IMMIGRATION LAW FOR THE APPELLATE LAWYER

By Michael Mehr and Vicki Firstman 2014

I. WHY AN APPELLATE LAWYER NEEDS TO BE CONCERNED ABOUT THE IMMIGRATION CONSEQUENCES OF A CONVICTION AND SENTENCE

A. It is our legal duty as effective advocates for our clients

In an appeal by right, a defendant is guaranteed the right to effective assistance of counsel. The Supreme Court stated that "the promise of *Douglas* that a criminal defendant has a right to counsel on appeal – like the promise of *Gideon* that a criminal defendant has a right to counsel at trial – would be a futile gesture unless it comprehended the right to the effective assistance of counsel." (*Evitts v. Lucey* (1985) 469 U.S. 387, 397.) Additionally, appellate counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." (*Id* at p. 394.)

The U.S. and California Supreme Courts have determined that regardless of whether immigration consequences are direct or collateral, advice concerning immigration consequences comes within the Sixth Amendment right to effective assistance of counsel and the corresponding California State Constitutional right. (*Padilla v. Kentucky* (2010) 559 U.S. 356, 365-366; *In re Resendiz* (2001) 25 Cal.4th 230.)

While the contours of an appellate attorney's legal responsibilities as effective advocates for our clients with regard to immigration consequences has not received the attention of appellate courts, it is clear that we cannot turn a blind eye towards immigration consequences merely because we have been appointed as appellate rather than trial counsel.

B. It is our ethical and professional responsibility

Regardless of legal responsibility, we will not be doing our client any good by ignoring the immigration consequences which are often more drastic than the penal

consequences of a conviction. While immigration law can be complex and is subject to rapid change, it can also be extremely satisfying to know that we can help our clients avoid an immigration disaster which not only affects them but their innocent families as well.

C. Best Practices

Admittedly, the immigration consequences may not be laid bare by the clerk's and reporter's transcripts on appeal unless counsel is appointed in a denial of a motion to vacate pursuant to Penal Code section 1016.5.

However, the same procedures that trial counsel must use to satisfy her *Padilla* obligations should be used by appellate counsel as well. A useful checklist is set forth in Marks, Mehr, and Tooby, Chapter 52, "Representing the Noncitizen Criminal Defendant," CRIMINAL LAW PROCEDURE AND PRACTICE, §52.2 (C.E.B. 2013):

- **Ascertain client's nationality and immigration status**.
- **Obtain from the client the information necessary to determine the immigration consequences of the conviction and to find out what, if anything, trial counsel did to explain these consequences and to try to avoid them**.
- **Call an immigration expert or research the exact immigration consequences and how to avoid these consequences**.
- **Explain the specific immigration consequences to the client**.
- **Ask the client how high a priority he or she places on the immigration consequences**.
- **Attempt to avoid the adverse immigration consequences**.

In addition, appellate counsel must ascertain the following:

- **What, if anything, trial counsel told defendant about the immigration consequences**;
- **What, if anything, trial counsel did to try to avoid the immigration consequences**.

If the defendant is still in custody it should be determined if there is an immigration hold and whether under the Trust Act, this immigration hold can be honored. (Gov. Code §§ 7282, 7282.5.)

If the defendant is in immigration custody, the new Immigrations Customs Enforcement ("ICE") online detainee locator system can be used to identify where the defendant is being held. (https://locator.ice.gov/odls/homePage.do)

If the defendant is in removal proceedings, the status of those proceedings can be determined if the defendant's Alien number is obtained from the defendant or the family through use of the 800 number. (1-800-898-7180)

Immigration consequences and strategies can be researched in Marks, Mehr, and Tooby, Chapter 52, "Representing the Noncitizen Criminal Defendant," CRIMINAL LAW PROCEDURE AND PRACTICE (C.E.B. 2013) and on the Immigrant Legal Resource Center website which is continually updated and very extensive at http://www.ilrc.org/crimes. Additionally, a new C.E.B. book on immigration consequences and criminal convictions will soon be published.

D. Obtain Authorization from SDAP before Habeas is filed

At present, SDAP is able to authorize payment for up to 12 hours of habeas compensation, but only where the SDAP Staff Attorney you are working with on a particular case pre-authorizes filing of the petition. If the reasonable amount of compensation exceeds 12 hours, SDAP must forward the claim to Presiding Justice Rushing for approval of SDAP's recommended compensation.

II. CASE EXAMPLE OF WHAT EVERY APPELLATE ATTORNEY SHOULD BE PREPARED TO DO TO AVOID NEGATIVE IMMIGRATION CONSEQUENCES

You are appointed defense counsel. Defendant pleaded guilty to possession for sale of marijuana. A motion to suppress evidence was litigated in the trial court. There is no discussion in the record of immigration issues. However, you find out that the defendant is

currently in removal proceedings solely as a result of this conviction. The defendant is a long-time lawful permanent resident. You talk to an immigration attorney and find out that a plea to the more serious offense of "transportation" or "offer to sell" marijuana would allow the defendant to pursue discretionary relief in immigration court which he would have a reasonably good chance of winning.

Would you just ignore the immigration consequences and pursue the motion to suppress issue? Or, would you decide to investigate further to determine whether trial counsel attempted to obtain a plea to the non-aggravated felony offenses of "transportation" or "offer to sell"?

This scenario is taken from an actual appeal, and fortunately, the panel attorney in this case talked to trial counsel and found out that he did not attempt to plead to the non-aggravated felony offense because it didn't occur to him. The panel attorney obtained approval from SDAP to pursue a habeas petition for ineffective assistance of counsel and filed it in the Court of Appeal in conjunction with the direct appeal on the suppression issue. (*People v. Bautista* (2004) 115 Cal.App. 4th 229, 237.) After the defendant's case was reversed, defendant entered a plea to "transportation" and eventually ended up winning cancellation of removal in the immigration court. Panel Attorney Meredith Fahn handled the appeal and the habeas petition, and Michael Mehr provided much consultation as well as a declaration in support of the writ.

If counsel for appellant had turned a blind eye towards immigration consequences the result would have been different since the appeal of the suppression issue was not successful. Appellate counsel had lived up to her legal duty and had the satisfaction of knowing that she had assisted in preventing an immigration disaster for her client and his family.

Sometimes the remedy will not be filing a habeas for ineffective assistance of counsel, but another remedy. This may sometimes be made in conjunction with an appeal if the trial court has jurisdiction. Sometimes the appeal should be resolved first before moving for a remedy in the trial court, or sometimes the appeal should be abandoned to proceed with a remedy in the trial court when the trial court does not have jurisdiction while an appeal is pending.

Post-conviction relief in the trial court may include recall of a sentence where a prison sentence triggers deportation, obtaining an expungement for a pre-July 2011 plea of guilty to a first time possession of drugs or paraphernalia conviction, obtaining a Penal Code section 17, subdivision (b)(3) reduction of a felony to a misdemeanor, modifying a sentence, vacating a judgment pursuant to Penal Code section 1016.5, or obtaining some other relief. This may be a more effective and straightforward way of helping a noncitizen defendant if immigration consequences are a high priority. Then, you have to determine whether to abandon the appeal to pursue the trial court remedy or whether the trial court still has jurisdiction to entertain the relief requested while the appeal is pending. (See generally, A.J. Kutchins, "Felony Appeals," CRIMINAL LAW PROCEDURE AND PRACTICE, Ch. 44, §44.4 (CEB 2013).

III. UPDATE ON CASE LAW ON CRIMINAL LAW AND IMMIGRATION FOR THE APPELLATE ATTORNEY

A. A conviction is final for immigration purposes even while a direct appeal is pending

In an unfortunate decision, the Ninth Circuit held in 2011 that a conviction pending on direct appeal although not yet final under state law is a "conviction" for purposes of immigration law. (*Planes v. Holder* (9th Cir. 2011) 652 F.3d 991, 996.) Prior to this decision, removal proceedings based solely on a conviction could be terminated upon proof that a direct appeal by right was pending. Now, a noncitizen defendant can be removed even during the pendency of the appeal. Although complicated, if the conviction is reversed on appeal, the defendant can move to reopen the removal order and seek return to this country.

B. Penal Code Section 1016.5 Cases

1. The relaxed standard for proof of "prejudice" in Section 1016.5 actions

In an important case, the California Supreme Court relaxed the standard of proof of "prejudice" in motions to vacate a judgment under Penal Code section 1016.5, where there is no proof that the alien advisement has been given: "We hold that because the question is

what the defendant would have done, relief should be granted if the court, after considering evidence offered by the parties relevant to that question, determines the defendant would have chosen not to plead guilty or nolo contendere, even if the court also finds it not reasonably probable the defendant would thereby have obtained a more favorable outcome." (*People v. Martinez* (2013) 57 Cal.4th 555, 559, italics in original.) The Attorney General sought a ruling that "prejudice" could only be shown if the defendant proved that he would have rejected a plea to take a case to trial. The court rejected this and stated: "We hold relief is available if the defendant establishes he or she would have rejected the existing bargain to accept or attempt to negotiate another." (*Ibid*.)

Because section 1016.5 is designed to allow the defendant to obtain a continuance and to negotiate with the district attorney once she becomes aware of the possible immigration consequences, "[t]he court does not decide if the prosecution would have offered a different bargain; it considers evidence that would have caused the defendant to expect or hope a different bargain would or could have been negotiated." (*People v. Martinez*, *supra,* 57 Cal.4th at p. 567.)

This case is an important victory because it will make it easier to establish prejudice in these cases in the future and will allow attorneys to argue that an immigration-neutral disposition could have been bargained for as part of the proof of prejudice.[1] Nevertheless the court stressed that proving that there are immigration-neutral dispositions that are possible is not enough. The credibility of the defendant is at issue.

The take-away is that these are winnable cases, but it is still important for the trial attorney to create a strong record showing what is at stake for the defendant at the time of the plea and why the defendant would not want to plead to an offense which would cause inadmissibility or deportability without a fight.

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[1] SDAP panel member Sara Coppin handled the appeal and petition for review and argued the case in the Supreme Court. An amicus was filed by attorney Michael Mehr for the Immigrant Legal Resource Center and Asian Law Caucus and an amicus was filed by Aimee Feinberg and Jon Philipsborn for the U.C. Davis School of Law Supreme Court Clinic and California Attorneys for Criminal Justice.

Importantly, this case concerned an undocumented defendant who was already deportable. Years after the conviction, he filed for adjustment of status and was put in removal proceedings. The *Martinez* court did not say – as some expected – that at the time he was already deportable for being undocumented.

2. On April 7, 2014, in *People v. Arriaga*, the California Supreme Court resolved a split of authority as to whether a certificate of probable cause must be obtained to appeal a denial of a Section 1016.5 motion

In *People v. Placencia* (2011) 194 Cal.App.4th 489, Division Six of the Second District Court of Appeal held that a certificate of probable cause is required to appeal a denial of a 1016.5 case. This generated a split of authority on the certificate requirement which the California Supreme Court favorably resolved on April 7, 2014, in *People v. Arriaga* (April 7, 2014, S199339) ____ Cal.4th ____ [2014 Cal. LEXIS 2469].) *Arriaga* held that a defendant is not required to obtain a certificate of probable cause before appealing a trial court's denial of a motion to vacate a conviction under Penal Code section 1016.5. In so holding, the court reasoned that such an appeal does not fall under Penal Code section 1237, subdivision (a)'s certificate requirement. Rather, the appeal is from an order "made after judgment, affecting the substantial rights of the party," and therefore is governed by *subdivision (b)* of section 1237.5, which does not impose a certificate mandate.

3. *People v. Arriaga* also held that the People must only prove by a preponderance of the evidence that the alien advisement was given if there is no record of such advisement

People v. Arriaga also decided that the People must only prove by a preponderance of the evidence, rather than by clear and convincing evidence, that the alien advisement was given absent a record of such an advisement.

In *Arriaga*, there was no record of the advisement. As a result, the People presented the testimony of the prosecutor at the defendant's 1986 plea proceeding, who testified that in plea matters, it was he, rather than the trial judge, who customarily gave the section 1016.5 advisements. Although the prosecutor did not recall defendant specifically, he testified it was

his practice to always advise defendants of the immigration consequences of pleading guilty. The prosecutor also recited the particular advisements it was his habit and custom to provide. In addition, the minute order for the hearing showed a checked box next to the statement that the defendant was advised of the possible effects of the plea on any alien or citizenship status, but was silent on advisement of the three possible immigration consequences resulting from a plea of guilty or no contest, i.e., deportation, exclusion from the United States and denial of naturalization.

The trial court denied the motion to vacate, ruling that the prosecution had proved by a preponderance of the evidence that the defendant was advised of the immigration consequences of his plea. The Court of Appeal affirmed and the Supreme Court granted review.

The defendant's attorney made a cogent argument that given the important interests at stake, i.e., the grave consequences of deportation, the intermediate standard of proof by clear and convincing evidence is required. However, the Supreme Court rejected that argument. While recognizing the substantial right of noncitizen defendants to complete immigration advisements before entering a plea of guilty or no contest, *Arriaga* held that other factors weighed in favor of the less stringent standard of proof, including (1) the fact that a motion pursuant to section 1016.5 is a collateral attack on a final judgment of conviction and (2) the government's strong interest in the finality of judgments.

It is significant to note, however, that the *Arriaga* court emphasized that "[t]here will be circumstances, not present here, under which the trial court may properly conclude that the prosecution has not rebutted the nonadvisement presumption. For instance, both the original prosecutor and the trial judge may be unavailable to testify; their testimony about what occurred at the plea hearing may prove less persuasive than the defendant's testimony; or the minute order for the plea hearing, by the absence of any notation that the defendant was advised, may strongly support an inference that advisements were *not* given . . . ." (*People v. Arriaga*, *supra*, ____ Cal.4th ____ [2014 Cal. LEXIS 2469, * p. 20.].)

C. *Padilla v. Kentucky*

1. The *Padilla* duty

In *Padilla v. Kentucky* (2010) 559 U.S. 356, the United States Supreme Court held that defense counsel representing a noncitizen has a Sixth Amendment duty not only to refrain from misadvice, but has an affirmative duty to advise a defendant about the risk of adverse immigration consequences. "[W]hen the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." (*Id*. at p. 369.) Conversely, the court held that "[w]hen the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." (*Ibid.*)

Padilla stressed the point that when "answers are readily available," counsel cannot turn a blind eye and refuse to give correct advice. (*Padilla v. Kentucky*, *supra*, 559 U.S. at pp. 369-371.) Because the legal literature is constantly updated and "readily available," counsel has a duty to research the law to give correct advice. It is only when the law itself is unclear that the defense attorney can just advise as to the risk of deportation.

2. *Padilla* is not retroactive

In *Chaidez v. United States* (2013) ____ U.S. ____ [133 S.Ct 1103], the United States Supreme Court held that the obligation to give affirmative advice about immigration consequences set forth in *Padilla v. Kentucky* was a "new rule" that did not apply retroactively to convictions final before March 31, 2010. (*Id.* at pp. 1105, 1113.) However, the court acknowledged that there was a minority of federal circuits and state jurisdictions that had recognized Sixth Amendment claims where the deficient representation involved affirmative misadvice. (*Id.* at p. 1112.) As discussed below, California was one of those jurisdictions. However, given the *Chaidez* holding, where the guilty or no contest plea arose before the date of the *Padilla* decision on March 31, 2010, practitioners should base any Sixth Amendment claims on *both* the federal constitution as well as the California guarantee of effective representation set forth in Article I, § 15.

3. In California, the criminal attorney has been under an obligation to advise (and defend) a client from immigration consequences since 1987

The Supreme Court in *Chaidez* acknowledged that *Padilla's* ruling answered an open question about the Sixth Amendment's reach "in a way that altered the law of most jurisdictions. In so doing, *Padilla* broke new ground and imposed a new obligation." (*Chaidez v. United States*, *supra*, ____ U.S. ____ [133 S.Ct. 1103, 1105.].) However, in cases pre-dating *Padilla*, one by at least 25 years, California case law had applied Article I, § 15 of the California Constitution to various claims of ineffective representation based on deficient performance involving immigration consequences. Thus, where a defendant's plea was entered before the date of the *Padilla* decision, California must apply its pre-*Padilla* case law.

In *People v. Soriano* (1987) 194 Cal.App.3d 1470, the court held that under Article I, §15 of the California Constitution as well as the Sixth Amendment to the U.S. Constitution, criminal defenders have the duty to advise noncitizen criminal defendants about the actual and specific immigration consequences of conviction. (*Id*. at pp. 1478-1479.) Following the rule set forth in *People v. Soriano*, a California Court of Appeal panel in 1989 made explicit what was only implicit in *Soriano*: the duty to advise about immigration consequences also includes the duty to defend against those consequences. (*People v. Barocio* (1989) 216 Cal.App.3d 99 [failure to file judicial recommendation against deportation or seek 364 day sentence is ineffective assistance of counsel].) This was also the holding in *People v. Bautista*, *supra*, 115 Cal.App.4th 229 [counsel correctly told the defendant that he "would" be deported for a conviction for possession for sale, but failure to attempt to plead up to "offer to sell" or "transportation" may be ineffective assistance of counsel].

While the California Supreme Court in 2001 stated in dictum that it was "not persuaded" as to whether a failure to advise was ineffective assistance of counsel, that case only addressed affirmative misadvice and expressly stated that "this case does not allege a mere failure to investigate, so the question is not squarely presented." (*In re Resendiz*, *supra*, 25 Cal.4th 230, 249-250.) *In re Resendiz* did not overrule *People v. Soriano* or *People v. Barocio*. Therefore, criminal defense counsel and lower state courts are bound to follow those opinions. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456

["Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction."].)

D. The standard of prejudice for IAC under *Padilla v. Kentucky*

The *Stickland* standard for prejudice for ineffective assistance of counsel cases is that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984) 466 U.S. 668, 694.) Although the court in *Padilla* explicitly repeated this standard, the court also stated that "to obtain relief on this type of claim, a petitioner must convince the court that *a decision to reject the plea bargain would have been rational under the circumstances*. See *Roe v. Flores–Ortega,* 528 U.S. 470, 480, 486, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)." (*Padilla v. Kentucky*, *supra*, 559 U.S. 356, 372, italics added.). The case cited by *Padilla – Roe v. Flores-Ortega* – involved IAC in the context of the failure to file a notice of appeal. *Roe* held that a prejudice test in this context simply requires that the defendant demonstrate that but for counsel's deficient conduct, he *would* have appealed. The court explained that it would be "unfair" to require the defendant to demonstrate that his hypothetical appeal had merit. (*Roe v. Flores-Ortega*, *supra*, 528 U.S. at p. 484.)

The standard of prejudice set forth in *Padilla* that "a decision to reject the plea would have been rational under the circumstances" (*Padilla v. Kentucky*, *supra*, 559 U.S. at p. 372) diverges from the traditional test where there is a challenge to a guilty plea, which requires a showing of a reasonable probability the defendant would have taken the case to *trial* but for the deficient advice of counsel. (*Hill v. Lockhart* (1985) 474 U.S. 52, 58.) Importantly, *Padilla* opens the possibility of arguing that the defendant can show prejudice if there was a reasonable probability that he could have negotiated a plea that would avoid or mitigate immigration consequences. (See, e.g., *Kovacs v. United States* (2nd Cir. 2014) 744 F.3d 39.)

Although the Supreme Court in *Premo v. Moore* adhered to a *doubly deferential standard* concerning ineffective assistance of counsel in plea bargaining, this was based on the traditional reluctance of courts to second guess plea bargaining and the law governing federal habeas review of a state court proceeding, which requires the defendant to show that there was an unreasonable application of clearly established Supreme Court precedent. (*Premo v. Moore* (2011) ____U.S. ____ [131 S.Ct. 733, 737].)

In *Missouri v. Frye* (2012) ____ U.S. ____ [132 S.Ct. 1399], the court held that a defendant can establish prejudice without having to show a reasonable probability that he would have taken the case to trial in the context of a *lapsed plea bargain* which would have resulted in a reduced sentence but for the failure of counsel to communicate it. (*Id.* at pp. 1409-1410.) In such cases, the defendant must be able to show that he would have accepted the offer to plead. (*Ibid.*) This standard also diverged from the traditional test where there is a challenge to a guilty plea, i.e., that the defendant demonstrate a reasonable probability he would have taken the case to trial but for the deficient advice of counsel. (See, e.g., *Hill v. Lockhart*, *supra*, 474 U.S. 52, 58).

In *Lafler v. Cooper* (2012) ____ U.S. ____, [132 S.Ct. 1376], the court considered a claim of ineffective representation where trial counsel's deficient representation caused a defendant to reject a plea offer and the defendant was later convicted after a trial. Diverging again from the traditional *Strickland* standard, the Supreme Court held that a Sixth Amendment claim lies if the defendant can demonstrate that but for the ineffective advice of counsel, there is a reasonable probability that the plea offer would have been accepted by both parties and the court, and that the conviction or sentence, or both, would have been less severe than that which was ultimately imposed. (*Id.* at p. 1385.)

The government may say that *Missouri v. Frye* only applies to *lapsed plea bargains* rather than prejudice in failing to negotiate a better plea bargain and that *Lafler v. Cooper* only applies to taking an *offered plea bargain* rather than taking the case to trial. The government may point out that the *Frye* court stated that "a defendant has no right to be offered a plea . . ., nor a federal right that the judge accept it." (*Missouri v. Frye*, *supra*, 132 S.Ct. 1399, 1410; internal citations omitted.) However, the context and facts in those cases does not mean that a court will not find prejudice in the loss of an opportunity to negotiate an immigration-neutral plea bargain. In fact, some courts have now indicated that *Hill*, *Frye* and *Lafler* were context-specific applications of the *Strickland* prejudice test and that prejudice can also be shown where there is a claim that the defendant was prejudiced by failure to negotiate an immigration-neutral plea. (See, e.g., *Kovacs v. United States*, *supra*, 744 F.3d 39.) State and federal courts have held that the defendant's desire to avoid deportation must be considered, along with the defendant's other unique circumstances, in the analysis of whether it would have been rational to reject the plea agreement in an effort to avoid deportation. (See, e.g., *Denisyuk v. State* (2011) 422 Md. 462, 485, 487-488; *United States v. Orocio* (3rd Cir. 2011) 645 F.3d 630, 643, 644, overruled on another ground in

Chaidez v. United States, *supra*, 133 S.Ct at p. 1107 & fn. 2; *State v. Sandoval* (2011) 171 Wn.2d 163, 174-176.)

The California Supreme Court has not had occasion to decide an IAC case concerning the loss of the opportunity to negotiate an immigration-neutral plea bargain but did focus on what the defendant would do in a section 1016.5 case in *People v. Martinez*, *supra*, 57 Cal.4th 555.

E. Habeas is the only procedural vehicle for bringing IAC claims in a California state proceeding and the habeas must be filed while a defendant is in custody or on probation or parole

The California Supreme Court has limited ineffective assistance of counsel claims to writs of habeas corpus and the writ must be filed while the defendant is either in physical custody as a result of the conviction or in constructive custody on probation or parole. (*People v. Kim* (2009) 45 Cal.4th 1078; *People v. Villa* (2009) 45 Cal.4th 1063). The writ must be filed in the Superior Court, but if there is an appeal pending, it can be filed in the appellate court in conjunction with the appeal. As noted above, SDAP requires counsel to get permission before filing a habeas petition.

F. Legislative Changes Affecting Immigration/Criminal Law in California

1. Trust Act (Government Code Gov. Code §§ 7282, 7282.5.)

The Trust Act, effective, January 1, 2014, restricts enforcement of immigration detainers to certain specified convictions. See discussion at the Immigration Legal Resource Center website at: http://www.ilrc.org/files/documents/ilrc_trust_act_memo_final_jan_6.pdf

2. Transportation of controlled substances in Health & Safety Code sections 11379 and 11352 is now defined as "Transportation for Sale," limiting the options for noncitizens

For crimes committed on or after January 1, 2014, Health & Safety Code sections 11379 and 11352 define "transportation" as "transportation for sale." While this is beneficial for citizen defendants because transportation for personal use cannot be prosecuted by these statutes and must be prosecuted under the less serious possession statutes (Health & Saf. Code, §§ 11377, 11350), for non-citizen clients this change takes away a commonly used defense. Since "transportation" under these statutes was defined as transportation for personal use, this was not an "aggravated felony" for immigration purposes. Now, for any new offenses, the only non-aggravated felony offense in Health & Safety Code sections

11379 and 11352 is an "offer to sell" a controlled substance and only in the Ninth Circuit. The problem with the crime of "offering to sell" a controlled substance is that it is a crime of moral turpitude as well as a controlled substance offense. Nevertheless it is not an aggravated felony. For additional information see http://www.ilrc.org/files/documents/update_transport_11352_11379.pdf

G. Proposed Legislative Changes

1. Legislation introduced to make the maximum penalty for any county jail sentence 364 days

SB 1310 has been introduced, and would add Penal Code 18.5. That section would provide: "Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days." If passed and signed by the Governor, this would eliminate aggravated felonies based on imposition of a year term in the county jail, and would also eliminate the deportability offense of one crime of moral turpitude after admission in which there is a potential one year offense.

2. Amending Penal Code Section 1000 (deferred entry of judgment)to pre-plea diversion

There is discussion about getting a sponsor to amend Penal Code section 1000 (deferred entry of judgment for minor drug offenses) to pre-plea diversion. This would restore the procedure used for drug diversion to its pre-1997 version. The only change from the pre-1997 version is that instead of just a waiver of the right to a speedy trial, additional waivers would be taken, so that in the event of unsuccessful termination, it would be easier and quicker for the prosecution to get a judgment.

Right now a non-citizen defendant faces deportability and inadmissibility for even the most minor drug offenses including possession of a controlled substance (Health & Saf. Code, § 11350), possession of marijuana (Health & Saf. Code, § 11357), possession of paraphernalia (Health & Saf. Code, § 11364), and being under the influence of a controlled substance (Health & Saf. Code, § 11550.) The only exception is that a permanent resident is not deportable for "a single offense involving possession for one's use of thirty grams or less of marijuana." (8 U.S.C. §1227(a)(2)(B)(I).)

Prior to the July 14, 2011 Ninth Circuit decision of *Nunez-Reyes v. Holder* (9th Cir. 2011) 646 F.3d 684, non-citizen defendants would not have a conviction for immigration purposes if they had a conviction for a first offense of simple possession of controlled substances or paraphernalia where there was a dismissal after successful deferred entry of judgment, withdrawal of guilty pleas under Proposition 36, or a Penal Code section 1203.4

dismissal. However, the court in *Nunez-Reyes v. Holder* held that this was no longer the law prospectively for any non-citizen who entered a guilty or no contest plea on or after the date of this decision. So if the guilty plea was on or before July 14, 2011, a dismissal will still eliminate a conviction for this class of crimes for immigration purposes. After July 14, 2011, a dismissal will not have any remedial effect for immigration purposes.

Right now the only immigration neutral plea for a non-citizen charged with possession of a controlled substance, paraphernalia, or under the influence of a controlled substance, is either a plea to a non-drug offense (such as Penal Code section 32, accessory after the fact, with 364 days or less) or a plea for permanent residents to possession of a controlled substance without identifying the drug. For additional details see http://www.ilrc.org/files/documents/update_transport_11352_11379.pdf

CONCLUSION

Thanks to some extraordinary appellate advocacy, Dave Bautista and Rodrigo Martinez are free of the specter of removal from the United States and are living with their families. Dave Bautista was pulled out of immigration custody during the pendency of the appeal, and he never went back. Rodrigo Martinez was on the brink of deportation because of a 1992 conviction at the age of 18 for transportation of $8 worth of marijuana. Since 1992, he has led a crime free life. He married a lawful permanent resident, fathered four children, and as his wife is blind, he became the sole support for his family. After the Supreme Court's decision in his case, Mr. Martinez negotiated a dismissal of the charge with the District Attorney's Office.

Absent the intervention of appellate counsel, these men with deep and abiding ties to this country, would have been separated from their families and forced to return to the country of their birth – a country that ironically, could not have been more foreign to them.

In a time when courts seem to be ever leaning in a more and more conservative bent, cases involving immigration consequences are evolving in what can only be described as a progressive arc. Persistent and creative litigation such as that demonstrated in the *Bautista*, *Martinez*, and *Padilla* cases continue to push the legal envelope in a positive direction.

At the same time, legislation such as that mentioned in this article – a 364-day county jail term as a matter of course and the possibility of bringing back pre-plea diversion – offer other avenues of relief. All hopeful.

When you, as appellate advocates, begin reviewing your records on appeal, think about the next Dave Bautista or the next Rodrigo Martinez. See if you can find him or her on the pages of the transcripts you read or in the story your client tells you. Don't hesitate to attempt to expand the prevailing legal parameters in aid of your client. Be the author of the next hopeful chapter. . .