

Washington Defender Association's Immigration Project

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Immigration Law and Criminal Sentencing

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Some, but not all, immigration penalties related to criminal convictions are only triggered by the sentence. Sentences can be the determining factor in whether a noncitizen is subject to removal (deportation) or denied immigration benefits such as citizenship and lawful residency. Many immigration penalties can be avoided by careful attention to the sentencing issues.

Statutory Definition: “Sentence” is defined for immigration purposes as, “Any reference to a term of imprisonment or 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.*”¹

Overview: The 1996 immigration legislation dramatically changed the definition of sentence and rules governing the effect of sentence in immigration proceedings. However, sentencing remains an area in which criminal defense counsel can exert significant control over immigration consequences of an offense. The general rule under this definition is that the sentence for immigration purposes will be *the amount sentence imposed regardless of time suspended* (e.g. a 365 day sentence with 364 days suspended will be a 365 day sentence for immigration purposes). For instance, obtaining a sentence imposed of less than one year imprisonment can prevent many offenses (most importantly, gross misdemeanors) from being classified as aggravated felonies.² A sentence of not more than six months imposed for a first misdemeanor conviction of an offense involving moral turpitude will qualify the noncitizen for the “*petty offense exception*” to the inadmissibility ground which impacts noncitizens seeking entry into the U.S. and applying for immigration benefits such as lawful status and citizenship. A noncitizen who has been sentenced to five years in the aggregate for one or more aggravated felonies is automatically barred from applying for withholding of removal, which is a form of relief from removal for persons facing persecution in their home country.

There are two important exceptions to this general rule. The bar to establishing good moral character is triggered where a noncitizen spends *180 days or more actually confined* for a conviction during the period for which good moral character must be established. Good moral

¹ See 8 U.S.C. 1101(a) (48) (B).

²The most common offenses that will trigger this designation are theft, PSP, burglary, crimes of violence and false documents. See 8 USC 1101(a) (43).

character is a requirement for U.S. citizenship and certain avenues to getting lawful residency. The second exception is the ground of deportability for one crime of moral turpitude (which applies to noncitizens who were lawfully admitted or have lawful status) which is triggered if the statutory maximum *possible sentence* is one year or more (which thus includes all Washington state gross misdemeanor offenses).

Electronic Home Detention: The Ninth Circuit has not yet ruled whether partial house arrest or electronic home detention constitutes a sentence to imprisonment for immigration purposes.³ Until they decide otherwise, defense counsel should assume that such a highly controlled release status amounts to a sentence under immigration law. However, it can be an important as a viable option for noncitizens to avoid apprehension by immigration authorities in jail.

Probation: Probation alone is never a sentence to confinement, although if the judge orders the noncitizen to spend time in jail as a condition of probation, the time ordered is a sentence.⁴ The time imposed after a probation or parole violation is included within the definition of “sentence imposed.” For example, a defendant who initially receives a sentence of less than one year, but then violates his probation or parole and is sentenced to an additional term of imprisonment that, when added to the original term, brings the total sentence imposed to over one year, will be considered to have a one-year sentence imposed for purposes of determining aggravated felon status.⁵ One criminal defense strategy to avoid this is to plead to a new offense that avoids immigration penalties, rather than taking a probation violation on the original offense if the additional time imposed triggers more significant immigration penalties. While not a sentence under immigration law, naturalization to U.S. citizenship will not be granted to an applicant who is on probation or parole.

Deferred Sentences: Under Washington’s deferred sentencing laws,⁶ no sentence to confinement is imposed. Any period of jail time specified as a condition of probation will constitute a sentence imposed for immigration purposes. Defense counsel seeking a deferred

³ The Third Circuit directly addressed the question. In *Ilchuk v. Attorney General of U.S.*, 434 F.3d 618, 623 (3rd Cir 2006) the court opted for an extremely expansive definition of “term of imprisonment” that includes house arrest with electronic monitoring. The Court held that the Immigration Act’s “disjunctive phrasing—‘imprisonment ... include[s] the period of incarceration or confinement’—suggests that Congress intended for ‘imprisonment’ to cover more than just time spent in jail.” *Id.* See also *Rodriguez v. Lamer*, 60 F.3d 745, 749 (11th Cir. 1995) (home confinement may constitute custody). *Ilchuk* did not cite its own contrary precedent *Holzappel v. Wyrsh*, 259 F.2d 890 (3d Cir.1958), but relied on a District Court memorandum decision, *Salim v. Reno*, 2000 WL 33115910 (E.D.Pa. Jan.16, 2001), which found that *Holzappel*, which involved a formally suspended sentence, was superseded by the addition of INA § 101(a) (48) (B) in 1996. The underlying holding of *Holzappel* is that psychiatric confinement under a primarily rehabilitative law is not a sentence to confinement.

⁴ *Matter of F*, 1 I&N Dec. 343 (BIA 1942); *Matter of V*, 7 I&N Dec. 577 (BIA 1957); *Matter of De La Cruz*, 15 I&N Dec. 616 (BIA 1976). Note that some of these cases also provide that time ordered in jail as a condition of probation is not a sentence. That is no longer the case after the 1996 enactment of the statutory definition of sentence under INA 101(a) (48) (B).

⁵ *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (a defendant sentenced to 365 days probation who then violated the terms of his probation and was sentenced to two years imprisonment had been sentenced to more than one year for purposes of the definition of an aggravated felony).

⁶ RCW §§ 35.20.255, 3.50.320, 3.66.067, 46.61.5055.

sentence to avoid the immigration consequences of a sentence, should be vigilant that no damaging period of incarceration is actually specified in the judgment and sentence.

Suspended Sentences: Washington’s suspended sentence is a form of suspended execution of sentence and will count as a “term of imprisonment” and as a sentence under the immigration definition. It will include the amount of time imposed, regardless of suspended time (e.g. 365 days with 365 suspended equals a 365 day sentence).

Sentence Modifications: In *Matter of Cota-Vargas*⁷ the Board of Immigration Appeals held that when a judge modifies a sentence, this will control for immigration purposes even if the basis for the motion is not legal error but merely a need to avoid immigration consequences. Often it is far easier to persuade a criminal court judge to modify an imposed sentence than to vacate the conviction. In most cases, reducing the imposed sentence to less than a year will stop the offense from being an aggravated felony. For example, a theft, burglary or crime of violence must have a “sentence imposed” (including suspended sentences) of a year or more in order to be an aggravated felony. (In contrast, statutory rape, drug trafficking, or being a felon in possession of a firearm is an aggravated felony regardless of sentence imposed.)

In a 2006 decision, *State v. Quintero-Morelos*,⁸ Div. III upheld the right of a trial judge to modify a sentence for immigration-related reasons. However, Div. I recently issued a problematic decision, *Benyaminov v. City of Bellvue*,⁹ finding that a post conviction 1-day sentence modification was time-barred under RCW 10.73.090. WDA’s Immigration Project has significant resources to assist defense counsel in making PCR motions.

Apprendi Issues: In *Matter of Martinez-Zapata*¹⁰ the BIA held that post-*Apprendi*¹¹ sentence enhancement factors will constitute an element of the offense of conviction if, under the law of the convicting jurisdiction, they increased the maximum penalty for the crime and they had to be proved to a jury beyond a reasonable doubt if not admitted to by the defendant.¹² Thus, *in qualifying cases*, the elements required for the sentence enhancement will be treated as elements of the offense of conviction, so that, e.g., a conviction for burglary with a firearms sentence enhancement imposed may be classed as an offense involving firearms, and thus be a basis for deportability under that separate deportation ground.

Defense Sentencing Strategies: WDA’s Immigration Project provides assistance and resources to defenders addressing sentencing issues. In particular, we now have available on our website (www.defensenet) an extensive legal memorandum and strategy overview for challenging (and appealing decisions from) judges who refuse to impose sentences of less than 365 days in misdemeanor cases.

- **Avoiding aggravated felony classification:**
 - Bargain for 364 days.

⁷ *Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005).

⁸ *State v. Quintero Morelos*, 133 Wash.App. 591, 137 P.3d 114 (2006) (relief under CrR 7.8(b) (1)); rev. den’d *State v. Morelos*, 159 Wash.2d 1018, 157 P.3d 403 (2007).

⁹ 183 P.3d 1127.

¹⁰ *Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007), partially overruling *Matter of Rodriguez-Cortes*, 20 I&N Dec. 587 (BIA 1992).

¹¹ *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¹² *Martinez-Zapata* at 426.

- Plead to more than one offense, sentences to run consecutively but no single count or offense to carry a sentence of more than 364 days, e.g. two counts of assault with a deadly weapon, each carrying an eight-month sentence, to run consecutively.
 - Waive credit for time served or prospective good time and try to persuade the judge to impose an official shorter sentence in return.
 - On a probation violation, consider taking a new conviction with sentence imposed instead of taking an additional sentence on the original violation, if the additional sentence would bring the total to a year for the one conviction.
- **Petty Offense Exception:** To bring the defendant within the petty offense exception to the moral turpitude ground, on a first misdemeanor (or felony reduced to a misdemeanor) conviction obtain a sentence of six months or less. Adapt the strategies discussed above.
 - **Potential Sentence:** A person is deportable if convicted of a crime involving moral turpitude committed within five years of admission if it carries a potential sentence of one year. If possible, plead to a misdemeanor with a potential sentence of six months. Plead to an offense that does not involve moral turpitude; see Annotations to Chart on Moral Turpitude. Depending on the state statute, a plea to attempt generally will cut the potential sentence so that, for example, a felony reduced to a misdemeanor will have a potential sentence of one year or less.¹³ If the offense was not committed within five years of admission, a single moral turpitude offense is not a basis for deportability (although a sentence imposed of one year or more will make most crimes involving moral turpitude into aggravated felonies).
 - **180 Days Served: The Good Moral Character Requirement**
 - To keep the client eligible to establish good moral character, obtain a disposition that will not require the noncitizen to be in jail as a result of a conviction for more than 179 days total during the period that good moral character must be proved.
 - Any physical reduction in the number of days confined, such as early release for good behavior, will help the client. Look for any legal way to make the days served not the result of a conviction, such as waiving credit for time served.

¹³ See, for example, Wash. Rev. Code § 9A.56.050 (2) Third Degree Theft; and RCW § 9A.28.020 (3) (e), Attempt. A Washington simple misdemeanor is punishable by a maximum of 90 days. As a simple misdemeanor, a single *attempted* third degree theft with no priors would not be a deportable offense, even if committed *within* 5 years of admission. 8 USC § 1227(a)(2)(A)(i)(II); INA § 237(a)(2)(A)(i)(II).