Hillsborough County Association of Criminal Defense Lawyers
Presents:

CRIMIGRATION: The Marriage of Immigration and Criminal Law

Terry Clifton Christian, Esq.
Former U.S. Immigration Judge and Board Certified Criminal Lawyer

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II. Categories of Criminal Conduct Incurring Immigration Consequences.

III. The Immigration Consequences of Criminal Convictions and Criminal Behavior.

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About the Author

Terry Clifton Christian, Christian & Associates, P.A., 15310 Amberly Drive, Suite 250, Tampa, Florida 33647, (813) 228-7743, provides full service representation in the areas of Immigration and Nationality Law, Criminal and Administrative Law at the Hearing, Trial and Appellate Level including Federal Court Litigation of Alien Rights and Immigration Criminal Cases, Federal and State Felony and White Collar Criminal Defense, and Attorney and Professional Discipline and Licensing. A former Florida prosecutor, Terry Christian is one of only eleven lawyers Florida Bar Board Certified as an Expert in both Criminal Trial and Criminal Appellate Law and he is a Diplomate of the National Board of Trial Advocacy where he is Board Certified as a Criminal Trial Advocate. Mr. Christian has over twenty years experience in Immigration and Criminal Law and Federal and State Litigation and has Reported Cases in both Federal and State Appellate Law. He has lead several voluntary bar associations and received numerous awards and citations for his service to the bar and the community. Mr. Christian is rated "AV" in the Martindale Hubbell Law Directory and is listed, inter alia, in the Bar Register of Preeminent Lawyers, Who's Who in American Law, Florida Super Lawyers and Chambers USA Guide to America's Leading Lawyers for Business. In 2003, Mr. Christian served as a U.S. Immigration Judge with the Executive Office for Immigration Review, Detroit Immigration Court, and he is a graduate of the National Judicial College, Reno, Nevada. He served as an officer in the American Immigration Lawyers Association (AILA) Central Florida Chapter from 1992-1997, on the Board of Directors, 2005-2006, as Tampa Regional Vice President, 2006-2007, Executive Vice President, 2007-2008, Chapter Chair 2008-2009 and again on the Board of Directors 2009-2010. In 2008, AILA recognized Mr. Christian with a special merit award for Outstanding Contributions to the Practice of Immigration Law. In 1992, Mr. Christian initiated the Immigration and Nationality Certification Program in Florida and was appointed by the Board of Governors of the Florida Bar and both Florida AILA Chapters as Chairman of the Committee to Draft Standards for Immigration and Nationality Law Certification by the Florida Bar. He served from 1992-1994 when Immigration and Nationality Law was established as an area of specialization for all Florida Lawyers. Mr. Christian is listed as both an expert witness and a mentor in the area of Immigration Law by FACDL and has been qualified as an expert in Immigration Law in both state and federal court. Mr. Christian is a frequent speaker in the areas of Immigration and Criminal Law and has been named to the 2011 Edition of the Best Lawyers in America in the area of Immigration Law. Attorneys seeking assistance are invited to contact Mr. Christian by telephone or by E-mail at tchristian@thelawus.com or www.tchristianlaw.com

Part I. The Definition of a Conviction Under the Immigration and Nationality Act

INA Section 101(a)(48) (A); 8 U.S.C. § 1101(a)(48)(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 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. *See also*, Matter of Cabrera, 24 I&N Dec. 459 (BIA 2008)(nolo plea to drug possession under Florida law, where defendant received a withholding of adjudication and was assessed costs and surcharges, resulted in defendant's conviction because costs and surcharges were a punishment under federal law) *as cited in* Kurzban's Immigration Law Sourcebook, at 215. Kurzban's Immigration Law Sourcebook is generally considered the best and most comprehensive volume available in the area of immigration law and is regularly referred to by both immigration lawyers and immigration judges.

Part II. Categories of Criminal Conduct Incurring Immigration Consequences

A. Crimes Involving Moral Turpitude Determining whether a criminal conviction is a CIMT for purposes of U.S. Immigration Court proceedings requires an analysis of the statute under which the alien has been convicted (as opposed to the alien's conduct that resulted in the conviction). *See Goldeshtein v. INS*, 8 F.3d 645 (9th Cir. 1993); *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008).

CIMT Defined

Historically, a CIMT has been generally defined as an act of baseness, vileness, or the depravity in private and social duties which one person owes to another, or to society in general, contrary to accepted and customary rule of right and duty between people." Black's Law Dictionary 1008 (8th ed. 2004). *In Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001), the BIA stated that the phrase "CIMT" is a matter of Federal law for immigration purposes, which "refers generally to conduct that is inherently base, vile or depraved, and contrary to the accepted rules of morality and the duties owed between persons or society in general . . ." Under this standard, the nature of a crime is measured against contemporary moral standards and may be susceptible to change based on the prevailing views in society. Furthermore, although crimes involving moral turpitude often involve an evil intent, a specific intent is not a prerequisite to finding that a crime involves moral turpitude . . ." Id. at 83; *see also Matter of Serna*, 20 I&N Dec. 579 (BIA 1992) (Neither the seriousness of the offense nor the severity of the sentence imposed is determinative as to whether the crime is a CIMT.). On April 2, 2007, the BIA found the offense of trafficking in counterfeit goods or services in violation of 18 U.S.C. § 2320(a) to be a CIMT because: (1) this offense is *analogous* to the offense of uttering or selling false or

counterfeit papers relating to the registry of aliens under 18 U.S.C. § 1426(b); (2) both crimes require proof of an *intent* to traffic *and knowledge* that the items/objects are counterfeit; and (3) both crimes result in significant societal harm. *See Matter of Kochlani*, 24 I&N Dec. 128 (BIA 2007). As characterized by the Ninth Circuit, CIMTs are of essentially two types: those offenses characterized by grave acts of baseness or depravity and those involving fraud. *See Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1074 (9th Cir. 2007)(en banc). To fall under the second category, the crime must involve knowingly false representations made to gain something of value. A violation of CPC § 350(a) for willfully manufacturing, intentionally selling, or knowingly possessing for sale any counterfeit mark is a CIMT because the conduct in question is inherently fraudulent and thus involves knowingly false representations made in order to gain something of value. *See Tall v. Mukasey*, 517 F.3d 1115 (9th Cir. 2008). On September 19, 2007, an *en banc* panel of the Ninth Circuit held that for a crime to be a CIMT, the generic definition imposes two elements: base, vile, or depraved conduct; *and* the conduct violates accepted moral standards.

Moreover, crimes involving fraud are not a *per se* category of CIMTs. In the case at bar, a violation of CPC § 32, involving the crime of accessory after the fact is *not* a CIMT, because conduct underlying an accessory after the fact conviction "does not necessarily involve conduct that involves baseness or depravity." Indeed § 32 of the CPC includes a potential set of crimes broader than the generic definition of a CIMT. *See Navarro-Lopez v. Gonzales*, 503 F.3d1063 (9th Cir. 2007) (en banc). On October 9, 2007, a divided, three-member panel of the Ninth Circuit, citing *Navarro-Lopez v. Gonzales*, *supra*, added a third element for a crime to be a CIMT; it must be done, "willfully or with evil intent . . . ." *Quintero-Salazar v. Keisler,* 506 F.3d 688 (9th Cir. 2007). Factually, in 1998 the alien plead *nolo contendere* to contributing to the delinquency of a minor by engaging in intercourse with a female under the age of 16,whereas, the alien was over 21 years. The divided panel concluded that the conduct of the alien was statutorily prohibited rather then inherently wrong; hence, it was not a CIMT. It is unclear if this divided panel decision is consistent or inconsistent with *Navarro-Lopez v. Gonzales*, *supra*. On November 7, 2008, the Attorney General of the United States (AG) issued a new CIMT standard establishing for the BIA and IJs an administrative framework for determining whether an alien has been convicted of a CIMT in *Matter of Silva-Trevino*. However, the decision was not available until November 19, 2008. **Citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), as authority, the AG established a three-step approach for analyzing CIMTs:** First, look to the statute of conviction under the categorical inquiry to determine whether there is a realistic probability—not a theoretical possibility—that the State or Federal criminal statute at issue would be applied to reach conduct that does not involve moral turpitude. If the categorical inquiry does not resolve the question, then engage in a modified categorical inquiry and examine the record of conviction, including documents such as the indictment or information, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. If the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines is necessary or appropriate to resolve accurately the CIMT issue. In making this three-step analysis, the adjudicator may depart from *Taylor v. United States*, 495 U.S. 13 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), because "moral turpitude" is a non-element aggravating factor that stands apart from the elements of the

criminal offense. Here, the alien was convicted of indecency with a child in violation of Texas Penal Code § 21.11(a)(1), a second-degree felony punishable by a 2- to 20-year term of imprisonment. The AG stated that, to qualify as a CIMT for the purposes of the Act, the crime must involve reprehensible conduct and some degree of scienter, including: specific intent, deliberateness, willfulness, or recklessness. Here, the AG concluded that the adjudicator must make an inquiry regarding the alien's knowledge of the victim's age, and that the burden of proof is on the alien to establish "clearly and beyond doubt" that he is not inadmissible within the meaning of § 240(c)(2)(A) of the Act. *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). The lack of a specific intent requirement in 18 U.S.C. § 2252(a)(5)(B), which bars "knowing" as opposed to willful possession of child pornography, constitutes a CIMT where "such intent is implicit in the nature of the crime." *See Gonzales-Alvarado v. INS*, 39 F.3d 245, 246 (9th Cir. 1994); *Navarro-Lopez v. Gonzales*, 503 F.3d 1062, 1074 (9th Cir. 2007) (en banc); *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 997 (9th Cir. 2008); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002). Thus, the alien's naturalization could be revoked by the United States District Court where during the five-year period before the alien applied for naturalization the alien was not a person of good moral character because of his 2001 conviction for possession of child pornography in violation of 18 U.S.C. § 2252(a)(5)(B). *See United States v. Santacruz*, 563 F.3d 894 (9th Cir. 2009) (per curiam). An alien charged with a CIMT is inadmissible under § 212(a)(2)(A)(i)(I) or deportable under § 237(a)(2)(A)(i) of the Act. *But see Rusz v. Ashcroft*, 376 F.3d 1182 (9th Cir. 2004) (relying on *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2000) (en banc), holding that a felony conviction for petty theft with a prior conviction for burglary in violation of CPC §§ 484, 488, and 666 is not a crime for which a sentence of one year or longer may be imposed within the meaning of § 237(a)(2)(A)(i)(II) of the Act). An alien convicted of a CIMT under § 237(a)(2)(A)(i) of the Act is ineligible for § 240A(b)(1) relief, regardless of his status as an arriving alien or his eligibility for a petty offense exception under § 212(a)(2)(A)(ii)(II) of the Act. *See Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009); see also REAL ID Act of 2005.

Good Moral Character / CIMT

A person can be of GMC for ten years before applying for § 240A(b)(1) relief and yet have committed a CIMT more than ten years earlier, which bars the alien from such relief under § 240A(b)(1)(C), because that provision does not place any time limitation on when the crime was committed. *See Flores Juarez v. Mukasey*, 530 F.3d 1020 (9th Cir. 2008).

ATTRIBUTION: *See* ALIENS IN THE UNITED STATES IMMIGRATION COURT By Immigration Judge HARRY L. GASTLEY, Last Updated December 31, 2009, pages 95-100, at http://www.justice.gov/eoir/vll/benchbook/resources/Criminal_Law_Outline.pdf for a complete treatment of how cases involving criminal aliens are treated in Immigration Court and the source from which the information on Crimes Involving Moral Turpitude was taken.

B. Crimes of Violence as defined in 18 U.S.C. § 16 for which the term of imprisonment imposed is at least one year

Determining whether a criminal conviction is a crime of violence for purposes of Immigration Court proceedings requires a two-step analysis.

First, § 101(a)(43)(F) of the Act states that the definition of aggravated felony includes a crime of violence as defined in 18 U.S.C. § 16 for which the term of imprisonment imposed is at least one year. See Matter of S-S-, 21 I&N Dec. 900 (BIA 1997) (Terrorism under Iowa Code Ann. § 708.6, shooting/discharging a firearm at or into a building where there are people or threatening to do so is a crime of violence under18 U.S.C. § 16(b)); and second, the term "crime of violence" is defined at 18 U.S.C. § 16 as: an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or 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. *See Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999).

Other Considerations: mens rea element

On November 9, 2004, the United States Supreme Court held that an LPR convicted in year 2000 of driving under the influence of alcohol (DUI) and causing serious bodily injury, in violation of Fla. Stat. § 316.193(3)(c)(2)(2003), was not subject to removal pursuant to § 237(a)(2)(A)(iii) of the Act, vis-a-vis §101(a)(43)(F) of the Act. This was true because State DUI offenses such as Florida's statute, which do not have a *mens rea* element or require only a showing of negligence in the operation of a vehicle, are not crimes of violence under 18 U.S.C. §16. Further, the Supreme Court held that both subsection (a) and (b) of 18 U.S.C. §16 contain the same legislative formulation: the use of physical force against another's person or property. *See Leocal v. Ashcroft*, 543 U.S. 1 (2004).

State DUI Convictions in Light of *Leocal*

Arizona aggravated DUI & felony endangerment In *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001), an aggravated DUI under ARS § 28-697(a)(2) was found not to be a crime involving moral turpitude (CIMT) since there was no culpable mental state requirement in the criminal statute. (distinguishing *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 2000)). This decision did not directly address whether aggravated DUI under the Arizona statute is a crime of violence, whereas the concurring and dissenting opinions take opposite positions on whether the conviction in question is a crime of violence. *See United States v. Hernandez-Castellanos*, 287 F.3d 876 (9th Cir. 2002). There, a felony endangerment conviction under ARS § 13-1201 for driving under the influence in a vehicle missing its right front tire and with the driver's four minor children as passengers is not an aggravated felony within the meaning of 18 U.S.C. § 16(b) vis-a-vis § 101(a)(43)(F) of the Act. This was the conclusion because a "substantial risk of imminent death or physical injury" is not the same thing as a "substantial risk that physical force may be used." *See id (*citing *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001)) and holding that the offense must "require recklessness as to, or conscious disregard of, a risk that physical force will be used against another, not merely the risk that another might be injured."

California DUI

In *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001), a violation of California Vehicle Code (CVC) § 23153 (driving under the influence of alcohol with bodily injury) was not a crime of violence, because the statute encompasses conduct that is merely negligent; whereas, 18 U.S.C. § 16 requires a volitional act, as opposed to mere negligence. *See also United States v. Portillo-Mendoza*, 273 F.3d 1224 (9th Cir. 2001)(use of force requires a volitional act; cites

Trinidad-Aquino as authority, despite
five convictions for DUI); *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002) (citing *Trinidad-Aquino*, the Ninth Circuit ruled that a California conviction for DUI under § 23152(a) of the CVC, a statute providing enhanced penalties for multiple convictions, is not a crime of violence).

BIA Decisions Again, citing *Trinidad-Aquino* and similar decisions from three other circuits, the BIA overruled *Matter of Puente*, 22 I&N Dec. 1006 (BIA 1999), and *Matter of Magallanes*, 22 I&N Dec.1 (BIA 1998), in *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002), holding that, for a DUI offense to be considered a crime of violence; it must be committed at least recklessly and involve a substantial risk that the perpetrator may resort to the use of force to carry out the crime.

Nevada DUI A criminal conviction for the offense of driving while intoxicated/under the influence in violation of NRS §§ 484.379 or 484.3795 is not a crime of violence subject to § 101(a)(43)(F) of the Act, in light of the recent Supreme Court decision and the BIA and Ninth Circuit decisions cited above. *See Bhatti v. INS*, 22 Fed.Appx. 770 (9th Cir. 2001, unpublished) (citing *Trinidad-Aquino* and finding that CVC § 23153, like NRS § 484.379, can be violated through negligence; hence such a violation is not a crime of violence under §101(a)(43)(F) of the Act).

Gross Vehicular Manslaughter On May 23, 2005, the Ninth Circuit in *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005), ruled that the offense of gross vehicular manslaughter while intoxicated, in violation of CPC § 191.5(a), is not a crime of violence because gross negligence is still negligence, however flagrant, and there is no requirement in the statute that the defendant intentionally used his vehicle to inflict injury. The Court noted that under *Leocal*, the defendant must actively employ force against another to violate 18 U.S.C. § 16.

ATTRIBUTION: *See* ALIENS IN THE UNITED STATES IMMIGRATION COURT By Immigration Judge HARRY L. GASTLEY, Last Updated December 31, 2009, pages 91-95, at http://www.justice.gov/eoir/vll/benchbook/resources/Criminal_Law_Outline.pdf for a complete list of definitions relevant to the treatment of criminal aliens in Immigration Court and the source from which the information on Crimes of Violence was taken.

C. Illicit Trafficking in Controlled Substance Conviction

An alien convicted of "illicit trafficking" in a controlled substance, including a drug trafficking crime (as defined in 18 U.S.C. § 924(c)(2)), is subject to removal from United States under § 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony as defined at § 101(a)(43)(B) of the Act. For example, a single conviction for possession of more than 5 grams of cocaine is subject to a 5-20 year sentence under 21 U.S.C. § 844(a) and hence is a § 101(a)(43)(B) aggravated felony.

Stage Drug Offense

A State drug offense is an aggravated felony for immigration purposes only if it is punishable as a felony under: the Controlled Substances Act (CSA), 21 U.S.C § 801 et seq.; other Federal drug laws named in the definition of drug trafficking crime at 18 U.S.C. § 924(c)(2); or
is a crime involving a trafficking element within the meaning of § 101(a)(43)(B) of the Act. *See Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004) (A 4-month jail sentence for

possession of methamphetamine in violation of CPC § 11377(a) does not meet this 3-part test and thus is not an aggravated felony under §101(a)(43)(B) of the Act.); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004). Note that the term "drug" is not defined at 21 U.S.C. § 821(g)(1); whereas, the term "felony drug offense" is defined at 21 U.S.C. § 802(44) as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marijuana, or depressant or stimulant substances." On July 31, 2006, the Ninth Circuit ruled that, because a conviction under Cal. Health and Safety Code § 11366 required "purposeful" action, it required "knowing" action, and under a categorical approach, a conviction under § 11366 constituted an "aggravated felony." *See Slaviego-Fernandez v. Gonzales*, 455 F.3d 1063 (9th Cir. 2006). More recently, in *United States v. Morales-Perez*, 467 F.3d 1219 (9th Cir. 2006), the Ninth Circuit held that the Federal crime of attempted possession of a controlled substance - cocaine - with intent to sell encompasses the California - defined crime of purchasing cocaine base for purposes of sale. Similarly, on February 15, 2008, a panel of the Ninth Circuit held that a Kansas felony conviction for possession of marijuana with intent to sell necessarily means that the alien possess the marijuana with the intent to engage in commercial dealing. Thus, under *Lopez v. Gonzales*, 549 U.S. 47 (2006), the conviction here is a trafficking offense within the meaning of § 101(a)(43)(B) of the Act. *See Rendon v. Mukasey*, 516F.3d 1087 (9th Cir. 2008).

State Law Misdemeanor Offense

For purposes of § 101(a)(43)(B) and (U) of the Act, a Maryland misdemeanor conviction for conspiracy to distribute marijuana constitutes a § 101(a)(43)(B) aggravated felony because the elements of the State offense correspond to the elements of an offense that carries a maximum penalty of five years imprisonment under the CSA. *See Matter of Aruna*,24I&N Dec. 452 (BIA 2008).

Punishable by More Than One Year Imprisonment

For purposes of § 101(a)(43)(B) of the Act, a felony offense is one punishable by more than one year imprisonment under applicable Federal or State law. *See citations at paragraph 1. above*, and 18 U.S.C. § 3559(a)(5) (Federal definition of felony).

Criminal Sentencing Enhancement

By contrast, in the criminal sentencing enhancement context, a drug offense is an aggravated felony under § 101(a)(43)(B) of the Act if it is punishable under the CSA and is a felony. *See United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002); 18 U.S.C. § 3559(a)(5) (sentencing classification for Federal offenses, i.e., misdemeanor, gross misdemeanor, felony, etc.). A prior Arizona conviction for attempted possession of over 8 lbs. of marijuana, where the offense is a State law felony, is an aggravated felony under sentencing guidelines. *See* 18 U.S.C. § 3551, et seq., regarding United States Sentencing Commission Guidelines. On June 25, 2007, the Ninth Circuit ruled that a deferred, expunged or dismissed State court decision qualifies as a prior conviction under 21 U.S.C. § 841(b)(1)(A)-(D) because a dismissal based upon compliance with the terms and conditions of a sentence and judgment neither alters the legality of the conviction nor indicates that the defendant was actually innocent of the crime. *See United States v. Norbury*, 492 F.3d 1012 (9th Cir. 2007). On July 24, 2007, the Ninth Circuit ruled that in the immigration context, simple possession of a controlled substance that is punishable as a felony under State law but a misdemeanor under the Controlled Substances Act is not an aggravated

felony under § 101(a)(43)(B) of the Act. *See United States v. Figueroa-Ocampo*, 494 F.3d 1211 (9th Cir. 2007) (citing *Lopez v. Gonzalez*, 549 U.S. 41 (2006)).

First Offense

A State felony conviction for a first offense, simple possession of a controlled substance as defined under the CSA may nevertheless be considered an aggravated felony under § 101(a)(43)(B) of the Act if it satisfies the definition of "drug trafficking crime" as set forth in 18 U.S.C. § 924(c)(2). *See United States v. Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000) cert. denied 531 U.S. 1102 (2001); *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992) modified, *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002); *but see United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002) (An Arizona drug conviction for which the maximum penalty is probation is not an aggravated felony for purposes of the Federal sentencing guidelines). Similarly, an expunged conviction for simple possession that satisfies the requirements of the Federal First Offender Act (FFOA) at 18 U.S.C. § 3607 is not a conviction for immigration purposes. *See Lujan-Armendariz v. INS*, 222 F.3d 728, 749-50 (9th Cir. 2000). Likewise, expungement of lesser offenses with no corresponding Federal analogue - such as possession of drug paraphernalia - may also qualify for FFOA treatment. *See Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000); *Ramirez-Altamirano v. Mukasey*, 554 F.3d 786 (9th Cir. 2009), amended, 563 F.3d 800. FFOA relief is not available for possession of pipe drug paraphernalia in violation of CHSC where the alien violated a condition of his probation. *See Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009).

State Drug Conviction

To determine whether a State drug conviction constitutes a "drug trafficking crime" under 18 U.S.C. § 924(c)(2), and hence an aggravated felony under § 101(a)(43)(B) of the Act, the Court must apply the applicable Federal circuit court of appeals standard. Within the Ninth Circuit, the conviction must be punishable as a felony under the CSA at 21 U.S.C. § 801 et seq. or other Federal drug laws named in the definition of "drug trafficking crime" or is a crime involving a trafficking element within the meaning of § 101(a)(43)(B). *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); *Matter of Yanez*, 23 I&N Dec. 390 (BIA 2002); *United States v. Ibarra-Galindo*, 206 F.3d 1137 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001); *Gonzalez-Vega v. INS*, 35 Fed. Appx. 607 (9th Cir. May 24, 2002, unpublished) (A conviction under § 11378 of the California Health and Safety Code (CHSC) is a felony conviction and an aggravated felony under § 101(a)(43)(B) of the Act). On December 5, 2006, the U.S. Supreme Court held that a State conviction for simple possession of a controlled substance that is a felony under State law but a misdemeanor under the CSA is not an aggravated felony for immigration purposes, with a few exceptions, e.g., 21 U.S. C. §844(a) where, for example, the defendant is in possession of more than five grams of cocaine base. *See Lopez v. Gonzales*, 549 U.S. 41 (2006); *see also United States v. Valle-Montalbo*, 474 F.3d 1197 (9th Cir. 2007) (A sentencing case in which the court held that a violation of § 11378 for possession of a controlled substance for sale is categorically a drug trafficking offense for sentencing purposes.). On December 13, 2007, the BIA issued two published decisions on this subject. In the first decision, *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007), the BIA held that decisional authority of the U.S. Supreme Court and the applicable Federal circuit court of appeals determines whether a State drug offense is an aggravated felony within the meaning of § 101(a)(43)(B) of the Act, by virtue

of its "correspondence" to the Federal felony offense of "recidivist possession," as defined in 21 U.S.C. § 844(a). In this case the BIA cited Fifth Circuit precedent as dictating that a Texas conviction for alprazolam possession committed after a prior State conviction for a "drug, narcotic, or chemical offense" became "final" within the meaning of 21 U.S.C. § 844(a). By contrast, the Ninth Circuit ruled in *Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2005) and in *United States v. Rodriguez*, 464 F.3d 1072 (9th Cir. 2006), rev'd, 128 S.Ct. 1783 (2008), that an adjudicator cannot consider recidivist sentencing enhancements at all when seeking to determine whether a state offense constitutes an aggravated felony. However, in *United States v. Rodriguez*, 128 S.Ct. 1783 (2008) the Supreme Court overruled the Ninth Circuit precedent by finding that "when a sentencing judge, under a guidelines regime or a discretionary sentencing system, increases a sentence based on the defendant's criminal history -100% of the punishment is for the offense of conviction." In the second of the December 13, 2007, published decisions, the BIA held that the LPR alien's 2003 Florida offense involving simple possession of marijuana did not constitute an aggravated felony, even though it was committed after a prior drug conviction had become final within the meaning of 21 U.S.C. § 844(a), because the second conviction did not arise from a State proceeding in which the alien's status as a recidivist drug offender was either admitted or determined by a judge or jury. *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007) (citing *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007)). Note that this case arose in the Eleventh Circuit, which had not issued any precedent decision with respect to the "recidivist possession" issue. By contrast, in *United States v. Norbury*, 492 F.3d 1012, 1014-15 (9th Cir. 2007), the Ninth Circuit concluded that a withheld or deferred adjudication remains a valid, prior conviction under the recidivism provisions of 21 U.S.C. § 844(a).

Matching a State Drug Conviction to a Generic Offense

The Ninth Circuit ruled that a conviction for possession or purchase of cocaine base for purposes of sale, in violation of California Health and Safety Code § 11351.5, is not categorically a drug trafficking offense within the meaning of USSG § 2L1.2(b)(1)(A) pertaining to the Federal Sentencing Guidelines. *See United States v. Morales-Perez*, 448 F.3d 1158(9th Cir. 2006).

Indeterminate Sentence

A 1999 conviction under NRS § 453.336 for possession of a controlled substance, with an indeterminate, suspended sentence of 12 to 48 months is a drug trafficking crime as defined in 18 U.S.C § 924(c)(2), which is punishable under the Federal Controlled Substances Act at 21 U.S.C. § 844(a) and a felony as defined at 21 U.S.C § 802(44) ("an offense punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country"), because the instant conviction is a category E felony under Nevada law and therefore an aggravated felony under § 101(a)(43)(B) of the Act. *See United States v. Arellano-Torres*, 303 F.3d 1173 (9th Cir. 2002).

ATTRIBUTION: *See* ALIENS IN THE UNITED STATES IMMIGRATION COURT By Immigration Judge HARRY L. GASTLEY, Last Updated December 31, 2009, pages 55-62, at http://www.justice.gov/eoir/vll/benchbook/resources/Criminal_Law_Outline.pdf for a complete treatment of how cases involving criminal aliens are treated in Immigration Court and the source from which the information on drug trafficking crimes was taken.

D. <u>Aggravated Felonies</u>: INA Section 101(a)(48) (A); 8 U.S.C. § 1101(a)(43) The term "aggravated felony" means-

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in controlled substance (as described 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);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of title 18, United States Code) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of title 18, United States Code (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in-

(i) section 842 (h) or (i) of title 18, United States Code, or section 844 (d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g) (1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924 (b) or (h) of title 18, United States Code (relating to firearms offenses); or

(iii) section 5861 of the Internal Revenue Code of 1986 (relating to firearms offenses);

(F) 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 at least 1 year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least 1 year;

(H) an offense described in section 875, 876, 877, or 1202 of title 18, United States Code (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of title 18, United States Code (relating to child pornography);

(J) an offense described in section 1962 of title 18, United States Code (relating to racketeer influenced corrupt organizations, or an offense described in section 1084 (if it is the second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of 1 year imprisonment or more may be imposed;

(K) an offense that-

(i) relates to the owning, controlling, managing, or supervising of a prostitution business; or

(ii) is described in section 2421, 2422, 2423, of Title 18, United States Code (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of title 18, United States Code (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in-

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of title 18, United States Code;

(ii) section 601 of the National Security Act of 1947 (50 U.S.C. 421) (relating to protecting the identity of undercover intelligence agents); or

(iii) section 601 of the National Security Act of 1947 (relating to protecting the identity of

undercover agents);
(M) an offense that-
(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
(ii) is described in section 7201 of the Internal Revenue Code of 1986 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;
(N) an offense described in paragraph (1)(A) or (2) of section 274(a) (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;
(O) an offense described in section 275(a) or 276 committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;
(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of title 18, United States Code, or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding o nly the alien's spouse, child, or parent (and no other individual) to violate a provision of this Act;
(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more; and
(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year ;
(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;
(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and
(U) an attempt or conspiracy to commit an offense described in this paragraph.
The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

ATTRIBUTION: *See* AGGRAVATED FELONY CASE SUMMARY, By Immigration Judge Bertha A. Zuniga (San Antonio), February 25, 2010 (Summary updated regularly) at www.justice.gov/eoir/vll/benchbook/resources/Aggravated_Felony_Outline.pdf for an exhaustive treatment of case interpretations of aggravated felonies.

E. Other Crimes and Criminal Conduct Proscribed in the INA The INA specifically

proscribes various and numerous crimes as well as criminal conduct short of conviction by describing which aliens are inadmissible and which aliens are deportable in, respectively INA Sections 212 and 237, *infra*. The important thing to understand and remember is that the result of being either inadmissible or deportable are often the same since they both can result in the alien being placed in removal (deportation) proceedings. *See* e.g., INA Section 237(a)(2)(A)(1); 8 U.S.C. §1227(a)(2)(A)(1) (Any alien . . . [i]nadmissible at time of entry or of adjustment of status . . . is within one or more of the . . . classes of deportable aliens). Therefore, being inadmissible pursuant to INA 212 or deportable pursuant to INA 237 results in being subject to removal (deportation) proceedings pursuant to INA Section 240.

Part III. Immigration Consequences of Criminal Convictions and Criminal Behavior

Inadmissibility and Deportability

A. **Inadmissible aliens.** INA § 212(a); 8 U.S.C. § 1182(a) entitled "Classes of aliens ineligible for visas or admission" provides that " . . . aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

(1) Health-related grounds . . .
(2) Criminal and related grounds . . . (*Infra*)
(3) Security and related grounds . . .
(4) Public charge . . .
(5) Labor certification and qualifications for certain immigrants . . .
(6) Illegal entrants and immigration violators . . .
(7) Documentation requirements . . .
(8) Ineligible for citizenship . . .
(9) Aliens previously removed . . .
(10) Miscellaneous . . . ."

INA Section 212(a)(2); 8 U.S.C. §1182(a)(2) Classes of Aliens Ineligible for Visas or Admission.-
Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
(2) Criminal and related grounds.-

(A) Conviction of certain crimes.-

(i) In general.-Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of

(I) a crime involving moral turpitude (other than a purely political offense or an attempt or conspiracy to commit such a crime), or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), **is inadmissible**.

(ii) Exception.-Clause (i)(I) shall not apply to an alien who committed only one

crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

(B) Multiple criminal convictions.-Any alien convicted of 2 or more offenses (other than purely political offenses), regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement were 5 years or more is inadmissible.

(C) CONTROLLED SUBSTANCE TRAFFICKERS- Any alien who the consular officer or the Attorney General knows or has reason to believe--

(i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so; or

(ii) is the spouse, son, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissaible.

(D) Prostitution and commercialized vice.-Any alien who-

(i) is coming to the United States solely, principally, or incidentally to engage in prostitution, or has engaged in prostitution within 10 years of the date of application for a visa, admission, or adjustment of status,

(ii) directly or indirectly procures or attempts to procure, or (within 10 years of the date of application for a visa, admission, or adjustment of status) procured or attempted to procure or to import, prostitutes or persons for the purpose of prostitution, or receives or (within such 10- year period) received, in whole or in part, the proceeds of prostitution, or

(iii) is coming to the United States to engage in any other unlawful commercialized vice, whether or not related to prostitution, is inadmissible.

(E) Certain aliens involved in serious criminal activity who have asserted immunity from prosecution.-Any alien-

(i) who has committed in the United States at any time a serious criminal offense (as defined in section 101(h)),

(ii) for whom immunity from criminal jurisdiction was exercised with respect to that offense,

(iii) who as a consequence of the offense and exercise of immunity has departed

from the United States, and

(iv) who has not subsequently submitted fully to the jurisdiction of the court in the United States having jurisdiction with respect to that offense, is inadmissible.

(F) Waiver authorized.-For provision authorizing waiver of certain subparagraphs of this paragraph, see subsection (h).

(G) FOREIGN GOVERNMENT OFFICIALS WHO HAVE COMMITTED PARTICULARLY SEVERE VIOLATIONS OF RELIGIOUS FREEDOM- Any alien who, while serving as a foreign government official, was responsible for or directly carried out, at any time, particularly severe violations of religious freedom, as defined in section 3 of the International Religious Freedom Act of 1998 (22 U.S.C. 6402), is inadmissible.

(H) SIGNIFICANT TRAFFICKERS IN PERSONS-

(i) IN GENERAL- Any alien who commits or conspires to commit human trafficking offenses in the United States or outside the United States , or who the consular officer, the Secretary of Homeland Security, the Secretary of State, or the Attorney General knows or has reason to believe is or has been a knowing aider, abettor, assister, conspirator, or colluder with such a trafficker in severe forms of trafficking in persons, as defined in the section 103 of such Act, is inadmissible.

(ii) BENEFICIARIES OF TRAFFICKING- Except as provided in clause (iii), any alien who the consular officer or the Attorney General knows or has reason to believe is the spouse, or daughter of an alien inadmissible under clause (i), has, within the previous 5 years, obtained any financial or other benefit from the illicit activity of that alien, and knew or reasonably should have known that the financial or other benefit was the product of such illicit activity, is inadmissible.

(iii) EXCEPTION FOR CERTAIN SONS AND DAUGHTERS- Clause (ii) shall not apply to a son or daughter who was a child at the time he or she received the benefit described in such clause.

(I) MONEY LAUNDERING- Any alien--

(i) who a consular officer or the Attorney General knows, or has reason to believe, has engaged, is engaging, or seeks to enter the United States to engage, in an offense which is described in section 1956 or 1957 of title 18, United States Code (relating to laundering of monetary instruments); or

(ii) who a consular officer or the Attorney General knows is, or has been, a knowing aider, abettor, assister, conspirator, or colluder with others in an offense which is described in such section; is inadmissible.

B. **Deportable Aliens**. INA § 237(a); 8 U.S.C. § 1227(a) entitled "Classes of deportable aliens"provides that "Any alien . . . in and admited to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status . . .

(2) Criminal Offenses . . . (*Infra)*

(3) Failure to register and falsification of documents . . .

(4) Security and related grounds . . .

(5) Public charge . . .
(6) Unlawful voters . . . ."

INA Section 237(a)(2); 8 U.S.C. §1227(a)(2) General Classes of Deportable Aliens
(a) Classes of Deportable Aliens.-Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

[(1) Inadmissible at time of entry or of adjustment of status or violates status.-

(A) Inadmissible aliens.-Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law.-Any alien who is present in the United States in violation of this Act or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 221(i) , is deportable.

(C) Violated nonimmigrant status or condition of entry.-

(i) Nonimmigrant status violators.-Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section , or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry.-Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section is deportable.

(D) Termination of conditional permanent residence.-

(i) In general.-Any alien with permanent resident status on a conditional basis under section (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 216 (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception.-Clause (i) shall not apply in the cases described in section 216(c)(4) (relating to certain hardship waivers).

(E) Smuggling.-

(i) In general.-Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification.-Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 203(a)(2) (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has en couraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in

violation of law.

(iii) Waiver authorized.-The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) [repealed]

(G) Marriage fraud.-An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 212(a)(6)(C)(i)) and to be in the United States in violation of this Act (within the meaning of subparagraph (B)) if-

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such entry of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) WAIVER AUTHORIZED FOR CERTAIN MISREPRESENTATIONS. -- The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 212(a)(6)(C)(i), whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who-

(i)

(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 212(a) which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.]

(2) Criminal offenses.-

(A) General crimes.-

(i) Crimes of moral turpitude.-Any alien who-

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245(j)) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed.
is deportable

(ii) Multiple criminal convictions.-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, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony.-Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High Speed Flight.-Any alien who is convicted of a violation of section 758 of title 18, United States Code, (relating to high speed flight from an immigration checkpoint) is deportable.

(v) FAILURE TO REGISTER AS A SEX OFFENDER- Any alien who is convicted under section 2250 of title 18, United States Code, is deportable.

(vi) Waiver authorized.-Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances.-

(i) Conviction.-Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts.-Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses.- Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code) in violation of any law is deportable.

(D) Miscellaneous crimes.-Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate-

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18, United States Code, for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18, United States Code;

(iii) a violation of any provision of the Military Selective Service Act (50 U.S.C. App. 451 et seq.) or the Trading With the Enemy Act (50 U.S.C. App. 1 et seq.); or
(iv) a violation of section 215 or 278 of this Act, is deportable.

(E) Crimes of Domestic violence, stalking, or violation of protection order, crimes against children and.-

(i) Domestic violence, stalking, and child abuse.-Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18, United States Code) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders.-Any alien who at any time after entry is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) TRAFFICKING- Any alien described in section 212(a)(2)(H) is deportable.

(3) . . . .

See uscis.gov for access links to a comprehensive list of all the laws, regulations, policy memoranda and precedent decisions effecting United States immigration law and practice.

ATTRIBUTION: *See* ALIENS IN THE UNITED STATES IMMIGRATION COURT By Immigration Judge HARRY L. GASTLEY, Last Updated December 31, 2009, at http://www.justice.gov/eoir/vll/benchbook/resources/Criminal_Law_Outline.pdf for a complete treatment of how cases involving criminal aliens are treated in Immigration Court.

IN THE COUNTY COURT OF SARASOTA COUNTY, STATE OF FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,
Plaintiff,
vs.

Case No: 1997-MM-000000 NC
Division: A

MISTER REDACTED,
Defendant.
_____/

MOTION TO VACATE, CORRECT OR SET ASIDE SENTENCE PURSUANT TO RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE AND, IN THE ALTERNATIVE, REQUEST FOR A HEARING ON MOTION

Comes Now the Defendant, **Mister REDACTED**, by and through the undersigned attorney, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure and moves this Honorable Court to Vacate the Judgment, Sentence and Plea in the above-styled cause and, in the alternative, Requests A Hearing on the motion and in support thereof would show:

1. On June16, 1997, Mister REDACTED entered a plea of No Contest to a charge of Possession of Marijuana, a first degree misdemeanor, in violation of Florida Statutes Section 893.13(6)(b).

2. The Court accepted the plea, withheld adjudication, sentenced Mr. REDACTED to twelve months probation and ordered him to pay fees and costs totaling about $130.00.

3. On or about December 11, 1997, Mr. REDACTED paid the fees and completed the probation pursuant to an Early Termination.

4. Mr. REDACTED did not appeal the judgment or disposition thereof.

5. Mr. REDACTED has not previously filed for any post-conviction relief, including petitions, motions, or applications, with respect to this judgment.

6. Mr. REDACTED is not a native or citizen of the United States, he is a native of Canada and a citizen of Canada and that was his status at the time of entering his plea.

7. The sworn Probable Cause Affidavit filed by the Sarasota Police Department in the instant case lists Mr. REDACTED as a United States Citizen.

8. Mr. REDACTED's due process rights were violated by his No Contest plea that was not made knowingly and voluntarily with an understanding of the nature of the charges and the consequences of the plea, to wit:

a. The Immigration and Nationality Act provides that "[t]he 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.**" (Emphasis added). INA §101(a)(48)(A), 8 U.S.C. §1101(a)(48)(A);

b. Although the law governing the immigration consequences of a criminal conviction is a matter of federal statute and readily attainable by prudent counsel, Mr. REDACTED's counsel did not advise him as to the potential immigration consequences of his plea;

c. Mr. REDACTED believes that he was not given the oral advisory that his No Contest Plea might subject him to deportation pursuant to the laws and regulations of the United States in accordance with Florida Rule of Criminal Procedure 3.172(c)(8); and,

d. As a result of his conviction in the instant case Mr. REDACTED is inadmissible for lawful permanent residence in the United States pursuant to the terms of INA § 212(a)(2), 8 U.S.C. §1182(a)(2) which provides in relevant part:

"Classes of Aliens Ineligible for Visas or Admission - Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States;

(2) Criminal and related grounds. -

(A) Conviction of certain crimes.-

(i) In general.- Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21U.S.C. 802), is inadmissible."

9. Mr. REDACTED believes that he was not advised of the immigration consequences of a No Contest Plea in the instant case because everyone believed him to be a United States Citizen since the sworn affidavit of the Sarasota Police Department erroneously recorded him as having United States Citizenship.

10. On September 28, 2008, Mr. REDACTED filed with the United States Citizenship and Immigration Services Bureau of the United States Department of Homeland Security a Form I-485 Application to Register Permanent Residence or Adjust Status as someone for whom an immigrant visa is immediately available at the time of his application subject to his being admissible to the United States for permanent residence.

11. In a decision dated January 13, 2010, Mr. REDACTED's Form I-485 Application to Register Permanent Residence or Adjust Status was denied because he was found to be inadmissible to the United States for permanent residence pursuant to the above-stated provision of law. See § 212(a)(2), 8 U.S.C. §1182(a)(2), supra.

12. Mr. REDACTED is the immediate relative spouse of his United States Citizen wife,

Mrs. I. M. REDACTED, 1111 Northerly Drive, Sarasota, Florida 34232 whom he married on February 7, 2009.

13. Mr. REDACTED was born on November 99, 1901, in Redacted, Canada and is now aged thirty-three (33) years-of-age.

14. At the time of the instant offense Mr. REDACTED was twenty (20) years-of-age.

15. Mr. REDACTED has been lawfully present in the United States since October 33, 1995 when he immigrated to the United States with his family at the age of nineteen (19).

16. Mr. REDACTED works as a Construction Project Manager at H.R. Halderman Plumbers, Inc., 666 Fruitville Road, Sarasota, Florida 34232.

17. Mr. REDACTED's parents, Also REDACTED and Likewise REDACTED and all of his siblings reside in the United States and are admitted to lawful permanent residence in the United States or naturalized citizens of the United States who have fully assimilated to life in the United States and intend to remain in the United States for the rest of their lives.

18. Mr. REDACTED grew up in the United States after having left the nation of Canada at the age of nineteen (19) and has fully assimilated into life in the United States and has neither family nor job prospects if he is returned to Canada and no independent means with which he could support himself.

19. Mr. REDACTED, would otherwise be entitled to remain indefinitely in the United States with his wife and extremely close-knit immediate family but he is now subject to deportation and removal due to his No Contest plea in this case and his resultant inadmissiblity to lawful permanent residence in the United States.

20. If Mr. REDACTED had known of the potential immigration consequences of his No

Contest plea, then he would not have plead to the marijuana charge since the search of his vehicle could have and should have been contested.

21. The record does not contain an affirmative showing that Mr. REDACTED entered a knowing, intelligent and voluntary No Contest plea in accordance with Boykin v. Alabama, 395 U.S. 238, 242-43 (1969), and Koenig v. State, 597 So.2d 256, 258 (Fla. 1992) because the record does not show that Mr. REDACTED was relying fully advised of the potential immigration consequences of his plea and, in fact, the record shows that everyone believed him to be a United States Citizen based upon the sworn affidavit of the Sarasota Police Department.

22. The erroneous citizenship information recorded on the sworn affidavit of the Sarasota Police Department Probable Cause Affidavit was only recently uncovered when undersigned counsel was retained to review the case.

23. The recently uncovered affirmative error in the sworn affidavit of the Sarasota Police Department Probable Cause Affidavit caused all parties to treat the instant case differently than they would have if it had been known that Mr. REDACTED was not a citizen of the United States.

24. The recently uncovered affirmative error in the sworn affidavit of the Sarasota Police Department Probable Cause Affidavit constitutes newly discovered evidence bearing on the knowing and voluntary nature of the No Contest Plea in the instant case.

25. The newly discovered evidence of the affirmative error in the sworn affidavit of the Sarasota Police Department Probable Cause Affidavit is a fundamental misstatement of the fact of Mr. REDACTED's citizenship upon which all parties relied in advising and treating Mr. REDACTED.

26. The fundamental misstatement of the fact of Mr. REDACTED's citizenship contained in the sworn affidavit of the Sarasota Police Department upon which all parties relied in advising and treating Mr. REDACTED led to a failure to properly advise and treat Mr. REDACTED's case with the same gravity that it otherwise would have been treated had the fact of Mr. REDACTED's alien status been known.

27. The failure to properly advise Mr. REDACTED of the immigration consequences of a criminal conviction for persons who are not United States citizens constitutes a fundamental defect in the underlying proceedings and the judgement and sentence in the instant case must be vacated.

28. There is no petition, application, appeal, motion, or other pleading now pending in any court, either state or federal, as to the judgment under attack.

Wherefore, Mr. REDACTED respectfully requests that this Honorable Court grant this Motion to Vacate Judgment and Plea or grant such other and further relief as the Court finds reasonable under the circumstances.

OATH

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

Before me, the undersigned authority, this day personally appeared **Mister REDACTED**, who first being duly sworn, says that he has read the foregoing motion for post-conviction relief and has personal knowledge of the facts and matters therein set forth and alleged and that each and all of these facts and matters are true and correct.

_____
Mister REDACTED

SWORN TO (AFFIRMED) AND SUBSCRIBED TO before me this _____ day of _____, 200__, by **Mister REDACTED** who is: (__) personally known to me; or (__) who has produced _____ as identification and who took the following Oath:

Under penalties of perjury, I declare that I have read the foregoing motion and that the facts stated in it are true.

_____
Mister REDACTED

_____
Notary Public
State of Florida At Large

_____
Street Address City and State Zip Code Telephone

My Commission Number is _____ and expires _____.

MEMORANDUM OF LAW

This motion is brought pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. Florida Rules of Criminal Procedure 3.850 (2000). Florida Rule of Criminal Procedure 3.850(b) provides that a Motion to Vacate, Correct or Set Aside Sentence shall not be " . . . filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence . . . ." Id. Mr. REDACTED respectfully submits that the instant case involves facts on which the claim is predicated that were unknown to the movant and the movant's attorney and could not have been

ascertained by the exercise of due diligence and, therefore, the two-year limitation period is not applicable in the instant case. The fact of the erroneous citizenship information recorded on the sworn affidavit of the Sarasota Police Department Probable Cause Affidavit is not something that the defendant even knew existed because he was a defendant twenty (20) years old and relying on the advice of his law-school educated public defender. The fact of the erroneous citizenship information recorded on the sworn affidavit of the Sarasota Police Department Probable Cause Affidavit is not something that a public defender who handles hundreds of cases at any given time would devote either the time or resources to investigate given the relatively minor consequences of the plea for someone believed to be a United States citizen. Moreover, criminal cases are about guilt, innocense and/or mitigation of punishment and no public defender has the time, resources or inclination to investigate the citizenship status of a defendant who has already been labeled a United States citizen by the sworn affidavit of the law enforcement officer who lodged the charge. Thus, Mr. REDACTED entered the system wrongfully labeled a United States citizen by the sworn affidavit of the Sarasota Police Department and was thereafter treated as if he held that status by everyone that he came in contact with during the pendency of the case and he had no reason to believe or know that he was actually being treated without the proper advice and information he needed in order to make a knowing, voluntary decision about whether to plead or contest the case, and the serious future, and, in this case, draconian, immigration consequences which would one day flow from his unknowing plea.

A claim that a plea was involuntary is a cognizable claim under Rule 3.850 of the Florida Rules of Criminal Procedure. Fl. R. Crim. P. 3.850 (2000). In Boykin v. Alabama, the United States Supreme Court held that a trial judge must ensure a defendant has intelligently and

voluntarily entered his plea to protect the defendant's due process rights. Boykin v. Alabama, 395 U.S. 238, 242-43 (1969). The Court stated ". . . several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial." A guilty plea involves ". . . the privilege against compulsory self-incrimination . . . ," the right to trial by jury, and ". . . the right to confront one's accusers." Id. at 243. A trial judge must make sure the defendant ". . . has a full understanding of what the plea connotes and of its consequence." Id. at 244; *See also* Marriott v. State, 605 So. 2d 985 (Fla. 4th DCA 1992) (stating that due process requires a court accepting a guilty plea to carefully inquire into the defendant's understanding of the plea). A trial court's compliance with the Rules of Criminal Procedure requiring the court to personally inform the defendant of certain specified rights and possible consequences before accepting a guilty plea does not always guarantee that the plea is constitutionally valid. Fountaine v. United States, 411 U.S. 213, 215 (1973).

The issue of the knowing and voluntary nature of a plea may be raised in the trial court in a motion for post-conviction relief if the issue has not been previously raised and ruled upon. Fla. R. Crim. P. 3.850 (2000); State v. Thompson, 735 So. 2d 482 (Fla. 1999). The defendant has the burden of showing that the plea was not voluntary or knowing. Mikenas v. State, 460 So. 2d 359, 361 (Fla. 1984). A trial court is bound to assume that the allegations in a 3.850 motion are true in the absence of "an evidentiary hearing or any record attachments refuting [a] petitioner's allegations." Ford v. State, 825 So. 2d 358, 361 (Fla. 2002); *See also* Dugart v. State, 578 So. 2d 789 (Fla. 4th DCA 1991) (holding that appellant's allegations were sufficient to require evidentiary hearing where the record does not contain evidence to refute the allegations); Payne v. State, 890 So. 2d 284 (Fla. 5th DCA) (holding that an evidentiary hearing is required

where the record does not contain conclusive evidence to refute appellant's facially sufficient 3.850 motion); Charles v. State, 920 So. 2d 740 (Fla. 5th DCA 2006) (holding that appellant is entitled to an evidentiary hearing based on a facially sufficient 3.850 motion).

Florida Rule of Criminal Procedure 3.172(c)(8) requires that a court accepting a plea inform the defendant "that if he or she is not a United States citizen, the plea may subject him or her to deportation . . . ." "Where the defendant proves he has been prejudiced, a court's failure to inform him of this potential consequence renders the plea void as involuntary." *See, e.g.*, Peart v. Florida, 756 So.2d 42, 45-46 (Fla.2000); Marriott v. Florida, 605 So.2d 985, 987-88 (Fla. 4th DCA 1992). "A petition for writ of error coram nobis is the method by which an out-of-custody criminal defendant in Florida can vacate such an involuntary plea." *See* Peart, 756 So.2d at 45-46; Florida v. Seraphin, 818 So.2d 485, 487 (Fla.2002) *as cited in* Alim v. Gonzales, 446 F.3d 1239 (Eleventh Circuit 2006).

When a defendant enters a plea in reliance on affirmative misadvice and demonstrates that he or she was thereby prejudiced, the defendant may be entitled to withdraw the plea even if the misadvice concerns a collateral consequence as to which the trial court was under no obligation to advise him or her. *See* State v. Sallato, 519 So. 2d 605 (Fla. 1988) (remanding for trial court to determine whether defendant was given positive misadvice where defendant alleged he asked counsel whether the plea would jeopardize his chances of becoming a permanent citizen of the United States and counsel replied in the negative); Murphy v. State, 2002 Fla. App. LEXIS 6611, 27 Fla. L. Weekly D 1156 (Fla. 4th DCA May 15, 2002) (reversing order summarily denying motion for post conviction relief and noting "this court has held that affirmative misadvice, regarding even collateral consequences of a plea, may form the basis for

withdrawing the plea"); 814 So.2d 475, 478, (Fla. 4th DCA 2002) (reversing summary denial of motion for post conviction relief where defendant alleged counsel misadvised him that nolo plea would not function as guilty plea and could not be used against him in any subsequent proceeding, but plea was used to enhance federal sentence for subsequent offense); Watrous v. State, 793 So.2d 6, 11 (Fla. 2d DCA 2001) (reversing denial of post conviction relief for evidentiary hearing on defendant's claim that counsel misadvised him that after entering his plea, he would be released from custody almost immediately based on amount of time already served, but instead state filed petition for his involuntary civil commitment as sexually violent predator; noting that "[i]t is well-settled that affirmative misadvice regarding even collateral consequences of a plea forms a basis for withdrawing the plea"); *compare*, Collier v. State, 796 So.2d 629, 630 (Fla. 3d DCA 2001) (holding affirmative misadvice about enhancement consequences of plea does not constitute basis for post conviction relief).

In Ghanavati v. State, the Court held that "[a]s the motion for post conviction relief stated a cognizable claim, and the record does not refute the allegations, we reverse for an evidentiary hearing on the motion." Ghanavati v. State, 820 So.2d 989 (Fla. App., 2002). The Ghanavati case involved an allegation of affirmative misadvice of counsel regarding the potential immigration consequences. Specifically, the Court wrote, " . . . we conclude that appellant's allegation of positive misadvice renders his motion legally sufficient." Ghanavati v. State, at 991. Similarly, courts in other jurisdictions have reached the same conclusion. Thus, in Sandoval v. INS, 240 F.3d 577 (7th Cir.2001), the alien stated in his post-conviction motion that his counsel had advised him not to worry about his immigration status, and that he would not have entered a guilty plea had he known it would subject him to deportation. *See* Id. at 578.

Under Illinois law, a guilty plea entered in reasonable reliance upon erroneous advice of counsel that the plea would have no collateral deportation consequence could be rendered involuntary. *See* Id. at 578-79.

Mr. REDACTED seeks to vacate and set aside the judgment and sentence in this case based on affirmative misadvice regarding whether there would be immigration consequences if he plead No Contest. Mr. REDACTED relied upon the advice of his public defender who relied upon the information contained in the sworn affidavit of the Sarasota Police Department Probable Cause Affidavit filed in this case. This is newly discovered evidence that neither Mr. REDACTED nor his public defender knew of or reasonably could have been ascertained by the exercise of due diligence in the ordinary course of the disposition in a case such as this one. Mr. REDACTED was never advised of the potential immigration consequences that he might incur pursuant to INA § 212(a)(2), 8 U.S.C. §1182(a)(2) which provides in relevant part:

"Classes of Aliens Ineligible for Visas or Admission - Except as otherwise provided in this Act, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States;

(2) Criminal and related grounds. -

(A) Conviction of certain crimes.-

(i) In general.- Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in

section 102 of the Controlled Substances Act (21U.S.C. 802), is inadmissible."

And the reason that he was never properly advised is because the sworn affidavit of the Sarasota Police Department Probable Cause Affidavit filed in this case wrongfully attests to him being a United States citizen. Therefore, Mr. REDACTED did not know that his plea might subject him to inadmissibility and removal. Mr. REDACTED would not have plead No Contest to the charge had he known that he could suffer adverse immigration consequences (removal) if the Court accepted his plea. The fact of the erroneous attribution of United States citizenship to Mr. REDACTED that all parties relied upon from the affirmative misstatement of a fundamental fact in the sworn affidavit of the Sarasota Police Department led to either affirmative misadvice or negligent advice misadvice of Mr. REDACTED's public defender and all who came in contact with him in the justice system and the failure to properly advise and treat him as to the collateral consequences of his No Contest plea constitutes an unknowing, involuntary plea and a fundamental defect in the underlying proceedings in that Mr. REDACTED has been denied his constitutional rights to due process of law and the effective assistance of counsel. This affirmative misadvice and/or failure to advise by his lawyer as to the collateral consequences of his plea renders this motion legally sufficient and entitles Mr. REDACTED to a hearing on the motion.

In the instant case, Mr. REDACTED did not enter a knowing and voluntary plea because he was relying on either the affirmative misadvice or negligent failure to advise of his attorney notwithstanding any boilerplate warning in a plea form. The courts of Florida cannot and should not allow a plea to stand where the judge is advising a defendant that his conviction "may" incur immigration consequences, but his attorney is saying to him, in effect, "don't worry about." The

protections that the Florida Supreme Court afforded to all alien criminal defendants by way of Florida Rule of Criminal Procedure 3.172(c)(8) are hollow and meaningless without the concomitant and coextensive competent and effective advice of the Florida Bar members who represent these defendants, explain the rules to them and upon whose advice these defendants rely. The courts should not allow an attorney's affirmative misadvice or negligent failure to advise to obviate and obliterate the protective, prophylactic effect of Rule 3.172(c)(8) which the Florida Supreme Court intended to provide in such cases. The right to promulgate rules of procedure is delegated to the Florida Supreme Court by the Florida Legislature. *See* Florida Statutes Annotated, Constitution of Florida, Article Five, Section Two.

Mr. REDACTED should have been advised by his attorneys of the potential consequences of INA § 212(a)(2), 8 U.S.C. §1182(a)(2), supra which provides in relevant part that any alien convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21U.S.C. 802), is inadmissible." Mr. REDACTED's plea was not freely and voluntarily made because he waived his Fifth and Sixth Amendment rights to procedural and substantive due process of law in reliance upon the advice of his attorney who failed to fully advise him of the immigration consequences of his No Contest plea. The failure of the attorney to protect Mr. REDACTED's rights are a fundamental defect in the underlying proceeding and violative of the Fifth and Sixth Amendments to the United States Constitution. The United States Citizenship and Immigration Service (USCIS) has denied Mr. REDACTED's Form I-485 Application to Register Permanent Residence or Adjust Status as someone for whom an immigrant visa is immediately available at the time of his application

based upon finding him inadmissible. The United States Citizenship and Immigration Services Bureau of the United States Department of Homeland Security can now initiate removal proceedings against him as someone present in the United States who is inadmissible to the United States for permanent residence. Mr. REDACTED would not have voluntarily entered the No Contest plea if he had been fully advised by his attorney. Thus, Mr. REDACTED's due process rights have been violated by an unknowing, involuntary plea and he has been prejudiced by the violation. Mr. REDACTED is now facing the institution of removal proceedings and deportation. Mr. REDACTED will not be able to obtain relief from removal if his conviction in the above-styled case remains and, if removed (deported) will likely never be admitted to the United States again. If Mr. REDACTED had known that the No Contest plea was going to subject him to the immigration consequences (removal) he is now facing, he would not have entered the plea.

Mr. REDACTED brings this motion in good faith and in the interests of justice pursuant to the Florida Rules of Criminal Procedure and the applicable case law. Mr. REDACTED entered an unknowing, involuntary plea based upon the affirmative misadvice and/or negligent failure to advise of a lawyer appointed to represent him and protect his interests who was charged with the duty to fully and correctly advise him. The affirmative misadvice and/or negligent failure to advise in this case was constitutionally ineffective assistance of counsel resulting in a fundamental defect in the underlying proceedings and this Motion to Vacate Judgment must be granted due to the unknowing, involuntary nature of his plea.

Respectfully submitted,

Christian And Associates, P.A.

By:_____

Terry Clifton Christian, Esq.
Attorney and Counselor At Law
Florida Bar No: 754633
15310 Amberly Drive
Suite 250
Tampa, FL 33647
Telephone: (813) 228 - 7743
Facsimile: (813) 514 - 2877
E-Mail: tchristian@thelawus.com
Web Site: www.tchristianlaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was furnished by __First Class U.S. Mail __Certified U.S. Mail __Priority U.S. Mail __Express U.S. Mail __E-mail __Federal Express Courier __Facsimile Transmission _√_Hand Delivery, as appropriate, to the persons named below this day **Thursday, September 9, 2010**.

_____
Terry Clifton Christian, Esq.

Office of the State Attorney
Twelfth Judicial Circuit
2071 Ringling Boulevard
Sarasota, Florida 34237

IN THE COUNTY COURT OF SARASOTA COUNTY, STATE OF FLORIDA
CRIMINAL DIVISION

STATE OF FLORIDA,
Plaintiff,
vs.

Case No: 1997-MM-000000 NC
Division: A

MISTER REDACTED,
Defendant.
_____/

ORDER GRANTING MOTION TO VACATE JUDGEMENT

THIS MATTER is before the Court on Defendant's Motion to Vacate Judgement Pursuant to Florida Rule of Criminal Procedure 3.850(a)(5), filed on March 66, 2010. The matter came before the Court on May 66, 2010. The Court, after considering the Motion, the State's Response, the court file, the record, the testimony, and the arguments of counsel, finds as follows:

In his Motion, Defendant alleges that he was not informed by the Court or by counsel that his plea could result in removal from the United States and, therefore, his plea was not made knowingly and voluntarily. The Court finds that the evidence and testimony supports the Defendant's allegations that his plea was not knowingly and voluntarily made and, further, that the involuntary nature of the Defendant's plea constitutes a fundamental defect in the underlying proceeding and that the Defendant's Motion should therefore be granted. As such, Defendant's Motion is hereby granted.

It is therefore **ORDERED AND ADJUDGED** that Defendant's Motion is hereby **GRANTED**.

DONE AND ORDERED in Chambers in Sarasota County, Florida, this _____ day of May, 2010.

_____
Roy L. Bean, County Judge

Send copies to:

Terry Clifton Christian, Esq.
Attorney for Defendant
15310 Amberly Drive, Suite 250
Tampa, Florida 33647

Office of the State Attorney
Twelfth Judicial Circuit
2071 Ringling Boulevard

Sarasota, Florida 34237