

## PREFACE

# WHY IMMIGRATION LAW MATTERS IN THE CRIMINAL LAW CONTEXT

Walking into the large waiting room of the local U.S. Immigration and Customs Enforcement (ICE) detention center the other day, a young lawyer with a big smile approached me hurriedly and shook my hand. Enthusiastic and proud, she related to me a case she tried the week before, involving a detained client with a solicitation conviction. She successfully argued in pretrial memoranda to the judge that the solicitation offense did not qualify as an aggravated felony crime. She analyzed the statute, presented case law, and convinced the court with her legal analysis. The case, she told me, was terminated. Although ICE was appealing, the client—who had been held without bond—was released to his family.

Truthfully, I didn't completely follow the legal scenario she described, she talked with such excitement; but what was clear is that through research and writing, she had successfully contested the charge of removability. It was particularly rewarding that she literally ran over to me to share her success because she had read this very book, and listened to my lectures, on analyzing the conviction, contesting deportability, and moving to terminate. It was a satisfying moment for me.

In the past few years, there have been some incredibly interesting cases coming out of the federal courts, including our Supreme Court, that literally dissect the elements of the criminal statute and analyze the offense to determine whether it fits into an aggravated felony or moral turpitude classification. "Crime of violence" under 18 USC §16(b), for example, applies to both the aggravated felony and domestic violence grounds of removability; the courts have adhered to a strict interpretation of that phrase, and required an active use of intentional force. Based on this precedent, many state battery offenses will not qualify as aggravated felonies or crimes of "domestic violence." Two years ago, first-offense simple possession of cocaine was an aggravated felony drug-trafficking crime in half of the United States. As such, persons in the unlucky jurisdictions were ineligible for a waiver of removal and quickly deported. As I write this today, first-offense simple possession of a controlled substance is not an aggravated felony—by declaration of the Supreme Court—and thousands of one-time offenders are now eligible for relief. What's left for another day (that is, today and tomorrow) is the fate of persons with multiple, minor offenses for simple possession. The courts already are coming out with varied approaches to the two- or three-simple-possession conviction cases. The law is in an interesting state of flux.

Based on case law, we know that a theft crime may be an aggravated felony, but not necessarily meet the more narrow definition of moral turpitude. And it is clearer than ever that immigration judges must limit their determinations of deportability to the elements of the criminal statute and, if that is a divisible provision, the specific components of the record of conviction. The immigration courts are not second-stage criminal courts there to adjudicate guilt or innocence of certain underlying activity; the immigration courts' function is to review the conviction as is and find its proper

classification according to the immigration law. When the elements do not fit an immigration law classification, removal charges must be dismissed, regardless of the apparent nature or quality of the crime.

This truly is an exciting time to be practicing immigration law. What has emerged through the federal courts is a developing body of case law that encourages—no, mandates—careful analysis of the crime and aggressive argument in opposition to removal charges. The point is, *it can be done*. Motions to terminate because the statute is divisible or the element of intent is missing can and do prevail. Clients who otherwise would have no relief available as a defense to deportation leave the immigration court with the charges dismissed. It's a good feeling, but it requires tenacious attention to the criminal statute, and a willingness to conduct research.

This third edition devotes careful attention to the categorical and modified categorical approach, how to analyze a criminal statute, and what the courts have said in regard to a particular offense. Because waivers are necessary in many cases, this edition expands on discussion of the INA §212(c) waiver, cancellation, adjustment, and new sections on voluntary departure. Also, within these pages is updated analysis of postconviction relief: another valuable tool in the immigration attorney's arsenal.

### **The Knowing and Intelligent Plea**

For criminal defense attorneys, this book explains in an easy reading style the consequences of offenses according to the Immigration and Nationality Act. I think every serious writer must carry an imaginary reader or readers in the back of his or her mind as he or she writes, while constantly envisioning the best way to convey a thought to that illusive yet tangible person in his or her head. I originally wrote this book for criminal lawyers. I am gratified that it is used and well-liked by immigration colleagues. And to be sure, there are many days where my imaginary audience is my immigration law colleagues. But the primary inspiration for originally writing this book is to reach out to the criminal attorney representing a foreign-born client who seeks to make good decisions in the criminal context, but has the wherewithal to be concerned about deportation as well.

I think the line of demarcation between a good criminal defense attorney and a (sorry to say) mediocre one is that the former does worry about adverse immigration consequences for his or her foreign-born criminal client. This book's title includes the phrase, "*A Guide to Representing Foreign-Born Defendants.*" My message to the criminal bar is: this book is also for you. I hope the word is getting out.

I believe an immigration law component should be a required aspect of *every* criminal law and procedure course in law school. If the criminal law professors are not instructing on the law of deportation, they are not teaching a complete course, and they do their students a disservice. I see literally hundreds of pleas a year that dictate automatic deportation, about which the client had no idea at the time of the plea. A little tweaking and this drastic result could have been avoided. Possible deportation is an overwhelming collateral consequence and cannot be disregarded.

On the other hand, I am frequently consulted at the time of arrest (or even pre-arrest stage) by defense attorneys before they decide to enter a plea or go to trial. A good immigration/criminal team can do tremendously good work for the foreign-born client. A great lawyer I know once said, "The time to avoid adverse immigration consequences is

at the onset of the criminal charges, not after sentencing.”<sup>1</sup> Indeed, the most effective defense against deportation is effective representation at the criminal law stage, but this requires the defense bar’s desire to pay attention.

### ***Courts crack down on defense counsel***

In *State v. Paredes*,<sup>2</sup> the Supreme Court of New Mexico recently wrote:

If a defendant’s attorney informs him or her that deportation will not be a consequence of a guilty plea when the guilty plea renders deportation a possibility, then the attorney’s performance would be deficient. Also, when a *defendant’s* guilty plea almost certainly will result in deportation, an attorney’s advice to the client that he or she “could” or “might” be deported would be misleading and thus deficient.

....

[A]n attorney’s non-advice to an alien defendant on the immigration consequences of a guilty plea would also be deficient performance.

In so holding, the court cited to *Gonzalez v. State*,<sup>3</sup> wherein the Oregon Court of Appeals wrote:

[S]tating that a person “may” be subject to deportation implies there is some chance, potentially a good chance, that the person will not be deported. That is an incomplete and therefore inaccurate statement if made to an alien considering whether to plead guilty to an aggravated felony.

The American Bar Association (ABA) has recognized that avoiding deportation may well be many clients’ greatest potential difficulty—and greatest priority—in assessing the collateral consequences of a conviction. Accordingly, under the ABA Standards for Criminal Justice, “defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”<sup>4</sup>

A major motivation for writing this book five years ago was my frustration over meeting with frantic clients who had no idea their plea bargain would result in deportation. Admittedly, in certain cases, the criminal offense conduct and evidence thereof will be such that no plea will avoid deportation. In that situation, the client has a right to know that one aspect of the plea will be detention and deportation. Thus, this book also is about giving correct, good advice to a client who, upon completion of sentence, will be removed from the United States. Clients have a right to know.

### **A Note of Encouragement**

There are many encouraging stories of good, creative lawyering in the immigration/criminal law context. It is my hope that this book will not only teach the proper approach, but serve as an inspiration to those who put forth the effort to carefully research and strategize—the effort is well worth it.

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<sup>1</sup> Linda Osberg-Braun, Attorney at Law.

<sup>2</sup> 136 N.M. 533, 101 P.3d 799 (N.M. 2004).

<sup>3</sup> 191 Or. App. 587, 83 P.3d 921 (Or. App. 2004).

<sup>4</sup> ABA Standards for Criminal Justice: Guilty Pleas §14-3.2.

## How to Use This Book

The purpose of this book is to inform practitioners of immigration consequences in the criminal law context by utilizing a two- or four-step process. In an ideal situation (the four-step process), the practitioner will use this book when a client is initially facing criminal charges. In this situation, the process is as follows:

(1) Identify the immigration category or classification of the crime charged. The different classifications of crimes according to immigration law are discussed in chapter 5.

(2) Identify the possible adverse immigration consequences that attach to a conviction for such a crime. Adverse consequences can include ineligibility for a visa, residency, naturalization, or even deportation from the United States. Adverse immigration consequences are discussed in chapter 6.

(3) Identify potential forms of relief. Immigration waivers and other forms of relief are discussed in chapter 7.

(4) Identify possible solutions: avoid a “conviction” altogether; plead to an offense that does not implicate the immigration laws; or ameliorate the consequences by preparing the client to seek relief. Representing the accused is discussed in chapter 8.

In those situations in which a client comes to the office already convicted of a crime, this book may be utilized as a two-step process (steps 2 and 3): identify the immigration consequences of the conviction and analyze options for relief.

This book also discusses relief for the cooperating witness—an increasingly significant topic in immigration law. Immigration law now contains three nonimmigrant statuses for an individual who cooperates with law enforcement authorities—S, T, and U. Will your client get what he or she has been promised, or get tossed aside when the investigation or prosecution is complete? Defense attorneys know that cooperating witnesses often do not have clean hands; but one of these visa categories may be the client’s only option for remaining in the United States legally. The U visa regulations were recently released, and this book is one of the first books to cover these long-awaited provisions. Chapter 9 discusses visa categories for cooperating witnesses, as well as other cooperating witness alternatives.

Finally, for those criminal law practitioners who will represent the client throughout the immigration process, and for beginning immigration lawyers, chapter 10 provides a nuts-and-bolts discussion of how to prepare and present waivers and other forms of relief before the Department of Homeland Security and the immigration court.

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