ethical obligation – to bring all such claims on direct review.

Faced with an onslaught of ineffective-assistance claims on direct review and an inability to adjudicate them properly, Courts in this Circuit would have three basic choices, none of them acceptable.

First, Courts in this Circuit might try to adjudicate ineffective-assistance claims as part of direct review. But, as the Supreme Court explained in *Massaro*, such claims – at

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<sup>53</sup> See also, e.g., *United States v. Huard*, 342 F. App’x 640, 643-44 (1st Cir. 2009); *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003); *United States v. King*, 388 F. App’x 194, 198 (3d Cir. 2010); *United States v. Brooks*, 444 F. App’x 629, 629 (4th Cir. 2011); *United States v. Fearce*, 455 F. App’x 528, 530 (5th Cir. 2011); *United States v. Allen*, 254 F. App’x 475, 478 (6th Cir. 2007); *United States v. Cameron*, 302 F. App’x 475, 476 (7th Cir. 2008); *United States v. Kottke*, 138 F. App’x 864, 866 (8th Cir. 2005); *United States v. Carney*, 65 F. App’x 255, 257 (10th Cir. 2003); *United States v. Bolden*, 343 F. App’x 574, 577 (11th Cir. 2009).

least when, as here, they depend on facts beyond the trial record – cannot be properly litigated on direct review because the trial record will not “disclose the facts necessary to decide either prong of the *Strickland* analysis.” 538 U.S. at 505. Without a fully developed factual record (like the kind that, as this case shows, can be developed only on collateral review), even meritorious ineffective-assistance claims will fail. *Id.* at 506.

Furthermore, litigating ineffective-assistance claims on direct review puts appellate counsel “into an awkward position vis-à-vis trial counsel.” *Id.* When appellate counsel also served as trial counsel, he would be understandably reluctant – if not prohibited by ethical rules<sup>54</sup> – to bring a claim about his own ineffectiveness. See Amicus Br. for Nat’l Ass’n of Federal Defenders 15-18, *Chaidez v. United States*, available at 2012 WL 3041308. Even when different attorneys handled district court and appellate proceedings, tension would arise between the two that would impede litigation of an ineffective-assistance claim and bleed over into other issues on appeal as well. As the Supreme Court has noted, “[a]ppellate counsel often need trial counsel’s assistance in becoming familiar with a lengthy record on a short deadline,” and such assistance may be less forthcoming if appellate counsel will also be using that information to assess “trial counsel’s own incompetence.” *Id.*

Second, the Court of Appeals might – as it sometimes did before *Massaro* – stay appellate proceedings whenever defendants raise ineffective-assistance claims and remand the cases to this Court for evidentiary hearings to develop the records necessary to decide such claims. See, e.g., *United States v. Geraldo*, 271 F.3d 1112, 1116 (D.C. Cir. 2001); *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000). But, as the Government explained in *Massaro*, this practice is undesirable because “[a] routine resort to remand would delay imposition of a final judgment and would have the effect of undermining AEDPA’s strict limitations on the filing of successive [post-conviction] motions.” U.S. Br. 30 n.14; see also *Wilson*, 240 F. App’x at 145 (“Since *Massaro*, we have not remanded any case [on direct review] for an evidentiary hearing of an attorney’s effectiveness.”). Far from protecting society’s interest in the finality of criminal judgments, forcing ineffective-assistance claims into direct review would actually impede it.

Third, Courts in this Circuit could continue dismissing ineffective-assistance claims whenever they were brought on direct review, thereby forcing defendants to bring them subject to *Teague* on collateral review. But under this scenario, defendants would suffer a fundamental injustice: they would *never* be able to obtain unfiltered review of ineffective-assistance claims that depend (as nearly all do) on introducing evidence outside the trial record. If defendants on direct review pressed such claims, the Court of Appeals would dismiss the claims with instructions to raise them on collateral review. And if defendants brought such claims on collateral review, and those claims required this Court to create a “new rule” to grant relief, *Teague* would prevent the Court from doing so. Defendants would thus find themselves ensnared in a Catch-22. Just as Major Major had a policy of never seeing anyone in his office while he was in his office and would accept visitors into his office only when he was not there,<sup>55</sup> so applying *Teague* in

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<sup>54</sup> See ABA Model Rule of Professional Conduct 1.7(a)(2) (“lawyer shall not represent a client if . . . there is a significant risk that the lawyer’s representation of [the] client will be materially limited by . . . a personal interest of the lawyer.” (Or cite to state rule on point)

<sup>55</sup> See Joseph Heller, *Catch-22*, p. 106 (1961).

this context would leave defendants without any appropriate time to raise ineffective-assistance claims that depend on creating a “new rule.” Such claims would always be either too early or too late.

Such a state of affairs would be not only unfair but it would contravene “the general and indisputable rule, that where there is a legal right, there is also a legal remedy . . . , whenever that right is invaded.” 3 William Blackstone, *Commentaries on the Laws of England* \*23 (1768). It bears remembering that *Teague* is really a doctrine about “redressability.” *Danforth*, 552 U.S. at 271 n.5. The doctrine is not premised on the view that the Supreme Court’s decisions themselves create new constitutional rights that did not exist before. Instead, *Teague* provides that even when a conviction has been secured in violation of the Constitution, a federal court cannot remedy that violation if the error was not clear at the time the defendant’s conviction became final. *Id.* at 271. This non-redressability principle is perfectly acceptable against the backdrop of a regime in which defendants have opportunities prior to collateral review to ask courts to announce and to apply new rules. It cannot be justified, however, when no prior opportunity exists.

Preserving the possibility of a remedy when a defendant has been denied effective assistance of counsel – even when affording relief requires the articulation of a new rule – is especially important because “it is through counsel that the accused secures his other rights.” *Kimmelman*, 477 U.S. at 377. In other words, “the fairness and regularity” of the criminal justice system depends upon ensuring that lawyers live up to their Sixth Amendment obligations, and upon the federal courts’ ability to refine those obligations in light of ever-evolving circumstances in the criminal justice system. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *see also Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). The *Teague* doctrine should not hamstring this Court’s ability to define and enforce those obligations.

# BREATHING LIFE INTO THE FOURTH AMENDMENT IN IMMIGRATION CASES

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This memorandum is intended to be an introduction to suppression issues that may arise in immigration cases. This is an area in which the constitutional right to be free from unreasonable search and seizure has been “relaxed” at best and discarded at worst. Nonetheless, when the circumstances would normally warrant suppression and in cases in which the client is facing significant prison time, pursuing a suppression motion can be considered. Often, suppression issues are not pursued in immigration settings because there is a feeling that nothing can be suppressed. On the contrary, the issue of whether the officer’s or agent’s observations of the defendant, the defendant’s statement, the fact of the defendant’s presence, the fingerprints taken subsequent to the arrest, and ultimately the official records (criminal records and immigration “A-file”) can be used by the government to convict a defendant of illegal reentry is a controversial issue.

This memorandum is not an exhaustive treatise on Fourth Amendment law. The focus is on issues that have arisen in the District of New Mexico, and consequently the cases cited are weighted heavily towards the Tenth Circuit. Additionally, the cases generally involve reasonable suspicion for stops and are not limited to stops that resulted in immigration violations. This is so because often local law enforcement officers have initiated the stop, and it is during the subsequent detention that the immigration violation is discovered.

## I. APPLICABILITY OF THE FOURTH AMENDMENT

### A. Standard for Roving Border Patrol Stops: Was the Stop Justified at Its Inception?

The Fourth Amendment applies to actions of Border Patrol agents. *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975) (holding that “[t]he Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, [and] also forbids stopping or detaining persons for questioning about their citizenship on less than reasonable suspicion that they may be aliens.”); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973). The Fourth Amendment requires a finding of reasonable suspicion that criminal activity may be afoot before conducting roving Border Patrol stops. *United States v. Gandara-Salinas*, 327 F.3d 1127, 1129 (10th Cir.2003) (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). “Although an officer's reliance on a mere hunch is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” *Id.* (quoting *Arvizu*, 534 U.S. at 274). Under this standard, Border Patrol agents may stop vehicles “if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion” of criminal activity. *Id.* (quoting *United States v. Monsivais*, 907 F.2d 987, 989-90 (10th Cir. 1990) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975))). “A determination that reasonable suspicion exists ... need not rule out the possibility of innocent conduct.” *Arvizu*, 534 U.S. at 277.

The following factors are relevant in determining whether a law enforcement officer has reasonable suspicion to conduct an immigration stop: (1) characteristics of the area in which the vehicle is encountered; (2) proximity of the area to the border; (3) usual patterns of traffic on the particular road; (4) previous experience of the agent with alien traffic; (5) information about recent illegal border crossings in the area; (6) the driver's behavior, including any obvious attempts to evade officers; (7) aspects of the vehicle, such as a station wagon with concealed compartments; (8) the appearance that the vehicle was heavily loaded. *Gandara-Salinas*, 327 F.3d at 1129-30 (quoting *Monsisvais*, 907 F.2d at 990 (citing factors listed in *Brignoni-Ponce*, 422 U.S. at 884-85)).

In evaluating these factors, courts may not employ a “divide-and-conquer” approach by evaluating and rejecting each factor in isolation. *Arvizu*, 534 U.S. at 277. Instead, the ultimate determination of reasonable suspicion depends upon the totality of the circumstances. *Gandara-Salinas*, 327 F.3d at 1130. When making their determination, law enforcement officers may rely on their own experience and specialized training, and courts must defer to their ability to make inferences from and deductions about the cumulative information that may elude an untrained person. See *Arvizu*, 534 U.S. at 273; *United States v. De la Cruz-Tapia*, 162 F.3d at 1277-78.

In *United States v. Martinez-Cigarroa*, 44 F.3d 908, 910 (10th Cir. 1995), the Tenth Circuit stated in performing the analysis:

[W]e must examine the facts individually in their context to determine whether rational inferences can be drawn from them to support the line of suspicion under investigation. In other words, each fact must either be rationally suspicious in itself, or, despite being innocent on its face, must be rationally suspicious when viewed in context with other articulable facts.

Furthermore, the Tenth Circuit has noted that “not every suspicion that is articulable is reasonable.” *United States v. Miranda-Enriquez*, 941 F.2d 1081, 1083 (10th Cir. 1991) (citations and internal quotations omitted).

## **B. Scope of the Detention: Did the Encounter Last Too Long?**

In cases in which the defendant was initially stopped by a local law enforcement, the issue of whether the officer properly questioned the defendant about matters unrelated to the purpose of the initial stop may arise. This issue arises most commonly in the context of drug and gun crimes, when permission to search is requested, but the principles should be the same. Questioning a person about citizenship and immigration status should be considered beyond the proper scope of the initial stop in the absence of reasonable suspicion.

The Tenth Circuit has held that:

An investigative stop that was neither consensual nor the result of probable cause must fulfill two requirements: (1) the stop must be “justified at its inception,” and (2) the resulting detention must be “reasonably related in scope to the circumstances which justified the interference in the first place.” In the absence of probable cause or a warrant, the officer must have “an objectively reasonable and articulable suspicion that illegal activity has occurred or is occurring” in order to justify detaining an individual for a period

of time longer than that necessary to review a driver's license and vehicle registration, run a computer check, determine that the driver is authorized to operate the vehicle, and issue the detainee a citation.

*United States v. Salzano*, 158 F.3d 1107, 1111 (10th Cir. 1998)(citations omitted). The Tenth Circuit reviews the factors relied upon both individually and in the aggregate to determine whether, in the totality of the circumstances, the factors support a reasonable suspicion of criminal activity. *Id.* In so doing, the Court defers to “a law enforcement officer’s ability to distinguish between innocent and suspicious actions, but keep[s] in mind that [i]nchoate suspicions and unparticularized hunches ... do not provide reasonable suspicion.” *Id.* (citations and internal quotation marks omitted.) Furthermore, the Tenth Circuit has held that, although it is possible to base reasonable suspicion on factors that are consistent with innocent travel, “[s]ome facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous.” *Id.* (citations and internal quotations omitted).

A common scenario involves the officer returning documents and then asking for permission to ask more questions. The Tenth Circuit has held that “after an officer issues the citation and returns any materials provided, the driver is illegally detained only if the driver has objectively reasonable cause to believe that he or she is not free to leave.” *United States v. Shareef*, 100 F.3d 1491, 1501 (10th Cir. 1996). Although return of the driver’s documentation is required before a detention can end, the fact the officer returned documentation does not always indicate that an encounter has become consensual. *United States v. Elliot*, 107 F.3d 810, 814 (10th Cir. 1997). The return of documentation renders an encounter consensual only if “a reasonable person under the circumstances would believe he was free to leave or disregard the officer’s request for information.” *Id.* A “coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching the officer, or his use of a commanding tone of voice indicating that compliance might be compelled” suggests a detention has not ended. *United States v. Turner*, 928 F.2d 956, 959 (10th Cir. 1991). In *Fernandez*, the Tenth Circuit stated “there is no question that [defendant] was seized when [the officer] returned to the truck and started asking questions unrelated to the traffic stop.” *Fernandez*, 18 F.3d at 878.

#### **D. Factors Commonly Relied Upon to Support the Agent’s or Officer’s Alleged “Reasonable Suspicion” For Initial Stop and Continued Detention:**

##### **1. Vehicle Not Owned by The Defendant, Rental Cars.**

The government or officer commonly cites as a “suspicious factor” the fact that the defendant was driving a vehicle that did not belong to him. The fact that the car or vehicle was owned by someone else is not inherently suspicious. *United States v. Beck*, 140 F.3d 1129, 1137 (8th Cir. 1998) (nothing inherently suspicious in fact that defendant was driving a rental car, even though rented by an absent third person); *United States v. Wood*, 106 F.3d 942, 947 (10th Cir. 1997) (defendant’s use of a rental car not inherently suspicious).

The Tenth Circuit has stated that:

a defining characteristic of our traffic stop jurisprudence is the defendant’s lack of a valid registration, license, bill of sale, or some other indicia of proof to lawfully operate and possess the vehicle in

question, thus giving rise to objectively reasonable suspicion that the vehicle may be stolen.

*United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994).

The Tenth Circuit has repeatedly affirmed that the factor is not whether the vehicle is owned by someone other than the driver but whether the driver can prove he has legitimate possession of the vehicle. *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1484 (10th Cir. 1994) (“One recurring factor supporting a finding of reasonable suspicion ... is the inability of a defendant to provide proof that he is entitled to operate the vehicle he is driving.”); *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994) (“Defining characteristic of our traffic stop jurisprudence is the defendant’s lack of ... some ... indicia of proof to lawfully operate and possess the vehicle in question, thus giving rise to objectively reasonable suspicion that the vehicle may be stolen.”) (listing Tenth Circuit decisions).

In the cases often cited by the government, there were objective facts supporting a reasonable suspicion that the vehicle was stolen. *United States v. Villa-Chaparro*, 115 F.3d 799, 802 (10th Cir. 1997) (defendant provided a registration indicating the truck was owned by Ernesto Gomez of Las Cruces, New Mexico, but told the officer Gomez was in Deming, New Mexico); *United States v. Christian*, 43 F.3d 527, 530 (10th Cir. 1994) (conflicting information given by driver and passenger regarding how they came into possession of the vehicle, which was registered in the name of a third person who was not present); *United States v. Betancur*, 24 F.3d 73, 75 (10th Cir. 1994) (defendant unable to provide satisfactory explanation of how he came into possession of the pickup truck and who the owner was, combined with obvious alterations to truck’s bed); *United States v. Gonzalez-Lerma*, 14 F.3d 1479, 1483 (10th Cir. 1994) (driver had unsigned title and no vehicle registration, temporary driver’s license with a birth date differing from his other identification, questionable explanation for long trip, and no knowledge about construction company that allegedly provided the truck); *United States v. Turner*, 928 F.2d 956, 959 (10th Cir. 1991) (car not registered to defendant driver or the passenger combined with appearance inconsistent with claimed occupation and expensive compact disc collection); *United States v. Pena*, 920 F.2d 1509, 1514 (10th Cir. 1990) (vehicle had California plates and a punched-out trunk lock; driver had an Illinois license, could not provide the car’s registration, gave inconsistent responses about his destination, claimed twice that the car belonged to his brother, and professed no knowledge whatsoever of the registered owner); *United States v. Arango*, 912 F.2d 441, 447 (10th Cir. 1990) (vehicle registered to absent third parties whom defendant claimed were friends but who had no phone and could not be located combined with fact defendant had insufficient luggage for claimed two-week vacation).

## **2. Travel From Particular City or on a Particular Highway.**

Officers often say the vehicle was suspicious because “it wasn’t local” or was from out of state. Courts have held that “out-of-state plates are consistent with innocent behavior and not probative of reasonable suspicion.” *United States v. Beck*, 140 F.3d 1137. The mere fact that a car has Mexican license plates does not justify stopping the car to check the immigration status of the occupants. *United States v. Alvarado-Ramirez*, 975 F.Supp. 906, 919 (W.D.Tex.1997).

## **3. Travel Plans and Direction of Travel.**

Travel plans that are not suspicious do not support reasonable suspicion. *See Beck*, 140 F.3d at 1139 (holding there was nothing suspicious about defendant’s explanation for interstate travel in order to seek employment); *see also Wood*, 106 F.3d at 947 (nothing unusual about defendant’s

travel plans; mere unemployment does not make a vacation financially impossible; “[t]here is nothing criminal about traveling by car to view scenery.”); *cf. Sokolow*, 490 U.S. at 9, 109 S.Ct. at 1586-87 (Sokolow had made the twenty-hour flight from Honolulu to Miami in July for a forty-eight hour sojourn in Miami).

*United States v. Guillen-Cazares*, 989 F.2d 380 (10<sup>th</sup> Cir. 1993), found that there was no reasonable suspicion supporting the stop where, even though two cars appeared to be traveling together, they turned south on Interstate 25 and began traveling toward, rather than away from, the border. *Id.* at 384. Travel towards the border does not have the same probative value as travel away from the border, especially when the vehicle is a significant distance from the border. *See United States v. Neufeld-Neufeld*, 338 F.3d 374, 381 (5<sup>th</sup> Cir. 2003) (“noteworthy” that defendant was traveling north from the border); *United States v. Barbee*, 968 F.2d 1026 (10<sup>th</sup> Cir. 1992) (vehicle “traveling northbound on a highway known to be commonly used by alien and drug smugglers” at a time of year “when typically little traffic travels that road”); *United States v. Cardona*, 955 F.2d 976 (5<sup>th</sup> Cir. 1992)(direction of travel, etc., provided “reasonable suspicion to conclude the vehicle had originated its journey at the border”); *United States v. Magana*, 797 F.2d 777 (9<sup>th</sup> Cir. 1986) (truck heading north on main artery commonly used for smuggling).

#### **4. Recent Border Crossings.**

The Tenth Circuit has recognized that, because “many people living in border towns work in the United States and legitimately cross the border daily near their town of residence,” such crossings are “not out of the ordinary.” *United States v. De La Cruz-Tapia*, 162 F.3d 1275, 1279 (10<sup>th</sup> Cir. 1998).

#### **5. Traveling When Checkpoint Closed.**

Conduct or circumstances that “describe a very large category of presumably innocent travelers” is insufficient to support reasonable suspicion. *Reid v. Georgia*, 448 U.S. 438, 441 (1980). Additionally, the Tenth Circuit has previously criticized reliance on the time of day a person travels as a factor supporting reasonable suspicion. *See United States v. Miranda-Enriquez*, 941 F.2d 1081, 1084-85 (10<sup>th</sup> Cir. 1991); *see also United States v. Frisbie*, 550 F.2d 335, 338 (5<sup>th</sup> Cir. 1977) (“Approval of a stop ... founded upon dubious ‘suspicious’ circumstances of such slight import would result in subjecting the thousands of tourists visiting the area to unreasonable detention whenever they travel at hours when certain routes are less frequented.”).

#### **6. Appearance of the Vehicle**

The mere fact that a vehicle is older is not sufficient to support reasonable suspicion. *See United States v. Robert L.*, 874 F.2d 701, 703-04 (9<sup>th</sup> Cir. 1989) (fact that older model Oldsmobile had large trunk did not support reasonable suspicion where there was no evidence trunk appeared to be heavily loaded). The fact is, just about any kind of vehicle can be used to haul drugs and aliens. *See United States v. Rodriguez-Rivas*, 151 F.3d 377 (5<sup>th</sup> Cir. 1998) (describing the agent’s testimony, at note 3, as: “Later, responding to the court’s inquiry as to the need for probable cause or mere suspicion to make a stop, Garcia explained that ‘mere suspicion can vary from either one person or numerous persons, sir.’ He characterized the mere suspicion that led him in this case to suspect Rodriguez of alien smuggling as the type of vehicle driven. But he then testified ‘we have apprehended alien [sic] smuggling loads in various vehicles. It can be small cars, large cars, old vans,

new vans, ... just anything on wheels can be used to smuggle illegal aliens ... There is no set profile.”). *See also United States v. Cortez*, 449 U.S. 411, 415 (1981) (vans, pick up trucks, other small trucks, campers, motor homes and similar vehicles); *United States v. Doyle*, 129 F.3d 1372, 1374 (10th Cir. 1997) (large sedans); *United States v. Garcia-Barron*, 116 F.3d 1305, 1307 (9th Cir. 1997) (rental cars); *United States v. Jackson*, 825 F.2d 853, 856 (5th Cir. 1987) (sports car); *see also United States v. Rodriguez*, 976 F.2d 592, 596 (9<sup>th</sup> Cir. 1992) (“We may confidently assert that all types of vehicles have been used in smuggling operations at some place.”).

#### **7. Insufficient Luggage.**

Courts have rejected the idea that having few visible pieces of luggage supports reasonable suspicion of wrongdoing. *See, e.g., United States v. Tapia*, 912 F.2d 1367, 1371 (11th Cir. 1990) (reasonable suspicion not supported by facts that defendants were Mexican, had few pieces of luggage, were nervous, had car insured by third party, possessed valid driver’s licenses from San Antonio, looked away when passing trooper on freeway, and were traveling on the interstate in Alabama). This contrasts with the cases often cited by the government, in which the Court noted the combination of lack of luggage combined with lengthy trips. *United States v. Mendez*, 118 F.3d 1426, 1431 & 1431 n.3 (10th Cir. 1997) (discounting significance of lack of luggage in rear seat where vehicle had a trunk but noting that “we might view a lack of luggage in a vehicle’s passenger compartment much differently if the driver claimed to be making a lengthy trip and the vehicle did not have a trunk.”); *United States v. Jones*, 44 F.3d 860, 872 (10th Cir. 1995) (lack of luggage for cross-country, two-week trip); *United States v. Arango*, 912 F.2d 441, 447 (10th Cir. 1990) (two small bags for two adults ostensibly traveling from California to Denver, Colorado, for two-week vacation).

#### **8. Cleanliness of vehicle.**

The Tenth Circuit has found the vehicle’s cleanliness or lack thereof to be innocuous. *Cf. Wood*, 106 F.3d at 947 (presence of fast-food wrappers not supportive of reasonable suspicion).

#### **9. Defendant’s Behavior; Nervousness; Eye Contact; Weaving.**

The Tenth Circuit has discounted reliance on a defendant’s behavior as supportive of reasonable suspicion, especially where there is no evidence the officer has any prior knowledge of the defendant in order to evaluate the defendant’s behavior. *United States v. Barron-Cabrera*, 119 F.3d 1454, 1461 (10th Cir. 1997) (holding that while nervous behavior may be relevant, “we are wary of the objective suspicion supplied by generic claims that a Defendant was nervous or exhibited nervous behavior after being confronted by law enforcement officials....”); *see also Wood*, 106 F.3d at 947 (“It is certainly not uncommon for most citizens--whether innocent or guilty--to exhibit signs of nervousness when confronted by a law enforcement officer.”). The Tenth Circuit has stated that, where the officer does not know the defendant, he cannot tell if the defendant was acting normally or not. *See Fernandez*, 18 F.3d at 879; *see also United States v. Bloom*, 975 F.2d 1447, 1458 (10th Cir. 1992) (“Nothing in the record indicates whether [the agent] had any prior knowledge of Defendant. We do not understand how [the agent] would know whether defendant was acting nervous and excited or whether he was merely acting in his normal manner”), *overruled on other grounds, United States v. Little*, 18 F.3d 1499 (10th Cir. 1994).

The Tenth Circuit has discounted the avoidance of eye contact as suspicious behavior. *United States v. Barbee*, 968 F.2d 1026, 1028 (10th Cir. 1992) (“[S]uch behavior [as passengers sinking down below seat level] is suspicious conduct not clearly susceptible to unsuspecting interpretation, unlike passengers merely avoiding eye contact ....”). The Ninth Circuit has noted the incongruity of allowing both eye contact and avoidance of eye contact to qualify as suspicious behavior; it “put[s] the officers in the classic ‘heads I win, tails you lose’ position [and] the driver, of course, can only lose.” *United States v. Garcia-Camacho*, 53 F.3d 244, 247 (9th Cir. 1995) (citation omitted).

Behavior that is as consistent with careful driving as with criminal activity is not suspicious. *See United States v. Peters*, 10 F.3d 1517, 1522 (10th Cir. 1993) (officer’s observation that driver was gripping wheel of rental truck tightly and looking straight ahead at the road did not support reasonable suspicion; “we fail to see the nexus between careful driving and illegal conduct.”).

It is not unusual to weave a little when a law enforcement vehicle is following you. *See, e.g., United States v. Gonzales*, 841 F.Supp. 377 (D.N.M. 1993). *See United States v. Jones*, 149 F.3d 364, 370-71 (5<sup>th</sup> Cir. 1998) (“when the officer’s actions are such that any driver, whether innocent or guilty, would be preoccupied with his presence, then any inference that might be drawn from the driver’s behavior is destroyed”; such as the case here, as defendant’s glancing back at agent and drifting off highway attributable to fact agent was tailgating him).

In *United States v. Alvarado-Ramirez*, 975 F.Supp. 906 (W.D. Texas 1997), the district court concluded that a Border Patrol agent’s stop of the defendant’s vehicle was not justified where the basis of the stop was that the defendant’s vehicle might have been speeding, and the driver did not pull over, slow down, or make eye contact with the agent who was sitting in the closed border patrol checkpoint.

The Border Patrol agent’s stop of defendant’s truck was held to be invalid in *United States v. Gonzales*, 841 F.Supp. 377 (D.N.M. 1993). In *Gonzales*, the defendant was stopped in the middle of the day driving north on Highway 11 between Columbus and Deming. She was driving a pickup that the agent claimed to appear to be riding low. The truck had a tarp over the bed. As the truck passed, the driver looked “shocked” or “concerned,” with eyes that “were as big as pie plates.” After the agent began to follow the defendant, she slowed to below the 55 mph speed limit and drifted within the traffic lane.

#### **10. Prior Narcotics Convictions.**

Prior convictions for narcotics alone is insufficient to support reasonable suspicion of involvement in drugs on this occasion. *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997) (“Given the near-complete absence of other factors which reasonably gave rise to suspicion, the fact that Mr. Wood had previously been convicted of narcotics violations adds little to the calculus.”).

#### **11. Traffic Violations.**

The Tenth Circuit has stated, “if the failure to follow a perfect vector down the highway or keep one’s eyes on the road were sufficient reasons to suspect a person of [wrongdoing], a substantial portion of the public would be subject each day to an invasion of their privacy.” *United States v. Lyons*, 7 F.3d 973, 976 (10th Cir. 1993). Border Patrol agents do not have authority to stop vehicles solely for traffic violations, *see Ortiz v. United States Border Patrol*, 39 F.Supp.2d 1321 (D.N.M. 1999), though such violations may be considered in determining whether there is reasonable

suspicion, *see United States v. Alvarado-Ramirez*, 975 F.Supp. 906 (W.D. Texas 1997) (stating the border patrol agent “did not have the authority, under INS regulations, to stop vehicles for speeding. See 8 U.S.C. § 1357. Hence, his mere surmise that Ramirez appeared to be speeding cannot furnish a basis, in and of itself, to effect this stop.”). In addition, Border Patrol agents, by designation of the Attorney General, have limited abilities to enforce the drug laws. *United States v. Perkins*, 177 F.Supp.2d 570 (W.D.Texas 2001), *aff’d*, 352 F.3d 198 (5<sup>th</sup> Cir. 2003). On appeal, the Fifth Circuit held that Border Patrol agents could make a stop based on reasonable suspicion of *any criminal activity*. *Id.* at 200. However, this statement regarding criminal activity should not be construed as extending to enforcement of traffic laws. *Perkins* involved a stop for suspected drug smuggling based on an informant’s information.

Moreover, the Fifth Circuit has held that a traffic violation alone does not support a stop by Border Patrol, stating “the absence of Texas license plates alone does not authorize a Border Patrol agent to stop a vehicle.” *United States v. Rodriguez-Rivas*, 151 F.3d 377, 381 (5<sup>th</sup> Cir. 1998). In this case, the Fifth Circuit found there was insufficient evidence to support the Border Patrol agent’s stop of a van between 50 and 60 miles from the border on a highway leading from the border and Big Bend National Park, where the van appeared to be traveling at a high rate of speed (though apparently not speeding), the van lacked license plates, and the driver appeared to be slouching (he was very short). *See also United States v. Mariscal*, 285 F.3d 1127, 1130 (9<sup>th</sup> Cir. 2002) (holding that officer lacked reasonable suspicion to stop vehicle that was under surveillance on the basis of its making a right turn without signaling).

## 12. An Overall Useful Case

*United States v. Rodriguez*, 976 F.2d 592, 596 (9<sup>th</sup> Cir. 1992), in which the government claimed the factors supporting the stop by Border Patrol agents were that Interstate 8 is a “notorious route for alien smugglers”; Rodriguez, who was alone in his car, did not acknowledge the agents as he passed their marked car while other passing traffic did; Rodriguez’ car was of a kind agents thought could be used for alien smuggling; while being followed, Rodriguez looked at the agents several times in his rearview mirror and swerved slightly in his lane; although Rodriguez was alone in his car, it appeared “heavily loaded” and “kind of floated” over bumps in the road; and Rodriguez was a Hispanic male. The Court held reasonable suspicion did not support the stop, stating:

We believe that the factors cited here describe too many individuals to create a reasonable suspicion that this particular defendant was engaged in criminal activity. The agents tender to us the picture of innocent driving behavior but ask us to accept it as signifying criminal behavior to a trained and experienced eye. This we cannot do. Innocents, as well as criminals, sometimes keep their hands on the wheel and feet in the vehicle. Innocents, as well as criminals, drive vehicles which are as they are because many people will buy them including a space behind the seat in which a person or luggage might fit. The agents asserted that they had seen a photo of a similar vehicle which had been used in a smuggling operation at some unknown place and time. We may confidently assert that all types of vehicles have been used in smuggling operations at some place. Many people walk across the border; many drive, glancing at

a marked police or Border Patrol car; that such a shift of attention from the roadway to the police presence might cause a vehicle to veer off is hardly a whistle siren of misconduct. Although factors consistent with innocent travel might, when taken together, amount to reasonable suspicion, such is not the case given these facts.

In short, the agents in this case saw a Hispanic man cautiously and attentively driving a 16 year-old Ford with a worn suspension, who glanced in his rear view mirror while being followed by agents in a marked Border Patrol car. This profile could certainly fit hundreds or thousands of law abiding daily users of the highways of Southern California.

976 F.2d at 595.

## **II. APPLICABILITY OF THE EXCLUSIONARY RULE; BATTLING MISCONCEPTIONS CONCERNING LOPEZ-MENDOZA AND THE CONCEPT THAT “IDENTITY CAN’T BE SUPPRESSED”.**

### **A. Accepted Principles of Law Regarding the Exclusionary Rule and Fruit of the Poisonous Tree Doctrine.**

Even if the court agrees that the stop was unlawful, it may be an uphill battle to persuade the court that unlawfully obtained evidence pertaining to a defendant’s identity – including an agent’s identification of the defendant, the defendant’s statements identifying himself, the defendant’s fingerprints, and the official records located using the unlawfully obtained evidence – cannot be used by the government to prosecute that individual. When Border Patrol agents learn a person’s name, obtain fingerprints, connect the person with possible criminal activity, and locate relevant immigration and criminal records, this evidence should all be considered “fruit of the poisonous tree” that must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)); *United States v. Garcia*, 2005 WL 3556089 (D. Utah 2005) (suppressing statements about immigration status); *United States v. Olivares-Rangel*, 324 F.Supp.2d 1218 (D.N.M. 2004), *currently on appeal*. In addition, under *United States v. Gregory*, 79 F.3d 973, 979 (10<sup>th</sup> Cir. 1996), and *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975), the government must prove that the primary taint of the violation was purged by showing a sufficient attenuation or break in the causal connection between the illegal detention and the incriminating information. This evidence is the basis for proving all the elements of the charge against a defendant charged with illegally reentering the United States after deportation in violation of 8 U.S.C. § 1326. Unfortunately, some courts have been misapplied these principles, based on a fundamental misreading of *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

When law enforcement officers obtain evidence in violation of the Constitution, the exclusionary rule generally precludes its use in a criminal prosecution against the victim of the illegal seizure. *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (citing *Weeks v. United States*, 232 U.S. 383 (1914)). The exclusionary remedy extends not only to the primary evidence obtained from the illegal seizure, but also to the indirect product of the seizure, the secondary evidence or the “fruit of the poisonous tree.” *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920). Once the defendant has shown a causal connection between the

illegal seizure and the specific evidence alleged to be the fruit of the seizure, the government has the burden of persuasion of showing that the evidence is admissible because it was obtained by means sufficiently distinguishable to be purged of the primary taint. See *Brown v. Illinois*, 422 U.S. 590, 602-04 (1975); *Wong Sun v. United States*, 371 U.S. 471, 484-88 (1963). Even “the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality.” *New York v. Harris*, 495 U.S. 14, 19 (1990).

In both *Davis v. Mississippi*, 394 U.S. 721 (1969), and *Hayes v. Florida*, 470 U.S. 817 (1985), the Supreme Court held that fingerprints obtained as a result of constitutional violations and used for investigatory purposes must be suppressed in the criminal case flowing from that investigation. In *Davis*, the defendant’s fingerprints were obtained on two separate occasions, the first involving the illegal detention of defendant and others for the sole purpose of obtaining fingerprints, and the second after an arrest and detention that were based on neither a warrant nor probable cause. *Davis*, 394 U.S. at 725-27. The Court held that *Davis*’ detention for the purpose of obtaining fingerprints was subject to the constraints of the Fourth Amendment, and the fingerprints should therefore have been excluded. *Id.* at 727-28.

In *Hayes*, the defendant was taken into custody and fingerprinted without a warrant, probable cause, or consent. His fingerprints were then compared to those found at the scene of a crime. The Court affirmed *Davis*, 470 U.S. at 814-15, and stated that the lines drawn by the Fourth and Fourteenth Amendment are “crossed when the police, without probable cause or a warrant, forcibly remove a person from ... [the] place where he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes.” *Id.* at 816. Application of these principles should lead inexorably to the conclusion that, when government agents obtain a defendant’s name and fingerprints as the result of an unlawful detention, the government should not be able to use that information or any information derived from it to prosecute the individual.

## **B. The Lopez-Mendoza Pitfall.**

The government generally relies on the statement in *Lopez-Mendoza* that:

The “body” or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred. See *Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S.Ct. 854, 865, 43 L.Ed.2d 54 (1975); *Frisbie v. Collins*, 342 U.S. 519, 522, 72 S.Ct. 509, 511, 96 L.Ed. 541 (1952); *United States ex rel. Bilokumsky v. Tod, supra*, 263 U.S., at 158, 44 S.Ct., at 57.

*Lopez-Mendoza*, 468 U.S. at 1039-40. Numerous courts have read this passage as meaning that, no matter how unlawfully obtained, the government may use evidence of a defendant’s identity to prosecute him or her in court. A review of the cases cited by the Supreme Court demonstrates that what the Supreme Court meant was that an unlawful arrest did not deprive the district court of jurisdiction to decide the case or grant an unlawfully arrested defendant immunity from prosecution. See *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975) (agreeing that a conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952) (affirming that the power of a court to try a person for crime is not impaired by the fact that he had been brought within the court’s jurisdiction by reason of a “forcible abduction”); *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 158 (1923)

(defects in original arrest will not support habeas corpus petition if government can show sufficient grounds for custody); *Ker v. Illinois*, 119 U.S. 436 (1886) (holding that court has jurisdiction to try defendant even if defendant forcibly kidnapped in another country). These authorities speak only to the jurisdiction of the court to try the defendant; they do not go to the issue of what evidence can be used by the government to obtain a conviction. As the Supreme Court stated more clearly in *United States v. Crews*, 445 U.S. 463 (1980):

Insofar as respondent challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. *Gerstein v. Pugh*, 420 U.S. 103, 119, 95 S. Ct. 854, 865, 43 L.Ed.2d 54 (1975); *Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed. 541 (1952); *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886). The exclusionary principle of *Wong Sun* and *Silverthorne Lumber Co.* delimits what proof the Government may offer against the accused at trial, closing the courtroom door to evidence secured by official lawlessness. Respondent himself is not a suppressible “fruit,” and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct.

*Id.* at 474. It must be made clear that the defendant is not contending that the district court lacks jurisdiction because of his unlawful arrest; he is challenging the government’s ability to use the unlawfully obtained evidence to prove he is an alien who is unlawfully in the United States.

Contrary to the government’s common contention, *Lopez-Mendoza* does not stand for the proposition that the exclusionary rule does not apply where the government seeks to use unlawfully obtained evidence that identifies a person. In *Lopez-Mendoza*, the Supreme Court considered whether the exclusionary rule applied to civil deportation proceedings. One of the defendants in *Lopez-Mendoza*, after being arrested by an INS agent, admitted to his illegal entry into the United States. He unsuccessfully objected to his admission being offered as evidence at the deportation hearing, contending that the evidence should have been suppressed as the fruit of an unlawful arrest. The Court applied a balancing test. 468 U.S. at 1041. It noted that a deportation proceeding is a civil action solely to determine a person’s eligibility to remain in this country. *Id.* at 1038. The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws. *Id.* Consistent with the civil nature of a deportation proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing. *Id.* at 1038-39.

The Court then determined that several factors significantly reduced the value of applying the exclusionary rule to deportation proceedings. First, regardless of how the arrest occurred, deportation would still be possible when evidence not derived directly from the arrest was sufficient to support the deportation. *Id.* at 1042-43. Second, due to the number of persons who requested voluntary deportation, INS agents knew it was unlikely an arrest would be challenged in a formal hearing. *Id.* at 1044. Third, the INS had a comprehensive scheme for discouraging Fourth Amendment violations by its agents. *Id.* at 1044-45. Fourth, alternative remedies were available to

remedy Fourth Amendment violations. *Id.* at 1045. On the other hand, the Court determined that the cost to society of applying the Fourth Amendment exclusionary rule to deportation proceedings would be high. In particular, application of the rule would compel the courts to release from custody persons who would then immediately resume their commission of a crime, the crime of being illegally in this country, and would unduly complicate the INS's simple deportation scheme. *Id.* at 1046.

Importantly, the Supreme Court's holding in *Lopez-Mendoza* applies solely to deportation proceedings. *Id.* at 1052. The Supreme Court did not purport to limit the application of the exclusionary rule in criminal proceedings, even if those criminal proceedings involved an immigration offense. *Id.* at 1042. None of the societal costs identified by the Court that it used to justify not applying the exclusionary rule to deportation proceedings apply in this context because the INS remains free to deport a defendant who is illegally in the United States despite the constitutional violation. On the other hand, application of the exclusionary rule will have the general deterrent effect it is intended to have because, as with other types of criminal cases and other law enforcement officers, the government will be deprived of the use of unlawfully obtained evidence in order to obtain criminal convictions. In fact, the Court specifically recognized the continuing applicability of the exclusionary rule in the criminal proceedings and its deterrent effect, stating:

The INS does not suggest that the exclusionary rule should not continue to apply in criminal proceedings against an alien who unlawfully enters or remains in this country, and the prospect of losing evidence that might otherwise be used in a criminal prosecution undoubtedly supplies some residual deterrent to unlawful conduct by INS officials.

*Id.* at 1042. Under the government's common interpretation of *Lopez-Mendoza*, the exclusionary rule will have no deterrent effect against Border Patrol agents because the government is allowed to use information obtained as a result of unconstitutional conduct to criminally prosecute individuals as well as to deport them. Such a conclusion is contrary to the Supreme Court's statements in *Lopez-Mendoza*.

The Supreme Court's decision in *United States v. Janis*, 428 U.S. 433 (1976), on which the Supreme Court relied in reaching its decision in *Lopez-Mendoza*, makes clear that the mere fact evidence obtained in violation of the Fourth Amendment is admissible in a civil proceeding does not make the evidence admissible in a related criminal proceeding. In fact, it was important to the Court's analysis when determining the effectiveness of applying the exclusionary rule to civil proceedings that the state law enforcement officials were already "punished" by the exclusion of the evidence in the state criminal trial as a result of the same conduct and in any federal criminal trial that might be held. 468 U.S. at 447-48. Furthermore, in *Lopez-Mendoza*, the Supreme Court recognized that Fourth Amendment violations by Border Patrol agents could lead to evidence being suppressed in any criminal prosecution of the noncitizen defendant and result in the government being unable to proceed with the criminal prosecution, stating that:

When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.

*Id.* at 1047.

The Eighth Circuit applied these principles in a criminal case involving 8 U.S.C. § 1326 to hold that the defendant’s fingerprints, obtained by exploiting the defendant’s detention following an illegal traffic stop and arrest, must be suppressed in a subsequent prosecution for being an illegal alien in the United States. *United States v. Guevara-Martinez*, 262 F.3d 757 (8<sup>th</sup> Cir. 2000). In so ruling, the court distinguished between jurisdictional challenges, *see Lopez-Mendoza*, 468 U.S. at 1039 (body or identity of alleged alien not suppressible in civil deportation proceeding), and evidentiary challenges to fingerprint evidence in criminal cases, *see Davis v. Mississippi*, 394 U.S. 721 (1969) (fingerprint evidence suppressed in criminal case); *Hayes v. Florida*, 470 U.S. 811 (1985) (same).

The Eighth Circuit first pointed out the error of relying on the United States Supreme Court’s decision in *Lopez-Mendoza* for the proposition that suppression is not an appropriate remedy. *See Guevara-Martinez*, 262 F.3d at 753-55. The Eighth Circuit then noted that, in *Lopez-Mendoza*, one defendant was trying to challenge the jurisdiction of the immigration court over him by suppressing his very presence before the Court; and it was in this context that “the Court said that the ‘body or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest.’” *Guevara-Martinez*, 262 F.3d at 753 (quoting *Lopez-Mendoza*, 468 U.S. at 1039).

However, in *Lopez-Mendoza*, there was a second petitioner who was objected to the evidence offered against him in the proceeding. *See Guevara-Martinez*, 262 F.3d at 753. The Eighth Circuit observed that:

[T]he Court addressed th[is] evidentiary case ... from a different tack. There the Court acknowledged the “general rule in a criminal proceeding [] that statements and other evidence obtained as the result of an unlawful warrantless arrest *are suppressible* if the link between the evidence and the unlawful conduct is not too attenuated.” Thus, the Court’s reference to the suppression of identity appears to be tied only to a jurisdictional issue, not to an evidentiary issue.

*Guevara-Martinez*, 262 F.3d at 753 (citation and footnote omitted; emphasis added by *Guevara-Martinez* court). The *Guevara-Martinez* Court concluded that, under this reading of *Lopez-Mendoza*, the Supreme Court intended to subject identity-related evidence to the same exclusionary rule as other types of evidence: “If the Supreme Court meant to exempt identity-related evidence in a criminal proceeding from the ‘general rule,’ we believe the Court would have said so while discussing the evidentiary challenge, not the jurisdictional challenge.” *Guevara-Martinez*, 262 F.3d at 754.

The Eighth Circuit bolstered its conclusion by pointing to the fact that “[p]rior to *Lopez-Mendoza*, the Supreme Court twice applied the exclusionary rule to fingerprint evidence obtained as the result of unlawful arrests and detentions.” *Guevara-Martinez*, 262 F.3d at 754 (citing *Davis*, 394 U.S. at 727, and *Hayes*, 470 U.S. at 815).<sup>1</sup> “Because *Lopez-Mendoza* doesn’t indicate

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<sup>1</sup> Contrary to the Eighth Circuit’s statement, *Hayes* was not decided before *Lopez-Mendoza*. Nevertheless, *Hayes* (decided in 1985) was decided so soon after *Lopez-Mendoza* (decided in 1984) as to strongly indicate that *Lopez-Mendoza* should be read as the Eighth Circuit says.

that *Davis* and *Hayes* are overruled, we are bound to apply those earlier cases.” *Guevara-Martinez*, 262 F.3d at 754 (citation omitted).

The Eighth Circuit thus “conclude[d] that *Lopez-Mendoza*’s statement about the suppression of identity only refers to jurisdictional challenges, not to fingerprint evidence challenged in a criminal proceeding.” *Id.* The Eighth Circuit then went on to affirm the district court’s suppression of the § 1326 defendant’s fingerprints in that case. *See id.* at 755-56. Other courts have agreed with this view of *Lopez-Mendoza*. *See United States v. Garcia-Beltran*, 389 F.3d 864, 867 (9<sup>th</sup> Cir. 2004) (stating that “*Lopez-Mendoza* does not preclude suppression of evidence unlawfully obtained from a suspect that may in a criminal investigation establish the identity of the suspect.”); *United States v. Alvarez-Becerra*, 33 Fed. Appx. 403, 409 (10<sup>th</sup> Cir. 2002) (Briscoe, J., concurring) (unpublished) (stating that, although the government is not barred from proving a defendant’s identity at trial, “[t]angible evidence of a defendant’s identity, such as statements made by defendant or fingerprints taken during an illegal arrest or stop are subject to suppression”); *United States v. \$191,910.00 in U.S. Currency*, 16 F.3d 1051, 1064 (9<sup>th</sup> Cir. 1994) (“On careful examination, *Lopez-Mendoza* merely reaffirms the longstanding rule that a court does not lose jurisdiction over an individual merely because the government secured his presence in the forum through illegal means.”); *United States v. Mitchell*, 957 F.2d 465, 470 (7<sup>th</sup> Cir. 1992); *Matta-Ballesteros v. Henman*, 896 F.2d 255 (7<sup>th</sup> Cir. 1990); *United States v. Ortiz-Hernandez*, 276 F.Supp.2d 1113 (D. Oregon 2003) (same); *United States v. Mendoza-Carillo*, 107 F. Supp.2d 1098 (D. S.D. 2000) (same). The Florida Supreme Court has analyzed *Lopez-Mendoza* in the same manner. *See Perkins v. State*, 760 So.2d 85, 86-87 (Fla.), *cert. denied*, 531 U.S. 1029 (2000).

### C. Distinguishing *Guzman* and Similar Cases

The government often relies on such decisions as *United States v. Guzman-Bruno*, 27 F.3d 420 (9<sup>th</sup> Cir. 1994), and *United States v. Roque-Villanueva*, 175 F.3d 345 (5<sup>th</sup> Cir. 1999), which have broadly applied *Lopez-Mendoza* to prohibit suppression of so-called “identity evidence.” The Third Circuit recently followed these cases to hold that the government could introduce the defendant’s A-file despite the unconstitutional arrest. *United States v. Bowley*, 435 F.3d 426 (3<sup>d</sup> Cir. 2006). The Court reasoned that the Supreme Court would not have used the word “never” in *Lopez-Mendoza* if it had not meant it. Additionally, it followed the rationale of earlier cases that the defendant does not have a possessory interest or a privacy interest in the A-file. The reasoning of these and similar cases is misplaced because they did not consider what was meant by “identity” and provide no reasoned analysis for their sweeping conclusions that evidence of the defendants’ identities and the immigration files could not be suppressed. Their conclusions are also contrary to established Fourth Amendment principles and have been rejected by numerous other courts.

The Ninth Circuit, in *Guzman-Bruno*, confused identity with evidence and erroneously applied the Supreme Court’s dictum in *Lopez-Mendoza* when it determined that a noncitizen defendant whose identity was discovered as the result of an unlawful stop could not suppress the records discovered as a result. The Court stated:

A defendant’s identity need not be suppressed merely because it is discovered as the result of an illegal arrest or search. “[T]here is no sanction to be applied when an illegal arrest only leads to discovery of the man’s identity.” *Hoonsilapa v. INS*, 575 F.2d 735, 738 (9<sup>th</sup> Cir.) (*Hoonsilapa*), modified by, 586 F.2d 755 (9<sup>th</sup>

Cir.1978). “The ‘body’ or identity of a defendant ... is never itself suppressible as a fruit of an unlawful arrest.” *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039, 104 S.Ct. 3479, 3483, 82 L.Ed.2d 778 (1984); *see also United States v. Foppe*, 993 F.2d 1444, 1449 (9th Cir.) (suppression of incidental observations by police, such as appearance, would not have deterrent effect on unlawful police activity), *cert. denied*, 510 U.S. 1017, 114 S.Ct. 615, 126 L.Ed.2d 579 (1993). These cases clearly foreclose Guzman-Bruno’s attempt to suppress the fact of his identity.

*Id.* at 421-22. As recognized in *Guevarra-Martinez*, the Ninth Circuit erroneously confused the issue of the court’s jurisdiction to try a defendant with the government’s ability to use illegally obtained evidence. The other cases cited by the Ninth Circuit in *Guzman-Bruno* also do not support the government’s argument that the exclusionary rule does not require exclusion of the illegally obtained evidence in this case from trial. *Hoonsilapa*, like *Lopez-Mendoza*, is a civil deportation case. *Hoonsilapa v. INS*, 575 F.2d 735, 737 (9th Cir.), *modified by*, 586 F.2d 755 (9th Cir.1978). *Foppe* involved suppression of an officer’s observation at trial that, since the time of the bank robbery, the defendant had grown a full beard, and not statements and evidence obtained from the defendant as the result of the unlawful stop-and-frisk. *United States v. Foppe*, 993 F.2d 1444, 1448-49 (9th Cir. 1993).

*Guzman-Bruno* also relied on an earlier case, *United States v. Orozco-Rico*, 589 F.2d 433 (9th Cir.1978), in which the defendant had contended his due process rights were violated when the government deported witnesses before he could obtain their testimony to contest the legality of his arrest. In *Orozco-Rico*, the Ninth Circuit held it did not matter whether the defendant’s arrest was illegal because the government would be able to prove he was present in the United States based on the officer’s identification of him. An illegal arrest would not serve to suppress his identity since, “there is no sanction to be applied when an illegal arrest only leads to discovery of the man’s identity and that merely leads to the official file or other independent evidence.” *Id.* at 435. However, a close reading of the court’s opinion demonstrates that the court was misapplying the inevitable discovery doctrine. *See United States v. Larsen*, 127 F.3d 984, 987 (10th Cir. 1997) (independent discovery doctrine requires that investigation that would have hypothetically discovered the evidence be independent of the constitutional violation and police misconduct). Generally, as in *Davis*, the agents’ attention will focus on the defendant solely as a result of the Fourth Amendment violation.

In addition to being rejected by the Eighth Circuit in *Guevarra-Martinez*, the Ninth Circuit has interpreted *Lopez-Mendoza* in a manner contrary to the government’s interpretation and its own holding in *Guzman-Bruno*. In *Garcia-Beltran*, the Court stated that “*Lopez-Mendoza* does not preclude suppression of evidence unlawfully obtained from a suspect that may in a criminal investigation establish the identity of the suspect.” 389 F.3d at 867. The Ninth Circuit had previously recognized that the statement regarding “identity” referred to the court’s jurisdiction. *See \$191,910.00 in U.S. Currency*, 16 F.3d at 1064 (“On careful examination, *Lopez-Mendoza* merely reaffirms the longstanding rule that a court does not lose jurisdiction over an individual merely because the government secured his presence in the forum through illegal means.”).

There is no reason to distinguish between the A-file which the government used to prove the elements of the offense and other evidence, such as fingerprints, contraband or inculpatory statements, which are fully suppressible if obtained as the result of a Fourth Amendment violation

even if the government is not able to prove an element of the crime as a result of the suppression. *See, e.g., Davis, supra* (fingerprints); *Wong Sun, supra* (statements); *United States v. Ceccolini*, 435 U.S. 268, 274 (1978) (witness testimony).

Furthermore, the Tenth Circuit has specifically recognized that the actions of INS agents in eliciting admissions concerning a defendant's identity can violate the Constitution and require suppression of the statements. In *United States v. Parra*, 2 F.3d 1058 (10th Cir. 1993), this Court held that the INS agent's questioning of a defendant were intended to elicit incriminating information and an attempt to get the defendant to admit his true identity, thereby obtaining evidence relevant to establishing an essential element necessary for a conviction of being an illegal alien in possession of a firearm. *Id.* at 1067-68. This Court concluded that the trial court erred in denying the motion to suppress the defendant's statements concerning his identity. *Id.* However, in *Parra*, this Court concluded the error was harmless because the defendant's identity was not at issue at trial and there was overwhelming evidence the defendant used an alias. *Id.* at 1068. Importantly, the defendant's initial arrest was lawful and the agent, before questioning the defendant, had already discovered the defendant's true identity and linked him to his immigration file. *Id.*

#### **D. A-Files Should be Suppressed as Fruit of the Poisonous Tree**

The government often contends that the immigration file should not be suppressed because the defendant lacks standing to challenge the introduction of the A-file, relying on *United States v. Bowley*, 435 F.3d 426 (3d Cir. 2006); *United States v. Roque-Villanueva*, 175 F.3d 345 (5<sup>th</sup> Cir. 1999); *United States v. Herrera-Ochoa*, 245 F.3d 495 (5<sup>th</sup> Cir. 2001); and *United States v. Guzman-Bruno*, 27 F.3d 422 (9<sup>th</sup> Cir. 1994). Unfortunately, courts often seem to be swayed by this argument. However, as discussed, *supra*, these cases misinterpret the Supreme Court's decision in *Lopez-Mendoza*. Furthermore, these cases rely on the premise that a person must have a proprietary or possessory interest in evidence to assert that it should be suppressed. This reasoning is contrary to established Supreme Court precedent.

To establish standing, a defendant must show a violation of his own individual rights. As the Supreme Court has held, "defendants ... may claim the benefits of the exclusionary rule if their own Fourth Amendment rights have ... been violated." *United States v. Salvucci*, 448 U.S. 83, 85 (1980). As long as a defendant's Fourth Amendment rights were violated, there is no independent requirement that he have some proprietary interest in the items sought to be suppressed.

*Wong Sun*, the seminal case defining the "fruit of the poisonous tree" doctrine, exemplifies these principles. As part of a drug investigation, federal agents unlawfully arrested James Wah Toy and questioned him. 371 U.S. at 473, 479. Toy said that he had no drugs, but Johnny Yee did. *Id.* at 474-75. Agents then entered and searched Yee's residence. *Id.* at 474-75. Although it was the entry into Yee's residence that yielded drugs, Toy had "standing" to object to their admission at his trial. *See id.* at 487-88. The violation of Toy's rights--through his own illegal arrest--led to Toy's making statements. Those statements led agents to Yee, and Yee surrendered narcotics to the agents. *Id.*

Just as Toy was entitled to suppression of Yee's drugs, a reentry defendant is entitled to suppression of the contents of the INS's A-file. The agents unlawfully stopped and arrested the defendant. While he was under arrest, the agents obtained his name and fingerprints. Those fingerprints were used to secure the A-file and criminal records, and the government seeks to introduce the contents of those documents against the defendant. Under the Supreme Court's

rationale in *Wong Sun*, the defendant's records are a fruit of the poisonous tree that the district court properly suppressed. The government is prohibited from using the tainted evidence in the prosecution. See *United States v. Rodriguez-Arreola*, 270 F.3d 611, 619 (8<sup>th</sup> Cir. 2001) (government not prohibited from prosecuting illegal reentry defendant so long as it uses untainted evidence of identity). In fact, numerous state court cases have held that where the defendant's identity is an element of the charged crime, pre-existing government records obtained as a result of information illegally obtained following an unlawful arrest should be suppressed. See, e.g., *Perkins v. State*, 734 So. 2d 480, 482 (Fla. Ct. App. 1999) (suppressing evidence of the arresting officer's post-arrest identification of the defendant, which was "the proof linking the defendant to the motor vehicle records"), *aff'd*, 760 So.2d 85 (Fla. 2000); *State v. Starr*, 754 P.2d 618, 619-20 (Or. Ct. App. 1988) (affirming as "fruit of the poisonous tree" the information that the defendant's driver's license was suspended); *People v. Santiago*, 645 N.Y.S.2d 746, 748-49 (N.Y. Crim. Ct. 1986) (ruling that preexisting DMV records "only accessed by obtaining the defendant's identity through an allegedly illegal stop" can be suppressed as "fruit of the poisonous tree"); *Zimmerman v. Commonwealth*, 363 S.E.2d 708, 710 (Va. 1988) (dismissing indictment for driving as a "habitual offender" where prosecution was based on identity evidence obtained by officer during an illegal stop, which was then used by the officer to access DMV records).

Several recent cases have concluded that, even if the initial fingerprints taken from the defendant as a result of the illegal detention must be suppressed, the government can take a second set of fingerprints, either as part of the criminal case or pursuant to removal proceedings, and can then use those in the criminal case to introduce the A-file. *United States v. Flores-Sandoval*, 422 F.3d 711 (8<sup>th</sup> Cir. 2005); *United States v. Garcia-Beltran*, 443 F.3d 1126 (9<sup>th</sup> Cir. 2006). Such a conclusion would seem to be clearly contrary to the basic principles and purposes of the exclusionary rule. If the government has had continuous custody of the defendant as a result of the unlawful arrest, it would seem that any fingerprints subsequently obtained would be tainted by that initial unlawful seizure.

#### **E. The Rationale of the Exclusionary Rule**

The public policies underlying the exclusionary rule support its application in the context of defendants charged with immigration crimes. The exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Deterrence has always been the aim of the exclusionary rule. See *Mapp v. Ohio*, 367 U.S. 643, 657-660 (1961). Deterrence is so central to the exclusionary rule's purpose that courts will refuse to apply it even following manifestly illegal searches, seizures, or arrests, when applying the rule would not serve to deter police misconduct. See *Arizona v. Evans*, 514 U.S. 1, 14-16 (1995); *United States v. Leon*, 468 U.S. 897 (1984). Conversely, when applying the rule will serve its deterrent goal, courts will enforce it strictly. The Supreme Court made this plain more than eighty years ago in a decision that remains unquestioned:

The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before Court but that it shall not be used at all. Of course, this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may

be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

*Silverthorne Lumber Co.*, 251 U.S. at 392.

Suppression of the statements and fingerprints proving the defendant's identity, as well as the records located as a result of that evidence, is required because of the deterrent purpose of the exclusionary rule: Border Patrol and other law enforcement officers would be put on notice that similar conduct in future cases would be counterproductive. This is not a case of independent source or inevitable discovery. The illegal arrest and the fingerprints and statements seized from the defendant for investigatory purposes are the but-for causes of the reentry charges.

To rule that a reentry defendant's fingerprints, statements, and the records located using that information cannot be suppressed effectively establishes a class of criminal prosecutions to which the exclusionary rule does not apply, illegal reentry after deportation cases. To obtain a conviction under 8 U.S.C. § 1326 for illegal reentry after deportation, the government must prove only that the defendant: (1) is an alien; (2) was previously arrested and deported; (3) was thereafter found in the United States; and (4) lacked the permission of the appropriate authority. *United States v. Meraz-Valetta*, 26 F.3d 992, 997 (10th Cir. 1994), *overruled on different issue by United States v. Aguirre-Tello*, 353 F.3d 1199 (10<sup>th</sup> Cir. 2004). The main evidence to support the government's case against a defendant will be evidence of the defendant's identity and the records located using that name and his fingerprints. If a defendant's identity is ascertained solely as the result of a Fourth Amendment violation, the government, consistent with Fourth Amendment principles and the exclusionary rule, should not be allowed to use the information in its case-in-chief against the defendant. A decision to allow the Government to nonetheless use unlawfully obtained evidence in a criminal prosecution undermines the purpose of the exclusionary rule, rendering the protection of the Fourth Amendment of no value and effectively striking it from the Constitution in cases where an unlawful stop leads to a prosecution for illegal reentry. *See Weeks*, 232 U.S. at 394-94 (stating that if trial courts admit illegally obtained evidence, the protection of the Fourth Amendment is rendered of no value; to approve police conduct after the fact "affirm[s] by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution ....").

The Supreme Court has recognized that "[t]o forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.'" *Nardone*, 308 U.S. at 340. Failure to suppress the evidence obtained in immigration cases arising out of unlawful stops and seizures would effectively approve the Border Patrol agents' undisputed constitutional violations because the government would be able to use all the evidence obtained as a direct result of the unlawful stop and interrogation to obtain a criminal conviction against a defendant, as well as to deport him. *Lopez-Mendoza* does not authorize such a result.

"The exclusionary rule was fashioned as a sanction to redress and deter overreaching governmental conduct prohibited by the Fourth Amendment." *Davis*, 394 U.S. at 724. "Our decisions recognize no exception to the rule that illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof." *Id.* The government asks this Court to take an isolated sentence out of *Lopez-Mendoza*, divorce it from its context, and stretch it far from its original meaning. Contrary to the government's interpretation, *Lopez-Mendoza* does not hold that the government can use evidence of a defendant's identity to prove a crime even when that evidence was obtained in violation of the defendant's constitutional

rights. Rather, the Supreme Court has recognized that “[t]he Fourth Amendment, of course, applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.” *Brown v. Texas*, 443 U.S. 47, 50 (1979) (internal quotes omitted). It further stated, in discussing a Texas statute that made it a crime to refuse to identify oneself to a law enforcement officer who has lawfully stopped the individual and asked for that information, that:

In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant’s right to personal security and privacy tilts in favor of freedom from police interference. The Texas statute under which appellant was stopped and required to identify himself is designed to advance a weighty social objective in large metropolitan centers: prevention of crime. But even assuming that purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.

*Id.* at 52. Interpreting *Lopez-Mendoza* to prohibit suppression of statements and fingerprints in the immigration crime context would allow INS officers to stop and detain individuals in the absence of reasonable suspicion. *Lopez-Mendoza* does not authorize such a result. There is no exception in *Lopez-Mendoza* for statements of identity and associated evidence, nor is there a blanket exception for immigration and criminal records.

#### **F. Breaking the Link.**

Even if the courts are reluctant to tell the government that it cannot use the A-file, suppressing such evidence as the defendant’s statements and the agent’s testimony may be sufficient to prevent the government from proving the crime of reentry. In *United States v. Herrera-Ochoa*, 245 F.3d 495 (5<sup>th</sup> Cir. 2001), the Fifth Circuit reversed the reentry defendant’s conviction because the government failed to have the agent testify that the defendant was in the United States on the date alleged in the indictment. The appellate court held that the trial court could not infer, from the alien defendant’s exercise of his Sixth Amendment right to be present at his trial on the illegal re-entry charge that he was present in United States upon date specified in indictment.

### **III. ANOTHER BASIS FOR SUPPRESSION OF STATEMENTS: LACK OF MIRANDA WARNINGS**

Failure to give *Miranda* warnings may provide a basis for suppressing statements taken from aliens. See *United States v. Flores-Sandoval*, 422 F.3d 711 (8<sup>th</sup> Cir. 2005) (lack of evidence establishing circumstances of arrestee’s initial detention and statement to Border Patrol that he was an illegal alien, and lack of evidence that arrestee received a *Miranda* warning before making statement, required suppression of statement in subsequent prosecution and statement could not provide basis for Immigration and Customs Enforcement (ICE) to place arrestee in custody or obtain additional statements and fingerprints, even though there was no indication of improper conduct by ICE; government did not establish that officials believed, or had reason to believe, that arrestee was

an alien before questioning him); *United States v. Garcia*, 2005 WL 3556089 (D. Utah 2005). A review of the exclusionary rule as applied to statements obtained in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), demonstrates that evidence of identity is not exempt from the exclusionary rule. Although a majority of the Supreme Court has recognized a “routine booking question” exception, which exempts from the protection of *Miranda* and its progeny questions designed to secure the “biographical data necessary to complete booking or pretrial services,” *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (plurality opinion of Brennan, J.), the exception is not absolute. Questions the officer “should know are reasonably likely to elicit an incriminating response from the suspect” are not considered routine booking questions. *Id.* Courts have recognized that questions about alienage, identity, birthplace, and similar biographical data are intended to elicit incriminating responses in the context of immigration crimes and other crimes in which citizenship is an issue. *See, e.g., United States v. Parra*, 2 F.3d 1058, 1068 (10<sup>th</sup> Cir. 1993) (INS agent’s questioning of defendant about his true name to link defendant to his “incriminating immigration file” constituted improper interrogation); *United States v. Doe*, 878 F.2d 1546, 1551-52 (1st Cir. 1989) (“questions about citizenship, asked on the high seas, of a person present on a foreign vessel with drugs on board,” constituted improper interrogation, since U.S. citizenship was an element of the offense); *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983) (alien arrested on gun charges was improperly interrogated by INS agent about his alien status); *United States v. Gonzales-Sandoval*, 894 F.2d 1043, 1046-47 (9th Cir. 1990) (statements elicited by Border Patrol agents about detainee’s immigration status, place of birth, and aliases constituted improper interrogation). The United States Supreme Court recently recognized the potentially incriminating nature of questions about identity in *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, \_\_\_\_ U.S. \_\_\_\_, 124 S.Ct. 2451 (2004), when it stated that “a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense.” *Id.* at 2461. Thus, when Border Patrol agents question suspects about their names and immigration status, the agents are asking questions that they know are reasonably likely to elicit incriminating responses.

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIENT,

Defendant.

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Cause No. 11 CR 1

**SENTENCING MEMORANDUM (Border Excerpt)**

CLIENT, by his undersigned counsel, respectfully files this sentencing memorandum, and requests that this Court find that his background merits favorable treatment. Mr. CLIENT requests that his sentence be pursuant to the factors set forth in 18 U.S.C. § 3553 and USSG §§ 5H1.6 (family), 5K2.12 and 5K2.0 (coercion/duress and factors not adequately considered by the Sentencing Commission: border violence).

***2. USSG §§ 5K2.12 and 5K2.20 - Border violence and danger***

In the March 8, 2010 Addendum to the PSR, Probation concluded that a departure due to the border violence under § 5K2.12 (analyzing it as a coercion and duress issue) was unwarranted because there was no documentation to corroborate Mr. CLIENT's claim. Attached to this memorandum are the hospital report from his hospitalization, where he was hospitalized from November, 2008, until February, 2009, from three stab wounds to his abdomen, and a certification from [name deleted for his safety] the Administrative Section Director of the Municipal Presidency of [city], also documenting the attack. Mr. CLIENT

has thus documented and corroborated his attack and near-murder.

Mr. CLIENT lives in, and was attacked in, San Juanito, Chihuahua. San Juanito is a small town west of Chihuahua (City) and Cuauhtémoc, Chihuahua. It is extremely close (about 20 miles) to Creel, Chihuahua, where cartel gunmen murdered a baby and thirteen adults in August of 2008, only three months before Mr. CLIENT was attacked and nearly killed.<sup>1</sup>

Since Mr. CLIENT was attacked, the violence continues. A year ago, police stood by and watched while drug assassins invaded the town and committed a massacre:

Around 30 gunmen are seen [in police surveillance video] arriving in SUVs at a crossroads just outside the town that is the starting point for the spectacular sightseeing railway winding through Mexico's Copper Canyon.

With assault rifles slung across their backs, the men gather around one vehicle, where they snort a white power handed out by a man in an SUV who appears to give orders.

At one point the camera tracks a contingent of gunmen as they run across a frosted field to surround a house, shooting through the windows and kicking in a

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<sup>1</sup> See, Betty McMahon, "Baby Among Fourteen Gunned Down in Creel," *Ground Report*, ("The relative tranquility of the picturesque mountain town of Creel, a common starting place for people visiting Mexico's famed Copper Canyon, was shattered Saturday, Aug. 16 when gunmen mowed down 14 people, including a one-year-old child who was killed in his father's arms. Twelve others were injured and taken to local hospitals. The victims, mostly members of one family, were attending a family party at a dance hall.

The gunmen in three pickups, dressed in black and wearing ski masks, used high-power rifles in the massacre. The shooting continued for 10 minutes according to reports in *The Herald* de Chihuahua. Hundreds of tourists, hearing the gunfire, took refuge in nearby restaurants.

Creel, a town of about 5,000 in the Sierra Tarahumara mountain range, is the second-largest town (after San Juanito) in the municipality of Bocoyna, Chihuahua.") available at: <http://www.groundreport.com/World/Baby-among-14-gunned-down-in-Creel-Mexico/2867679>

door.

Later they stop a passing car, haul the driver out and kick him on the tarmac. After a few moments he rises to his feet, shakes the hand of one of his assailants and is allowed to drive away. The film ends with the gunmen disappearing into the mountains in a convoy of 15 vehicles.

The images come from a massacre occurring on 15 March in which eight people were killed in and around Creel and a nearby town called San Juanito. They included a 14-year-old girl shot dead inside a different house from the one attacked on film. The rest were abducted, killed and then dumped outside town, or killed in their vehicles. Six people were also injured.<sup>2</sup>

On September 10, 2010, the United States State Department issued a dire travel warning, especially warning United States citizens to avoid the border areas, and especially northwest Chihuahua (San Juanito is in western Chihuahua):

*Violence Along the U.S.-Mexico Border*

Much of the country's narcotics-related violence has occurred in the northern border region. For example, since 2006, three times as many people have been murdered in Ciudad Juarez, in the state of Chihuahua, across from El Paso, Texas, than in any other city in Mexico. More than half of all Americans killed in Mexico in FY 2009 whose deaths were reported to the U.S. Embassy were killed in the border cities of Ciudad Juarez and Tijuana.

Since 2006, large firefights have taken place in towns and cities in many parts of Mexico, often in broad daylight on streets and other public venues. Such firefights have occurred mostly in northern Mexico, including Ciudad Juarez, Tijuana, Chihuahua City, Nogales, Nuevo Laredo, Piedras Negras, Reynosa, Matamoros and Monterrey. Firefights have also occurred in Nayarit, Jalisco and Colima. During some of these incidents, U.S. citizens have been trapped and temporarily prevented from leaving the area.

**The situation in northern Mexico remains fluid; the location and timing of future armed engagements cannot be predicted. U.S. citizens are urged to exercise extreme caution when traveling throughout the region, particularly in**

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<sup>2</sup> <http://www.guardian.co.uk/world/2010/apr/15/police-video-mexico-drug-war?INTCMP=SRCH>

**those areas specifically mentioned in this Travel Warning.**

...

The situation in the state of Chihuahua, specifically Ciudad Juarez, is of special concern. Mexican authorities report that more than 2,600 people were killed in Ciudad Juarez in 2009. Three persons associated with the Consulate General were murdered in March, 2010. U.S. citizens should defer unnecessary travel to Ciudad Juarez and to the Guadalupe Bravo area southeast of Ciudad Juarez. U.S. citizens should also defer travel to the northwest quarter of the state of Chihuahua. From the United States, these areas are often reached through the Columbus, NM and Fabens and Fort Hancock, TX ports-of-entry. In both areas, American citizens have been victims of drug related violence. There have been recent incidents of serious narcotics-related violence in the vicinity of the Copper Canyon in Chihuahua.

[http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_4755.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_4755.html). This is the situation that Mr.

CLIENT fled.

According to the University of San Diego's Trans Border Institute, as of December, 2010, there were 34,550 homicides related to drug violence, the vast majority of which had occurred in Chihuahua state. The executive summary of that report is attached hereto; the full report is available at: <http://justiceinmexico.org/resources-2/drug-violence/>.

The immigration code and international law are full of provisions permitting foreigners who fear harm in their home countries to remain in the United States.<sup>3</sup> *See, eg.*, asylum, 8 U.S.C. § 1231, withholding of deportation, 8 U.S.C. § 1158, the *United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, De. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027, (enacted into U.S. law Oct. 21, 1998, see 8 C.F.R. 208.17 (2002)); customary international law principle of

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<sup>3</sup> (or in whichever country is host, in the case of international law.)

nonrefoulement,<sup>4</sup> see eg., Bill Frelick, "Refugee Rights: The New Frontier of Human Rights Protection" 4 BUFF. HUM. RTS. L. REV. 261, 262 (1998). However, these protections apply to foreigners who fear harm at the hands of their governments.

Tragically, the government is completely enmeshed in the border violence. The Guidelines are devoid of discussion of the additional punishment of deporting a defendant to an extremely dangerous situation.<sup>5</sup>

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<sup>4</sup> *Nonrefoulement*: The obligation of states not to return a refugee, in any manner whatsoever, to a country where his or her life or freedom would be threatened lies at the core of the Refugee Convention (Article 33). Non-refoulement is also a well-established principle of customary international law. [www.hrw.org/press/2001/12/refconbg1211.htm#Nonrefoulement](http://www.hrw.org/press/2001/12/refconbg1211.htm#Nonrefoulement)

<sup>5</sup> The Los Angeles Times has a website section dedicated to the atrocities in Mexico. As of the filing of this memorandum, According to *Mexico Under Siege: The Drug War at Our Doorstep* (<http://projects.latimes.com/mexico-drug-war/#/its-a-war>) 30,196 persons had been killed in the war as of December 27, 2010.

See also, for a comprehensive report on Mexican drug cartels, violence, and the enmeshing of the cartels and the police, CRS (Congressional Research Service) *Report for Congress, Mexico's Drug Cartels* (Colleen W. Cook, Analyst in Latin American Affairs, Foreign Affairs, Defense, and Trade Division ("CRS Report") (Updated February, 2008) available at <http://www.fas.org/sgp/crs/row/RL34215.pdf> (last accessed December 27, 2010).

According to the *New York Times*, the drug violence escalated in Mexico after the PRI lost its monopoly on government in 2000, and the corrupt pact between the PRI and the drug cartels, which established a sort of truce ended, and the government prosecuted and/or permitted the extradition of cartel leaders.

"The government has captured or killed some of the top figures in the Mexican cartels . . . 'The idea,' [Mexican Secretary of Public Security Genaro] García Luna said, 'was that by taking off the head, the body would stop functioning.' Instead, he noted ruefully, 'the assassins took control.' Rather than destroying the cartels, the government's high-level strikes transformed the cartels from hierarchical organizations with commanding figures at the top to unruly mobs of men vying for power. The cartel's hit men and hired muscle began shooting and slaughtering their way into the upper ranks of the organizations."

Daniel Kurtz-Phelan, *The Long War of Genaro García Luna*, *New York Times* July 13, 2008 (available at [www.nytimes.com/2008/07/13/magazine/13officer-t.html](http://www.nytimes.com/2008/07/13/magazine/13officer-t.html)) (hereafter "*New York Times*")

#### ***4. Other § 3553(a)(2) Factors in Evaluating Parsimony***

##### ***d. Disparate treatment***

Mr. CLIENT returned after surviving a deadly attack that nearly killed him and left him in the hospital for months. He also has a long established family here, but the fact he was actually attacked sets his situation apart from others less directly touched by the cartel drug wars. A sentence of thirty-three months would not be disparate in comparison to others in his situation.

#### ***5. Conclusion***

Judges have traditional sentencing discretion “to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon*, 116 S.Ct. at 2053.

The goals of rehabilitation, just punishment, deterrence, incapacitation, and avoiding disparities can be reached with a sentence under the guidelines, and under the "parsimony provision," a variance is required as it is the sentence sufficient to, but not greater than necessary, to accomplish these purposes.

The circumstances of Mr. CLIENT's reentry do not justify a lengthy sentence in order to meet the goals of § 3553(a). The goals of rehabilitation, just punishment, deterrence, incapacitation, and avoiding disparities can be reached with a sentence under the guidelines, and under the "parsimony provision," a variance is required as the guideline sentence is not greater than necessary to accomplish these purposes. This Court should find

that a sentence that is sufficient, but not greater than necessary, to effect the purposes of 18 U.S.C. § 3553 would be thirty-three months.

Respectfully submitted,

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111 Lomas NW, Suite 501  
Albuquerque, NM 87102  
(505) 346-2489

*[Electronically filed]*

Kari Converse  
*Attorney for Mr. CLIENT*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY THAT on April 11, 2015, I filed the foregoing electronically through the CM/ECF system, which caused AUSA to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

I FURTHER CERTIFY THAT on such date I served the foregoing by e-mail on the following non-CM/ECF Participants: , USPO

*[Electronically filed]*

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIENT,

Defendant.

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Cause No. 10 CR 1111

**SENTENCING MEMORANDUM (*Border Violence Excerpt*)**

CLIENT, by his undersigned counsel, respectfully files this sentencing memorandum, and requests that this Court find that his background merits favorable treatment. Mr. Quintana requests that his sentence be pursuant to the factors set forth in 18 U.S.C. § 3553, USSG § 4A1.3 (over representation of criminal history), USSG § 5H1.6 (family ties), USSG § 2L1.2 note 8 (acculturation), CHARACTER and USSG § 5K2.0 (factors not adequately considered by the Sentencing Commission: remoteness of predicate offenses; border violence, and temporary return related to this violence).

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***2. 18 U.S.C. § 3553(a)(1): Nature and circumstances of offense  
and the history and characteristics of the defendant***

CLIENT is from Nuevo Casas Grandes, a city about 60 miles west of the city of Chihuahua, and one of the cities worst hit in the Mexican drug wars. Mr. CLIENT had moved to the United States when was 18, right after he finished the 10th grade in Mexico. He worked

construction, landscaping, and housecleaning in Las Vegas, Nevada, and in Phoenix, but then was arrested for DWI in 1996. He did not go to his original sentencing date, and was arrested, sentenced to probation, and then deported in 2002.

Mr. CLIENT met his wife María Nayarez in Arizona. Their children, now 15 and 11, were born while the family was living in Arizona. Mr. CLIENT used to have a drinking problem. He started drinking at age 17, around 1991, in Mexico. He would drink on weekends, up to 24 beers per weekend. In 1996, after his two DWI's, he stopped drinking cold turkey. He now had a family, and his son José Luis has just been born, and when his family intervened with him, he made the decision to turn his life around. He was abstinent until 2005, when at a party he decided that he thought he could handle occasional alcohol. At the party he had about a dozen beers, and ended up in the conflict documented in paragraph 28. He realized that he absolutely could not drink, and has been abstinent since that time.

After Mr. CLIENT was deported in 2002, the family tried to make it in Mexico, but the economy was so bad that after a few years, they returned to the U.S. There, they remained, working, until he was arrested on a suspended license charge in Phoenix in January, 2010, and turned over to immigration authorities.

When he was deported in June, 2010, it was his intent to remain in Mexico. With his savings, he invested in a party planning business in Nuevo Casas Grandes, specializing in *quinceañeras* and weddings. But he had not counted on the impossibility of operating a business in the current situation in Mexico. The sicarios, the drug cartels' assassins/enforcers/ extortionists, began threatening Mr. CLIENT, and demanded more money than they were able to

make. There have been numerous attacks on gatherings by the sicarios<sup>1</sup> which made people hesitant to sponsor or attend events. Mr. CLIENT sent his wife and children up to the United States again in August, 2010, to put them out of reach of kidnapings and killings. Finally, Mr. CLIENT had to close his business, and he determined to return to the United States to join his family. He was apprehended by border patrol agents near a small road between Lordsburg and the Mexican border.

On September 10, 2010, the United States State Department issued a dire travel warning, especially warning United States citizens to avoid the border areas, and especially northwest Chihuahua (Nuevo Casas Grandes is approximately halfway between the city of Chihuahua and the border, to the northwest of Chihuahua):

*Violence Along the U.S.-Mexico Border*

Much of the country's narcotics-related violence has occurred in the northern border region. For example, since 2006, three times as many people have been murdered in Ciudad Juarez, in the state of Chihuahua, across from El Paso, Texas, than in any other city in Mexico. More than half of all Americans killed in Mexico in FY 2009 whose deaths were reported to the U.S. Embassy were killed in the border cities of Ciudad Juarez and Tijuana.

Since 2006, large firefights have taken place in towns and cities in many parts of Mexico, often in broad daylight on streets and other public venues. Such firefights have occurred mostly in northern Mexico, including Ciudad Juarez, Tijuana, Chihuahua City, Nogales, Nuevo Laredo, Piedras Negras, Reynosa, Matamoros and Monterrey. Firefights have also occurred in Nayarit, Jalisco and Colima. During some of these incidents, U.S. citizens

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<sup>1</sup> See, eg, Sara Miller Llana, *Mexico birthday party massacre bears resemblance to Juarez killings* Christian Science Monitor July 19, 2010 (available at [www.csmonitor.com/World/Americas/2010/0719/Mexico-birthday-party-massacre-bears-resemblance-to-Juarez-killings](http://www.csmonitor.com/World/Americas/2010/0719/Mexico-birthday-party-massacre-bears-resemblance-to-Juarez-killings)); Elisabeth Malkin, *Drug Gang Suspected in Mexico Party Massacre*, New York Times, July 18 2010 (available at <http://www.nytimes.com/2010/07/19/world/americas/19mexico.html>) (covering same massacre); AFP, *Drug Hitmen Suspected in Party Killings as Parents Bury Dead*, Feb 2, 2010 (available at [www.google.com/hostednews/afp/article/ALeqM5hHsr\\_M9PMI4QsA3a-xYDzkB-03ZQ](http://www.google.com/hostednews/afp/article/ALeqM5hHsr_M9PMI4QsA3a-xYDzkB-03ZQ)); *Numbed by Ciudad Juarez's Endless Killings, Mexico Shrugs off Teen Party Deaths*, Reuters, Oct 25, 2010 (available at: <http://blogs.reuters.com/global/2010/10/26/ciudadjuarezpartydeaths>)

have been trapped and temporarily prevented from leaving the area.

**The situation in northern Mexico remains fluid; the location and timing of future armed engagements cannot be predicted. U.S. citizens are urged to exercise extreme caution when traveling throughout the region, particularly in those areas specifically mentioned in this Travel Warning.**

...

The situation in the state of Chihuahua, specifically Ciudad Juarez, is of special concern. Mexican authorities report that more than 2,600 people were killed in Ciudad Juarez in 2009. Three persons associated with the Consulate General were murdered in March, 2010. U.S. citizens should defer unnecessary travel to Ciudad Juarez and to the Guadalupe Bravo area southeast of Ciudad Juarez. **U.S. citizens should also defer travel to the northwest quarter of the state of Chihuahua.<sup>2</sup> From the United States, these areas are often reached through the Columbus, NM and Fabens and Fort Hancock, TX ports-of-entry.** In both areas, American citizens have been victims of drug related violence. There have been recent incidents of serious narcotics-related violence in the vicinity of the Copper Canyon in Chihuahua.

...

Continued concerns regarding road safety along the Mexican border have prompted the U.S. Mission in Mexico to impose certain restrictions on U.S. government employees transiting the area. Effective July 15, 2010, Mission employees and their families may not travel by vehicle across the U.S.-Mexico border to or from any post in the interior of Mexico. This policy also applies to employees and their families transiting Mexico to and from Central American posts. This policy does not apply to employees and their family members assigned to border posts (Tijuana, Nogales, Ciudad Juarez, Nuevo Laredo, and Matamoros), although they may not drive to interior posts as outlined above.

[http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_4755.html#](http://travel.state.gov/travel/cis_pa_tw/tw/tw_4755.html#)

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#### ***4. Other § 3553(a)(2) Factors in Evaluating Parsimony***

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<sup>2</sup> The April, 2010 version of this warning specifically referred to Nuevo Casas Grandes, which is in the northwest quarter of the state of Chihuahua: "The situation in the state of Chihuahua, specifically Ciudad Juarez, is of special concern. The U.S. Consulate General recommends that American citizens defer non-essential travel to the Guadalupe Bravo area southeast of Ciudad Juarez and to the northwest quarter of the state of Chihuahua *including the city of Nuevo Casas Grandes and surrounding communities.* From the United States, these areas are often reached through the Columbus, NM. . . "

<http://www.salem-news.com/articles/april122010/mexico-travel.php> (emphasis added)

**d. Disparate treatment**

Mr. CLIENT has a minor and remote history. He is a good man, and a good father and husband. It would be inaccurate to compare his situation to that of a person not prevented from earning a living because of *sicario* activity and with more recent convictions. He came back fleeing deadly violence and to see his children. A sentence of six months would not be disparate in comparison to others in his situation.

**5. Conclusion**

Judges have traditional sentencing discretion “to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon*, 116 S.Ct. at 2053.

The goals of rehabilitation, just punishment, deterrence, incapacitation, and avoiding disparities can be reached with a sentence under the guidelines, and under the "parsimony provision," a variance is required as it is the sentence sufficient to, but not greater than necessary, to accomplish these purposes.

The circumstances of Mr. CLIENT's reentry do not justify a lengthy sentence in order to meet the goals of § 3553(a). The goals of rehabilitation, just punishment, deterrence, incapacitation, and avoiding disparities can be reached with a sentence under the guidelines, and under the "parsimony provision," a variance is required as the guideline sentence is not greater than necessary to accomplish these purposes. This Court should find that a sentence that is sufficient, but not greater than necessary, to effect the purposes of 18 U.S.C. § 3553 would be six months.

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CLIENT,

Defendant.

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Cause No. 10 CR 2222

**SENTENCING MEMORANDUM (*Border Violence Excerpt*)**

CLIENT, by his undersigned counsel, respectfully files this sentencing memorandum, and requests that this Court find that his background merits favorable treatment. Mr. Ochoa requests that his sentence be pursuant to the factors set forth in 18 U.S.C. § 3553, USSG § 4A1.3 (over representation of criminal history), USSG § 5H1.6 (family ties), USSG § 2L1.2 note 8 (acculturation), and USSG § 5K2.0 (factors not adequately considered by the Sentencing Commission: remoteness of predicate offenses; border violence, and temporary return related to this violence).

***2. 18 U.S.C. § 3553(a)(1): Nature and circumstances of offense  
and the history and characteristics of the defendant***

CLIENT was born in Cuauhtémoc, Chihuahua, a city about 60 miles west of the city of Chihuahua, and lived there during his childhood. He is the middle of nine children. He attended school through fifth grade. Thirty years ago, in 1980, he moved to the United States for the better economic opportunities, and since that time, has lived in the Brighton, Colorado area,

returning to Mexico only for brief visits. He was thirteen when he came here. As Mr. CLIENT puts it, "Everything that I have, I have on this side. My children are here. Everything that I have done in my life has been here." He has been married to María Victoria, a United States citizen, for 22 years. They have three children: Federico, 18, Doménica, 16, and Álvaro, 15. He supported his family working in landscaping, roofing, and in a tortilla factory. Due to his young age when he came here, he has never worked in Mexico, and has no papers to do so.

Shortly after coming to the United States, Mr. CLIENT began to drink, and drank for about thirteen years, until he was 28. Fifteen years ago, he stopped drinking. His criminal history reflects that the domestic violence incidents ceased with his drinking. His last arrest other than a prior and the current illegal reentry charges occurred under the influence of alcohol, fifteen years ago. In that offense, both parties were very intoxicated, and neither spoke the other's language. Both matters led to the offense, as Mr. CLIENT got upset when the woman who had given him a ride did not drive to where he thought she was taking him, and he first grabbed at her to get her to stop the car, and then broke a window to get out of the car (he explains that the inner door handle was at the top of the window and he could not get it to work). He thought he was charged with breaking the window, and was willing to accept his punishment for this. He had no idea he was pleading guilty to a violent robbery and was facing eight years in prison.

When he was deported, he did not want to ask his wife to bring the truck down. They had predictably grown apart during his years in prison, and more importantly, he did not want his family even to enter Ciudad Juárez, much less drive the truck along the extremely dangerous highway to Cuauhtémoc. The drug war which has broken out is affecting his town horribly. On

September 10, the United States State Department issued a dire travel warning, especially warning United States citizens to avoid the border areas, and especially northwest Chihuahua.

*Violence Along the U.S.-Mexico Border*

Much of the country's narcotics-related violence has occurred in the northern border region. For example, since 2006, three times as many people have been murdered in Ciudad Juarez, in the state of Chihuahua, across from El Paso, Texas, than in any other city in Mexico. More than half of all Americans killed in Mexico in FY 2009 whose deaths were reported to the U.S. Embassy were killed in the border cities of Ciudad Juarez and Tijuana.

Since 2006, large firefights have taken place in towns and cities in many parts of Mexico, often in broad daylight on streets and other public venues. Such firefights have occurred mostly in northern Mexico, including Ciudad Juarez, Tijuana, Chihuahua City, Nogales, Nuevo Laredo, Piedras Negras, Reynosa, Matamoros and Monterrey. Firefights have also occurred in Nayarit, Jalisco and Colima. During some of these incidents, U.S. citizens have been trapped and temporarily prevented from leaving the area.

**The situation in northern Mexico remains fluid; the location and timing of future armed engagements cannot be predicted. U.S. citizens are urged to exercise extreme caution when traveling throughout the region, particularly in those areas specifically mentioned in this Travel Warning.**

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The situation in the state of Chihuahua, specifically Ciudad Juarez, is of special concern. Mexican authorities report that more than 2,600 people were killed in Ciudad Juarez in 2009. Three persons associated with the Consulate General were murdered in March, 2010. U.S. citizens should defer unnecessary travel to Ciudad Juarez and to the Guadalupe Bravo area southeast of Ciudad Juarez. U.S. citizens should also defer travel to the northwest quarter of the state of Chihuahua. From the United States, these areas are often reached through the Columbus, NM and Fabens and Fort Hancock, TX ports-of-entry. In both areas, American citizens have been victims of drug related violence. There have been recent incidents of serious narcotics-related violence in the vicinity of the Copper Canyon in Chihuahua.

...

Continued concerns regarding road safety along the Mexican border have prompted the U.S. Mission in Mexico to impose certain restrictions on U.S. government employees transiting the area. Effective July 15, 2010, Mission employees and their families may not travel by vehicle across the U.S.-Mexico border to or from any post in the interior of Mexico. This policy also applies to employees and their families transiting Mexico to and from Central American posts. This policy does not apply to employees and their family members assigned to border posts (Tijuana, Nogales, Ciudad Juarez, Nuevo

Laredo, and Matamoros), although they may not drive to interior posts as outlined above.

[http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_4755.html#](http://travel.state.gov/travel/cis_pa_tw/tw/tw_4755.html#)

Mr. CLIENT tried to work in Cuauhtémoc, but the *sicarios*, the paid assassins in the employ of the cartels, made it impossible. They would accost and assault, extort, and/or rob people out on the streets. Without his truck, Mr. CLIENT could not get to job sites. His ability to work was further impaired because he did not have working papers.<sup>1</sup> He determined to return to Brighton to retrieve his truck. He knew that he was not supposed to come back, but could not find a way to get it without going to Brighton. He was stopped minutes after crossing the border.

### ***3. 18 U.S.C. § 3553(a)(4) and (5): Guidelines and Policy Statements***

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#### ***c. Extraordinary circumstances not foreseen by the Commission***

The immigration code and international law are full of provisions permitting foreigners who fear harm in their home countries to remain in the United States.<sup>2</sup> *See, eg.*, asylum, 8 U.S.C. § 1231, withholding of deportation, 8 U.S.C. § 1158, the *United Nations Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, De. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027, (enacted into U.S. law Oct. 21, 1998, see 8 C.F.R.

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<sup>1</sup> This is a common problem for Mexican citizens who have spent their entire adult lives in the United States. As explained by a colleague in Mexico City, to get formal employment, "He/she would need an official identification to start. A birth certificate would be a good start. To get a *credencial de lector*, one also would need proof of residence. I also believe that there are certain periods when *credenciales* are issued and times when they are not. As last I knew, a drivers license is not an official I.D. The person also would need to go to SAT (tax folks) and get a CURP, and official tax ID number. This person also needs to get registered with Seguro Social. Most jobs also require letters of reference from former employers (usually 2) and may require personal letters of reference from friends."

<sup>2</sup> (or in whichever country is host, in the case of international law.)

208.17 (2002)); customary international law principle of nonrefoulement,<sup>3</sup> *see eg.*, Bill Frelick, "Refugee Rights: The New Frontier of Human Rights Protection" 4 BUFF. HUM. RTS. L. REV. 261, 262 (1998). However, these protections apply to foreigners who fear harm at the hands of their governments.

Tragically, the government is completely enmeshed in the border violence. The Guidelines are devoid of discussion of the additional punishment of deporting a defendant to an extremely dangerous situation.<sup>4</sup> Mr. CLIENT has been unable to work because of the *sicarios* in

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<sup>3</sup> *Nonrefoulement*: The obligation of states not to return a refugee, in any manner whatsoever, to a country where his or her life or freedom would be threatened lies at the core of the Refugee Convention (Article 33). Non-refoulement is also a well-established principle of customary international law. [www.hrw.org/press/2001/12/refconbg1211.htm#Nonrefoulement](http://www.hrw.org/press/2001/12/refconbg1211.htm#Nonrefoulement)

<sup>4</sup> The Los Angeles Times has a website section dedicated to the atrocities in Mexico. As of the filing of this memorandum, According to *Mexico Under Siege: The Drug War at Our Doorstep* (<http://projects.latimes.com/mexico-drug-war/#/its-a-war>) 30,196 persons have been killed in the war as of December 27, 2010.

Just this month, there was a mass murder near Cuauhtemoc: "The bodies of six people presumably slain by drug-gang hit men were found Thursday on a highway in northern Mexico, the Chihuahua state Attorney General's Office told Efe. [sic]

'Apparently they forced the men out of a vehicle and killed them on the highway to Cuauhtemoc,' a town some 100 kilometers (62 miles) southwest of Chihuahua city, the state capital, AG's office spokesman Carlos Gonzalez said.

At least 60 shell casings from high-caliber weapons littered the area where the six bodies were found, according to initial reports."

<http://latino.foxnews.com/latino/news/2010/12/09/slain-mexican-highway/> (Dec. 9, 2010)

Last month, the Santa Fe Reporter contained a feature article about van service from Colorado and New Mexico to Chihuahua used by people who have become afraid to drive themselves. Alexa Schirtzinger, in *The Chihuahua Express*, Nov. 24, 2010, available at: <http://www.sfreporter.com/santafe/article-5776-the-chihuahua-express.html>, writes, "We are waiting for *la camioneta*, the 15-passenger van that makes the 12-hour trip from Santa Fe to Chihuahua, Mexico, four days a week. At this hour, the streets are deserted. One of the men, [] introduces himself as Juan, . . . is from Delicias, a Mexican city southwest of Chihuahua, the capitol of the state . . . . As with most conversations related to US-Mexico travel, this one turns quickly to the *narcoguerra*, the drug-related violence that has plagued Mexico for more than a

Chihuahua, and it is abundantly clear that the Mexican government has lost its ability to protect its citizens. This is not a circumstance that the Commission ever imagined. That it is a circumstance that presently applies to many fleeing the horrible violence of the border does not change the fact that at the time the guidelines were adopted, no one could have anticipated this situation, it is not accounted for in the guidelines, and it constitutes substantial additional punishment.

#### ***4. Other § 3553(a)(2) Factors in Evaluating Parsimony***

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decade. In some respects, it is now a full-blown war. 'Before, it wasn't like this,' Juan says. **"The violence is much worse now, especially in Juárez and Cuauhtémoc,"** a city just south of Chihuahua. Statistics bear out Juan's perception. According to a CBS special report this month, 10,000 people have been killed so far this year in Mexico's drug violence—a 53 percent increase over 2009. (emphasis added)

*See also*, for a comprehensive report on Mexican drug cartels, violence, and the enmeshing of the cartels and the police, CRS (Congressional Research Service) *Report for Congress, Mexico's Drug Cartels* (Colleen W. Cook, Analyst in Latin American Affairs, Foreign Affairs, Defense, and Trade Division ("CRS Report") (Updated February, 2008) available at <http://www.fas.org/sgp/crs/row/RL34215.pdf> (last accessed December 27, 2010).

According to the *New York Times*, the drug violence escalated in Mexico after the PRI lost its monopoly on government in 2000, and the corrupt pact between the PRI and the drug cartels, which established a sort of truce ended, and the government prosecuted and/or permitted the extradition of cartel leaders.

"The government has captured or killed some of the top figures in the Mexican cartels . . . 'The idea,' [Mexican Secretary of Public Security Genaro] García Luna said, 'was that by taking off the head, the body would stop functioning.' Instead, he noted ruefully, 'the assassins took control.' Rather than destroying the cartels, the government's high-level strikes transformed the cartels from hierarchical organizations with commanding figures at the top to unruly mobs of men vying for power. The cartel's hit men and hired muscle began shooting and slaughtering their way into the upper ranks of the organizations."

Daniel Kurtz-Phelan, *The Long War of Genaro García Luna*, *New York Times* July 13, 2008 (available at [www.nytimes.com/2008/07/13/magazine/13officer-t.html](http://www.nytimes.com/2008/07/13/magazine/13officer-t.html)) (hereafter "*New York Times*")

**d. Disparate treatment**

Mr. CLIENT could not have sought asylum here because of his convictions, although thousands of his countrymen are doing so.<sup>5</sup> His convictions are remote, and it would be inaccurate to compare his situation to that of a person not prevented from earning a living because of *sicario* activity and with more recent convictions. He came back just to recover his truck so he could return to Mexico and support himself there. A sentence of 30 months would not be disparate in comparison to others in his situation.

**5. Conclusion**

Judges have traditional sentencing discretion “to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.” *Koon*, 116 S.Ct. at 2053.

The goals of rehabilitation, just punishment, deterrence, incapacitation, and avoiding

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<sup>5</sup> *see, eg.*, Nora Zimmet, *Surge in Asylum Seeking Mexicans Taxing Already Overworked Immigration System*, Fox News, February 19, 2009, available at: <http://www.foxnews.com/story/0,2933,496925,00.html>:

"According to U.S. Citizenship and Immigration Services, 2,231 Mexicans sought asylum in the United States in fiscal 2008 – up from 1,366 in 2006, before drug violence in Mexico began to escalate. And it is not just the number of applicants that is increasing – the number of approved applications has more than doubled from 61 in 2006 to 123 in 2008.

'The issue of asylum claims is one part of a number of signs we're seeing that are the results of border violence,' says Michael Friel, director of media relations at Customs and Border Protection."

*see also*, Daniel Gonzalez, *More fleeing cartels in Mexico, seeking asylum in U.S.* Arizona Republic, January 24, 2010, available at: <http://www.azcentral.com/news/articles/2010/01/24/20100124asylum0124.html>



**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Defendant.

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Cause No. 09-CR- JH

**MOTION TO SUPPRESS EVIDENCE**

, by his undersigned counsel, moves the  
Court to suppress all evidence of his identity, fingerprints, statements, purported immigration  
file, and all observations of his presence in the United States, obtained as a result of the  
unlawful stop of the car in which he was riding on January 30, 2009. As grounds, Mr.  
states as follows:

**FACTS**

On Friday January 30, 2009, late in the evening, Mr. pulled into the parking  
lot of the Casa Liquors store on the , hoping to purchase some beer, but finding it closed,  
pulled back out. He committed no traffic violations in performing this maneuver, and  
committed no crimes. Nonetheless, Bernalillo County Sheriff's Office (BCSO) Deputy  
decided to stop him. The Computer Assisted Dispatch (CAD) report indicates no  
reason for the stop, nor any inquiries about the vehicle prior to the stop. The only citation

written was for no insurance, which obviously cannot be detected from outside the car. The tape of the radio dispatch also indicates only that the car was stopped. When interviewed, the officer could not provide any reason for having stopped him.

When Deputy [redacted] did stop Mr. [redacted], he requested his identification and vehicle registration and insurance, and at this point discovered there was no insurance. He apparently had no suspicion that Mr. [redacted] was driving drunk, as he performed no field sobriety tests nor breath alcohol test. Mr. [redacted] provided him with his driver's license. When he ran a check on Mr. [redacted], he discovered that he had been deported. He thereupon arrested Mr. [redacted], and took him to the Metropolitan Detention Center, where he was held on a "courtesy hold" by the city. He was held for a day with no charges or holds, or any basis. Immigration and Customs Enforcement (ICE) placed a hold on him the next day, on Saturday, January 31, and three days later, on Tuesday, February 3, picked him up. On Wednesday, February 4, he finally was brought before a magistrate judge, where he was charged with a violation of 8 U.S.C. § 1326(b).

### **ARGUMENT**

Mr. [redacted] was illegally stopped without probable cause or reasonable suspicion to believe that he had just committed, or was about to commit, or was in the process of committing, a criminal or traffic offense. He was then held from January 30 until February 4 before being brought before a magistrate judge. As a remedy for the violations of the Fourth Amendment, 18 U.S.C. § 3501 and F.R.Crim. P. 5, Mr. [redacted] is entitled to suppression of all evidence obtained as a result, including evidence of his identity, fingerprints, statements,

his purported immigration file and all observations of his presence in the United States. This remedy will not prevent Mr. [redacted]’s deportation, but cannot be used to prosecute him. Such a remedy has been employed by the Honorable District Court Judge Robert Brack of the District of New Mexico, *see United States v. Olivares–Rangel*, 458 F.3d 1104 (10th Cir. 2006) and by the Honorable District Court Judge Bruce Black in *United States v. Gonzales–Calderon*, CR 05–1369 BB) (D.N.M. Sept. 16, 2005), and should be employed by this Court as well.

Whether evidence obtained following a Fourth Amendment violation must be suppressed depends on whether the evidence “has been come at by exploitation of [the] illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (quoting Maguire, EVIDENCE OF GUILT, 221 (1959)). It is incumbent upon the government to prove the evidence was sufficiently attenuated from the illegal detention to purge the illegality’s taint. That burden is a “heavy” one. *United States v. Caro*, 248 F.3d 1240, 1247 (10<sup>th</sup> Cir. 2001); *United States v. Gregory*, 79 F.3d 973, 979 (10<sup>th</sup> Cir. 1996). To determine whether the government has met that heavy burden, a court must examine the three factors applied in *Brown v. Illinois*, 422 U.S. 590 (1975): (i) temporal proximity; (ii) the presence of intervening circumstances; and particularly (iii) the purpose and flagrancy of the police misconduct. *Id.* at 603; *Gregory*, 79 F.3d at 979-80. In this case, all three factors strongly weigh against the government.

First, the government acquired the evidence Mr. [redacted] seeks to suppress during the illegal stop and arrest. The observation of Mr. [redacted]’s presence in the United States

occurred simultaneously with the stop. Mr. [REDACTED] allegedly made a statement after several days of being held without being brought before a Magistrate Judge. His fingerprints were obtained at the time he was booked into the Metropolitan Detention Center with no charges or holds, and when ICE picked him up on February 3. The immigration file purportedly related to Mr. [REDACTED] was accessed when these fingerprints were submitted to the IDENT system right after the prints were taken. The actual file must have been requested around that time as well.

Second, there were no intervening circumstances to attenuate the taint. To purge the taint an intervening event must “isolate[] the defendant from the coercive effects of the original illegal stop.” *Gregory*, 79 F.3d at 980. No such event occurred in this case. Mr.

[REDACTED] was illegally detained throughout the acquisition of all the evidence against him. The Deputy Sheriff maintained the coercive atmosphere. Any *Miranda* warnings given by the deputy sheriff, or days later, by immigration agents did not dissipate the effects of the ongoing illegal detention and arrest. *See, Brown*, 422 U.S. at 603 (*Miranda* warnings do not automatically purge the taint of an illegal arrest). All the government’s evidence seamlessly flowed from the illegal detention and arrest.

Third, the misconduct of the government’s agents was intentional and flagrant. There was absolutely no reason to stop Mr. [REDACTED], and even less to arrest him and hold him many days without bringing him before a magistrate judge.

In *United States v. Olivares-Rangel*, 458 F.3d 1104, Judge Brack concluded that suppression was an appropriate remedy when the border patrol stopped the defendant without

reasonable suspicion on I-40, approximately 150 miles over the 100 mile limit permitted by 8 U.S.C. § 1357(a)(3). This violated the Fourth Amendment. *324 F. Supp. 2d 1218*, 1222 (D.N.M. 2004). Following the stop, the agent recognized the defendant as an undocumented person he was familiar with, and asked him questions about his identity and citizenship, verified he was in the country illegally, took his fingerprints at the station, used those prints to connect the accused to his immigration and prior criminal record and used that information to elicit incriminating admissions from him. *Id.* The court held that the illegal stop tainted all the evidence of Olivares-Rangel's identity, including his name and fingerprints and the Border Patrol agents' knowledge of his presence in the United States and thus, all that evidence must be suppressed. *Id.* at 1223-24. The Court of Appeals affirmed this part of Judge Brack's holding:

A defendant may still seek suppression of specific pieces of evidence (such as, say, fingerprints or statements) under the ordinary rules announced in *Mapp* and *Wong Sun*. A broader reading of *Lopez-Mendoza* would give the police carte blanche powers to engage in any manner of unconstitutional conduct so long as their purpose was limited to establishing a defendant's identity.

458 F.3d at 1111. *See also, Gonzales Calderon*, CR 05-1369 BB (D.N.M. Sept. 16, 2005) (J. Black granted motion to suppress, holding at page 6 that “[T]angible evidence of the defendant’s identity obtained as a result of the illegal stop and arrest is suppressible evidence, including Defendant’s statements regarding his identity and any fingerprints taken from the defendant during the illegal stop and arrest.”) (citations omitted).

In this case, the conduct is even less justifiable. Unlike immigration officers, BCSO deputies are not authorized to effect immigration arrests. I.N.A. § 287(g) (8 U.S.C.

§ 1357(g)) allows Immigration and Customs Enforcement (ICE) to enter into cooperation agreements with local law enforcement agencies, which empower agents of these agencies to enforce immigration laws after extensive training.<sup>1</sup> Part of the agreement entails training for the state and local officers so that they can recognize immigration violations and understand constitutional limits on investigations. *Id.*; see *Memoranda of Understanding, Sec. VIII, available on website*. BCSO has not entered into such an agreement. *Id.*<sup>2</sup> Its officers are not empowered to act as immigration agents, and Deputy [redacted] was acting beyond his authority when he arrested Mr. [redacted] for an immigration violation.

In suppressing the evidence in *Olivares-Rangel*, Judge Brack and the Tenth Circuit

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<sup>1</sup> According to ICE ([http://www.ice.gov/pi/news/factsheets/section287\\_g.htm](http://www.ice.gov/pi/news/factsheets/section287_g.htm)):

The 287(g) program is only one component under the ICE ACCESS umbrella of services and programs offered for assistance to local law enforcement officers.

ICE developed the ACCESS program in response to the widespread interest from local law enforcement agencies who have requested ICE assistance through the 287(g) program, **which trains local officers** to enforce immigration law as authorized through section 287(g) of the Immigration and Nationality Act.

...

Memorandum of Agreement

The **MOA defines the scope and limitations of the authority to be designated**. It also establishes the supervisory structure for the officers working under the cross-designation and prescribes the agreed upon complaint process governing officer conduct during the life of the MOA. Under the statute, **ICE will supervise all cross-designated officers** when they exercise their immigration authorities. The agreement must be signed by the ICE Assistant Secretary, and the governor, a senior political entity, or the head of the local agency before trained local officers are authorized to enforce immigration law.

...

Training Requirements

ICE offers a **four-week training program** now held at the Federal Law Enforcement Training Center (FLETC) ICE Academy (ICEA) in Charleston, SC conducted by certified instructors.” (emphasis added)

<sup>2</sup> The Las Vegas Police Department and the NM Dep’t of Corrections are the only two agencies in New Mexico with the Memorandum of Understanding and with officers who have completed the training. *Id.*

relied upon the Supreme Court's decisions in *Davis v. Mississippi*, 394 U.S. 721 (1969), and *Hayes v. Florida*, 470 U.S. 811 (1985). In those cases, the defendants were arrested without probable cause in order to obtain fingerprints to investigate whether their prints matched prints found at crime scenes. The Court held that fingerprints acquired for investigatory purposes as the result of an illegal detention must be suppressed. *Hayes*, 470 U.S. at 815-16; *Davis*, 394 U.S. at 728. Similarly, the Eighth Circuit has affirmed the suppression of fingerprints obtained to investigate whether the defendant had violated any immigration laws, as were Mr. [redacted]'s fingerprints in this case, where the fingerprints were taken following an illegal detention. *United States v. Guevara-Martinez*, 262 F.3d 751, 752-56 (8<sup>th</sup> Cir. 2001). The court in *United States v. Mendoza-Carrillo*, 107 F.Supp.2d 1098, 1106-1107 (D.S.D. 2000) suppressed a defendant's fingerprints and statements of identity obtained following an illegal detention. There, an officer properly stopped a vehicle for an equipment violation, and became suspicious of the passenger. He called immigration, who advised him that he did not have arrest powers but to bring him to a local jail for immigration authorities to interview him. A detainer was faxed to the jail 2½ hours after Mendoza Carrillo was arrested. The evidence was suppressed because the questioning of Mendoza Carrillo was an improper expansion of a traffic stop. Here, the traffic stop was unjustified at the inception and the same result should be reached. In *United States v. Parra*, 2 F.3d 1058, 1067-68 (10<sup>th</sup> Cir.), *cert. denied*, 510 U.S. 1026 (1993), the Tenth Circuit ruled that a district court erred in failing to suppress a defendant's statements regarding his identity in response to questions that violated *Miranda v. Arizona*, 384 U.S. 436 (1966). *See also, United States v. Aguin-*

*Guerra*, 2004 WL 1875050, \* 2 (N.D.Ia. Aug. 20, 2004) (suppressing defendant’s statement of illegal presence following a *Miranda* violation).

Thus, the proposition that identity-related evidence may be suppressed is well-founded. To hold otherwise would eliminate any deterrence against police agents violating people’s rights. To establish virtually all immigration offenses the government only requires identity evidence. If such evidence may not be suppressed, police may trample the constitution without any fear of jeopardizing immigration prosecutions. Indeed, immunity for suppression of identity evidence would provide police with “an incentive to discovery a person’s identity in whatever way they can, put[ting] the privacy rights of legal aliens and citizens that might for any reason be suspended of illegal entry at too great a risk . . .”

*Mendoza-Carrillo*, 107 F.Supp.2d at 1107.

Finally, the government violated Mr. \_\_\_\_\_’s right to be brought before a United States Magistrate Judge without delay guaranteed by F.R.Crim. P. 5, and 18 U.S.C. § 3501. As recently reiterated by the Supreme Court in *Corley v. United States*, 129 S.Ct. 1558, 2009 WL 901513 (2009), the *McNabb-Mallory* rule precludes admission of any statements given by an accused who is not brought before a magistrate judge within six hours of his arrest. “[In *McNabb* W]e invoked the supervisory power to establish and maintain ‘civilized standards of procedure and evidence in federal courts. . . A person making an arrest within the United States must take the defendant without unnecessary delay before a magistrate judge.” 129 S.Ct. at 1562. Corley was first taken to a local police station, much like Mr.

\_\_\_\_\_ was taken first to a local jail. From there, Corley was brought to a hospital for

treatment of a cut, and from there to the FBI office, where he was interrogated for many hours. The next day, his previous day's interrogation was reduced to writing, and only then, 29.5 hours after his arrest, was he brought before a magistrate judge. 129 S.Ct. at 1565. Mr. [redacted] was held 106.5 hours before he was brought before a magistrate judge.<sup>3</sup>

### CONCLUSION

For all of the above reasons, this Court should suppress all the evidence obtained as a result of Mr. [redacted]'s detention and arrest, including, among other things, all evidence of his identity, fingerprints, statements, his purported immigration file and all observations of his presence in the United States. Mr. [redacted] requests that this Court hold an evidentiary hearing on this motion and following that hearing enter an order suppressing all the evidence obtained as a result of Mr. [redacted]'s unlawful stop and arrest on January 30, 2009, including evidence of his identity, fingerprints, statements, his purported immigration file and all observations of his presence in the United States.

Respectfully submitted,

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<sup>3</sup> While Mr. [redacted] was arrested on a Friday night, it was not until the following Wednesday that he was brought before a magistrate judge.