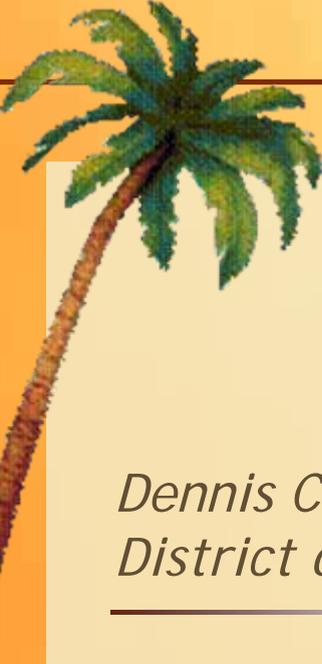


MULTI-TRACK FEDERAL CRIMINAL DEFENSE SEMINAR



*Dennis Candelaria, AFD
District of New Mexico*

IMMIGRATION:
Defending Against the
Illegal Entry and Illegal
Reentry Charges



**NO ME MOLESTES CABRON! TOMA SUS
DOCUMENTOS Y VETE BUEY**

(English translation: Yes, Mr. Immigration Officer, how can I help you?)

Special thanks to Edgar Holguin AFPD WDTX, Kari Converse AFPD DNM, and Francisco Morales AFPD WDTX for allowing me to use their material.

Introduction

Prosecution for immigration crimes, especially, illegal reentry after removal, are becoming more common across the country. In January of 2005 11% of all federal inmates were in custody for an immigration crime. The non-United States citizen population in federal prisons now stands at 28% of the 187,000 persons incarcerated in Bureau of Prisons facilities.

On its face, the crime of illegal reentry, 8 USC 1326, seems to be one of the simplest criminal offenses in the US code. It consists of four elements:

1. An alien;
2. Who has been formally removed or excluded;
3. Who thereafter has entered, attempted to enter or has been found in the United States;
4. And did not have consent from the Attorney General to reapply for admission.

In cases where a person is accused of being "found in" the crime is a pure status offense, where the accused does not have to commit an act to be found guilty of committing the offense it only consists of a person's status as a non-citizen, who was deported at some time in the past (an administrative event), who was merely present in the United States without permission (a lack of an administrative event).

In most 1326 trials, the bulk of the evidence of the accused is documentary. To prove the elements the government will most often rely on:

1. For alienage: Admissions made by the alien in the past or present case or birth certificate submitted by the alien in the past in an attempt to obtain an immigration benefit.
2. For removal: An immigration judges/immigration officers order of removal and 1-205 warrant of removal. An immigration officer may testify as to the procedures of removal or in rare cases that they actually recall the actual physical removal of the person.
3. For entry/found **in**: The arresting officer who saw the defendant in the United States.
4. For consent: A case agent testifying that he reviewed the defendants A-file and various immigration databases and could find no application and/or consent by the attorney general for the defendant to re-enter. There may also be a Certificate of Non-Existence.

As a result, a 1326 trial may consist of as few as two witnesses. One is the case agent, who is the

custodian of the A-file and testifies as to elements 1, 2, and 4. The other is the arresting agent, who testifies as to the element 3.

DEFENDING UNLAWFUL REENTRY CASES

CHAPTER ONE: Discovery of documents within the A-file

Federal Rule of Criminal Procedure 16 is the primary resource for defense counsel to receive discovery from the government. In a typical prosecution for unlawful reentry case, the government will provide a copy of the defendant's "A-file." As with any trial, additional discovery can be requested by a letter to the Assistant U.S. Attorney. If disputes arise between parties, the District Court can be brought in resolve these disputes. Rule 16 provides a wide range of discovery that is attainable by defense counsel to include but not limited to: any statements made by the defendant to include written or oral statements, the defendant's prior criminal history, prior removal history to include voluntary removals, and prior history requesting lawful admission into the United States.

Most of the documents the government will rely on to prosecute an unlawful reentry case come from the "A-File" or Mien File of the defendant. The A-File is the documented immigration history of the defendant and is discoverable under Rule 16. The A-file will consist of the immigration history (illegal or legal) collected by the government and the documents in the A-file will generally be admissible as public records.

Review of the entire A-file is key to case. In particular one needs to look for:

1. Prior statements made by the defendant to authorities.
2. Removal orders and Notices to Appear (NTA's) or Orders to Show Cause (OSC).
3. Documents relating to criminal history.
4. I-205 warrant of removal.
5. Any previous immigration applications the person may have filed,
6. Prior legal status the person may have had.

Documents in the A-File: why are they important and what do they mean?

Immigration law is highly complex and paper driven. The A-file can consist of hundreds of pieces of paper and there maybe even more documents in other A-files and databases. This is a snapshot at some of the more important documents of an A-file.

I-205 (Warrant of Removal/Deportation)

The I-205 is a Warrant of Removal/Deportation document maintained by Immigration and Customs Enforcement (previously INS). This is one of the most critical documents maintained in an alien's A-file. It functions as an arrest warrant for the immigration service, permitting them to detain an individual until removal, as well as verifying the removal of the alien.

An immigration judge's order of removal is not sufficient to demonstrate the person was actually physically removed from the United States. Instead, an order of removal is only evidence that a judge ordered a person removed at an immigration hearing. To demonstrate actual removal from the United States it is necessary to have the I-205 produced to show that the removal order of the judge/district director was actually carried out.

The I-205 is like a checklist. It is meant to ensure that the removal actually took place. The front page consists of the order to arrest and remove the person from the United States. It will include some background information, including the name, place of entry and the provision under which the person was ordered removed. It is the back or second page that is most often important for our purposes. The second page is where the immigration service will document the removal was actually executed. It has the name of the alien followed by the place, date and means of removal.

Underneath this description is a photo of the person removed with the person's right index fingerprint. Further below is a signature of the person removed, followed by the signature of the person who took the fingerprint.

The two key areas are below. The first is a space for the person who witnessed the departure to sign and place his title. Then further down there is an additional space for the person who verified the departure. These are the two witnesses to the actual removal from the United States of the defendant, Alien Transportation System (JPATS) flight that flies from the interior of the United States to one of the border towns or an international port of entry. When the JPATS plane arrives, usually carrying anywhere from 50 to 120 persons, they are boarded onto government buses and vans by ICE and U.S. Marshals officers. They are then transported to the port of entry, where they are then processed for the actual removal by an immigration officer. This can take place overland if the person is being deported to Mexico or by being placed on an international flight if the removal is to another country. This is when the back of the I-205 is filled out and completed.

The I-205 is admissible at trial, as is most of the rest of the A-File, under the public records exception to the hearsay rule. The I-205 also has been found to not run afoul of *Crawford*. Failure to sign the I-205 does not preclude a finding the alien was deported.

An I-205 is important because an alien who is ordered removed but never actually left the country is not guilty of re-entering the country after removal. Courts have held that it is not necessary to have direct evidence, e.g. testimony by the actual agent who personally witnessed

the departure from the United States or videotape evidence if there is circumstantial evidence of the removal.

Often, the I-205 departure witnesses by will have a signature that is illegible or missing. There is no space provided for the official to print out or type his name and this is only rarely done. As a result, even though it is signed the government may at times be unable to produce the agent because the signature is illegible. The following space underneath it provides for an explanation for why a particular departure was not witnessed.

I-296

The I-296 is the kissing cousin of the I-205. Like the I-205 it is used to verify the actual physical removal of a person from the United States. However, it is used in place of the I-205 when the removal is pursuant to an expedited removal. An expedited removal is the removal of a person at the border without that person ever seeing an immigration judge. In 1996, Border Patrol agents and other immigration officials were given the authority to order someone removed if they apprehend that person at the border and that person is not a legal permanent resident or do have a credible form of relief and are aggravated felons.

The I-296 consists of warnings at the top of the page with a truncated "Verification of Removal" at the bottom of the page. Like the I-205 it provides a space for an officer to verify the signature, departure date, port and manner of departure and picture/fingerprint of the person being deported. The government may use the I-296 in place of the I-205 to show the person was actually removed in trial.

Notice to Appear

The Notice to Appear (NTA) is the charging document used by the immigration authorities to attempt to remove a person. The NTA acts like an indictment, informing the person and the immigration court as to what the immigration service intends to prove so the person can be ordered removed. It is also the formal document that places a person into removal proceedings. The NTA generally will list the factual allegations against the person, almost always starting with "You are not a citizen or national of the United States" and "You are a native of...." This is typically followed by the factual allegations that the service feels renders the person removable. It is then followed by the specific statute that the person has run afoul of that results in his removal from the country. At the bottom of the page will be setting of a court hearing, if any.

On the second page of the NTA are various warnings and advisements as well as the certificate of service on the person.

The NTA can be useful to research if the person can collaterally attack the removal order. It will help identify the reason for why the person was removed. It can also help determine if the person ever had legal status to be in the United States.

Order to Show Cause

The granddaddy of the NTA, the Order to Show Cause (OSC), is the charging document used by immigration authorities prior to the advent of the NTA in 1996. The OSC has the same effect as an NTA.

Certificate of Non-Existence

The Certificate of Non-Existence (CNER) is a document generated by the Office of Citizenship and Immigration Services (formerly INS) in Washington, D.C. in response to an agent requesting a review of available documents to determine if an individual has obtained consent for re-admission into the United States from the Attorney General or the Secretary of the Department of Homeland Security to reenter the United States. It is generated as part of the case against the person and sent from Washington. The government then introduces it at trial to prove element 4 through the case agent.

The Certificate has been found to be sufficient to meet the governments requirement as to the element of lack of consent to re-enter the United States. In the 9th circuit, these CNERs have been admitted in evidence without any requirement that the author testify, on two theories: Rule 902 (self-authentication by seal) plus 803(10)(non-hearsay) OR by 803(10) plus the statute, 8 USC §1360(d) and related regs 8 CFR §103.7(d)(4), which say that certain persons can certify the non-existence of a record and their certification will be accepted in court as if it were testimony. The 9th circuit has ruled that admission of the CNER does not violate *Crawford*, but the 1st circuit in *Earle* rejects that.

If the CNER is not sealed nor signed by the proper immigration official then it may be possible to argued that the Certificate is not admissible because the regulations clearly only delegate certifying authority to people in the central records office "or their designee, authorized in writing, in their absence. On the Certificate it is important to look at the bottom right-hand corner of the signature page of CNER -- the search is often done by someone other than the person who signed the CNER. Usually the searcher's initials are all that is given. This makes reliability a real problem--goes to admissibility, weight and reasonable doubt. See U.S. v. Salinas-Valencio (10th Cir.) and www.usdoj.gov/oig/special/0007/index.htm regarding a report into the problems with INS record keeping pages 300 to 400.

Trial counsel cannot argue that the Certificate of Non Existence does not exist unless counsel has first asserted that he has in fact applied for admission into the United States. See, *U.S. v. Navaez-Gomez*, 489 F.3d 970, 975 (9th Cir. 2007)("A defendant who does not assert that he applied for admission to the United States may not elicit testimony about record-keeping that suggests his application materials may have been lost.").

CHAPTER TWO: Pretrial Motions

Chapter two provides a brief overview of some of the common pretrial motions and the

suppression of tangible evidence under the 4th as well as statement under the 5th Amendment in a typical illegal reentry case.

Motions in limine

Trial counsel should file motions to preclude any mention or reference to the prior felony or aggravated felony in the Indictment. If the indictment alleges that the Defendant was convicted of a felony or an aggravated felony, defense counsel should move to preclude the government or the District Court from mentioning the prior conviction of the Defendant. The prior conviction is surplusage from the indictment and is prejudicial. *See Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (the existence of a prior aggravated felony conviction need not be alleged in the indictment because the conviction constitutes a sentencing enhancement). (See Attachment 1)

Federal Rule of Evidence 404(b) prohibits use of evidence of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith. The government may file notice to introduce evidence of the defendant's prior voluntary returns or formal deportations. Trial counsel should file a motion to preclude any reference to prior deportations that are not charged in the indictment pursuant to Fed Rules of Evidence 404 and 403. Any reference to other deportations would be so prejudicial as to outweigh any probative value of the evidence. (See Attachment 1)

Motions to suppress

Pursuant to Rules 12(b)(3) and 41(f) of the Federal Rules of Criminal Procedure defense counsel can move the District Court for an Order suppressing use at trial any physical evidence and statements obtained as a result of the unlawful seizure and interrogation conducted by U.S. Border Patrol Agents. When law enforcement officers seize or search a person without first obtaining a warrant, the government has the burden of establishing that a recognized exception to the Fourth Amendment's warrant requirement applies to the search or seizure. Accordingly, all statements and evidence obtained by the government to include statements of identity, fingerprints, the A-file and prior convictions obtained or located as the result of the unlawful seizure must be suppressed.

The Circuits are split as to what can be suppressed and when. *See United States v. Oscar-Torres* (4th Cir. 2007)(District court to determine, in obtaining the defendant's fingerprints (and attendant records), law enforcement officers were motivated by an investigative purpose); *United States v. Olivares-Rangel* (10th Cir. 2006)(interpreting *Lopez-Mendoza* as merely reiterating long-standing jurisdictional rule); *United States v. Guevara-Martinez* (8th Cir. 2001), *United States v. Bowley* (3rd Cir. 2006), *United States v. Navarro-Diaz* (6th Cir. 2005), *United States v. Roque-Villanueva* (5th Cir. 199)(interpreting *Lopez-Mendoza* as barring suppression of evidence of identity).

Statements obtained by law enforcement officers as a result of custodial interrogation are

inadmissible unless the defendant received Miranda warnings prior to questioning. Interrogation for *Miranda* purposes is defined as conduct likely to elicit an incriminatory response. *See Rhode Island v. Innis*, 446 U.S. 291 (1980). A determination of custody requires the court to ascertain whether the defendant was deprived of his freedom in any significant way within the meaning of *Miranda*. (See Attachment 1)

CHAPTER THREE: Collateral Attacks:

Collateral attacks on the prior removal order

A collateral attack in a reentry case is a pretrial motion filed challenging the removal order that is now being used, in part, to prosecute your client.

The Supreme Court has ruled as a matter of due process, an unlawfully obtained removal order may not be used as the basis for a 1326 conviction. Therefore an accused alien can collaterally attack a prior deportation order that was wrongfully obtained in a 1326 prosecution.

The Basics

Although not always consistent, courts have ruled the *Lopez-Mendoza* collateral attack has three steps:

1. The deportation proceeding must have been "**fundamentally unfair.**"
2. **Depriving the alien of judicial review;** and
3. The defect must **prejudice** the alien, depriving him of what would otherwise have been a reasonable likelihood of avoiding removal.

Where to Start

Probably the most helpful place to start in your analysis in most 1326 cases is with the third *step*, prejudice. *This is* because the alien must show prejudice to invalidate a 1326 conviction.

So what is prejudice? Basically ask yourself, could your client have received an immigration benefit if everything had gone well for the client. For example, if your client was formerly a legal permanent resident, he might have been able to avoid removal. But if your client was some guy who had lived in the United States all of a year with no legal status or family in the United States then there likely will be no prejudice. Use a process of elimination to determine who definitely does not qualify because they have no immigration benefits coming to them in the first place. They will not be able to collaterally attack their removal order.

Next, look for fundamental fairness in the proceeding. This is the sniff test. Something just doesn't feel right. Improper advisements by the immigration judge, changes in the law,. improper waivers of appeal, etc..., can serve as the basis for an unfair hearing.

Finally look to see how the case developed procedurally. Did the client waive appeal at some point? Did the client give up because he didn't want to wait around for an answer from the Board of Immigration Appeals for two years while he sat in an INS detention center? These questions can all be difficult to answer as you have to piece together the client's immigration hearing. It will be necessary to obtain transcripts of the proceeding. The easiest way is to see if the client appealed the case to the Board of Immigration Appeals as a written transcript will exist of the proceedings. If not, the proceedings will be on tape. In either case, contact the immigration court where the proceedings took place and obtain copies from them.

CHAPTER FOUR: Derivative Citizenship Defense

Introduction

Most people assume that a person can be a United States citizen only if they were born in the United States or if they, applied for and were granted US naturalization. In actuality, there are numerous other ways a person may be a citizen. Regardless of where a person was born, they may be United States citizens (USC) because of their parents citizenship or by certain conditions that occurred during their life. Often, an "alien" is really a USC without even realizing it. The Immigration and Nationality Act, contained in Titles of the United States Code, provides under Section 1400 scores of ways in which a person may have become a USC. This section deals with those ways that are commonly known a "derivative citizenship."

Derivative citizenship is key in 1326 cases because it goes to the first element of the offense "alienage." If your client is a U.S. citizen, he cannot be convicted of 1326. So sometimes proving a person is a United States citizen is his only real defense to the offense.

A person who is a derivative citizen is a USC when all of the conditions are met. Often, this is at birth. Therefore a derivative citizen is often a USC their entire life, only they didn't know it or couldn't prove it. Citizenship and Immigration Service (CIS; formerly the "customer service" arm of the INS) may issue a Certificate of Citizenship but this is only official proof of the persons' U.S. citizenship. It is not bestowing citizenship at the time the certificate is issued (unlike naturalization) but is instead only recognizing what has been true all along,

THE LAW OF DERIVATIVE CITIZENSHIP

The Legal Elements Step By Step

Step 1 -- Determine When the Client Was Born

Step 2 -- Determine Who the Child's Biological Parents Were

Step 3 --Determine if One or Both of the Parents or Grandparents are USC

Step 4 -- Determine if the Client was Born In or Out of Wedlock

Step 5 -- Determine if Any **Special Conditions** Apply

The Nuts and Bolts: Proving the Derivative Claim

Even if a person qualifies under the law, the person must still prove the claim with the necessary claim. Even a strong claim may fail due to a lack of documentary proof.

One important consideration is deciding whether you want to apply for a certificate of citizenship with CIS or whether you prefer to wait until trial to prove your case before a jury. This is a strategic decision that is dependent on the facts of your case. You may prefer to apply directly to the CIS to avoid the need of going to trial or to obtain the added benefit to your client of actually providing him with a legal means to stay in the US. However, you may prefer to go to trial if you have a case that may not meet the CIS requirements to issue a certificate and thus will be denied, or if you prefer to withhold some of the evidence at trial (note, reciprocal rules of discovery will require you to turn most if not all, documentary evidence in your possession if you intend to use it in court).

What you will need:

N-600 Application: If you are applying to CIS for a Certificate of Citizenship, it all starts with the official CIS application for the certificate, known as the N-600. This form can be found under the "Forms and Fees" section of the CIS website and is in fill-in PDF format. The form should be filled out completely as possible. There will also be a filing fee that will need to be submitted with the application. Although photos are normally required, if your client is in jail, the application can be submitted without the photos.

Be sure to include a detailed cover letter explaining how your client meets the requirements for derivative citizenship.

Birth Certificates: This is the basic document in any derivative case. You first need your client's birth certificate. The birth certificate is necessary to show paternity. If a USC parent's name is missing from the certificate, it will require an explanation, by way of affidavit from a witness or possibly a DNA test. If you cannot establish paternity, the person will not be able to claim derivative citizenship.

You also need the birth certificate of at least the USC parent to establish that person's citizenship. Also, the birth certificates of siblings can be useful to demonstrate paternity (provided they are all from the same parent) and to support affidavits.

Marriage Certificates: Needed to prove your client was born in wedlock.

Social Security Records: SSI records can be very useful to prove the person's parent accrued the physical presence or residency in the United States required. The social security service maintains work records dating back to the 1930's for all persons who worked and whose wages were reported. For CIS purposes, these are the strongest proof possible of a persons' presence in the U.S. The reason is the records show not just wages, but also where the person was employed and in what city. So if the records show the person worked in Chicago over a 20 year period, that will be strong evidence of the person's presence in the United States.

SSI records are not always the answer. A person may have never worked in the. United States. Or the person worked but their wages were never reported. In that ease, SSI records won't exist. Other common problems can include gaps in work history or dips in the amount a person was earning. This raises red flags with CIS as they often assume the person was just working seasonally in the U.S. and was returning to the foreign country for extended periods of time.

The exception to the strength of CIS records is when they show a person worked along the border. At times, CIS takes the position that the records fail to show the person actually lived in the United States, because the person could have been working in the United States while living in Mexico. There are two ways to address this. One is to show through other documents or affidavits that the person resided in the United States. The other is more elaborate. Even if a person did live in Mexico, the person may have still have spent enough time in the United States to qualify for physical presence purposes. Here, you must literally add up the hours worked and attempt to reach the figure you need.

Military Records: Another compelling form of evidence are military records of the USC parent. Any time the parent served in the military, including serving overseas, will count toward the presence requirement.

Even if the USC parent was not active service, military records regarding registering for the draft can still be useful to determine a parent was residing in a particular location.

School Records: Another very helpful form of documentary evidence. School records will often contain the address of the person and will frequently firmly establish a person's presence in the United States on a year to year basis.

CIS will expect school records if you are including school-age years as part of your claim of USC presence. If you are unable to obtain records (never went to school, records destroyed, etc.), explain their absence in your affidavits.

Affidavits: The catchall document in a derivative application. Affidavits should always be provided of all of the key witnesses. They should be detailed and as precise as possible and focus on the elements necessary as well as address any holes in the other evidence. Especially effective are affidavits from witnesses without a stake in the case, such as a neighbor who recalls the USC parent living at a particular address.

Employment Records: In addition to SST records, work records, including pay stubs, commendation letters, etc. may have been kept and are excellent documentary evidence. Large companies, such as the railroad, or governmental entities also may keep employment records that date back decades.

Mortgage/Rental Records: These are rarely kept but if they are, they are strong proof of a person residing at a particular location.

Pictures: Often overlooked, pictures may have great evidentiary value. A wedding picture can be used to show that a person was born in wedlock, for example.

Correspondence: Envelopes showing postmarks and US addresses or letters written to a person in the US can serve as evidence of physical presence or residence.

Church records: Often persons registered important events, such as births and weddings, with the church but failed to do so with local governments. A church record can be very valuable in the absence of governmental records.

Court and Criminal Records: What better proof of a persons' presence in the US than that they were serving time in prison? Other court records may establish other required elements.

County Property Tax and Deed Archives: Helps prove residency and physical presence.

Freedom of Information Act Request (FOIA): Notoriously slow, the FOIA may nevertheless be crucial. Documents that are otherwise unavailable may be present in the immigration file of another person. For example, say a IJSC husband applied for residency for his wife years ago. Since then the couple have passed away and all of their documents have been lost. A FOIA request of the wife's A-File can contain such documents as birth certificates, proof of residency, employment, etc.

The N-600 Packet

Once you have everything, put it together with the filing fee and cover letter and submit it to the CIS. It can be submitted through the mail but is preferable in person. Always get a receipt or send it certified return receipt as the CIS is notorious for losing documents. Make a copy of everything and never send originals, as they are notorious for losing those. Keep your originals and have them ready for request to be inspected by the CIS. The packet will be assigned to an adjudication officer within CIS familiar with derivative citizenship law. That officer will review the packet.

Often CIS will request to conduct an interview of the key witnesses to the application. The interviews are conducted by the adjudication officer of CIS working on the N-600 application. These interviews are conducted at the CIS office.

If CIS determines an interview is needed for adjudication then notice will be sent to the attorney and N-600 applicant. The interview notice will most often request to speak to a particular witness, most often the USC parent. The interview is supposed to be non-adversarial but care should always be taken. The witness will be placed under oath by the officer prior to the interview. The client's attorney can be present. Most often, the officer will be looking to fill in gaps of information or resolve questions that may have arisen. Generally they will start by requesting an overview of the person's life. They will compare the person's answers to any affidavits provided.

Obviously, witness preparation is important. This is especially true as many of the witnesses may be elderly and are being asked to recall facts that are decades old. Many may also be intimidated by the process. An attorney is allowed to accompany the person and is strongly encouraged to do so. The attorney can clear up any misunderstandings that may arise as well as ensure the civility of the interview. CIS officers may at times take the cynical position that an attempted fraud is taking place and counsel is critical. The applicant will rarely, if ever, be asked to the interview, as they themselves are not privy to the facts.

Adjudication of the Application

The N-600 application is reviewed by a CIS adjudication officer who can do one of three things: recommend approval, recommend denial or request further information. If the officer recommends either approval or denial, a supervisor reviews the officer's recommendation and is the person with the decision making authority to approve or deny. In most cases, the supervisor will follow the recommendation of the officer.

If the officer requests additional information then such request will be sent in writing to the attorney. This will be in the form of a letter that will list the additional evidence that must be submitted to support the application. A deadline for the submission of the evidence will also be noted. These requests must be answered promptly. CIS often denies applications on the basis the applicant failed to provide the additional information. For this reason, even if the evidence that is requested cannot be obtained, a written response stating the reasons for why the evidence is unavailable should be sent to CIS. This at least prevents CIS from claiming the applicant is not attempting to cooperate in the process. Applications can take months, even years, to process. If the client is in criminal proceedings, it is a good idea to request the AUSA contact the CIS offices and request the application be expedited.

Denial of the N-600 Application

Upon denial of the N-600 application, a person has two avenues for possible relief. One of the avenues is an administrative appeal to the Administrative Appeals Unit of the CIS. The AAU will review the case and issue a decision. The person must prepare a review sheet and file the appeal fee or request a waiver. A copy of the forms is provided in the Appendix, pages 18-21. AAU appeals are rarely successful and can also take years to run their course. The appeal takes place in Washington, D.C. Even though they are rarely successful, it may nonetheless be

necessary to preserve your clients' rights.

The other avenue is to file a petition for declaratory relief with the United States District Court. Under the provisions of the Immigration and Nationality Act, Section 360(a) of the Immigration and Nationality Act, 8 U.S.C. §1503, the District Court can order CIS to grant citizenship to your client, if the client meets all the requirements. This is a separate civil action. A model pleading is included in the Appendix at page 24.

Derivative Citizenship in Trial

Derivative citizenship is a "defense" available at a 8 USC 1325 or 1326 trial. Specifically, the citizenship defense goes to rebut the government's proof on the element of alienage. Although the Fifth Circuit pattern instruction for Section 1326 does not define "alien," the pattern charge for transporting and harboring aliens under 8 USC Section 1324 defines an "alien" in the negative as "any person who is not a national or citizen of the United States."

In most 1326 trials, the government will have some kind of proof regarding the client's alienage. This will usually take the form of either admissions by the client at the time of his arrest, statements made previously by a client to an immigration officer, statements on an immigration petition or even the birth certificate of the client. At this point, it is necessary to raise the issues of derivative citizenship to rebut the government's proof. If the government cannot prove beyond a reasonable doubt the person is an alien, then the person cannot be convicted.

Things to be aware of:

Removal orders as proof of alienage: A removal order is not proof of alienage. A removal order is admissible only to show an alien was removed from the United States, not that he is an alien. Immigration authorities have deported USC's in the past. A limiting instruction may be needed to prevent confusion by the jury.

Denial by CIS of an application: The denial of an application is not proof of alienage nor **is it** proof of the person is not a derivative citizen. First, remember the burden is different in each situation and the burden of proof is also different. For purposes of the N-600 application, the burden of proof will rest on your client and he must prove his USC by a preponderance of the evidence. But at trial, the burden is on the government to prove alienage and they must do so beyond a reasonable doubt. So that leaves a gap in the burdens of proof, where a person may be unable to prove their citizenship but there is still enough evidence to raise a reasonable doubt. It can lead to the situation of a person not being convicted of illegal re-entry due to questions about alienage but still not being able to show **his** USC and being deported.

Further, you should attempt to limine out any conclusions reached by an immigration officer. First, the conclusions reached are only an opinion of the prosecuting agency, and not an "expert" opinion. You can object under Federal Rules of Evidence 401, 402, 701 and 702.

Second, these conclusions are actually questions of fact that are to be resolved by a jury. An immigration officer should not be permitted to tell the jury how to decide the ultimate question in the case.

Effect of a not guilty: A not guilty finding does not confer US citizenship on a person. In fact, there is nothing to prevent the immigration authorities from detaining and attempting to deport your client who has just been found not guilty. A client will have two options at this point. One option is to raise the citizenship issue with immigration authorities immediately. This may prevent the person from being deported and immigration authorities may be able to process citizenship for the person. The drawback is the person may be detained while the authorities try figure it out and the person may be deported in the end anyway. The other option is to allow the reinstatement order to be executed and apply for citizenship from the foreign country.

Common Issues That Arise in Derivative Cases

Double Derivatives

At times, a client's parent is not obviously a U.S., citizen. The parent was also born overseas. However, the client's grandparents are U.S. citizens. In this case, it may be possible the client is himself a U.S. citizen. However, for that to be true, the parent of the client must first be established to be a U.S. citizen.

In this circumstance, start with the parent. Determine the appropriate law by finding the parent's date of birth and then see if the person meets all of the conditions. If they do, they can apply for their U.S. citizenship certificate. The next step is to see if the client meets the requirements. As with a client, a parent may likewise be unaware they are U.S. citizens by virtue of derivative citizenship.

Another Child Born During a Period of Presence in the United States

A common issue that arises is a sibling born in the foreign country while at the same time the parent is attempting to claim presence in the United States, this is a problem because the CIS will want to know how these children were being created while the parent was supposedly living in the United States. If children are being born overseas, especially over a prolonged period of time, it raises the idea the parent was really living in the foreign country. This must be addressed, most often through the use of an affidavit by the parent. Some common reasons, include:

1) If the parent lived along the border, it was not uncommon for a U.S. citizen parent to live and work in the United States during the week and visit the foreign spouse on the weekends in the neighboring border city. Beware, with this, as you may be cutting away at your presence requirement by admitting the person was living several days at a time overseas for an extended period. These days will literally cut away at the presence time.

2) If the U.S. citizen parent is a male, he may have been returning sporadically for visits

with his family. It was during this time procreation took place.

3) If the U.S. citizen parent is a female, she may have preferred to have the birth take place in Mexico, for any variety of reasons. When she is closer to her due date, she returns to Mexico to give birth there.

Whatever the case, an explanation needs to be afforded. Otherwise, CIS will suspect fraud and may deny the application.

The USC Parent is Dead

The death of the USC parent will not prevent a person from obtaining their citizenship. On the contrary, it is common for a USC parent to be deceased. This only means further investigation to find other witnesses who can attest to the person's presence. It also permits your client to sign any release forms (such as with SSI) as next of kin. If the USC parent is dead, CIS will require a death certificate. Otherwise, CIS will expect the USC parent to be available to interview regarding the application. Failure to provide a death certificate will lead CIS to suspect fraud.

Citizenship by military service of the client

There are various provisions that permit an alien to become a naturalized USC based on their military service, even if they have been deported or were not legal permanent residents at the time of their service. Section 1439 (dealing with three years or more of service) and 1440 (dealing with service during an armed conflict) exempt an honorably discharged alien veteran from residence and physical presence requirements that may otherwise apply. However, the person must still meet good moral character requirements. It may be possible to meet this requirement even with prior convictions if the convictions are old. Generally speaking, good moral character must be shown during the previous 5 years prior to the application, with any older convictions being left to the discretion of the CIS officer.

Beware the Mexican Birth Certificate

Mexican birth certificates are different from the birth certificate you may be used to in the US. For one, when you request a Mexican birth certificate from say, the *Servicio Civil*, you will often not get a copy of the original, but instead a sworn to computer form that lists the relevant information on it. In many cases this will be sufficient. However, there may be information on the original that is missing from the original. So if this information is missing, make a request from the officials to actually photocopy the original along with the computer printout.

Further, it is not uncommon for information to be added the birth certificate that has a legal impact. For example, the fact the child was legitimated may be noted on the back or in the margin. Literally, the birth certificate may be amended over time.

Common Law Marriages

CIS defers to the state law to make a determination if a person's parents were married. Therefore in states where common law marriages are recognized, for immigration purposes, a person may have been born in wedlock even though there was no formal marriage.

DNA Testing

More and more, CIS is requesting DNA testing to prove paternity, even if the father - appears on the birth certificate or has legitimated the child. There are various companies that do DNA testing across the United States.

Alienage

The government bears the burden of showing that your client was an alien at the time alleged in the indictment. If your §1326 client looks up at you during your first meeting with him and tells you he was born in Poughkeepsie, New York, get the birth certificate and you win. However, it is not always that easy. First, consider the work involved in establishing someone's citizenship. Then, the burden remains with the government to show your client's alienage beyond a reasonable doubt.

First, what are the ways someone is a US citizen?

We all know that persons born in the United States are US citizens. But, various other people, not born in the United States, can claim citizenship in the United States under various conditions and circumstances: 1. A determination that your client is a US citizen will act as a complete defense to certain cases (8 U.S.C. §1325, 8 U.S.C. §1326, for example), AND you have the pleasure of anointing someone a US citizen in the process.

Citizenship for persons born abroad

There is a set of very important preliminary questions we should ask of our clients charged in immigration cases where his foreign/alien status is an element of the offense:

1. Where were you born?
2. What is the citizenship of your mother, father, and all four grandparents (regardless of whether they are living or dead)?
 - a. Sometimes it is better to ask where the parents and grandparents were born because a lot of folks will confuse 'citizenship' with residency. There are rare cases in which an accused alien states that he was born in the United States. If that occurs, gather witnesses to attest to the birth: mom, midwife, doctor, etc. If, on the other hand, the client was **not born in the US**, but relates that a parent or

grandparent was, there still exists a decent possibility that he could be a US citizen.

For example, Antonio was born in Mexico in the 1955. His mother was a Mexican citizen, but his father was a US citizen. Prior to moving to Mexico, Antonio's dad lived in the US for a total of 30 years, from the date of his birth to the time he left for Mexico. In 1975, Antonio became a legal permanent resident alien. In 2000, Antonio was convicted of a serious crime for which deportation was mandatory. Can the INS deport him?

Answer: No. Antonio is a United States citizen. By using various charts known as Naturalization Charts, one can help determine Antonio's status in the United States. The charts are relatively easy to use and are driven by the precise circumstance and the date of birth of the person whose status is in question. If you have a client who meets the various requirements, he can file an N-600 to receive his certificate of citizenship. Since a key to determining citizenship through parents is the citizenship status of the parents, one would benefit from knowing the citizenship of the grandparents. If a grandparent is a citizen, they can pass citizenship to their child, which, in turn, can then pass citizenship to your client.

Other very important questions to ask include:

1. How long did client reside in the United States (from what date to what date)?
2. How long did parents reside in the United States (from what date to what date)?
3. How long did grandparents reside in the United States (from what date to what date)?
4. What forms of proof do you have to show the length and veracity of each of the three questions above?
 - a. Baptismal records
 - b. School records
 - c. Bills
 - d. Library registration
 - e. Medical records
 - f. School Annuals (yearbooks, newspaper, etc)
 - g. Neighborhood anecdotes
 - h. Family anecdotes
 - i. Other witnesses (anybody who came in contact with person in question)

CHAPTER FIVE: Paroling Witnesses Into the United States

Often, whether at trial or at a formal deportation hearing, trial counsel will need to call witnesses to testify to establish the client's claim to citizenship. If counsel needs to call a witness from a foreign country to testify in the United States, the following steps should be able to secure the witness to testify in the United States:

1. Decide which Port of Entry (POE) the witness will enter into the United States

2. Counsel will then need to write a letter to the Director of that particular POE. Within this letter, you will need to describe to the Director why this witnesses must be paroled into the United States (e.g. trial, immigration hearing, pretrial hearing, etc...) and the dates and times the witness will be needed in the United States.

3. Counsel will need to state his intentions by simply stating..."I intend to cross Mr. _____ into the United States at the Santa Fe Port of Entry."

4. Order for Free Process

5. Subpoena. The investigator will need a subpoena to take with him to the POE to hand deliver it to the witness.

6. The **Witness** will need **TWO** forms of identification.

Once the witness arrives at the POE, he/she will need to complete the immigration paperwork to enter into the United States. The immigration officials will give the witness a pass with an expiration date and time. The witness will then need to return to the same POE upon completion of his/her testimony to avoid criminal prosecution.

Conclusion

It can be challenging to represent people in re-entry and transporting cases. You may not be able to communicate with them in the absence of 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. Often very little can be done to help them, but in order to help them, it is critical to learn as much as possible about your client, and present your client's story in a creative, sympathetic, and compelling manner to the judge.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CR 06-416-HA

JOSE GUADALUPE VARGAS-VICTORIA,

Defendant.

DEFENDANT'S TRIAL MEMORANDUM

Defendant, Jose Vargas-Victoria, through his attorney, Lisa Hay, submits the following

trial memorandum relating to his trial scheduled for April 8, 2008. Mr. Vargas-Victoria has been indicted in a one-count indictment charging him with being an illegal alien found in the United States after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(2). The indictment alleges that Mr. Vargas-Victoria was deported from the United States as an alien on November 7, 1997, that he was thereafter found again in the United States on April 29, 2006, in Oregon, and that the relevant authorities had not consented to his re-entry. The government bears the burden of proving each element of the offense beyond a reasonable doubt. The elements of the offense are:

First, the defendant was deported from the United States;

Second, after deportation, the defendant voluntarily entered the United States;

Third, when the defendant entered he knew he was entering the United States, or after entering the United States he knew that he was in the United States and knowingly remained;

Fourth, the defendant was found in the United States without having obtained the consent of the Attorney General or the Secretary of the Department of Homeland Security to reapply for admission into the United States; and

Fifth, the defendant was an alien at the time of the defendant's entry into the United States.

See Ninth Circuit Model Jury Instruction 9.5B (2007).

MOTIONS IN LIMINE

Striking References To The Aggravated Felony From The Indictment

The indictment alleges that Mr. Vargas-Victoria was convicted of an aggravated felony, burglary in the first degree (residence) in June of 1983. The defense moves to strike this surplusage from the indictment because it is prejudicial.

The Ninth Circuit's Committee on Model Criminal Jury Instructions recommends that when a defendant is charged with being a deported alien who has illegally reentered the United States after having been convicted of an aggravated felony, the jury should be instructed on the crime of alien-reentry of deported alien, Instruction 9.5 (Alien-Reentry of Deported Alien), and no reference should be made to the existence of a felony or aggravated felony conviction. *See* comments to Model Criminal Jury Instruction 9.6. The Committee notes that this approach is mandated by *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) and *United States v. Alviso*, 152 F.3d 1195 (9th Cir. 1998):

In *Almendarez-Torres*, 523 U.S. at 244, the Supreme Court held that in a prosecution for illegal re-entry after deportation in violation of 8 U.S.C. § 1326(a), the existence of a prior aggravated felony conviction need not be alleged in the indictment because the conviction constitutes a sentencing enhancement pursuant to 8 U.S.C. § 1326(b)(2).

Thereafter, in *Alviso*, 152 F.3d at 1199, the Ninth Circuit held that in a prosecution for illegal reentry after deportation following a felony conviction, in light of *Almendarez-Torres*, "a prior felony conviction is not an element of the offense described in 8 U.S.C. § 1326(a)" and should therefore not be presented to the jury as proof thereof.

Id. (emphasis added).

Based on these authorities the defense seeks an order striking the reference to aggravated felony from the indictment.

Precluding References to Deportations Not Charged In the Indictment

The government filed a notice under Rule 404(b) indicating an intention to introduce evidence of Mr. Vargas-Victoria's deportations that were not charged in the indictment. The defense objects to introduction of such evidence and moves to preclude it.

Federal Rule of Evidence 404(b) prohibits use of evidence of other crimes, wrongs or acts to prove the character of a person in order to show action in conformity therewith. The Ninth Circuit has cautioned against the use of other acts evidence in criminal trials:

[E]xtrinsic acts evidence is not looked upon with favor . . . We have stated that our reluctance to sanction the use of evidence of other crimes stems from the underlying premise of our criminal justice system, that the defendant must be tried for what he did, not for who he is. Thus, guilt or innocence of the accused must be established by evidence relevant to the particular offense being tried, not by showing that the defendant has engaged in other acts of wrongdoing.

United States v. Bradley, 5 F.3d 1317, 1320 (9th Cir. 1993) (internal quotations omitted).

Here, the government seeks to introduce evidence of deportations that were not alleged in the indictment based on a claim that the deportations are intertwined with the charged offense. This is not accurate. The charged offense is quite specific: that Mr. Vargas-Victoria was found in the United States in April of 2006, after having been deported in November of 1997. Whether Mr. Vargas-Victoria has been deported before or after these dates is irrelevant. The government's argument that the other deportations will be used to show knowledge, plan and absence of mistake can be rejected because those factors have no bearing on the elements of the offense. Whether the defendant knew he could be deported, or planned to be deported, or mistakenly thought he could not be deported, are all irrelevant. *See United States v. Rendon-Duarte*, 490 F.3d 1142, 1144 (9th Cir. 2007) (government bears the burden of proving a logical

connection between defendant's purported involvement in the previous act and a material fact at issue in the crime with which he was charged.). Moreover, any reference to other deportations would be so prejudicial as to outweigh any probative value of the evidence. Finally, Mr. Vargas-Victoria's constitutional right to notice of the charges against him by indictment would be violated were the government to introduce evidence of other deportations that were not charged. The jury might convict Mr. Vargas-Victoria based on events not charged in the indictment.

Precluding Evidence of Mr. Vargas-Victoria's Prior Felony Convictions

The defense moves to preclude introduction of any of Mr. Vargas-Victoria's prior felonies. Today, the government provided the advance notice required by Rule 609(b) of the Federal Rules of Evidence that it intends to introduce evidence of two convictions: a 1998 felony for distribution of a controlled substance, and a 2003 felony for unlawfully re-entering the United States. Neither of these convictions should be presented to the jury as their prejudicial effect far outweighs any probative value.

The following factors are relevant under 609(a) in assessing the probative value and prejudicial effect of convictions:

1. The impeachment value of the prior crime;
2. The temporal relationship between the conviction and subsequent history of the defendant;
3. The similarity between the prior offense and the offense charged;
4. The importance of defendant's testimony; and
5. The centrality of the credibility issue.

United States v. Jimenez, 214 F.3d 1095, 1098 (9th Cir. (2000)); *United States v. Bagley*, 772

F.2d 482, 487 (9th Cir. 1985). These factors are not exclusive.

In examining these factors, the Ninth Circuit, in *Bagley*, has cautioned that "proper impeachment is not, in itself, evidence of guilt or innocence; . . ." *Id.* at 487. Impeachment is properly relied upon only to the extent that it reflects upon the credibility of the witness. In light of this purpose, prior convictions which do not in themselves implicate the veracity of the witness . . . have little impact on credibility" and, therefore, should not be admitted. *Id.*

As Mr. Vargas-Victoria's prior criminal convictions do not affect his veracity, the underlying facts and the titles of the convictions should be excluded. The prior convictions do not involve *crimen falsi* and thus have no impeachment value. There is no temporal relationship between the convictions and the subsequent history of the defendant.

The impact of the admission of prior illegal re-entry conviction or drug crime would be quite severe. It would invite the jury to conclude that Mr. Vargas-Victoria is a "bad person" and, therefore, more likely to be guilty in this case. The Court's exclusion of his convictions protects Mr. Vargas-Victoria from the "danger that the jury will punish the defendant for offenses other than those charged, or at least that it will convict when unsure of guilt because it is convinced that defendant is a bad man deserving punishment." *United States v. Hill*, 953 F.2d 452, 457 (9th Cir. 1991). For these reasons, the convictions should be excluded.

Admissibility of Alleged Admissions

The government now advises that it intends to use the defendant's admissions attached to an Order to Show Cause in order to prove its case. The government has not identified the precise admissions. Before admitting any such statements at trial, the Court should make a determination on their admissibility to assure that they were voluntarily made under 18 U.S.C. §

3501. Further, although no pretrial motion was filed, the defense requests a ruling on whether any statements were obtained in violation of the Fifth Amendment of the United States Constitution as described in *Miranda v. Arizona*, 384 U.S. 436, and *Dickerson v. United States*, 120 S. Ct. 578 (2000). To aid the Court in its determination, the defense offers the following legal principles which are relevant to the issue.

A. Voluntariness

The issue of voluntariness is always present, irrespective of any failure to bring a pretrial motion to suppress statements. Section 3501 of Title 18 is clear that before a confession may be admitted into evidence, the trial judge must determine that it was voluntarily made.

In any criminal prosecution . . . a confession . . . shall be admissible in evidence if it is voluntarily given. *Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.*

18 U.S.C. § 3501 (emphasis added).

The defense therefore requests that the Court determine the issue of voluntariness relating to any admission the government seeks to present at trial.

B. Admissibility under *Miranda*, *Dickerson* and the Fifth Amendment

The defense also requests that the Court consider suppressing the statements if taken in violation of *Miranda*, *Dickerson* or the Fifth Amendment of the United States Constitution.

Although normally such a motion is to be brought pretrial pursuant to Rule 12(b) of the

Federal Rules of Criminal Procedure, it may be considered up to or during trial if cause is shown (Rule 12(e)). Consideration of this issue now is warranted given the timing of events in this case. More than a year ago the defense requested notice of the government's, "intent to use any physical evidence or statements," in order to give the defendant the opportunity to move to suppress such evidence (see Discovery Request of November 2006, pg. 2). Despite this request, the government only provided such notice of its intent to use statements today, April 2, 2008, less than a week before trial. Given the government's tardiness in identifying statements it intended to use at trial, the defense had good cause for not requesting a hearing on the statements until this date.

Generally, statements obtained by law enforcement officers as a result of custodial interrogation are inadmissible unless the defendant received *Miranda* warnings prior to questioning. *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Solano-Godines*, 120 F.3d 957 (9th Cir. 1997). "Interrogation" for *Miranda* purposes is defined as conduct reasonably likely to elicit an incriminatory response. *Rhode Island v. Innis*, 446 U.S. 291, 300-301 (1980); *United States v. Chen*, 439 F.3d 1037, 1040 (9th Cir. 2006). A determination of "custody" requires the court to ascertain whether the defendant was ,deprived of his freedom in any significant way within the meaning of *Miranda*. *Orozco v. Texas*, 394 U.S. 324 (1969); *United States v. Lee*, 699 F.2d 466, 468 (9th Cir. 1982).

Although the *Miranda* rule developed in the context of criminal interrogations, the Ninth Circuit has recognized the loophole that would be created if civil interrogators were routinely employed to elicit evidence for a criminal case:

If civil investigations by the INS were excluded from the *Miranda* rule, INS agents could evade that rule by labeling all investigations as civil. Civil as well as criminal

interrogation of in-custody defendants by INS investigators should generally be accompanied by the *Miranda* warnings.

United States v. Mata-Abundiz, 717 F.2d 1277, 1279 (9th Cir. 1983). The need for an advice of rights turns not on the label of civil or criminal, but rather on whether there was 'interrogation' within the meaning of *Miranda*. *Id.*

In order to determine whether statements were obtained in violation of *Miranda*, this Court will need to review whether the questioning was ,reasonably likely to elicit an incriminating response," *id.* at 1280, or instead whether the immigration official had no reason to suspect that future criminal prosecution was possible. *See United States v. Salgado*, 292 F.3d 1169 (9th Cir. 2002). Because the government has not identified the statements it intends to use at trial, the defense can provide no factual background on this legal issue.

Instructions If Immigration Documents Are Received in Evidence

If the government introduces documents from civil immigration proceedings, the defense requests that the jury be instructed on the evidentiary weight of those documents. As the Ninth Circuit has held, ,the factual findings made in an earlier deportation proceeding do not conclusively establish a defendant's alien status in a subsequent criminal proceeding.

United States v. Meza-Soria, 935 F.2d 166, 170 (9th Cir.1991). Due to the differing standards of proof, a defendant is not collaterally estopped from attacking his or her alien status in a subsequent criminal proceeding. *Id.* at 169-70. For this reason, an order of deportation is insufficient as a matter of law to establish a defendant's alien status. *United States v. Ortiz-Lopez*, 24 F.3d 53, 55-56 (9th Cir.1994). The jury should be instructed on the value of immigration documents as follows:

"THE STANDARD OF PROOF IN A CIVIL PROCEEDING, SUCH AS AN

IMMIGRATION PROCEEDING, IS SIGNIFICANTLY LOWER THAN IN A CRIMINAL CASE. THEREFORE, THE FACTS DECIDED IN ARRIVING AT THE DEPORTATION ORDERS ARE NOT CONCLUSIVE PROOF OF MR. VARGAS-VICTORIA'S ALIEN STATUS IN THIS CRIMINAL CASE."

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. __

(Admissions or statements by Defendant)

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS:

Defendant CARLOS CENICEROS-RIOS, by and through his attorney, and pursuant to
Federal Rule of Criminal Procedure 30, respectfully requests the Court to instruct the jury on the
law as follows:

ADMISSIONS OR STATEMENTS BY DEFENDANT

There may have been evidence introduced that the Defendant has stated at one or more times
in the past that he was an alien or that he was born in Mexico. A person's citizenship status is
determined by law and cannot be changed by his or her verbal statements to immigration authorities.
Admissions by the Defendant of alienage do not automatically prove that he is an alien, but they are
evidence that you may consider like any other evidence in the case on the issue of whether the
Government has proven beyond a reasonable doubt that the Defendant is an alien.

Authority: 8 U.S.C. §349 (means by which citizenship may be renounced); *United States v.*
Meza-Soria, 935 F.3d 166, 170 (9th Cir. 1991).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. __

(United States Citizenship)

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS:

Defendant CARLOS CENICEROS-RIOS, by and through his undersigned attorney, and pursuant to Federal Rule of Criminal Procedure 30, respectfully requests the Court to instruct the jury on the law as follows:

UNITED STATES CITIZENSHIP

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside.

Authority: U.S. CONST. amend. XIV, §1; 8 U.S.C. §1401.

**DEFENDANT'S REQUESTED JURY INSTRUCTION NO. ___
(Citizenship under 8 U.S.C. §1409(a))**

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS:

Defendant CARLOS CENICEROS-RIOS, by and through his attorney, and pursuant to Federal Rule of Criminal Procedure 30, respectfully requests the Court to instruct the jury on the law as follows:

CITIZENSHIP OF A PERSON BORN OUT OF WEDLOCK

A person born out of wedlock is a citizen of the United States as of the date of his or her birth if:

- 1) a blood relationship between the person and the father is established by clear and convincing evidence;

- 2) the father had the nationality of the United States at the time of the person's birth;
- 3) the father (unless deceased) has agreed in writing to provide financial support for the person until the person reaches the age of 18 years;
- 4) while the person is under the age of 18 years—
 - A) the person is legitimated under the law of the person's residence or domicile;
 - B) the father acknowledges paternity of the person in writing under oath; or
 - C) the paternity of the person is established by adjudication of a competent court; and
- 5) The father was a United States citizen at the time of the person's birth who had previously been physically present in the United States or its outlying possessions for a total of five years or more, at least two of which were after the father attained the age of fourteen.

Authority: 8 U.S.C. §§1409(a); 1401(g).

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. __

(Applicable Law for Legitimation)

TO THE HONORABLE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS:

Defendant CARLOS CENICEROS-RIOS, by and through his undersigned attorney, and pursuant to Federal Rule of Criminal Procedure 30, respectfully requests the Court to instruct the jury on the law as follows:

APPLICABLE LAW TO DETERMINE LEGITIMATION

The applicable law to determine legitimation in this case is the law of the State of Chihuahua and Republic of Mexico. That law, as it applies to this case, provides that a child born out of wedlock who is acknowledged by the father in the birth certificate or before an official of the civil registry obtains the same status and rights as a legitimate child, including the rights to support, inheritance and the use of the father's surname, and is thus legally considered legitimated.

Authority: CODIGO FEDERAL CIVIL [C.C.F.][Federal Civil Code] §§369, 389 (Mex.); Rios v. Civiletti; 571 F. Supp. 218, 221 (D. P.R. 1983); *United States v. Viramontes-Alvarado*, 149 F.3d 912, 916 (9th Cir. 1998) (approving substantially similar instruction).