

CHAPTER 4:

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Most of the crime-related grounds of deportability and some of the crime-related grounds of inadmissibility require a conviction to make a noncitizen deportable or inadmissible. Even where criminal conduct may be sufficient for removal without a conviction, the U.S. Immigration and Customs Enforcement (ICE) may not be able to establish the conduct without a conviction. Therefore, in practice, ICE usually relies on convictions to establish deportability and inadmissibility.

Criminal defense attorneys should be aware that there is a statutory definition of conviction for immigration purposes. State law does not determine whether a state disposition will be considered a conviction for immigration law purposes. For example, a state disposition that results in the dismissal of all criminal charges may still be a conviction for immigration purposes in some instances.

Chapter 3 describes the offenses that trigger the principal immigration consequences for a defendant. *See also* Appendix A, Selected Immigration Consequences of North Carolina Offenses. Once you have determined that a particular offense is one that may trigger

immigration consequences for your client, you must then determine whether the potential disposition in the case would be considered a conviction for immigration purposes. You must also consider whether the potential sentence is of the type or length that would trigger adverse consequences.

4.1 Conviction for Immigration Purposes

A. Conviction Defined

In 1996, Congress adopted a statutory definition of conviction for immigration purposes. The definition of conviction was made deliberately broad in scope. It is set out in INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), as follows:

“The term ‘conviction’ means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where:

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt,

and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.”

Under this definition, a disposition may constitute a conviction either with a formal judgment of guilt or without a formal judgment.

B. Conviction without Formal Judgment

A state court disposition without a formal judgment will not constitute a conviction unless there has been both a finding, plea, or admission of guilt and the court has ordered some form of “punishment, penalty, or restraint on liberty.”

Under this prong of the definition, certain court proceedings in which a defendant enters a guilty plea or makes an admission of guilt up front and is ordered by the court to complete probation or some other condition will likely be treated as a conviction for immigration law purposes, even if the plea is later vacated or charges dismissed. In contrast, a pre-plea diversion arrangement, in which no plea is entered or admission made but some form of pre-trial probation or community service is ordered, will probably not be considered a conviction for immigration purposes.

Plea of Guilty. The term “plea” includes a no contest plea as well as a guilty plea. The definition has also been interpreted as including an *Alford* plea even though the defendant does not admit guilt with that type of plea. (In an *Alford* plea, the defendant asserts his or her innocence, but admits that sufficient evidence exists with which the prosecution could likely convince a judge or jury to find the defendant guilty.) See *Abimbola v. Ashcroft*, 378 F.3d 173, 180–81 (2d Cir. 2004).

Punishment or Restraint on Liberty. In addition to incarceration, the term “punishment” or “restraint on liberty” includes a variety of community corrections alternatives, such as probation, treatment alternatives to street crime (TASC), drug education school (DES), house arrest with electronic monitoring, community service, and anger management and substance abuse programs. It also includes other restraints such as restitution and a fine.

The punishment or restraint must be imposed by the court for the disposition to qualify as a conviction for immigration purposes. Thus, an agreement with a prosecutor to attend a drug treatment program or anger management program, for example, should not qualify as a restraint on liberty if not ordered by the court.

C. Finality of Conviction

Traditionally, a conviction was deemed effective for immigration purposes only when the judgment of conviction was final. *See Pino v. Landon*, 349 U.S. 901 (1955). A conviction is final when the direct appeal has been exhausted or waived. A pending state or federal post-conviction challenge, however, does not affect the finality of the conviction.

Some federal courts have suggested that Congress, in adopting a statutory definition of conviction, eliminated the requirement of finality. *See Montenegro v. Ashcroft*, 355 F.3d 1035 (7th Cir. 2004); *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999). The state of the law is in flux, but the traditional requirement of finality appears to continue to apply in the Fourth and Eleventh Circuits.

4.2

Effect of North Carolina Dispositions

A. Deferred Prosecution

In North Carolina, a “deferred prosecution” occurs when the state agrees to cease prosecution on the defendant’s successful completion of certain conditions. The court does not enter judgment against the defendant, and the deferred prosecution is generally not considered a conviction under state law. If the person fails to live up to the conditions, the state then reinstitutes the prosecution and seeks a conviction.

Types of Deferred Prosecution. There are two basic forms of deferred prosecution, formal and informal. Formal deferred prosecution is governed by G.S. 15A-1341(a1) and generally requires a written agreement and approval of the court. Formal deferrals may vary county by county. When a person is placed on formal deferred prosecution, the conditions of the deferral may be made a part of probation. Prosecutors also informally “defer” prosecution by dismissing the case on the defendant’s promise to abide by certain conditions.

In both instances, the defendant ordinarily does not enter a plea but may be asked to sign a statement admitting the charged conduct.

Immigration Consequences. Whether a deferral constitutes a conviction for immigration purposes depends on the structure of the deferred prosecution. The key factors are whether

the defendant made an admission of having committed the essential elements of an offense and the court imposed conditions as part of the deferred prosecution.

In a formal deferral, if the defendant is required to admit the essential elements of the offense and the court imposes conditions that the defendant must fulfill, the disposition will almost certainly be treated as a conviction for immigration purposes, even if the charges are later dismissed on successful completion of the conditions.

If, however, the court imposes conditions without an admission to the factual allegations, the deferral should not be considered a conviction for immigration purposes. Counsel should be wary of box # 5 of AOC-CR-610 (Nov. 2006) (deferred prosecution form), which states that “the admission of responsibility given by me and any stipulation of facts shall not be used against me for this offense. . . .” If checked, the document would suggest that the defendant had made an admission when, in fact, he or she may not have. In appropriate cases, therefore, strike the language or leave the box unchecked.

There is some risk to a defendant with a formal deferral even if he or she makes no admission. If ICE learns of the deferral, it might institute removal proceedings on the assumption that an admission of guilt is normally made in formal deferrals, but the defendant should ultimately prevail before an immigration judge. Also, for naturalization purposes and certain grounds of inadmissibility, certain admissions by a defendant will trigger adverse consequences without a conviction. If an individual applies for naturalization after a deferral and in the process admits to the charged conduct to an immigration officer, the individual may be denied naturalization.

An informal deferral by the prosecutor should not constitute a conviction for immigration purposes because ordinarily the defendant does not make an admission as a condition of such an arrangement. Further, there are no court-ordered restraints in an informal deferral, as the court is generally not involved in such an arrangement.

B. Drug Treatment Court Disposition

In North Carolina, there are both post-plea and pre-plea drug treatment courts. The practices vary from county to county. In a post-plea drug court, a defendant is required to plead guilty before the court will order the defendant to participate in a drug treatment program. Even if the court does not enter a judgment of conviction, such a disposition will almost certainly constitute a conviction for immigration purposes. This is true even if the state eventually dismisses the criminal charges because the combination of admission of guilt and restraint on the defendant’s liberty would be considered a conviction for immigration purposes. *See Matter of Salazar*, 23 I&N Dec. 223 (BIA 2002).

Drug treatment courts that require a guilty plea up front raise difficult issues for a noncitizen client. On the one hand, diversion to a drug treatment program may provide a way of getting all drug charges dismissed in the end. Moreover, if the individual does suffer from drug addiction, the treatment program may assist the person to overcome the addiction. On the other hand, the drug treatment court proceeding is almost certain to constitute a conviction for immigration purposes.

In a pre-plea drug court, a client typically must make an admission of guilt as part of a deferred prosecution agreement; thus the first requirement is met. If the court then imposes treatment or other restraints, the disposition will probably qualify as a conviction for immigration purposes. *See supra* § 4.2A (discussion of deferred prosecution). In some counties, the court does not order the treatment or other restraints, but simply approves of the deferred prosecution agreement. If the court does not order drug treatment or other restraints on the defendant, it is possible that such a disposition would not constitute a conviction for immigration purposes. It is not yet clear how an immigration court would treat such a procedure.

Regardless of whether a conviction has occurred, counsel should be aware that the mere admission of drug addiction or abuse may make certain individuals subject to deportability. *See supra* § 3.3D (discussing drug addiction and abuse ground of deportability). Generally, in district court and drug treatment court, there is no transcription of the proceedings, and the record of conviction generally consists of the documents filed with or entered by the court (charging document, judgment, etc.). *See also infra* § 6.1C (discussion of record of conviction in district and superior court).

C. 90-96 Deferral

A deferral under G.S. 90-96, sometimes called probation without conviction in North Carolina, is available for a narrow class of drug offenses. If the defendant pleads guilty or is found guilty, a court may defer further proceedings and place the defendant on probation without entering judgment. *See* G.S. 90-96(a). If the defendant fulfills the conditions of probation, the proceedings are dismissed and the defendant does not have a conviction under state law. However, the deferral will probably constitute a conviction for immigration purposes because the statute requires that the defendant plead or be found guilty and that the court impose conditions.

D. Prayer for Judgment Continued

A prayer for judgment continued (PJC) granted by a North Carolina court will almost always be treated as a conviction for immigration purposes.

A PJC occurs when the court accepts the defendant's guilty plea or finds the defendant guilty after trial but withholds judgment in the case. A PJC is now considered a conviction under state law for many purposes. If a PJC is granted and the court imposes conditions amounting to punishment, such as performance of community service or payment of a fine, then the definition of conviction has also been met for immigration purposes.

A PJC in which court costs alone have been imposed is a conviction as well. *See Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008) (imposition of court costs in the criminal sentencing context constitutes a form of punishment for immigration purposes). Even a PJC without the imposition of costs or other conditions might be treated as a conviction on the ground that it resembles a formal judgment of guilt.

E. Expungement

A North Carolina conviction that has been expunged will continue to constitute a conviction for immigration purposes. The Board of Immigration Appeals considered the issue of an Idaho expungement in *Matter of Roldan*, and held that no effect would be given in immigration proceedings to any state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative procedure. 22 I&N Dec. 512 (1999), *vacated in part sub nom. Lujan Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000). Although *Matter of Roldan* was ultimately reversed on other grounds, it is followed in immigration proceedings and in federal review of immigration decisions in the Fourth Circuit, Eleventh Circuit, and other federal courts.

F. Juvenile Delinquency Adjudication

Adjudication of Delinquency Not a Conviction. A juvenile delinquency adjudication is not a conviction for immigration purposes. See *Matter of Devision*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). Thus, regardless of the nature of the offense, a juvenile delinquency adjudication should not trigger any adverse immigration consequences based on conviction of a crime.

Under the North Carolina Juvenile Code, jurisdiction of a juvenile may be transferred to superior court on motion of the prosecutor, defense attorney, or the court if the juvenile was at least 13 years old at the time of the alleged commission of the offense and the offense would be a felony if committed by an adult. G.S. 7B-2200. A conviction of a 13-, 14-, or 15-year old resulting from a transfer to superior court may constitute a conviction for immigration purposes. Cf. *Vieira Garcia v. INS*, 239 F.3d 409, 414–15 (1st Cir. 2001) (upholding BIA decision that 17-year old tried as adult under Rhode Island law was convicted for immigration purposes).

Practice Note: Because it is settled law that a juvenile delinquency adjudication is not a conviction for immigration purposes, and a conviction in superior court has other adverse consequences for a juvenile (such as a criminal record for state law purposes), defense counsel should ordinarily resist transfer of a juvenile case to superior court.

Other Potential Consequences of Adjudication. Counsel representing juveniles should be aware that a finding of juvenile delinquency could still have adverse consequences for a noncitizen. First, it could be considered an adverse factor if the juvenile applies for any discretionary benefit under the immigration laws, such as adjustment of status to a lawful permanent resident. See *Wallace v. Gonzalez*, 463 F.3d 135 (2d Cir. 2006) (upholding BIA and immigration judge's consideration of noncitizen's New York youthful offender adjudication when evaluating his application for adjustment of status).

Second, certain grounds of inadmissibility and deportability do not require a conviction; mere “bad acts” or status can trigger the penalty. Examples include engaging in prostitution,

being a drug addict or abuser, using false documents, smuggling aliens, or the government having “reason to believe” the person has ever been a drug trafficker. Thus, a juvenile delinquency adjudication involving one of these offenses could support a finding of inadmissibility, in particular an adjudication involving drug trafficking. *See Matter of Favela*, 16 I&N 753 (BIA 1979) (holding that individuals who pled guilty to drug trafficking in juvenile proceedings are inadmissible as drug traffickers, even though there is no conviction). Adjudications involving these offenses can also be used to deny an application for Special Immigrant Juvenile Status (SIJS), which helps certain undocumented children in the state juvenile/foster care system obtain lawful immigration status. An adjudication involving drug trafficking will bar SIJS relief.

Additionally, defense counsel should be aware that immigration agents sometimes question clients in North Carolina juvenile detention centers. Admissions to immigration officers by juvenile clients without immigration status could lead to removal proceedings. *See supra* § 2.3C (discussing noncitizens’ rights when questioned by immigration agents).

G. Conviction Vacated via Post-Conviction Relief

The BIA has ruled that when a state court vacates a judgment of conviction based on a procedural or legal defect, the state court order must be given full faith and credit, and the conviction is eliminated for immigration purposes. *See Matter of Rodrigues-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). For example, if a conviction is vacated for ineffective assistance of counsel through a motion for appropriate relief, there is no longer a conviction for immigration purposes. Post-conviction issues are discussed in Chapter 8 *infra*.

The conviction is not eliminated for immigration purposes, however, if it was vacated for reasons “solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings.” *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003); *cf. Yanez-Popp v. INS*, 998 F.2d 231, 235 (4th Cir. 1993) (“[U]nless a conviction is vacated on its merits, a revoked state conviction is still a ‘conviction’ for federal immigration purposes.”).

4.3

Sentence to a Term of Imprisonment

In some cases, adverse immigration consequences are triggered by the length of imprisonment ordered. For example, a burglary offense that carries a term of imprisonment of one year or more results in an aggravated felony conviction and most likely mandatory removal.

A. Imprisonment Defined

For immigration purposes, a “term of imprisonment” includes “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of all or part of the sentence.” INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B).

The actual length of confinement ordered by the court is what counts as the sentence for immigration law purposes, even if the execution of sentence is suspended and the defendant does not serve any actual time in jail. *See Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995). For example, in a misdemeanor case, a defendant who receives a sentence of 150 days suspended and supervised probation will be treated as having been sentenced to 150 days in jail for immigration purposes. The duration of probation does not count as a term of imprisonment.

Further, a sentence is considered to be a sentence for the maximum term actually imposed, even if the defendant is released prior to serving the maximum term. *See Matter of D*, 20 I&N Dec. 827 (BIA 1994); *Matter of Chen*, 10 I&N Dec. 671 (BIA 1964). For example, a defendant who is sentenced to 11 months minimum and 14 months maximum in a felony case will be treated as having been sentenced to 14 months in jail for immigration purposes, even if he or she ultimately serves only 11 months in jail.

B. Sentence Modification

A trial court's order modifying or reducing a noncitizen's criminal sentence is recognized as valid for purposes of the immigration law without regard to the trial court's reasons for the modification or reduction. *See Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (trial court's reduction of defendant's prison sentence from 365 days to 240 days, *nunc pro tunc*, to the date of his original sentencing was recognized by the BIA, and defendant was no longer deportable for an aggravated felony because his receipt of stolen property offense was no longer one "for which the term of imprisonment [was] at least one year").

C. Implications for an Aggravated Felony

One Year Rule. The definition of term of imprisonment has important consequences for the aggravated felony ground of deportability because the immigration statute defines certain offenses as aggravated felonies only if the defendant receives a sentence of imprisonment of one year or more. *See supra* § 3.3A (discussing aggravated felonies). Thus, defense counsel should treat an active or suspended sentence of 10 months minimum and 12 months maximum (or longer) for such an offense as an aggravated felony, subjecting a noncitizen client to mandatory removal.¹

1. There may be an argument that a person sentenced to 10 months minimum and 12 months maximum does not have a one year sentence for immigration purposes. G.S. 12-3(12) (rules for construction of North Carolina statutes) states that whenever used in any statute "imprisonment for one month" means "imprisonment for thirty days." If this provision applies to a sentence of imprisonment of 10 months minimum and 12 months maximum, a person's maximum sentence would be 360 days, not 365 days, which would not constitute a one year sentence. *See generally Matter of Song*, 23 I&N Dec. 173 (BIA 2001). However, according to the North Carolina Department of Correction, it calculates each 12-month increment of a sentence as 365 days, and treats each monthly increment that is less than 12 months as 30 days. Thus, a 12-month sentence is calculated as 365 days, while an 18-month sentence is calculated as 365 days (for the 12-month increment), plus 180 days (6 x 30 days for the six-month increment). Neither the Board of Immigration Appeals nor local immigration courts have addressed this issue.

Consecutive Sentences. Consecutive sentences cannot be combined to satisfy the statutory one year requirement for aggravated felony offenses that depend on a minimum one-year sentence of imprisonment. *Compare* INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (requiring sentence of one year or more to trigger aggravated felony definition) *with* INA § 241(b)(3)(B), 8 U.S.C. § 1231(b)(3)(B) (providing that noncitizen sentenced to aggregate term of imprisonment of five years or more is ineligible for relief of withholding of removal) and INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B) (providing that noncitizen convicted of two or more offenses for which the aggregate sentence of imprisonment is five years or longer is inadmissible). As long as no individual count results in a maximum sentence of one year or longer, a total term of imprisonment (active or suspended) of more than one year will not satisfy the statutory definition for this type of aggravated felony offense. For example, if an individual is sentenced to 8 months minimum and 10 months maximum on two counts of burglary, to run consecutively, he or she will not have an aggravated felony conviction.

For a discussion of practical considerations in cases in which sentence length is critical, *see infra* § 6.2A.

D. Comparison to Potential Sentence

In some instances, the immigration statute focuses on the potential sentence that may be imposed—that is, whether the offense is punishable by a certain term of imprisonment. This approach is used in limited instances—specifically, with the grounds of removal involving crimes involving moral turpitude (CMT). *See* INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (an individual is deportable if convicted of one CMT committed within five years of admission to the U.S., for which a sentence of one year or longer may be imposed); INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (a noncitizen is inadmissible for a conviction or admitted commission of a CMT, unless the maximum possible sentence for the offense is one year or less, the actual sentence of imprisonment is six months or less, and the person has no prior CMT convictions). For those immigration grounds, the actual sentence imposed is not determinative.

In those instances, the sentence that “may be imposed” under structured sentencing for a felony may mean the maximum aggravated sentence that could be imposed for that crime on a defendant in prior record level VI. *See U.S. v. Harp*, 406 F.3d 242 (4th Cir. 2005); *U.S. v. Jones*, 195 F.3d 205 (4th Cir. 1999) (for purposes of federal sentencing guidelines, to determine whether a crime is “punishable” by a certain sentence, courts must consider the maximum aggravated sentence that could be imposed for that crime upon a defendant with the worst possible criminal history); *but see U.S. v. McManus*, 236 Fed. Appx. 855 (4th Cir. 2007) (unpublished) (for purposes of federal Assimilative Crimes Act, maximum sentence that may be imposed by federal court for state offense committed on federal enclave is maximum sentence defendant could receive in state court based on defendant’s prior record level under North Carolina’s structured sentencing statutes). It is unclear whether the interpretation in *Harp* applies to immigration law, but under such an interpretation, the potential sentence for an individual convicted of the lowest class of felony, Class I, would be 15 months maximum because that is the potential maximum sentence for a defendant in prior record level VI in the aggravated range.

