

4.3 Sentence to a Term of Imprisonment

- A. Imprisonment Defined
 - B. Sentence Modification
 - C. Implications for an Aggravated Felony
 - D. Comparison to Potential Sentence
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4.3 Sentence to a Term of Imprisonment

In some cases, adverse immigration consequences are triggered by the length of imprisonment ordered. For example, a burglary offense that carries a term of imprisonment of one year or more results in an aggravated felony conviction and most likely mandatory removal.

A. Imprisonment Defined

For immigration purposes, a “term of imprisonment” includes “the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of all or part of the sentence.” INA § 101(a)(48)(B), 8 U.S.C. § 1101(a)(48)(B).

The actual length of confinement ordered by the court is what counts as the sentence for immigration law purposes, even if the execution of sentence is suspended and the defendant does not serve any actual time in jail. *See Matter of Esposito*, 21 I&N Dec. 1 (BIA 1995). For example, in a misdemeanor case, a defendant who receives a sentence of 150 days suspended and supervised probation will be treated as having been sentenced to 150 days in jail for immigration purposes. The duration of probation does not count as a term of imprisonment.

Further, a sentence is considered to be a sentence for the maximum term actually imposed, even if the defendant is released before serving the maximum term. *See Matter of D*, 20 I&N Dec. 827 (BIA 1994); *Matter of Chen*, 10 I&N Dec. 671 (BIA 1964). In North Carolina, a period of post-release supervision is added to every felony sentence of imprisonment for felony offenses committed on or after December 1, 2011. *See* Justice Reinvestment Act of 2011, 2011 N.C. Sess. Laws 192; G.S. 15A-1340.17(d). The Fourth Circuit has found that the post-release supervision term counts toward the maximum term. *See United States v. Barlow*, 811 F.3d 133, 139–40 (4th Cir. 2015) (finding that “state law renders post-release supervision part of the term of imprisonment”). Thus, a defendant who is sentenced to 3 months minimum and 13 months maximum in a felony case will be treated as having been sentenced to 13 months in jail for immigration purposes, even if he or she ultimately serves only 3 months in jail and nine months on post-release supervision.

B. Sentence Modification

A trial court's order modifying or reducing a noncitizen's criminal sentence is recognized as valid for purposes of immigration law without regard to the trial court's reasons for the modification or reduction. *See Matter of Cota-Vargas*, 23 I&N Dec. 849 (BIA 2005) (trial court's reduction of defendant's prison sentence from 365 days to 240 days, *nunc pro tunc*, to the date of his original sentencing was recognized by the BIA, and defendant was no longer deportable for an aggravated felony because his receipt of stolen property offense was no longer one "for which the term of imprisonment [was] at least one year").

C. Implications for an Aggravated Felony

One Year Rule. The definition of term of imprisonment has important consequences for the aggravated felony ground of deportability because the immigration statute defines certain offenses as aggravated felonies only if the defendant receives a sentence of imprisonment of one year or more. *See supra* § 3.4A, Aggravated Felonies Generally.

The North Carolina Justice Reinvestment Act introduced a new nine-month period of mandatory post-release supervision (PRS) for class F through I felonies, effective for offenses committed on or after December 1, 2011. As a result, the lowest possible maximum term of imprisonment (including the PRS period) for a felony conviction in North Carolina, regardless of offense class or prior record level, is thirteen months. *See* 2011 N.C. Sess. Laws 192; G.S. 15A-1340.17(d). The Fourth Circuit has found that the PRS term counts towards the sentence. *See United States v. Barlow*, 811 F.3d 133, 139-40 (4th Cir. 2015). Thus, defense counsel should treat an active or suspended sentence of 3 months minimum and 13 months maximum (or longer) for specified offenses as an aggravated felony, subjecting a noncitizen client to mandatory removal.¹

A judge may impose a fine, without a sentence of imprisonment, for felonies that authorize a community or "C" punishment under structured sentencing. A judge also may enter a prayer for judgment continued or PJC, without a sentence of imprisonment. Even though a sentence of imprisonment of one year or more is authorized, a fine or PJC would be the sentence imposed in those circumstances and therefore would not make the offense an aggravated felony under the one-year rule.

Consecutive Sentences. Consecutive sentences cannot be combined to satisfy the statutory one year requirement for aggravated felony offenses that depend on a minimum one-year sentence of imprisonment. *Compare* INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F) (requiring sentence of one year or more to trigger aggravated felony definition) *with* INA § 241(b)(3) (B), 8 U.S.C. § 1231(b)(3)(B) (providing that noncitizen

1. For offenses committed before December 1, 2011, a low level felony may have an imposed sentence of less than one year. For example, a defendant may have been sentenced to 8 months minimum and 10 months maximum under structured sentencing for a Class H felony larceny. Because the imposed sentence is less than one year, the defendant would not have an aggravated felony conviction related to theft.

sentenced to aggregate term of imprisonment of five years or more is ineligible for relief of withholding of removal) and INA § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B) (providing that noncitizen convicted of two or more offenses for which the aggregate sentence of imprisonment is five years or longer is inadmissible). As long as no individual count results in a maximum sentence of one year or longer, a total term of imprisonment (active or suspended) of more than one year will not satisfy the statutory definition for this type of aggravated felony offense.

This concept does not come into play often in North Carolina because under structured sentencing all felony sentences of imprisonment now exceed one year.² For a discussion of practical considerations in cases in which sentence length is critical, see *infra* § 6.2A, Aggravated Felonies Triggered by a One Year Term of Imprisonment.

D. Comparison to Potential Sentence

In some instances, the immigration statute focuses on the potential sentence that *may* be imposed—that is, whether the offense is punishable by a certain term of imprisonment. This approach is used in limited instances—specifically, with the grounds of removal involving crimes involving moral turpitude (CMT). See INA § 237(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2) (A)(i) (an individual is deportable if convicted of one CMT committed within five years of admission to the U.S., for which a sentence of one year or longer *may* be imposed); INA § 212(a)(2)(A)(ii)(II), 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (a noncitizen is inadmissible for a conviction or admitted commission of a CMT, unless the maximum *possible* sentence for the offense is one year or less, the actual sentence of imprisonment is six months or less, and the person has no prior CMT convictions). For those immigration grounds, the actual sentence imposed, even if less than the maximum, is not determinative.

In those instances, the sentence that “may be imposed” under structured sentencing for a felony means the maximum sentence a defendant could receive in state court based on the defendant’s prior record level under North Carolina’s structured sentencing statutes. See *United States v. Simmons*, 649 F.3d 237, 240, 249-50 (4th Cir. 2011) (en banc). The Justice Reinvestment Act, effective for offenses committed on or after December 1, 2011, introduced a nine-month period of mandatory post-release supervision (PRS) for Class F through I felonies, the lowest felony classes in North Carolina. See Justice Reinvestment

2. There may be an argument that a person convicted of multiple felony offenses and sentenced to consecutive terms has not received a sentence of one year or more *for the second and subsequent offense*. For the second and subsequent offense, North Carolina law reduces the maximum sentence to be served by the period of post-release supervision for that offense. See G.S. 15A-1354(b). This argument may be helpful only where a non-aggravated felony is the first in the string of consecutive judgments (because the maximum sentence for the first-sentenced offense *will* include post-release supervision), followed by the potential aggravated felony offense (so that the reduction rule of G.S. 15A-1354(b) is applied to the potential aggravated felony). This argument may not succeed, as the maximum sentence “imposed” by the judge on the second and subsequent offense still includes the extra time for post-release supervision even though the defendant will never serve it.

Act of 2011, 2011 N.C. Sess. Laws 192. As a result, the sentence that “may be imposed” for any North Carolina felony conviction will be greater than a one year sentence. *See United States v. Barlow*, 811 F.3d 133, 139–40 (4th Cir. 2015).