Defending Non-Citizens in Illinois, Indiana, and Wisconsin

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"[T]hough deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty -- at times a most serious one -- cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

Bridges v. Wixon, 326 U.S. 135, 154 (1945).

DISCLAIMER

This manual is NOT INTENDED to serve as legal advice on individual cases, but to give a general overview of the immigration consequences for criminal convictions to public defenders and criminal defense attorneys who are working with non-citizen clients. Due to the ever-changing nature of immigration law, almost weekly administrative immigration appellate decisions, and federal court rulings, attorneys are strongly urged to contact and collaborate closely with an immigration attorney who works on criminal immigration cases in every case involving a non-citizen defendant.

CHAPTER

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Definition of "Conviction" for Immigration Purposes

How is "Conviction" Defined by Immigration Law?

Immigration law relating to non-citizens with criminal behavior has changed dramatically since 1996, with the most far-reaching changes in the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA),[84] and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA).[85] Congress amended the definition of a "conviction" for immigration purposes through IIRAIRA.

Certain felony convictions and misdemeanor convictions can now permanently bar long-term permanent residents from remaining in the United States, even though they may have never served any time in jail, are married to U.S. citizens, and have U.S. citizen children.[86] The definition of conviction is also retroactive, and certain dispositions that did not render a non-citizen deportable at the time that they were entered may now be

[84] *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996).
[85] *See* Pub. L. No. 104-208, 110 Stat. 3009 (1996).
[86] *See* Michelle Chen, "Immigrants' Stories Expose Murkiness of Deportation Laws," *The New Standard,* www.newstandardnews.net, Feb. 1, 2007; Anthony Lewis, "Cruelty Without Mercy," *The New York Times*, May 13, 2000, p. A19; Letter to Senator Max Cleveland from the Georgia State Board of Pardons and Paroles, Mar. 4, 2000, 77 *Interpreter Releases* 1078 (2000); Mike Dorning, "Petty Acts Now Haunt Immigrants; Deportations Soar Under 1996 Law," *Chicago Tribune*, Feb. 20, 2000, p. 1.

deportable offenses. Much of the discretion that Immigration Judges previously had to grant relief from deportation for minor offenses was stripped away by the expansion of the retroactive definition of a conviction and the number of crimes now considered to be "aggravated felonies" for immigration purposes.[87]

The term "conviction" is defined for purposes of immigration law in I.N.A. § 101(a)(48), 8 U.S.C. § 1101(a)(48). This definition differs from the definition of a conviction under state and federal criminal statutes, and it impacts non-citizens in Illinois, Indiana, and Wisconsin criminal proceedings. Some dispositions not considered to be "convictions" under state law may be found to be convictions for immigration purposes, resulting in non-citizens being found deportable or inadmissible.[88]

To prove that a non-citizen has a "conviction" for immigration purposes, the DHS may offer the following: an official record of judgment and conviction; an official record of plea, verdict, and sentence; a docket entry from court records that indicates the existence of the conviction; official minutes of a court proceeding; a transcript of a court hearing in which the court takes notice of the existence of the conviction; or record of conviction or an abstract submitted by electronic means to ICE by a State or a court where the appropriate State official or by the court in which the conviction was entered certifies it as an official record and ICE certifies its electronic receipt.[89] If an FBI rap sheet reasonably indicates that a non-citizen has been convicted of a crime, the rap sheet may also be used as evidence of a conviction.[90] Different strategies and plea bargains may lead to or avoid deportation

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[87] *See* Anne J. Greer & Teresa L. Donovan, "Conviction as Defined Under the Immigration and Nationality Act: An Evolving Meaning," 06-03 *Immigration Briefings* 1, Mar. 2006; Stacie Williams, "One Strike, You're Out: Immigration Law in the U.S.A.," *Extra*, www.extranews.net, Sept. 1, 2005, p. 13.

[88] *See e.g.*, 730 ILCS 5/5-6-1(c) (disposition of supervision); 720 ILCS 550/10 (first offender probation for cannabis), 720 ILCS 570/410 (first offender probation for controlled substance); IC 35-48-4-12 (first offender probation for possession of marijuana); Wis. Stat. § 961.47 (first offender probation for controlled substance and marijuana); *see also,* Gill v. Ashcroft, 335 F.3d 574 (7th Cir. Jul. 8, 2003) (holding that a first offender probation under 720 ILCS 570/410 is a conviction for immigration purposes).

[89] *See* I.N.A. § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B). Other evidence to prove a criminal conviction that may be offered by the DHS includes:

> [a]n abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence[;] [a]ny document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction[;] [or] [a]ny document or record attesting to the conviction that is maintained by an official of a State or Federal penal Institution, which is the basis for that Institution's authority to assume custody of the individual named in the record.

See id; *see also*, Dashto v. I.N.S., 59 F.3d 697 (7th Cir. Jul. 11, 1995) (holding that a certificate of statement of conviction by the court clerk stating that the alien had used a handgun is not satisfactory proof to sustain a finding of deportability for a conviction for a firearms offense where the court records did not confirm that the alien in fact used a handgun in connection with an armed robbery). For a discussion regarding documentation that may be used by DHS to prove that a crime involves moral turpitude, *see* Crimes Involving Moral Turpitude, *infra* at 3-3.

[90] *See* Rosales-Pineda v. Gonzales, 452 F.3d 627, 631-32 (7th Cir. Jun. 19, 2006) (relying on 8 C.F.R. § 1003.41(d) to find that a rap sheet could be used where there was sufficient evidence to link the

consequences.

Note: Police reports and the record of conviction.
Police reports should not be admitted into the criminal court record. In some areas, police reports are routinely attached to complaints or "informations" that are filed with the criminal court. Often defendants will be asked to stipulate to the admission of facts in police reports which are then entered into the court record.

Once police reports are admitted into the criminal court record, they can be used by the DHS in immigration proceedings to establish facts supporting deportability or inadmissibility, such as the relationship of a victim to an offender for an assault conviction which has been pled down from domestic battery to an assault.[91] Although it is advantageous for defense counsel to obtain a copy of the police report that may be attached to a criminal complaint or information, defense counsel should move to strike the police report from the state court record.[92]

Definition of "Conviction" and State Law

Where a formal judgment of guilt has been entered by a court as a result of a guilty plea or trial, it is clear that a non-citizen has a conviction for immigration purposes. However, where adjudication of guilt has been withheld, prongs (i) and (ii) of the definition must be carefully reviewed to determine whether the particular disposition meets the immigration definition of conviction. Prong (i) requires that: 1. a court find a non-citizen guilty; or 2. a non-citizen enter a plea of guilty, enter a plea of *nolo contendere*, or admit sufficient facts to warrant a finding of guilt.[93] Prong (ii) has been broadly defined. The Board of Immigration Appeals has defined the terms "punishment, penalty, or restraint on liberty" to include "incarceration, probation, a fine or restitution, a rehabilitation program, a work-release or study-release program, revocation or suspension of a driver's license,

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information regarding the offense to the non-citizen as evidence of a conviction to bar discretionary relief of adjustment of status and waivers under I.N.A. § 212(h), (i), 8 U.S.C. § 1182(h), (i) and stating that rap sheets may not always constitute sufficient evidence; also finding that because the non-citizen conceded deportability based on his two prior theft convictions, the Court of Appeals did not need to determine whether the rap sheet constituted clear and convincing evidence of a criminal conviction for a drug offense as required under I.N.A. § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B)).

[91] *See In re* Sanudo, 23 I&N Dec. 968 (BIA Aug. 1, 2006) (where narrative of police report not incorporated into the charging document or plea, it could not be considered in determining if noncitizen convicted of aggravated felony).

[92] *See* Flores v. Ashcroft, 350 F.3d 666, 671 (7th Cir. Nov. 26, 2003) (finding that the "domestic partner" element of the ground of deportability may be proved without regard to the elements of the state crime and finding that the police reports established that the battery victim was the non-citizen's wife); *cf.* Tokatly v. Ashcroft, 371 F.3d 613, 622-24 (9th Cir. Jun. 10, 2004) (rejecting the Seventh Circuit's analysis in Flores v. Ashcroft, 350 F.3d 666 (7th Cir. Nov. 26, 2003) and holding that to determine the "domestic" requirement of the conviction to establish deportability, the Immigration Judge cannot look at the facts behind the conviction other than the record of conviction as allowed by the modified categorical approach or to consider testimony of a non-citizen before the Immigration Judge); *see also In re* Babaisakov, 24 I. & N. Dec. 306 (BIA Sept. 28, 2007).

[93] *See* I.N.A. § 101(a)(48)(A)(i), 8 U.S.C. § 1101(a)(48)(A)(i).

deprivation of nonessential activities or privileges, or community service."[94] Costs, surcharges and other assessments, which constitute a "penalty" or "punishment" within the criminal proceedings, are sufficient to meet the "punishment or penalty" prong of the immigration definition of conviction.[95]

Definition of a Conviction
I.N.A. § 101(a)(48), 8 U.S.C. § 1101(a)(48)[96]

(A) 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.

(B) Any reference to a **term of imprisonment** of a sentence with respect to an offense **is deemed to include 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.

Illinois and Indiana law generally require that a defendant enter a plea of guilty, guilty but mentally ill, or not guilty at the arraignment.[97] Similarly, Wisconsin law requires a plea of not guilty, guilty, nolo contendere (no contest), or not guilty by reason of mental disease or defect.[98]

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[94] *See In re* Ozkok, 19 I&N Dec. 546, 551 (BIA Apr. 26, 1988); *see also*, Molina v. I.N.S., 981 F.2d 14, 18 (1st Cir. Dec. 4, 1992) (sustaining the INS interpretation of "conviction" to include probation ordered by a judge in a deferred adjudication).

[95] *See In re* Cabrera, 24 I&N Dec. 459 (BIA Feb. 27, 2008).

[96] [Emphasis in bold and italics added by the author.]

[97] *See* 725 ILCS 5/113-4(a); 725 ILCS 5/113-4.1 (allowing plea of nolo contendere in addition to a plea of guilty or not guilty for a violation of the Illinois Income Tax Act); 720 ILCS 570/410 (requiring a guilty plea or a finding of guilt without entry of a judgment before placing a defendant on first offender probation for a controlled substance violation); 720 ILCS 550/10 (first offender probation for a cannabis violation); IC 35-35-1-1; IC 35-35-2-1; IC 35-48-4-12 (first offender probation for controlled substances).

[98] *See* Wis. Stat. § 971.06; Wis. Stat. § 961.47 (first offender probation for controlled substance and marijuana).

The Board of Immigration Appeals has interpreted the statutory definition of "conviction" to mean that no effect is to be given in immigration proceedings to a 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 statute.[99] The Seventh Circuit Court of Appeals affirmed the Board's interpretation and held that a state disposition for first offender probation for a controlled substance offense constituted a conviction for immigration purposes, even though it was not a conviction under Illinois law as the charge was dismissed upon completion of probation.[100]

Thus, in a proceeding where a defendant has pled guilty or a finding of guilt has been made but a judgment of guilt has not been entered and the defendant successfully completes probation, the plea will be discharged and dismissed, with the result that he will not have a conviction under state law.[101] For a non-citizen defendant, however, where a judgment of guilt has not been entered but both prongs (i) and (ii) of the immigration definition of conviction have been met, a non-citizen will have a conviction for immigration purposes even though he does not have a conviction under state law.[102] An Alford plea will be treated as a guilty plea or admission of sufficient facts to fit the immigration definition of conviction because an Alford plea in essence means that the non-citizen maintains his innocence but admits that he could be found guilty of the alleged crime.[103] Where a general court-martial of the U.S. Armed Forces has entered a judgment of guilt against a non-citizen, the non-citizen will have a conviction for immigration purposes.[104]

An exception to a conviction for immigration purposes may exist for violations under county or municipal ordinances. For example, where a non-citizen has been found guilty of

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[99] *See In re* Roldan, 22 I&N Dec. 512 (BIA Mar. 3, 1999) (overruling *In re* Luviano, 21 I&N Dec. 235 (BIA Feb. 29, 1996); *In re* Ibarra-Obando, 12 I&N Dec. 576 (A.G. Dec. 28, 1967); *In re* G-, 9 I&N Dec. 159 (A.G. Jan. 17, 1961)). Juvenile dispositions of delinquency are generally not considered convictions for immigration purposes. *See* Juveniles and Immigration Consequences, *infra* at 5-1; *In re* Devison 22 I&N Dec. 1362 (BIA Sept. 12, 2000, Jan. 18, 2001); *In re* De La Nues, 18 I&N Dec. 140 (BIA Oct. 5, 1981); *In re* Ramirez-Rivero, 18 I&N Dec. 135 (BIA Oct. 5, 1981); 22 C.F.R. § 40.21(a)(2) (1998).

[100] *See* Gill v. Ashcroft, 335 F.3d 574 (7th Cir. Jul. 8, 2003) (finding that an Illinois disposition under 270 ILCS 470/410 which was dismissed pursuant to the state rehabilitative statutory scheme, and not because of any procedural or substantive defect in the conviction, remained a conviction for immigration purposes); *see also*, Ramos v. Gonzales, 414 F.3d 800, 803-6 (7th Cir. Jul. 12, 2005) (holding that a *nunc pro tunc* order of expungement did not eliminate a conviction for controlled substance offense for immigration purposes, even where the state court indicated in its order that the expungement was not being granted based on rehabilitative efforts of the non-citizen).

[101] *See* 730 ILCS 5/5-6-1(c); 730 ILCS 5/5-6-3.1(f); *see also*, 720 ILCS 570/410; 720 ILCS 550/10; IC 35-48-4-12; Wis. Stat. § 961.47.

[102] *See In re* Roldan, 22 I&N Dec. 512 (BIA Mar. 3, 1999); *In re* Punu, 22 I&N Dec. 224 (BIA Aug. 18, 1998).

[103] *See* North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160 (Nov. 23, 1970) (holding that a defendant may plead guilty while continuing to proclaim his innocence if he intelligently concludes that his innocence requires the entry of a guilty plea and the record before the judge contains strong evidence of actual guilt); People v. Church, 778 N.E.2d 251, 256 (Ill.App.3d Oct. 2, 2002) (finding that an Alford plea as understood in federal criminal practice is not available to a criminal defendant in Illinois other than in cases involving violation of the Illinois Income Tax Act, but holding that the criminal plea was properly accepted as a guilty plea).

[104] *See In re Rivera-Valencia*, 24 I&N Dec. 484 (BIA Apr. 2, 2008).

a "violation" under state law in which the state need only prove guilt by "a preponderance of the evidence instead of 'beyond a reasonable doubt,'" he is not entitled to a jury trial and need not be provided an attorney at no expense, he has not been "convicted" for purposes of immigration law.[105] Where a petty offense does not carry the right to a jury trial and if no term of imprisonment will or may be imposed, then a defendant does not have the right to appointed counsel in the proceedings.[106]

Note: Where a non-citizen has been charged with a local ordinance violation, review the ordinance in effect and other applicable ordinances and law to determine whether:

1. The state must prove guilt beyond a reasonable doubt;
2. The non-citizen is entitled to a jury trial; and
3. The non-citizen has a right to an attorney to represent him at no expense.

If the answer to all of the above questions is "yes", then he will have a "conviction" for immigration purposes.

In addition, court orders granting post-conviction motions based on statutory and/or constitutional defects in the underlying criminal court proceedings have been deemed effective to eliminate the grounds of inadmissibility and deportability.[107] However, where

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[105] *See In re* Eslamizar, 23 I&N Dec. 684, 687-688 (BIA Oct. 19, 2004) (citing case law that each element of an offense or crime must be proved beyond a reasonable doubt). *See* e.g., Lewis v. U.S., 518 U.S. 322 (Jun. 24, 1996); Scott v. Illinois, 440 U.S. 367 (Mar. 5, 1979).

[106] *See e.g.*, Lewis v. U.S., 518 U.S. 322 (Jun. 24, 1996); Scott v. Illinois, 440 U.S. 367 (Mar. 5, 1979).

[107] *See* Sandoval v. I.N.S., 240 F.3d 577, 580 (7th Cir. Feb. 12, 2001); *In re* Adamiak, 23 I&N Dec. 878 (BIA Feb. 8, 2006) (holding that a motion to vacate a conviction granted based on the failure of the state court to advise a non-citizen defendant of the possible immigration consequences of a guilty plea as required by Ohio statute was valid for immigration purposes). *See also*, Segura v. State, 749 N.E.2d 496 (Ind. Jun. 26, 2001) (holding that the failure of defense counsel to advise a defendant that deportation may follow as a consequence of a conviction may constitute deficient performance sufficient to support a claim of ineffective assistance of counsel under the Indiana Constitution and the Sixth Amendment to the U.S. Constitution and listing out the factors to be considered, including counsel's knowledge of defendant's status as an alien, defendant's familiarity with the consequences of conviction, severity of criminal penal consequences, and the likely subsequent effects of deportation); Sial v. State, 862 N.E.2d 702 (Ind. Ct. App. Mar. 28, 2007); Williams v. State, 641 N.E.2d 44, 49 (Ind. Ct. App. Oct. 11, 1994) (holding that the failure to advise a non-citizen defendant about the deportation consequences of a guilty plea constitutes ineffective assistance of counsel); People v. Correa, 108 Ill. 2d 541 (Sept. 20, 1985) (granting motion for post-conviction relief based on affirmative misadvice by defense counsel which was found to be ineffective assistance of counsel); 725 ILCS 5/113-8 (guilty plea advisal for IL); Wis. Stat. 971.08(1)-(2); State v. Dawson, 2004 WI App. 173 (Wis.App. Aug. 19, 2004) (holding that a trial court does not have authority to "reopen and amend" a prior conviction); State v. Lagundoye, 268 Wis.2d 77, 674 N.W.2d 526 (Wis. Jan. 30, 2004) (holding the rule announced in State v. Douangmala, 253 Wis.2d 173, 646 N.W.2d 1 (Wis. Jun. 19, 2002), finding that the harmless error rule in Wis. Stat. § 971.26 did not apply to Wis. Stat. § 971.08(1)(c) and Wis. Stat. § 971.08(2), does not apply retroactively to a non-citizen defendant who had exhausted his direct appeal rights prior to the date of the Doungmala decision); State v. Douangmala, 253 Wis.2d 173, 646 N.W.2d 1 (Wis. Jun. 19, 2002) (overruling the harmless error requirement announced in State v. Chavez, 175 Wis.2d 366, 498 N.W.2d 887 (Wis.Ct.App. Mar. 16, 1993) for motions to withdraw pleas where the requisite pre-plea advisal under Wis. Stat. § 971.08(1)(c) was not given by the state court); State v. Chavez, 175 Wis.2d 366, 498 N.W.2d 887 (Wis.Ct.App. Mar. 16, 1993) (holding that a non-citizen defendant had to demonstrate the absence of

post-conviction relief has been granted by a state court solely to eliminate the immigration consequences of a conviction without an underlying statutory or constitutional defect, the state court order has not been given full faith and credit for purposes of federal immigration law, which deems the non-citizen as convicted of the offense vacated by the state court.[108]

Non-Citizen Pleas and Sentencing Dispositions: Are They Considered Convictions under Immigration Law?

Type of Plea, Admission, or Finding **(*Dispositions that only apply to particular states are noted)**	**Guilty Plea, Admission of Facts, or Finding Of Guilt**	**+ Punishment, Penalty or Restraint on Liberty[109]**	**= Immigration Conviction?**
Guilty plea with a sentence of probation	Yes	Yes	Yes
Guilty plea with a sentence of conditional discharge	Yes	Yes	Yes
Guilty plea with a sentence of supervision (Illinois)	Yes	Yes	Yes
Guilty plea with a sentence of a term of imprisonment	Yes	Yes	Yes
Guilty but mentally ill plea with a sentence of probation	Yes	Yes	Yes
Guilty but mentally ill plea with a sentence of conditional discharge	Yes	Yes	Yes
Guilty but mentally ill plea with a sentence of supervision (Illinois)	Yes	Yes	Yes

the advisal by the state court, the likelihood of immigration consequences, and the fact that he was actually unaware of the immigration consequences of his plea); State v. Issa, 186 Wis.2d 199, 519 N.W.2d 741 (Wis. Ct. App. Jun. 28, 1994) (holding that the presence of immigration consequences in a plea questionnaire alone is not sufficient to show that a defendant was aware of the immigration consequences if the non-citizen defendant did not speak English); State v. Chavez, 175 Wis.2d 366, 498 N.W.2d 887 (Wis. Ct. App. Mar. 16, 1993) (holding that a non-citizen defendant must demonstrate that he was unaware of the risk of deportation based on his plea under the harmless error rule).

[108] *See* Ali v. Ashcroft, 395 F.3d 722 (7th Cir. Jan. 11, 2005) (finding that where a Wisconsin conviction for drug trafficking was vacated solely for immigration purposes, the non-citizen remained convicted of drug trafficking for immigration purposes); *In re* Pickering, 23 I&N Dec. 621 (BIA Jun. 11, 2003).

[109] The form of punishment, penalty or restraint on liberty must be ordered by a judge. A "penalty" includes fines and court costs. "Restraint on liberty" includes supervision, probation and any term of imprisonment.

Non-Citizen Pleas and Sentencing Dispositions: Are They Considered Convictions under Immigration Law?			
Type of Plea, Admission, or Finding **(*Dispositions that only apply to particular states are noted)**	**Guilty Plea, Admission of Facts, or Finding Of Guilt**	**+ Punishment, Penalty or Restraint on Liberty[109]**	**= Immigration Conviction?**
Guilty but mentally ill plea with a sentence to a term of imprisonment	Yes	Yes	Yes
Not guilty by reason of insanity	No	No	No
Finding of not guilty by a jury or court	No	No	No
Nolo contendere (no contest) with a sentence of probation (Wisconsin)	Yes	Yes	Yes
Nolo contendere with a sentence of a term of imprisonment (Wisconsin)	Yes	Yes	Yes
Stipulation to Facts with a sentence of probation	Yes	Yes	Yes
Stipulation to facts with a sentence of conditional discharge	Yes	Yes	Yes
Stipulation to facts with a sentence of supervision (Illinois)	Yes	Yes	Yes
Stipulation to facts with a sentence to a term of imprisonment	Yes	Yes	Yes
Finding of guilt with a sentence of probation	Yes	Yes	Yes
Finding of guilt with a sentence of conditional discharge	Yes	Yes	Yes
Finding of guilt with a sentence of supervision (Illinois)	Yes	Yes	Yes
Finding of guilty with a sentence to a term of imprisonment	Yes	Yes	Yes

Non-Citizen Pleas and Sentencing Dispositions: Are They Considered Convictions under Immigration Law?			
Type of Plea, Admission, or Finding **(*Dispositions that only apply to particular states are noted)**	**Guilty Plea, Admission of Facts, or Finding Of Guilt**	**+ Punishment, Penalty or Restraint on Liberty[109]**	**= Immigration Conviction?**
Finding of guilt but mentally ill plea with a sentence of probation	Yes	Yes	Yes
Finding of guilt but mentally ill plea with a sentence of conditional discharge	Yes	Yes	Yes
Finding of guilt but mentally ill plea with a sentence of supervision (Illinois)	Yes	Yes	Yes
Finding of guilty but mentally ill plea with a sentence to a term of imprisonment	Yes	Yes	Yes
Nolo contendere plea (violations of Illinois Income Tax Act, 725 ILCS 5/113-4.1)	Yes (taken as guilty plea)	Yes	Yes
Alford plea with probation or a term of imprisonment	Yes (taken as guilty plea)	Yes	Yes
Guilty Plea OR Finding of Guilt with a sentence of first offender probation for a controlled substance offense pursuant to 720 ILCS 570/410 or Wis. Stat. § 961.47	Yes	Yes	Yes
Guilty Plea OR Finding of Guilt with a sentence of first offender probation for possession of marijuana pursuant to 720 ILCS 550/10, IC 35-48-4-12, or Wis. Stat. § 961.47	Yes	Yes	Yes
Case is pending and no plea has been entered	No	No	No

Non-Citizen Pleas and Sentencing Dispositions: Are They Considered Convictions under Immigration Law?			
Type of Plea, Admission, or Finding **(*Dispositions that only apply to particular states are noted)**	**Guilty Plea, Admission of Facts, or Finding Of Guilt**	**+ Punishment, Penalty or Restraint on Liberty[109]**	**= Immigration Conviction?**
Withdrawal of a guilty plea, an Alford plea, or a plea of nolo contendere within the statutorily permitted period	No	No	No
Pre-trial diversion for a misdemeanor offense other than a DUI or motor vehicle offense. IC 33-39-1-8. (Indiana)	No	Yes	No
Deferred prosecution with plea of guilty or no contest and conditions for a specified period (Wisconsin)	Yes	Yes	Yes

Impact of the Immigration Definition of "Conviction" on State Dispositions

If a defendant is charged with a crime other than a Class A misdemeanor or a felony, an Illinois circuit court may defer proceedings and enter an order for supervision of the defendant upon a plea of guilty or a stipulation by the defendant to facts supporting the charge or a finding of guilt.[110] A disposition of supervision under Illinois statute meets the definition of conviction for immigration purposes because the non-citizen enters a plea of guilty (or stipulates to facts supporting the charge or a finding of guilt) and a judge has imposed a period of supervision. Likewise, where a plea of guilty, a stipulation by the defendant to the facts supporting the charge, or a finding of guilt has been entered and a sentence of probation or conditional discharge has been imposed, a non-citizen will have a conviction for immigration purposes.[111]

In Indiana, pre-trial diversion may be a viable alternative for non-citizens charged with certain misdemeanor offenses. Pre-trial diversion does not involve or require an admission of guilt, admission of the elements or facts of the offense, or adjudication of

[110] *See* 730 ILCS 5/5-6-1(c).
[111] *See* 730 ILCS 5/5-6-1(a)-(b); Wis. Stat. § 973.09; IC 35-38-2-1; IC 35-38-2-1.8; IC 35-38-2-2.3; IC 35-38-2-3.

guilt.[112] Rather, the defendant agrees to the conditions of a pretrial diversion program offered by the prosecutor and signs an agreement with the prosecutor, which is then filed with the state court.[113] Prosecution of the defendant is withheld and, if the non-citizen completes the agreement, then the charge is dismissed.[114]

A deferred prosecution agreement under Wisconsin law may constitute a conviction under I.N.A. §101(a)(48)(A), 8 U.S.C. §1101(a)(48)(A). For a non-citizen to be placed into a volunteer probation program, he must plead guilty or nolo contendere to the charge and will be subject to conditions imposed by the court while the sentence or judgment of conviction is withheld.[115] Similar requirements exist for other deferred prosecution programs.[116] The requirements for each county's program must be evaluated against the immigration definition of a conviction.

In addition, state first offender probation for controlled substance offenses will also result in a conviction for immigration purposes. For example, in order to qualify for 410 first offender probation in Illinois, a plea of guilty or a finding of guilt is required before the court places the defendant on probation.[117] When a defendant successfully completes 410 probation, the court discharges him and dismisses the criminal proceedings; thus, a defendant will not have a conviction under Illinois law.[118] Wisconsin has a similar first offender provision known as conditional discharge for possession of a controlled substance as a first offense.[119] However, both the Illinois and Wisconsin statutes are considered to be rehabilitative statutes and a non-citizen defendant who is placed on first offender probation will have a conviction for immigration purposes.[120] Similarly, a non-citizen defendant who receives first offender probation for a cannabis violation under 720 ILCS 550/10, IC 35-48-4-12, or Wis. Stat. § 961.47 will have a conviction for immigration purposes.[121] Indiana does not have a first offender provision for controlled substance offenses other than marijuana.[122]

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[112] *See* IC 33-39-1-8.
[113] *See id.*
[114] *See id.*
[115] *See* Wis. Stat. § 973.11.
[116] *See* Wis. Stat. § 971.37; Wis. Stat. § 971.38; Wis. Stat. § 971.39.
[117] *See* 720 ILCS 570/410(a); *see also*, 720 ILCS 550/10 (possession of cannabis); IC 35-48-4-12 (possession of cannabis); Wis. Stat. § 961.47 (possession of cannabis and other controlled substances).
[118] *See* 720 ILCS 570/410(f)-(g).
[119] *See* Wis. Stat. § 961.47 (requiring a plea or finding of guilty to defer proceedings and place an offender on probation; upon completion of the probationary period, the court shall discharge the offender and dismiss the charge).
[120] *See In re* Roldan, 22 I&N Dec. 512 (BIA Mar. 3, 1999); Gill v. Ashcroft, 335 F.3d 574 (7th Cir. Jul. 8, 2003) (holding that a first offender probation under 720 ILCS 570/410 is a conviction for immigration purposes)..
[121] *See* 720 ILCS 550/10; I.N.A. § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (grounds of deportability and an exception for simple possession of 30 grams or less of marijuana); I.N.A. § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II); I.N.A. § 212(h), 8 U.S.C. § 1182(h) (grounds of inadmissibility and a limited waiver for simple possession of 30 grams or less of marijuana).
[122] Whether a disposition for first offender status under the Federal First Offender Act (FFOA) in federal district court constitutes a conviction for immigration purposes has not been decided by the Seventh Circuit or the BIA. *See In re* Roldan, 22 I&N Dec. 512 (BIA Mar. 3, 1999). The Seventh Circuit has, however, indicated that a disposition under the FFOA may still count as a conviction for

Contrary to the immigration consequences for dispositions under the first offender probation provisions of state law, an order to complete "drug school" should not result in a conviction for immigration purposes as long as a non-citizen does not enter a guilty plea, nolo contendre plea, or admit to facts regarding the offense before the court. Some localities also have "drug courts", including 23 such county court programs in Illinois[123] and 28 drug courts in Indiana.[124] Each county or local program's requirements must be compared to the immigration definition of conviction under I.N.A. §101(a)(48)(A), 8 U.S.C. §1101(a)(48)(A) to determine whether a non-citizen will be deemed to have a "conviction" for immigration purposes.[125]

Sentencing under State Law

Immigration consequences may differ for state convictions depending upon whether an indeterminate or a determinate sentencing scheme was in effect at the time of sentencing.[126] In *In re S-S-*,[127] the Board of Immigration Appeals interpreted I.N.A. § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48), by clarifying that a criminal sentence includes a suspended sentence. The Board applied the new definition and held that a suspended sentence for an indeterminate term not to exceed five years under an Iowa statute was a five year sentence.[128] The sentencing scheme in this case was an indeterminate sentencing scheme.[129]

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immigration purposes. *See* Gill v. Ashcroft, 335 F.3d 574, 578-79 (7th Cir. Jul. 8, 2003); Ramos v. Gonzales, 414 F.3d 800, 806 (7th Cir. Jul. 12, 2005). The Ninth Circuit Court of Appeals has ruled that a disposition under the FFOA and state equivalents of the FFOA are not convictions under I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A). *See* Lujan-Armendarez v. I.N.S., 222 F.3d 728 (9th Cir. Aug. 1, 2000).

[123] *See, e.g.*, Tona Kunz, "Drug court comes out from under the veil," *Daily Herald*, May 14, 2007 (describing the drug court system in Kane County, Illinois); Illinois Association of Drug Court Professionals, www.iadcp.org/Courts.asp, listing drug courts and their contact information in the Illinois counties of Champaign, Coles, Cook (adult and juvenile), Dekalb, DuPage, Effingham, Grundy, Jersey, Kane (adult and juvenile), Kankakee, Knox, Lake, Lee, Macon, Madison, Mclean, Morgan, Peoria (adult and juvenile), Pike, Rock Island, Saline, St. Clair, Vermilion, Will (adult and juvenile), and Winnebago.

[124] *See* Indiana Judicial Center, "Drug Court Background," available at http://www.in.gov/judiciary/pscourts/drugcourts/background.html.

[125] *See* Definition of Conviction, *supra* at 2-3.

[126] In an indeterminate sentencing scheme, the state court imposes a sentence by ordering that the defendant be committed to the Department of Corrections or a similar agency for an indeterminate period, i.e. zero to five years. The Department of Corrections then determines the length of the sentence that the defendant will serve. In a determinate sentencing scheme, the state court will follow the sentencing guidelines mandated by the legislature and established by the sentencing commission to impose a sentence of a specific period of time. The state court has the discretion to depart durationally and/or dispositionally from the guidelines based on aggravating or mitigating factors but will impose a determinate sentence, i.e. two years.

[127] *See In re* S-S-, 21 I&N Dec. 900 (BIA May 6, 1997).

[128] *See id.* at 5; *see also*, *In re* D-, 20 I&N Dec. 827 (BIA Jun. 24, 1994).

[129] *See id.*

Wisconsin uses both determinate and indeterminate sentencing.[130] Illinois convictions entered prior to 1978 were sentenced under an indeterminate sentencing scheme.[131] Therefore, the Board's decision in *In re S-S-*, *supra*, will apply to Wisconsin convictions for which indeterminate sentences are imposed and Illinois convictions entered prior to the 1978.

Indiana uses determinate sentencing.[132] Since 1978, Illinois has had a determinate sentencing scheme.[133] Under the present sentencing provisions, a state circuit court shall place a defendant on probation or conditional discharge unless the court determines that imprisonment or periodic imprisonment is necessary to protect the public, probation or conditional discharge would deprecate the seriousness of the conduct and be inconsistent with the ends of justice, or such action is specifically prohibited by statute.[134]

Where the circuit court does not impose a term of imprisonment, the court reserves the right to later impose or pronounce a term of imprisonment should the defendant violate the terms of probation, including a sentence to the statutory maximum.[135] If a court determines that the defendant has violated a condition of probation, conditional discharge,

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[130] *See* Wis. Stat. § 973.01 (bifurcated sentence of imprisonment and extended supervision); Wis. Stat. § 973.013 (indeterminate sentence); Wis. Stat. § 973.03 (determinate jail sentence).

[131] *See* The Unified Code of Corrections, Pub. Act No. 77-2097, 192 Ill. Laws 758-838 (codified at Ill. Rev. Stat. Ch. 38 §§ 1001-1-1 to 1008-6-1 (1973); Criminal Code of 1961, 1961 Ill. Laws 1983-2049 (codified at Ill. Rev. Stat. Ch. 38 §§ 1-1 to 35-1 (1961); H.B. 103, 62d Ill. Gen. Assem., 1st Sess., 1941 Ill. Laws. 560 (amending Ill. Rev. Stat. Ch. 38 § 802 (1941)); Sentence, Commitment, and Parole Act of 1917, H.B. 1029, 1917 Ill. Laws. 353; Ill. Rev. Stat. Ch. 38 § 498(1) (1920); 1895 Ill. Laws 158 (codified at Ill. Rev. Stat. Ch. 38 §§ 498-509 (1895)). For additional history about indeterminate sentencing in Illinois in the 1800s, *see* Gregory W. O'Reilly, "Truth-in-Sentencing: Illinois Adds Yet Another Layer of "Reform" to Its Complicated Code of Corrections," *27 Loy. U. Chi. L.J.* 985, 989-990 (Summ. 1996).

[132] *See* IC 35-50-1-1.

[133] *See* Pub. Act No. 80-1099, 1977 Ill. Laws 3264-3368 (codified as amended in different sections of Ill. Rev. Stat. Ch. 38 (1979)); 730 ILCS 5/5-8-1; 730 ILCS 5/5-8-3. For a discussion about amendments to sentencing laws subsequent to 1978, *see* Gregory W. O'Reilly, "Truth-in-Sentencing: Illinois Adds Yet Another Layer of "Reform" to Its Complicated Code of Corrections," *27 Loy. U. Chi. L.J.* 985, 993-1023 (Summ. 1996).

[134] *See* 730 ILCS 5/5-6-1(a). Periodic imprisonment is an alternative to a traditional term of imprisonment and can consist of 48 hour periods of custody on weekends or during the week. *See* 730 ILCS 5/5-3(b)(2).

[135] *See* 730 ILCS 5/5-6-4(e); 730 ILCS 5/5-5-3(b); 730 ILCS 5/5-6-4.1. It is important to note that the term "sentence" has a different meaning under Illinois law than it does under the Immigration and Nationality Act. For example, a sentence is defined under 730 ILCS 5/5-1-20 as "the disposition imposed by the court on a convicted defendant." Under 730 ILCS 5/5-5-3(b), a disposition may include a period of probation, a term of periodic imprisonment, a term of conditional discharge, a term of imprisonment, a fine, an order for restitution, a sentence of participation in "boot camp," or an order to clean up and repair damage. A period of probation is thus defined as a disposition and a sentence under Illinois statute. However, a term of imprisonment of sentence has been defined by the Board of Immigration Appeals as a term of imprisonment which has been imposed upon a defendant. *See In re* S-S-, 21 I&N Dec. 900 (BIA May 6, 1997). Therefore, a sentence of probation for one year where a term of imprisonment has not been imposed will not be deemed to be a sentence of one year for purposes of immigration law relating to the definition of aggravated felony or grounds of inadmissibility. *See* Aggravated Felonies and case law, *infra* at 3-34; Grounds of Inadmissibility, *infra* at 4-1.

or supervision, the court can continue the existing order or impose any other sentence that was available at the time of the initial sentencing under 730 ILCS 5/5-5-3.[136]

Where a defendant has been convicted of a felony or a misdemeanor offense, is an alien as defined by the Immigration and Nationality Act, and has a final order of deportation entered against him, a circuit court may hold the sentence in abeyance upon motion of the State's Attorney and remand the defendant to the custody of the U.S. Attorney General for deportation where his deportation would not deprecate the seriousness of the conduct nor be inconsistent with the ends of justice.[137] Similarly, where a defendant sentenced for a felony, a misdemeanor, or 410 probation for a controlled substance offense, the circuit court may, upon motion by the State's Attorney to suspend the sentence imposed, commit the defendant to the custody of the U.S. Attorney General for deportation.[138] If the non-citizen returns to the U.S. after being deported, the circuit court may impose any sentence that was available under 730 ILCS 5/5-5-3 at the time of the initial sentencing.[139]

Boot Camp and Non-Citizens

An Illinois state court may sentence a defendant to the "impact incarceration program," an alternative to prison which is based on the concept of a military basic training program or "boot camp."[140] Wisconsin has a similar program called the "challenge incarceration program".[141] Indiana does not have a boot camp program.

In order to recommend that a defendant be placed in boot camp, the Illinois state court must first impose a definite term of imprisonment. A sentence to "boot camp" is not, however, a viable option for non-citizen defendants. Once a non-citizen defendant is transferred to the Illinois Department of Corrections' booking center in Joliet, Illinois, or reports to serve his sentence at the booking center, the Illinois Department of Corrections will screen him for placement in the program.[142] Part of the process includes a review of a prisoner's place of birth and immigration status where he is not a U.S. citizen; if he is not a U.S. citizen, then contact with the DHS will be made, if a detainer has not already been placed on him. At that point, the Illinois Department of Corrections may consider additional factors beyond those listed in the statute, such as whether there is a DHS detainer or other outstanding warrant against the non-citizen.[143]

Once the DHS has placed a detainer on the non-citizen, he will be deemed ineligible by the Illinois Department of Corrections to participate in boot camp and will be subject to serve the entire term of imprisonment or sentence as imposed upon him by the sentencing

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[136] *See* 730 ILCS 5/5-5-3.
[137] *See* 730 ILCS 5/5-5-3(l)(A).
[138] *See* 730 ILCS 5/5-5-3(l)(B).
[139] *See* 730 ILCS 5/5-5-3(l)(D).
[140] *See* 730 ILCS 5/5-8-1.
[141] *See* Wis. Stat. § 302.045.
[142] *See* Ill. ADMIN. CODE § 460.30(a).
[143] *See* 730 ILCS 5/5-8-1.1(b)(2); *see also* Solorzano-Patlan v. INS, 207 F.3d 869, 871 & n.4 (7th Cir. Mar. 10, 2000) (noting that the Illinois Department of Corrections has rejected non-citizen offenders recommended for boot camp by the sentencing court).

court. The term of imprisonment considered for immigration purposes is the entire term of imprisonment initially ordered, not the boot camp period ordered. This sentence to a term of imprisonment may also have dramatic immigration consequences because the conviction may be found to be an aggravated felony based on the length of the sentence.[144]

Thus, it is not in the interest of a non-citizen to agree to accept a sentence to boot camp when he will not be eligible to participate in it once he arrives at the Department of Corrections facility. In addition, counsel may face an ineffective assistance of counsel claim by his non-citizen client in a post-conviction petition to vacate a guilty plea with severe immigration consequences.

Classification and Sentencing Ranges for State Offenses

Classification of Offense	Possible Term of Imprisonment	Fines	Probation/ Conditional Discharge
ILLINOIS			
FELONY	730 ILCS 5/5-8-1(a)(1)-(7)	730 ILCS 5/5-9-1(a)(1)	730 ILCS 5/5-6-2(b)(1)-(2)
First degree murder	Not less than 20 years and not more than 60 years.	$25,000 or the amount specified in the offense, whichever is greater. Where the offender is a corporation, $50,000 or the amount specified in the offense, whichever is greater.	Not available.
Second degree murder	Not less than 4 years and not more than 20 years.	Same as above.	Not available.
Class X	Not less than 6 years and not more than 30 years.	Same as above.	Not available.
Class 1 (other than second degree murder)	Not less than 4 years and not more than 15 years.	Same as above.	Probation or conditional discharge not to exceed 4 years.
Class 2	Not less than 3 years and not more than 7 years.	Same as above.	Probation or conditional discharge not to exceed 4 years.
Class 3	Not less than 2 years and not more than 5 years.	Same as above.	Probation or conditional discharge not to exceed 30 months.
Class 4	Not less than 1 year and not more than 3 years.	Same as above.	Probation or conditional discharge not to exceed 30 months.

[144] *See* Aggravated Felonies, *infra* at 3-34.

Classification of Offense	Possible Term of Imprisonment	Fines	Probation/ Conditional Discharge
MISDEMEANOR	730 ILCS 5/5-8-3(a)	730 ILCS 5/5-9-1(a)(1)-(3)	730 ILCS 5/5-6-2(b)(3)
Class A	Less than 1 year (364 days or less).	$2,500 or the amount specified in the offense, whichever is greater.	Not to exceed 2 years.
Class B	Not to exceed 6 months.	$1,500	Not to exceed 2 years.
Class C	Not to exceed 30 days.	$1,500	Not to exceed 2 years.
PETTY OFFENSE	N/A	730 ILCS 5/5-9-1(a)(4)	730 ILCS 5/5-6-1(b)(4)
Petty offense	None.	$1,000 or the amount specified in the offense, whichever is less.	Not to exceed 6 months.
INDIANA			
FELONY	IC 35-50-2-3, 4, 5, 6, 7	IC 35-50-2-3, 4, 5, 6, 7	IC 35-50-2-2(c)
Murder	Between 45 and 65 years. If 18 years of age or older, a person may be sentenced to life imprisonment.	Not more than $10,000.	Not available.
Class A	Between 20 and 50 years.	Not more than $10,000.	If the court suspends a sentence of imprisonment, it may place a person on probation for a period to end no later than the date that the maximum felony sentence will expire.
Class B	Between 6 and 20 years.	Not more than $10,000.	Same as above.
Class C	Between 2 and 8 years.	Not more than $10,000.	Same as above.
Class D	Between 6 months and 3 years.	Not more than $10,000.	Same as above.
MISDEMEANOR	IC 35-50-3-2, 3, 4	IC 35-50-3-2, 3, 4	IC 35-50-3-1
Class A	Not more than 1 year.	Not more than $5,000.	Not more than 1 year of probation, notwithstanding the maximum term of imprisonment for the misdemeanor.
Class B	Not more than 180 days.	Not more than $1,000.	Same as above.
Class C	Not more than 60 days.	Not more than $500.	Same as above.
INFRACTION	IC 34-28-5-4		
Class A	None.	Up to $10,000.	None.

Classification of Offense	Possible Term of Imprisonment	Fines	Probation/ Conditional Discharge
Class B	None.	Up to $1,000.	None.
Class C	None.	Up to $500	None.
Class D	None.	Up to $25	None.
WISCONSIN			
FELONY	Wis. Stat. 939.50	Wis. Stat. 939.50	Wis. Stat. 973.09
Class A	Life	None.	Probation depends on the violation and number of prior convictions.
Class B	Not to exceed 60 years.	None.	Same as above.
Class C	Not to exceed 40 years.	Not to exceed $100,000.	Same as above.
Class D	Not to exceed 25 years.	Not to exceed $100,000.	Same as above.
Class E	Not to exceed 15 years.	Not to exceed $50,000.	Same as above.
Class F	Not to exceed 12 years and 6 months.	Not to exceed $25,000.	Same as above.
Class G	Not to exceed 10 years.	Not to exceed $25,000.	Same as above.
Class H	Not to exceed 6 years.	Not to exceed $10,000.	Same as above.
Class I	Not to exceed 3 years and 6 months.	Not to exceed $10,000.	Same as above.
MISDEMEANOR	Wis. Stat. 939.51	Wis. Stat. 939.51	Wis. Stat. 973.09
Class A	Not to exceed 9 months.	Not to exceed $10,000.	Probation depends on the violation and number of prior convictions.
Class B	Not to exceed 90 days.	Not to exceed $1,000.	Same as above.
Class C	Not to exceed 30 days.	Not to exceed $500.	Same as above.
FORFEITURE	Wis. Stat. 939.52		
Class A	N/A	Not to exceed $10,000.	N/A
Class B	N/A	Not to exceed $1,000.	N/A
Class C	N/A	Not to exceed $500.	N/A
Class D	N/A	Not to exceed $200.	N/A
Class E	N/A	Not to exceed $25.	N/A

Sentencing Factors and Immigrants The following factors are areas for arguments which may support a motion for a sentencing departure for non-citizen defendants:	
Factors	**Arguments**
Nature of Charge	Pretext arrest/racial incident? Similar to act of self-defense? Post-traumatic stress disorder?
Degree of Aggravation of Offense	Post-traumatic stress disorder? Other mental or emotional issues?
Mitigating Factors regarding Defendant's Behavior	Post-traumatic stress disorder? Lack of understanding of U.S. laws? Lived in situation of anarchy? Lived in country without a functioning judicial system? Lack of understanding regarding the U.S. judicial system? Cultural differences/behavior sanctioned in the non-citizen's culture/country? Strong provocation by another?
Prior Conviction Record of Defendant	Juvenile record?
Personal Characteristics of Defendant	<u>Mental/psychological stability</u> Difficulties with adjustment to the U.S.? Post-traumatic stress disorder? Refugee? Living conditions prior to coming to U.S.? Tortured by governmental or other agent? Imprisoned in another country? Length of time and conditions? Possibility/Probability of persecution or torture in home country if deported? <u>Employment</u> Recently cut off welfare and/or food stamps? Possible effect on current employment? Sole provider for family? <u>Family ties</u> Married to U.S. citizen or immigrant? Ages of children, if any? Extended family in U.S.? Psychological impact on U.S. citizen/LPR spouse, children, or parents if defendant is deported? <u>Community Ties</u> Position within local ethnic community (i.e. clan leader, shaman, community leader)?

Sentencing Factors and Immigrants The following factors are areas for arguments which may support a motion for a sentencing departure for non-citizen defendants:	
Factors	**Arguments**
	Length of time in community? Volunteer in community, ethnic, religious, or educational organization(s)?
Treatment Needs and Desires of Defendant	Post-traumatic stress disorder? Chemical dependency treatment? Culturally appropriate treatment?
Economic Situation of Defendant	Number of persons supported by defendant? Current employment or possibility? Economic impact or excessive hardship on U.S. citizen/LPR spouse, children, or parents if defendant is deported? Economic impact or excessive hardship on U.S. citizen/LPR spouse, children, or parents if defendant is held in indefinite detention by the DHS as a result of the criminal conviction (in the case of a person who cannot be deported due to a lack of foreign diplomatic relations)?
Defendant's Attitude Toward Criminal Behavior	Acceptance of guilt? Reason for criminal act?
Victim's Attitude toward Defendant	Victim wants prosecution of defendant? Victim wants charges dropped? Victim was the primary aggressor? Victim's immigration status will be negatively impacted? Immigration status of victim's family members will be negatively impacted?
Immigration Status of Defendant	Status as a deportable alien and conditions of confinement?[145]

[145] For a discussion about whether cultural heritage and deportable status as a non-citizen can be considered under the U.S. Sentencing Guidelines, *see* U.S. v. Guzman, 236 F.3d 830 (7th Cir. Jan. 3, 2001) (holding that deportable status as a non-citizen can be considered where alienage results in a harsher sentence for a non-citizen than for a U.S. citizen and that cultural heritage cannot be

Sentencing Factors and Immigrants The following factors are areas for arguments which may support a motion for a sentencing departure for non-citizen defendants:	
Factors	**Arguments**
Dividing Lines Regarding Immigration Consequences	Aggravated felony Category v. sentence crimes For sentence crimes: 365 v. 364 days term of imprisonment Crimes Involving Moral Turpitude Possible maximum term of imprisonment Mandatory detention without bond Custody by the DHS under I.N.A. § 236(c), 8 U.S.C. § 1226(c)

Finality of a Conviction

Prior to the 1996 legislation, the Supreme Court held that a conviction must be final under state or federal court procedure in order to be a conviction for immigration purposes.[146] Generally, a conviction is not final until all direct appeals are exhausted; however, a conviction is final where a discretionary appeal has been taken. In light of the change in the definition of conviction under IIRAIRA, the issue of whether a judgment from which a timely direct appeal has been taken can be considered to be a final conviction for immigration purposes has not been directly addressed by the Board of Immigration Appeals.[147]

Whether a conviction is final for immigration purposes was discussed recently by the Board of Immigration Appeals. In a sharply divided *en banc* opinion, the majority held that a pending late-reinstated appeal of a conviction does not undermine the finality of the

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considered because it is the joinder of gender and national origin which are expressly forbidden considerations in sentencing); U.S. v. Farouil, 124 F.3d 838, 847 (7th Cir. Aug. 26, 1997) (holding that the federal district court could consider whether the non-citizen's status as a deportable alien has resulted in unusual or exceptional hardship in his conditions of confinement for purposes of the sentencing guidelines).

146 *See* Pino v. Landon, 349 U.S. 901 (Apr. 11, 1955) (*per curiam*). *See also*, Mansoori v. I.N.S., 32 F.3d 1020, 1024 (7th Cir. Aug. 8, 1994) (holding that a state conviction is final for immigration purposes where a direct appeal is not pending); Will v. I.N.S., 447 F.2d 529, 533 (7th Cir. Aug. 25, 1971); *In re* Thomas, 21 I&N Dec. 20 (BIA Apr. 28, 1995) (holding that direct appeal must be exhausted or waived for a conviction to be considered final for immigration purposes); *In re* Polanco, 20 I&N Dec. 894 (BIA Oct. 21, 1994) (holding that a conviction is final for immigration purposes where a non-citizen failed to timely file a direct appeal and did not show that his request for a nunc pro tunc appeal had been granted by the state appellate court).

147 *See In re* Roldan, 22 I&N Dec. 512, 526 (BIA Mar. 3, 1999); Montenegro v. Ashcroft, 355 F.3d 1035 (7th Cir. Jan. 22, 2004) (stating in dicta that a conviction need not be final under state law to constitute a conviction for immigration purposes).

conviction for immigration purposes.[148] It specifically noted the split among the circuit courts of appeals regarding finality of a conviction for immigration purposes.[149]

The Board specifically declined to address whether a direct appeal timely filed constitutes a final conviction for immigration purposes.[150] At this point, there are viable arguments that the following state dispositions should not be deemed "convictions" for immigration purposes: (1) a state conviction reversed on direct appeal on the merits; and (2) a state conviction reversed on direct appeal relating to a violation of a fundamental statutory or constitutional right in the underlying criminal proceedings (*not* as the result of the operation of a state rehabilitative statute).[151]

> **Note:** Where a non-citizen will likely plead guilty or lose at trial, efforts should be made to preserve the criminal record for use in the immigration proceedings. Defense counsel should review the majority, concurrences, and dissent opinions of *Cardenas Abreu* carefully, as well as the applicable state and circuit precedent, to raise and preserve all issues for judicial review regarding direct appeals of convictions and the applicable state procedures and rights of direct appeals. For an excellent summary of *Matter of Cardenas-Abreu* and strategies regarding the finality of a conviction for immigration purposes, see "Practice Advisory: Conviction Finality Requirement: The Impact of *Matter of Cardenas-Abreu*," Immigrant Defense Project, May 11, 2009, available at http://immigrantdefenseproject.org/webPages/deportation.htm.

Restorative Justice Programs

Several counties in Illinois have begun alternative sentencing/restorative justice programs.[152] For example, in one restorative justice program in central eastern Illinois, the offender meets with the victim and community members to work out an agreement; the offender does not attend a criminal court hearing or have a judgment of conviction entered against him unless he fails to abide by the terms of the agreement. A non-citizen who completes the program will not have a conviction for immigration purposes. Attorneys and community members are encouraged to develop and implement similar programs in their communities.[153]

In Wisconsin, the "Community Conferencing Program" is based upon the principles of restorative justice. The Milwaukee County District Attorney's Office runs the program which has held over 350 conferences between victims, the offenders, and affected

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[148] *In re* Cardenas Abreu, 24 I&N Dec. 795 (BIA May 4, 2009).
[149] *See id.* at 797, n. 3.
[150] *See id.* at 798-99.
[151] *See In re* Roldan, 22 I&N Dec. 512, 524 n.9 (BIA Mar. 3, 1999) (declining to decide the effect to be given a federal disposition under 18 U.S.C. § 3607 until that issue is directly presented to the BIA).
[152] The Illinois Balanced and Restorative Justice Initiative has information about restorative justice programs throughout Illinois with links to information for each program, available at http://www.ibarji.org/.
[153] For more information about developing restorative justice programs, *see* Illinois Balanced and Restorative Justice Initiative at http://www.ibarji.org/.

community members since May 2000.[154]

In Indiana, the Indianapolis Restorative Justice Program works with first time youth offenders under the age of 14 facing charges of assault, criminal mischief, disorderly conduct, shoplifting and theft.[155] For adults, Indiana has begun to develop "problem-solving" courts.[156]

For any restorative justice or problem-solving court program, the requirements for participation in the program must be reviewed against the immigration definition of a conviction. In some circumstances, a non-citizen may decide to take a case to trial or to plead to an alternative charge rather than face a conviction for immigration purposes if he completes a restorative justice or problem-solving court program.

Application to Cases

Case of Epherem from Sudan

Epherem entered the U.S. as a lawful permanent resident on December 3, 1994 based on a visa petition filed by his lawful permanent resident mother. He is single and does not have any children.

On June 1, 1999, he was arrested by the Chicago police department for allegedly shoplifting a $2000 diamond ring from a local department store. He was charged with retail theft, a Class 3 felony under 720 ILCS 5/16A-3(a) and 720 ILCS 5/16A-10(3). Since this was his first offense, the judge placed him on probation for two years after Epherem entered a plea of guilty.

Analysis: Under the definition of conviction, Epherem has a conviction for immigration purposes. First, he pled guilty to the offense. Second, he was placed on probation, which has been found to be a form of restraint on liberty. Because his theft conviction is a conviction for a crime involving moral turpitude within his first five years after becoming a lawful permanent resident and a sentence of one year or longer could have been imposed, he is deportable under the Immigration and Nationality Act (I.N.A.) § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i). He is eligible to apply for asylum, withholding of removal, and relief under the Convention against Torture if he believes that he will be persecuted or tortured upon his return to Sudan.

Epherem, however, cannot defend his "green card" or lawful permanent resident status because he had only resided in the United States as a lawful permanent resident for

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154 For more information, contact David M. Lerman, Assistant District Attorney and Program Director, Milwaukee County District Attorney's Office, 821 W. State Street, Room 406, Milwaukee, WI 53233, tel. 414-278-46555, Lerman.David@mail.da.state.wi.us. *See also*, Wisconsin Legislative Audit Bureau Report on Restorative Justice Programs, available at http://www.legis.state.wi.us/lab/Reports/04-6highlights.pdf.

155 For more information, see Indianapolis Restorative Justice Program at http://www.findyouthinfo.gov/cf_pages/programdetail.cfm?id=27.

156 For more information, see Indiana Judicial Center, "Problem-Solving Courts," available at http://www.in.gov/judiciary/pscourts/about.html.

three years at the time he committed his offense, a crime involving moral turpitude. A person who has resided in the United States for seven years, including at least five years as a lawful permanent resident and two years in another legal status, such as refugee status, is eligible to defend his or her green card by requesting cancellation of removal from the Immigration Judge, provided that none of his convictions are aggravated felonies.[157] If he were married to a U.S. citizen or had a U.S. child age 21 or older, he would be eligible for an immigrant visa and to apply for adjustment of status with a waiver under INA § 212(h) to obtain his lawful permanent residence again.

Case of Patryk from Ireland

Patryk, an Irish citizen and a lawful permanent resident, works as a bartender in Kenosha, Wisconsin. In January 2006, he had a physical altercation with his wife after a long night at the bar, and she called her best friend's husband who is a local police officer to arrest him. He was arrested and charged with domestic battery under Kenosha City Ordinance No. 9.947.01. The Kenosha City Ordinance references Wis. Stat. § 947.01, disorderly conduct, to define an offense of domestic battery. Under the ordinance, a defendant does not have the right to a jury trial. Thus, even though Patryk pled guilty as charged for hitting his wife, he is not deportable from the U.S. under I.N.A. § 237(a)(2)(E)(i), 8 U.S.C. § 1227(a)(2)(E)(i) for having been convicted of a crime of domestic violence. If he had been charged with and convicted for violating Wis. Stat. § 947.01 in Milwaukee, however, then he would be deportable for having been convicted of a crime of domestic violence.

Practice Tips

In a removal proceeding, both prongs of I.N.A. § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48), must be met in order to establish that a non-citizen has a conviction for immigration purposes. The first prong addresses admissions of guilt or sufficient facts by the non-citizen to warrant a finding of guilt. State statutes require the entry of a guilty plea, a stipulation to facts, or a finding of guilt in order to qualify for an deferred prosecution, supervision, probation, or conditional discharge.

The courts and prosecutors must be educated as to why a non-citizen should qualify for supervision without pleading guilty or stipulating to or admitting facts that could lead to a finding of guilt on the record. They should be encouraged to continue a case informally for a period of time to allow a non-citizen to complete specified requirements (i.e. community service, payment of restitution) without the entry of a plea of guilt, stipulation to facts, admission of facts that would allow for a finding of guilt or the entry of an order for a period of supervision, probation, or conditional discharge. After the non-citizen completes the specified requirement, the charge could be dismissed and the non-citizen will not have a conviction for immigration purposes.

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[157] *See* Cancellation of Removal, *infra* at 6-23; Aggravated Felonies, *infra* at 3-34.

The second prong addresses deprivation of a non-citizen's liberty. Probation is a deprivation of liberty sufficient to meet the second prong. The issue then becomes how to avoid any restraint or deprivation of liberty. Creativity and educating the courts by defense counsel is key. Some strategies to consider: a continuance for dismissal with no admissions and no restraints; the defendant is responsible to the court (not a probation officer); restitution/community service through alternative sentencing procedures (outside of court) and in lieu of costs and fines. Some clients may be more likely than others to violate the terms of their probation, conditional discharge, or supervision. In such cases, defense counsel can request that the state court impose a definite but suspended term of imprisonment designed to avoid an aggravated felony or another conviction that falls under the grounds of inadmissibility or deportability.