The criminal defense attorney’s intuitive pursuit of freedom for a client is almost always the best approach in the representation of individuals charged with a crime. When representing noncitizens, however, the prudent practice is to deemphasize immediate freedom and instead to focus on the collateral consequences the conviction will have on the noncitizen’s immigration status.

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A quick ticket to freedom from the criminal system may mean a one way ticket in shackles to one’s country of birth to noncitizens. This raises the question: Does the last sentence of Maryland Rule 4-242(e), which reads, “[t]he omission of advice concerning the collateral consequences [to a non-citizen] of a plea does not itself mandate that the plea be declared invalid,” extend a tacit release from liability to the criminal defense counsel who fails to advise a noncitizen client of the collateral immigration consequences of a plea? The answer may be no. But, because the consequences of deportation remain as dire today as they did sixty-three years ago when the Supreme Court in Bridges v. Wixon, 326 U.S. 135, 164 (1945), found that “the impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence,” criminal defense counsel may be liable for malpractice if they fail to take into account collateral consequences to noncitizens. “A deported alien may lose his family, his friends, and his livelihood forever. Return to his native land may result in poverty, persecution and even death.” Id. ABA standard 14-3.2(f), which states that competent representation requires the attorney to provide advice regarding the collateral consequences ahead of the plea seems to support a claim of liability. Regardless, criminal defense counsel, at a minimum, should be aware of the significant collateral consequences of criminal convictions to noncitizens and take extra care when representing those individuals.

To that end, the following paragraphs are intended to provide a general overview of the intersection between criminal law and immigration law. Three topics will be addressed: convictions, aggravated felonies, and crimes involving moral turpitude (CIMT). Although aggravated felonies and CIMTs do not encompass all the types of crimes that trigger immigration consequences, discussion of them is important because they trigger harsh consequences and cause a great number of people to face removal (deportation) proceedings.

**CONVICTIONS**

The term “conviction,” with respect to an alien, as expected, includes a formal judgment of guilt entered by a court. If adjudication of guilt has been withheld, the Immigration and Nationality Act (“INA”) §101(a)(48)(A) provides a two prong test to determine if there is a conviction for immigration purposes. The first prong may be satisfied by any of the following: the judge has made a finding of guilty or the alien has entered a plea of guilty or nolo contendere or the alien has admitted sufficient facts to warrant a finding of guilt. The second prong requires the judge to order some form of punishment, penalty, or restraint on the alien’s liberty. Juvenile delinquency proceedings do not result in a conviction for immigration purposes. The standards established in the Federal Juvenile Delinquency Act, 18 U.S.C. §5031-50, govern whether an offense by a young offender is to be considered an act of delinquency or a crime. Matter of Devison, 22 I&N Dec. 1362 (BIA 2000).

A common way of resolving criminal charges in Maryland is by a “Stet.” Maryland Rule 4-248 (a), dealing with “[d]isposition by [s]tet, in its relevant part, states: “On motion of the State Attorney, the court may indefinitely postpone trial of a charge by marking the charge ‘stet’ on the docket.” The postponement of the prosecution prevents the imposition of a penalty. Therefore, a “stet” does not meet either prong of the definition of a conviction and consequently is not a conviction for immigration purposes.

A different conclusion is reached when we analyze Probation Before Judgment (PBJ). Section 6-220 (b) of the Criminal Procedure Article of the Maryland Code in its relevant part reads: “When a defendant pleads guilty or nolo contendere or is found guilty of a crime, a court may stay the entering of judgment, defer further proceedings and place the defendant on probation subject to reasonable conditions if . . . the defendant gives written consent after the determination of guilt or acceptance of a nolo contendere plea.” Consequently, since a disposition of a charge by PBJ requires the individual to acknowledge guilt or plead nolo contendere, it satisfies the first prong of the definition of a conviction. The second prong is met by the court’s imposing probation, a restriction on one’s liberty, as the punishment for the violation. Since both prongs of the definition of a conviction are met, PBJ is a conviction for immigration purposes.

If criminal defense counsel reached a plea agreement that turns out to have caused a client’s de-facto deportation, the attorney typically seeks, as post-conviction relief, the vacation of the plea. Vacation of a plea will vacate the conviction for immigration purposes as long as it was not pursuant to a rehabilitative statute or because of immigration hardship. The vacation of the plea must be for a procedural or substantive defect in the underlying criminal proceeding and not for reasons solely related to post-conviction events such as avoiding immigration consequences. Matter of Pickering, 23 I&N Dec. 621(BIA 2003). The Writ of Error Coram Nobis is an effective way of eliminating immigration consequences as it vacates the conviction ab initio. Matter of C, 8 I&N Dec. 611 (BIA 1960).
AGGRAVATED FELONIES

Immigration defense counsel when coordinating plea agreements with their criminal defense counterpart will always try to prevent an aggravated felony conviction, as any alien who is convicted of an aggravated felony at any time after admission is deportable. INA § 237(a)(2)(A)(iii). The Immigration and Nationality Act at §101(a)(43) identifies crimes that meet the definition of an aggravated felony. In some instances, as in INA § 101(a)(43)(A), the crimes listed—murder, rape, or sexual abuse of a minor—leave little room for interpretation. In others, such as INA §101(a)(43)(B) (illicit trafficking in a controlled substance), the intervention of the Supreme Court was required to clarify its meaning. The analysis used by the Supreme Court of this aggravated felony and INA §101(a)(43)(F) (crime of violence) will be highlighted below to provide insight regarding the intricacies of aggravated felonies.

Section 101(a)(43)(B) of the Immigration and Nationality Act states that “illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code) is an aggravated felony.” The term “illicit trafficking” is left undefined by the INA. Section 924(c) of title 18 of the U.S.C., however, defines a “drug trafficking” crime as any felony punishable under the Controlled Substances Act. Section 101(a)(43)(U) of the Immigration and Nationality Act, a catch-all subsection, which in its relevant part says “the term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State Law ...”, caused confusion in the interpretation of INA § 101(a)(43)(B), as it appeared that any controlled substance offense categorized as a felony under state law was an aggravated felony for immigration purposes.

The Supreme Court in Lopez v. Gonzales, 127 S.Ct. 625 (2006), found that when a state felony conviction does not proscribe conduct punishable as a felony under the Federal Controlled Substances Act it is not an aggravated felony. A state offense constitutes a “felony punishable under the Controlled Substances Act” only if it proscribes conduct punishable as a felony under that federal law. Therefore, a state conviction for first time simple possession of a controlled substance is not an aggravated felony because this conduct is not punishable as a felony under the federal criminal code.

The intervention of the Supreme Court was also required to interpret INA § 101(a)(43)(F), which states that “a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year [is an aggravated felony].” In Leocal v. Ashcroft, 543 U.S. 1 (2004), the Court reviewed whether an alien convicted for driving under the influence (DUI) and causing serious bodily injury in an accident was an aggravated felon under this subsection.

Title 18 U.S.C. §16 consists of two subsections. The first subsection, § 16 (a) of title 18 U.S.C., defines a crime of violence as “an offense that has as an element the use . . . of physical force against the person or property of another.” In analyzing the word “use,” the Court found that “use” requires active employment. Although a person may actively employ something in an accidental manner, it is less natural to say that a person actively employs physical force against another by accident. Therefore, “use . . . of physical force against the person or property of another” suggests a higher degree of intent than negligent or merely accidental conduct. Since DUI offenses like the one in Leocal do not have a mens rea component or require only a showing of negligence in the operation of a vehicle, the Court in Leocal held that a DUI offense is not a crime of violence under 18 U.S.C. §16(a).

The second subsection of title 18 U.S.C., §16 (b), defines a crime of violence as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.” Title 18 U.S.C. §16(b) covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense. The reckless disregard in Section 16(b) relates not to the general conduct or to the possibility that harm will result from a person’s conduct, but to the risk that the use of physical force against another might be required in committing a crime.

On the one hand, burglary, by its nature, involves a substantial risk the burglar will use force against the victim. On the other hand, physical force need not actually be applied in the course of operating a vehicle while intoxicated and causing an injury. Therefore, the Court concluded that DUI is not a crime of violence under title 18 U.S.C. §16(b). The Court in construing both Sections 16 (a) and (b) of title 18 U.S.C. determined that a “crime of violence” using its ordinary meaning, combined with Section 16’s emphasis on the use of physical force against another person, suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses.

In its analysis in Leocal the
Supreme Court accepted the categorical approach in analyzing aggravated felonies. The categorical approach looks solely to the structure of the statute that is the subject of the conviction and determines whether a person convicted under that statute must be convicted of the designated aggravated felony. When the criminal statute describes acts that do and do not qualify as an aggravated felony, the court proceeds to the modified categorical approach, where the court will conduct a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though the statute of conviction was facially over inclusive. *Chang v. INS*, 307 F.3rd 1185 (9th Cir. 2002).

This review of aggravated felonies has been limited to two specific crimes to give a general idea regarding what aggravated felonies are. However, the list of crimes defined as aggravated felonies is very extensive, and a close reading of INA §101(a)(43) in its entirety is recommended to have a better understanding of how expansive the aggravated felony category is. INA §101(a)(43)(U), in its catch all function, extends the meaning of aggravated felonies to any attempt or conspiracy to commit any of the offenses listed under INA §101(a)(43). The Supreme Court in *Gonzalez v. Duenas*, 127 S. Ct. 815 (2007), further expanded the list of offenses that are aggravated felonies by holding that the term “theft offense” in INA §101(a)(43)(G) includes the crime of aiding and abetting a theft offense.

The general principle is that federal law controls immigration law. Consequently, when reviewing state criminal statutes, it is imperative that counsel refer to the corresponding federal statute to determine the consequences of the offense in immigration law. Criminal defense counsel will benefit greatly by having a copy of the definition section of the federal crimes to consult as they are contemplating plea agreements.

One of the consequences to noncitizens if convicted of an aggravated felony is that they are subject to mandatory detention. This means that the noncitizen convicted of an aggravated felony is not eligible to be released on bond or otherwise. Although Immigration Judges do not have the authority to release a person subject to mandatory detention, they retain jurisdiction to determine whether the person is properly included within the mandatory detention provision. *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999).

The gravest consequence to noncitizens found to be aggravated felons is that they will be deported, as there is no relief available to aggravated felons in removal proceedings. The only exception is that those with plea agreements prior to April 24, 1996 may seek relief under the repealed INA §212(c). *INS v. St. Cyr*, 533 US 289 (2001).

Once a noncitizen is identified by Immigration Customs and Enforcement (ICE) as an aggravated felon, ICE will place a detainer on the noncitizen that will effectively prevent him or her from being released, except into federal immigration custody, during the criminal proceedings. If the noncitizen is sentenced to imprisonment, the detainer will remain during the prison term to facilitate transfer to immigration custody once the noncitizen is finished serving the state penalty. Under 8 C.F.R. § 287.7(d), noncitizens with detainers shall be maintained in custody “for a period not to exceed 48 hours.” If a noncitizen is not transferred to immigration custody within 48 hours after finishing his sentence, release might be achieved via a state *habeas corpus* petition under this regulation.

**Crimes Involving Moral Turpitude**

Any alien who is convicted of a crime involving moral turpitude (CIMT) committed within five years after the date of admission, and for which a sentence of one year or longer may be imposed, is deportable. INA §237(a)(2)(A)(i). Additionally, INA §237(a)(2)(A)(ii) makes deportable any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct.

The term moral turpitude is not defined by statute, but rather by case law. It refers generally to conduct which is inherently base, vile, or depraved and contrary to the accepted rules of morality. Moral turpitude has been defined as intrinsically wrong or *malum in se*, so it is the nature of the act itself and not the statutory prohibition which renders it a CIMT. It is the inherent nature of the crime, defined by the statute and interpreted by the courts, as limited and described in the record of conviction, and not the facts and circumstances of the case that determines if a crime is a CIMT. *Matter of Short*, 20 I&N Dec 136 (BIA 1989).

Examples of CIMTs are assault with a dangerous weapon, statutory rape, fraud, and theft. If the statute encompasses both acts that do and do not involve moral turpitude, deportability can not be sustained.

If the statute is divisible, the court looks to the “record of conviction.” *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999). The record of conviction includes the charging document,
written plea agreement, transcript of plea colloquy and any explicit factual finding by the trial judge to which the defendant assented. *Shepard v. U.S.*, 544 U.S. 13 (2005). If the offense is a CIMT and carries a potential sentence of a year or more, it triggers a possible ground for deportation. A CIMT offense with a sentence reduced to 11 months probation, but with a potential sentence of a year or more, will cause the noncitizen to be deportable.

**Conclusion**

Noncitizens present criminal defense counsel with the challenge of changing their approach to criminal defense. This new approach requires careful review of the criminal statutes, comparing them to what the INA indicates to be a deportable offense. Defense counsel should have INA §101(a)(43), the definition of an aggravated felony, close by.

Since CIMTs vary from statute to statute and are interpreted on a case by case basis, counsel may need to reach out to an immigration attorney for guidance when encountering potential CIMTs. Counsel should keep in mind that it is essential to review the actual criminal statute involved, and that the underlying circumstances of the crime do not determine if an offense is a CIMT.

Perhaps most importantly, criminal defense counsel must keep in mind that a conviction for immigration purposes is more expensive than for criminal court. The University of Maryland Law School’s Immigration Clinic maintains a chart on its website to help criminal defense counsel determine the immigration consequences of specific Maryland criminal statutes. This chart should provide additional guidance to practitioners.