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**How to Eliminate Your Oregon Unconstitutionally Obtained Convictions!
If Convicted Prior to January 20, 2004 file your PCR (Post-conviction
Relief) petition by January 19, 2006**

WARNING! A criminal conviction for even a misdemeanor crime (the courts have held that some misdemeanors can be considered an “aggravated felony”) could result in permanent deportation from the United States. Before pleading guilty or no contest; make sure you completely know the immigration consequences of the conviction. Don’t accept any plea negotiation without fully understanding the immigration consequences of the conviction.

In Gonzalez v. State of Oregon, 191 Or App 587, 83 P3d 921, *review allowed* 337 Or 247 (2004) the Court of Appeals of the State of Oregon held that a “may be deported” advisal is ineffective assistance of counsel if that is all the advice given to an immigrant defendant who has been convicted of an aggravated felony. Immigrants who receive such misleading advice at the time of their plea proceedings are entitled to Post Conviction Relief, that is elimination of the conviction, if PCR is applied for in a timely manner.

Oregon law provides that a PCR action must be filed within two years of the date of conviction with the exception that if the claim could not reasonably have been filed at an earlier time, it can be filed at a later time. If this exception is found to apply to Gonzalez based PCR cases in Oregon, this would allow filing of these PCR cases through January 19, 2006. Under Oregon law, publication of law gives notice to the public of the law and therefore, if the statute of limitations (SOL) can be extended in these cases; the SOL will not be extended past on or about January 19, 2006.

After winning their post-conviction case(s), these immigrant defendants would be sent back to the trial stage of the case, and could assert their right to trial and/or attempt to negotiate for a non-deportable offense.

¹ This is an updated Immigrant Defendant Letter, the fifth in a continuing series. The advice herein does not address the potential for relief from deportation on grounds of asylum, withholding of removal, or under the Convention against Torture, or under VAWA (Violence Against Women Act). See counsel on these other issues if they present in your case.

Oregon plea petitions misadvise immigrants of the immigration consequences of convictions, which is unfortunately frequently the only advice that the immigrant has received regarding immigration consequences. The standard Oregon plea petition advises the immigrant that he *may* be deported even though as a required matter of the immigration laws he *must* be deported if convicted of an aggravated felony crime. Therefore, Gonzalez has left the post-conviction avenue wide-open for immigrants who were misadvised by their criminal defense attorney of the banishment requirement of an “aggravated felony” conviction.

This Gonzalez PCR ground would also apply to other instances in which immigrants must be deported following their convictions and are misadvised by their attorney and the court that they may be deported. For an example, see www.defendlife.net, which includes a pleading where in a Clackamas County case a Theft two conviction was eliminated on a Gonzalez type argument, made more than two years after the conviction. Without this conviction being eliminated, the immigrant would have had to have been deported because she’d been convicted of a crime of moral turpitude punishable by a year or more within her first five years as a legal permanent resident.

An important case on this deportation and inadmissibility ground of removal was issued by the Board of Immigration Appeals in June, 2005 and stated that a person convicted of CIMT (Crime Involving Moral Turpitude) punishable by imprisonment for at least one year is removable if the crime was committed within five years of the first or any subsequent admission date. The admission date refers, among other things, to the date of adjustment to permanent resident status. Matter of Shanu, 23 I&N Dec. 754 (BIA 2005) I.D. #3513. Traveling outside of the United States appears to start the five year clock running anew each time because each return to the United States involves a subsequent admission into the United States. Only naturalization would end the CIMT clock restarting upon each trip outside the United States.

Thousands or possibly tens of thousands at times, immigrants have been deported from their families forever because they have pled guilty to a criminal charge without understanding that tragic, eternal banishment results from their conviction. These immigrants are literally signing off on their eternal banishment when they enter into what amounts to an unknowing and involuntary plea. If they return to the USA, after their deportation, to be with their families; they are often convicted of illegal entry and incarcerated in federal prisons. The most prosecuted federal crime is illegal re-entry. The prisons are full of thousands of immigrants serving time for illegal re-entry.

The immigration court's "mandatory minimum" of deportation from which immigration judges cannot deviate is prescribed in INA (Immigration and Nationality Act) 101(a) 43 et. seq. This sentence/punishment is in practical effect rendered by the trial judge sentencing the criminal defendant "alien". The absurdity is that in the past many times neither the judge, nor the criminal defense attorney, nor the prosecutor, nor the immigrant entering the plea knew that banishment was the required consequence of the plea being accepted by a judge who is familiar with the criminal but not with immigration laws.

These "aggravated felony crimes" include but are not limited to:

1. Murder;

2. Drug trafficking: Delivery of a controlled substance, possession with intent to deliver, manufacturing of drugs. Other convictions related to drug activity may not be "aggravated felony" convictions. Solicitation and/or offering to sell under California criminal law, for instance, is not an "aggravated felony" as of the date of this writing. Therefore, see counsel, if you have been charged and/or convicted of any drug case to identify whether or not you have been charged and/or convicted with an "aggravated felony" crime. You should consult with immigration counsel while criminal defense charges are pending, not only after the criminal charge is complete. If you are charged with an "aggravated felony", one key is that if a plea is entered, that it be to a non-aggravated conviction and/or a non-deportable offense, if at all possible.

Compare, Lujan-Armendariz v. INS, 222 F. 3d 728 (9th, 2000). Possession of a controlled substance is not an aggravated felony in the Ninth Circuit, but it is in other parts of the United States. Do not travel without first consulting with an immigration attorney if you have been convicted of possession of controlled substance (PCS) even in the Ninth Circuit as it is a ground of deportability as well as inadmissibility and seeing an attorney prior to travel may help you keep your freedom. That said, simple possession of flunitrazepam or more than five (5) grams of crack cocaine is an aggravated felony.

If the Government (ICE) attempts to deport an "alien" based on marijuana possession, the government has the burden of establishing that the offense is not a single offense of simple possession for personal use of 30 grams or less of marijuana. Absent such proof, an alien should not be deportable under this ground.

3. A “crime of violence” (which is a term of art defined at 18 USC 16(a) and cross-referenced in the INA under Section 101(a)(43)(F)) in which a sentence of at least one year is imposed; Misdemeanor assault four in which a one-year suspended or executed sentence is imposed is an aggravated felony under this definition; see Matter of Martin Interim Decision #3481 (BIA 2002), decided, September 26, 2002, holding that Misdemeanor Third Degree Assault is an “aggravated felony.” This was a Domestic Violence Criminal Charge and conviction. The U.S. Supreme Court in Leocal v. John Ashcroft, 160LEd2d271(2005), decided that a DUII conviction with serious bodily injury is not a "crime of violence," and therefore not an "aggravated felony?" For a potential defense to be raised in deportation proceedings, if necessary, to this aggravated felony ground, please see aggravated felony number 10.

4. Trafficking in weapons or destructive devices;

5. Money laundering in an amount over \$10,000; (ten thousand dollars)

6. Rape;

7. Sexual abuse of a minor; (sexual contact is not required with the minor to be an aggravated felony Matter of Rodriguez-Rodriguez, Int. Dec. 3411, decided by the Board of Immigration Appeals on September 16, 1999, held conviction for indecency with a minor is an “aggravated felony.”); Also see Matter of Small Interim Decision #3476, (2002) holding that misdemeanor sexual abuse of a minor is as an “aggravated felony” requiring the deportation of the immigrant-defendant. Operation Predator "targets" anyone ever convicted of any form of sex crime, even convictions from many years ago. Immigrant-defendants are being arrested and put into deportation proceedings and deported based on these old convictions. Customs and Border Patrol has a list of all people labeled as sex offenders. These deportations are subject to challenge under Ubaldo-Figueroa v. INS, 347 F.3d 718 (9th Cir. 2003). (*Judge Pergerson's concurring opinion lays out the Due Process/retroactivity argument to be raised as defense to even being able to charge these old 'Operation Predator' cases.*)

8. Theft (including receipt of stolen property) or burglary in which the term of imprisonment is at least one year. But a "Car Burglary," as defined by California law, is not considered a burglary under this statute. And sentencing enhancements, requiring a sentence above one year on a repeat property offender in Oregon is not an “aggravated felony” under Ninth Circuit precedent.

9. Racketeering;

10. Failure to appear convictions on a felony charge for which a sentence of two or more years imprisonment may be imposed are facially aggravated felony(s) but these convictions may be challenged as not properly called aggravated felony(s) based on recent United States Supreme Court cases, including Blakely v. Washington, 159 L. Ed 2d 403 (2004), USA v Booker, 160 L. Ed 2d 621 (2005).

Since many “crimes of violence” have statutory maximums of more than one year, but the sentencing guideline range controls the actual sentence that the judge may impose and the guideline is below this one year marker for many “felony” charges; the issue is whether or not these cases are truly punishable by a year or more. This potential deportation defense also applies to the “crime of violence” deportation ground where that “crime of violence” ground requires a sentence of a year or more. (Please see #3 on this list)

11. Promoting, compelling prostitution;

12. Fraud and deceit crimes, including tax evasion in which the loss to the victim or IRS exceeds \$10,000;

13. Alien smuggling (with exceptions);

14. Prior deportation for an aggravated felony;

15. False making or altering a passport (with exceptions);

16. Failure to appear for service of a criminal sentence if the underlying offense is punishable by a term of two years or more;

17. Offenses 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;

18. An offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers or which have been altered for which the term of imprisonment is at least one year.

Other convictions can also result in deportation proceedings for which no waiver is available. You should consult with an immigration attorney if you are involved with the criminal courts now or have been in the past to learn if you are eligible for a waiver of deportation and/or your likelihood of being granted such a waiver by the immigration court. See an immigration attorney if you

have any of the above mentioned problems or potential problems, as an immigration attorney may be able to help you naturalize, avoid deportation, and advise you on whether or not you can travel² outside the United States without fear of untoward consequences. The law constantly changes. This article is intended as a brief overview of current law and would need further refinement, even at this time, depending upon the special circumstances of each individual immigrant.

Thank you.

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Caveat: Transmission of this information is not intended to create an attorney-client relationship. It is general information only, and your specific circumstances' as an immigrant defendant require direct consultation with an immigration attorney to fully evaluate your immigration status and options.

OCDLA Member Brian Conry is a criminal defense/immigration attorney in Portland who focuses on deportation defense, and post-conviction. He maintains a website that focuses on deportation defense and post-conviction law at www.defendlife.net. Mr. Conry is also a member of the National Lawyers Guild/National Immigration Project, the American Immigration Lawyers Association, and the National Association of Criminal Defense Lawyers.

² This office has recently consulted with several immigrants after they were sent to "deferred inspection" after traveling outside of the United States. These individuals would have been eligible for naturalization because their convictions were old, but upon travel they were placed in exclusion/removal proceedings. The immigrants were treated as "arriving aliens" and held in custody until the time that the removal hearing takes place, which is ordinarily at least several weeks and/or months after the "deferred inspection." The lesson: naturalize as soon as you possibly can, and do not travel until after you are naturalized if you have an old and/or pending criminal charge.