SAN FRANCISCO
1458 Howard Street
San Francisco, CA 94103

WASHINGTON, D.C.
1015 15th Street, NW
Suite 600
Washington, D.C. 20005

SAN ANTONIO
500 Sixth Street
Suite 204
San Antonio, TX 78215

AUSTIN
6633 East Hwy 290
Suite 102
Austin, TX 78723

ilrc@ilrc.org
www.ilrc.org

California Committee on Revision of the Penal Code

September 15, 2020

Re: **Sentencing Considerations and Immigrations**

Dear Members of the Committee,

The Immigrant Legal Resource Center (ILRC) is a national nonprofit, headquartered in San Francisco, CA, with over forty years of expertise in the complex interplay between immigration and criminal law. The ILRC has extensively analyzed, written about, taught, and advised on the immigration effect of California crimes and sentences. We have worked closely to educate and advise California public defenders, prosecutors, superior court judges, and stakeholders in delinquency proceedings about immigration consequences. Among other forms of technical assistance, we provide regular trainings to California Judicial Council, the California Public Defender Association, the California District Attorney Association, and the County Welfare Directors Association about the unique needs of system-impacted noncitizens.

Immigration law has evolved over time so that now "[t]he 'drastic measure' of deportation or removal, *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), is [] virtually inevitable for a vast number of noncitizens convicted of crimes." *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Criminal sentencing, and felony/misdemeanor designation, can have enormous impact on an immigrant's ability to remain lawfully in the United States. Making informed—sometimes very minor—technical changes in the disposition often can avoid unintended immigration consequences, and still meet the criminal law sentencing goals. Each defendant's case requires an individual analysis, but here are three key issues that often arise when trying to mitigate or eliminate immigration consequences.

1. Sentence Imposed of 364[1] Days or Less, Rather Than A Year

[1] While a 364-day sentence is the most common goal, for various other immigration purposes the noncitizen may need to avoid an imposed sentence of six months, 90 days, or other amount. Legal citations can be provided to show the need for these sentences in individual cases.

Some (but not all[2]) offenses will become an "aggravated felony" for immigration purposes if a sentence of a year or more is imposed. An aggravated felony conviction causes the worst possible harm to all immigrants, leading to mandatory deportation, mandatory immigration detention, and mandatory denial of almost all forms of immigration relief for green card holders, refugees, asylees, survivors of abuse, undocumented workers, etc. A sentence of 364 days or less avoids this consequence. The maximum possible sentence for a misdemeanor is 364 days. See P.C. § 18.5(a) (2015).

Defense counsel may make the following requests to avoid a felony one-year sentence for their client for immigration purposes:

- **364, or less, sentence.** Request suspended imposition of sentence and felony probation with custody for 364 days or less, rather than custody for one year.

- **Credits for time served.** Request delaying the plea or sentencing hearing while the defendant spends time in custody; then offer to waive credits in exchange for a prospective sentence that is less than a year. For example, rather than a sentence of two years, defendant will spend six months in custody before sentencing and then ask to waive those credits in exchange for an eight-month prospective sentence – thus spending the same amount of custody time, but avoiding an aggravated felony.

- **Probation violation strategies.** A probation violation hearing is a critical moment. If additional custody time is imposed at the time of a probation violation, that additional time is added to the original sentence for immigration purposes. If the total imposed sentence between the initial sentence and the probation violation sentence is a year or more, the offense can become an aggravated felony. Many defense counsel are not alert to the risks at a PV hearing, but if they are, they may ask to not be sentenced on the probation violation and instead plead to a related offense that does not become an aggravated felony if a year or more is imposed.[1]

- **IOSS rather than EOSS**. Defense counsel may ask for suspended imposition of sentence, rather than a prison sentence imposed but execution suspended, because the whole suspended sentence is considered an imposed sentence for immigration purposes. [3]

- **Vacate sentence of 365 for cause.** Immigration authorities will *not* give effect to an order to decrease a sentence from 365 to 364 days, pursuant to P.C. § 18.5(b). For immigration purposes, any change in an imposed sentence must be due to legal error, e.g., pursuant to order under P.C. § 1473.7.[4]

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[2] The one-year penalty does not apply across-the-board. Some offenses are not aggravated felonies even if a year or more is imposed (e.g., burglary), while other offenses are aggravated felonies even if no time is imposed (e.g., any drug trafficking). See the definition of aggravated felony, 8 USC § 1101(a)(43).

[3] For immigration purposes, an imposed sentence is defined at 8 USC § 1101(a)(48)(B) as "the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part."

[4] *Matter of Thomas and Matter of Thompson*, 27 I&N Dec. 674 (A.G. 2019) (a judicial modification of an imposed sentenced will have immigration effect only if the basis for the order was a defect in the prior proceedings).

2. A California conviction of a misdemeanor instead of a felony, can avoid key immigration penalties

The actual sentence imposed is not the only risk for immigrant defendants. Sometimes the state classification will trigger certain consequences, regardless of the sentence imposed. Some California felonies and even "strikes" have limited immigration effect, and some misdemeanors and even infractions have fatal effect. But in some instances, a defendant desperately wants to plead to a misdemeanor rather than a felony.

- **Relief barred by a single felony.** Some forms of relief for vulnerable individuals are barred if the person has a conviction of a single felony. This includes DACA (Deferred Adjudication for Childhood Arrivals, providing protection for "DREAMers") and TPS (Temporary Protected Status, providing protection for individuals from countries designated by the U.S. due to recent natural disaster or civil collapse).

- **Crimes involving moral turpitude.** Conviction of an offense that immigration law classes as a crime involving moral turpitude ("CIMT") can have severe immigration consequences, some of which are based on the potential sentence of the offense. In particular, a single conviction of a CIMT can cause a range of penalties unless it has a potential sentence of either 365 or 364 days (depending on the immigration context). As of January 1, 2015, P.C. § 18.5(a) provides that a California misdemeanor has a maximum possible sentence of 364 days; that avoids all CIMT penalties based on potential sentence. Defense counsel may ask for a misdemeanor versus felony plea for a CIMT. Counsel might offer that the client will fulfill conditions that warrant a grant of a misdemeanor, or might offer a plea to a different but related felony offense that is not a CIMT. (For example, fraud is a CIMT, but false personation under P.C. 530.5 is not.)

- **Requests to designate a wobbler offense as a misdemeanor at plea or sentencing rather than later under Penal Code § 17(b)(3)**. Based on a 2019 decision by Attorney General Barr,[5] DHS attorneys are arguing that a P.C. § 17(b)(3) reduction that occurred after imposition of probation does not have immigration effect; instead, the conviction remains a felony for immigration purposes, and hence has the above penalties. Therefore, in light of Defense counsel may request the offense to be designated a misdemeanor at sentencing, and defendant may offer to comply with various conditions to support the offer, or, if there is one, offer to plead to a different felony offense.

3. Sentence enhancements

Sentence enhancements have multiple consequences in immigration proceedings.

- **Time imposed on sentence enhancements counts towards total sentence.** Sentence enhancements can take an otherwise immigration neutral disposition and turn it into an immigration damaging offense. This is because time imposed pursuant to an enhancing provision (recidivist and/or conduct enhancement or alternative sentencing scheme, e.g.,

[5] *See Matter of Thomas and Thompson, supra.*

petty with a prior) is considered part of the total sentence imposed.[6] An increased sentence based on an enhancement is the treated the same as any sentence. Certain offenses will become an aggravated felony if a sentence of a year or more is imposed.

- **Substantive enhancements constitute an element of the offense.** Immigration law recognizes that a substantive sentence enhancement constitutes an element of the offense.[7] For example, for immigration purposes a conviction for driving under the influence with an enhancement for endangering a child is a deportable "crime of child abuse," whereas two separate convictions – a DUI with no enhancement, plus a misdemeanor child endangerment under P.C. § 273a(b) – would not be deportable offenses.

- **Gang enhancements are particularly damaging for immigrants, including juveniles.** Although it is not a per se removal ground, a conviction or enhancement under Cal. Pen. C. §186.22(a), (b), or (d) can be very damaging to a noncitizen. A gang enhancement or conviction is used to find inadmissibility under the "security and related grounds," which are not waivable.[8] A noncitizen with a gang enhancement is extremely likely to be denied immigration relief, and held without bond in ICE detention. They can be deemed "inadmissible" as members of terrorist organizations. Informed defense counsel will avoid pleading to the substantive offense, or take extra time in some other manner, rather than pleading to provisions under these sections. It serves as a bar to DACA and DAPA, and is a major priority for immigration enforcement.

If it is useful, ILRC staff would be happy to provide any additional information to the Committee or consult on this or any other matter about the penal code's impact on noncitizens.

Sincerely,

Kathy Brady

Kathy Brady
Senior Staff Attorney

Rose Cahn

Rose Cahn
Senior Staff Attorney

[6] *See United States v. Rodriquez*, 553 U.S. 377 (2008).
[7] See, e.g., *Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007), citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and partially overruling *Matter of Rodriguez-Cortes*, 20 I&N Dec. 587 (BIA 1992).
[8] A person is inadmissible if the govt "knows, or has reasonable ground to believe, seeks to enter the United States to engage solely, principally, or incidentally in any … unlawful activity" 8 USC § 1182(a)(3)(A)(ii).