Chapter 4
Conviction and Sentence for Immigration Purposes

Most of the crime-related grounds of deportability and some of the crime-related grounds of inadmissibility require a conviction to make a noncitizen deportable or inadmissible. Even where criminal conduct may be sufficient for removal without a conviction, the U.S. Immigration and Customs Enforcement (ICE) may not be able to establish the conduct without a conviction. Therefore, in practice, ICE usually relies on convictions to establish deportability and inadmissibility.

Criminal defense attorneys should be aware that there is a statutory definition of conviction for immigration purposes. State law does *not* determine whether a state disposition will be considered a conviction for immigration law purposes. For example, a state disposition that results in the dismissal of all criminal charges may still be a conviction for immigration purposes in some instances.

Chapter 3 describes the offenses that trigger the principal immigration consequences for a defendant. *See also* Appendix A, Selected Immigration Consequences of North Carolina Offenses. Once you have determined that a particular offense is one that may trigger immigration consequences for your client, you must then determine whether the potential disposition in the

case would be considered a conviction for immigration purposes. You must also consider whether the potential sentence is of the type or length that would trigger adverse consequences.

4.1 Conviction for Immigration Purposes

A. Conviction Defined

In 1996, Congress adopted a statutory definition of conviction for immigration purposes. The definition of conviction was made deliberately broad in scope. It is set out in INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A), as follows:

> 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.

Under this definition, a disposition may constitute a conviction with or without the entry of a formal judgment.

B. Conviction without Formal Judgment

Generally. A state court disposition without a formal judgment will constitute a conviction if there has been both a finding, plea, or admission of guilt *and* the court has ordered some form of "punishment, penalty, or restraint on liberty."

Under this prong of the definition, certain court proceedings in which a defendant enters a guilty plea or makes an admission of sufficient facts to warrant a finding of guilt and is ordered by the court to complete probation or some other condition will likely be treated as a conviction for immigration law purposes even if the plea is later vacated or charges dismissed. In contrast, a pre-plea diversion arrangement, in which no plea is entered or admission made but some form of pretrial probation or community service is ordered, should not be considered a conviction for immigration purposes. The application of this definition to different North Carolina dispositions is discussed *infra* in § 4.2, Effect of North Carolina Dispositions.

Plea of Guilty. The term "plea" includes a no contest plea as well as a guilty plea. The definition has also been interpreted as including an *Alford* plea even though the defendant does not admit guilt with that type of plea. (In an *Alford* plea, the defendant asserts his or her innocence but admits that sufficient evidence exists with which the prosecution could likely convince a judge or jury to find the defendant guilty.) *See Abimbola v. Ashcroft*, 378 F.3d 173, 180–81 (2d Cir. 2004).

Punishment or Restraint on Liberty. In addition to incarceration, the term "punishment" or "restraint on liberty" includes a variety of community corrections alternatives, such as probation, treatment alternatives to street crime (TASC), drug education school (DES), house arrest with electronic monitoring, community service, and anger management and substance abuse programs. It also includes other restraints, such as restitution and a fine. *See Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008).

The punishment or restraint must be imposed by the court for the disposition to qualify as a conviction for immigration purposes. An agreement with a prosecutor to attend a drug treatment program or anger management program, for example, should not qualify as a restraint on liberty if not ordered by the court.

C. Finality of Conviction

Traditionally, a conviction was deemed effective for immigration purposes only when the judgment of conviction was final. *See Pino v. Landon*, 349 U.S. 901 (1955). A conviction is final for immigration purposes when the direct appeal has been exhausted or waived. A pending state or federal post-conviction challenge, however, does not affect the finality of the conviction.

The Ninth Circuit has found that Congress, in adopting a statutory definition of conviction, eliminated the requirement of finality. *Planes v. Holder*, 652 F.3d 991, 996 (2011), *reh'g denied*, 686 F.3d 1033 (9th Cir. 2012). In contrast, the Third Circuit has held that the finality rule survives, at least with regard to a "formal judgment of guilt"—that is, the conviction is not considered final until direct appeal has been exhausted or waived. *Orabi v. Att'y Gen. of U.S.*, 738 F.3d 535 (3d Cir. 2014). Although the law is in flux, the traditional requirement of finality appears to continue to apply in the Fourth and Eleventh Circuits, which review cases arising from the North Carolina and Georgia immigration courts involving North Carolina defendants.

4.2 Effect of North Carolina Dispositions

A. Deferred Prosecution

In North Carolina, a "deferred prosecution" occurs when the State agrees to cease prosecution on the defendant's successful completion of certain conditions. The court does not enter judgment against the defendant, and the deferred prosecution is generally not considered a conviction under state law. If the person fails to live up to the conditions, the State then reinstitutes the prosecution and seeks a conviction.

Types of Deferred Prosecution. There are two basic forms of deferred prosecution, formal and informal. Formal deferred prosecution is governed by G.S. 15A-1341(a1) and generally requires a written agreement and approval of the court. Formal deferrals may vary county by county. When a person is placed on formal deferred prosecution, the conditions of the deferral may be made a part of probation. Prosecutors also informally

"defer" prosecution by dismissing the case on the defendant's promise to abide by certain conditions.

In both instances, the defendant ordinarily does not enter a plea but may be asked to sign a statement admitting the charged conduct.

Immigration Consequences. Whether a deferral constitutes a conviction for immigration purposes depends on the structure of the deferred prosecution. The key factors are whether the defendant made an *admission o*f having committed the essential elements of an offense and the *court imposed conditions* as part of the deferred prosecution.

In a formal deferral, if the defendant is required to admit the essential elements of the offense and the court imposes conditions that the defendant must fulfill, the disposition will almost certainly be treated as a conviction for immigration purposes, even if the charges are later dismissed on successful completion of the conditions. In this instance, though the defendant does not enter a guilty plea and only admits the essential elements of the offense, that is sufficient to trigger a conviction under immigration law.

If, however, the court imposes conditions *without* an admission to the factual allegations, the deferral *should* not be considered a conviction for immigration purposes. Counsel should be wary of box # 9 of AOC-CR-626 (Dec. 2016) (deferred prosecution), which states that "the admission of responsibility given by me and any stipulation of facts shall be used against me and admitted into evidence without objection in the State's prosecution against me for this offense. . . ." If checked, the document would suggest that the defendant had made an admission when, in fact, he or she may not have. In appropriate cases, therefore, strike the language or leave the box unchecked.

The Fourth Circuit recently stated that a "deferred prosecution agreement is not by itself a sufficient 'admission of facts,' given that it seems to merely describe the anticipated admission of responsibility and stipulation to take place. . . ." *Boggala v. Sessions*, 866 F.3d 563, 568 n.3 (4th Cir. 2017). In *Boggala*, the Court found that the deferred prosecution agreement at issue was a conviction under immigration law because the defendant stipulated to sufficient facts as part of the deferral, in that instance during the hearing at which the court accepted the deferral. *Id*. (finding that petitioner was informed in writing of the facts to be used against him and then later stipulated to those facts underlying each element of the crime). Thus, a deferral agreement, unaccompanied by a written or oral admission or stipulation of sufficient facts, should not rise to a conviction under immigration law.

There is still some risk to a defendant with a formal deferral even if he or she makes no admission. If ICE learns of the deferral, it might institute removal proceedings on the assumption that an admission of guilt is often made in formal deferrals, but a defendant armed with this law should ultimately prevail before an immigration judge.

An informal deferral by the prosecutor should not constitute a conviction for immigration purposes because ordinarily the defendant does not make an admission as a condition of

such an arrangement. Further, there are no court-ordered restraints in an informal deferral—the second requirement—as the court is generally not involved in such an arrangement.

B. Drug Treatment Court Disposition

In North Carolina, there are both post-plea and pre-plea drug treatment courts. The practices vary from county to county. In a post-plea drug court, a defendant is required to plead guilty before the court will order the defendant to participate in a drug treatment program. Even if the court does not enter a judgment of conviction, such a disposition will almost certainly constitute a conviction for immigration purposes. This is true even if the State eventually dismisses the criminal charges because the combination of admission of guilt and restraint on the defendant's liberty would be considered a conviction for immigration purposes. *See Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002).

Drug treatment courts that require a guilty plea up front raise difficult issues for a noncitizen client. On the one hand, diversion to a drug treatment program may provide a way of getting all drug charges dismissed in the end. Moreover, if the individual suffers from drug addiction, the treatment program may assist the person to overcome the addiction. On the other hand, the drug treatment court proceeding is almost certain to constitute a conviction for immigration purposes.

In a pre-plea drug court, a client typically must make an admission of guilt as part of a deferred prosecution agreement; thus, the first requirement is met. If the court then imposes treatment or other restraints, the disposition will probably qualify as a conviction for immigration purposes. *See supra* § 4.2A, Deferred Prosecution. In some counties, the court does not order the treatment or other restraints but simply approves the deferred prosecution agreement. If the court does not order drug treatment or other restraints on the defendant, it is possible that such a disposition would not constitute a conviction for immigration purposes. It is not clear how an immigration court would treat such a procedure.

C. 90-96 and 15A-1341 Deferrals

A deferral under G.S. 90-96, called a conditional discharge or discharge and dismissal in North Carolina, is available for a narrow class of drug offenses. If the defendant pleads guilty or is found guilty, a court may defer further proceedings and place the defendant on probation without entering judgment. *See* G.S. 90-96(a). If the defendant fulfills the conditions of probation, the proceedings are dismissed and the defendant does not have a conviction under state law. However, the deferral will almost certainly constitute a conviction for immigration purposes because the statute requires that the defendant plead or be found guilty and that the court impose conditions.

North Carolina recently created a similar conditional discharge procedure for Class H and I felonies and misdemeanors other than impaired driving offenses. *See* G.S. 15A-1341(a4); *see also* G.S. 15A-1341(a3) (conditional discharge for prostitution offenses).

For the above reasons, these dispositions would probably constitute convictions for immigration purposes.

D. Prayer for Judgment Continued

A prayer for judgment continued (PJC) granted by a North Carolina court will almost always be treated as a conviction for immigration purposes.

A PJC occurs when the court accepts the defendant's guilty plea or finds the defendant guilty after trial but withholds judgment in the case. A PJC is considered a conviction under state law for many purposes, whether or not the court imposes any conditions or costs.

For immigration purposes, if a PJC is granted and the court imposes conditions amounting to punishment, such as performance of community service or payment of a fine, then the definition of conviction has been met. A PJC in which court costs alone have been imposed is a conviction as well. Even though North Carolina law does not treat court costs as punishment (*State v. Popp*, 197 N.C. App. 226 (2009)), the immigration courts do. *See Matter of Cabrera*, 24 I&N Dec. 459 (BIA 2008) (imposition of court costs in the criminal sentencing context constitutes a form of punishment for immigration purposes). It is unclear whether a PJC without the imposition of costs or other conditions would be treated as a conviction for immigration purposes.

E. Expungement

A North Carolina conviction that has been expunged will continue to constitute a conviction for immigration purposes. The Board of Immigration Appeals considered the issue of an Idaho expungement in *Matter of Roldan-Santoya* and held that no effect would be given in immigration proceedings to any state action that purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative procedure. 22 I&N Dec. 512 (1999).

F. Juvenile Delinquency Adjudication

Adjudication of Delinquency Not a Conviction. A juvenile delinquency adjudication is not a conviction for immigration purposes. *See Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2001); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). Thus, regardless of the nature of the offense, a juvenile delinquency adjudication should not trigger any adverse immigration consequences based on conviction of a crime.

Under the North Carolina Juvenile Code, jurisdiction of a juvenile may be transferred to superior court for prosecution as an adult for some felonies. A conviction of a juvenile resulting from a transfer to superior court likely constitutes a conviction for immigration purposes. *See, e.g., Singh v. U.S. Att'y Gen.*, 561 F.3d 1275, 1278–79 (11th Cir. 2009)

(finding that a 15-year old tried as an adult under state law was convicted for immigration purposes).

Practice Note: Because it is settled law that a juvenile delinquency adjudication is not a conviction for immigration purposes, and a conviction in superior court has other adverse consequences for a juvenile (such as a criminal record for state law purposes), defense counsel should ordinarily resist transfer of a juvenile case to superior court.

Other Potential Consequences of Adjudication. Counsel representing juveniles should be aware that a finding of juvenile delinquency could still have adverse consequences for a noncitizen. First, it could be considered an adverse factor if the juvenile applies for any discretionary benefit under the immigration laws, such as adjustment of status to a lawful permanent resident. *See Wallace v. Gonzales*, 463 F.3d 135 (2d Cir. 2006) (upholding BIA and immigration judge's consideration of noncitizen's New York youthful offender adjudication when evaluating his application for adjustment of status).

Second, certain grounds of inadmissibility and deportability do not require a conviction; mere "bad acts" or status can trigger the penalty. Examples include engaging in prostitution, being a drug addict or abuser, using false documents, smuggling aliens, or the government having "reason to believe" the person has ever been a drug trafficker. Thus, a juvenile delinquency adjudication involving one of these offenses could support a finding of inadmissibility, in particular an adjudication involving drug trafficking. *See Matter of Favela*, 16 I&N 753 Dec. (BIA 1979) (holding that individuals who pled guilty to drug trafficking in juvenile proceedings are inadmissible as drug traffickers even though there is no conviction). Adjudications involving these offenses can also be used to deny an application for Special Immigrant Juvenile Status (SIJS), which helps certain undocumented children in the state juvenile/foster care system obtain lawful immigration status. An adjudication involving drug trafficking will bar SIJS relief.

Additionally, defense counsel should be aware that immigration officers sometimes question clients in North Carolina juvenile detention centers. Admissions to immigration officers by juvenile clients could lead to removal proceedings. *See supra* § 2.3D, Advise Your Clients of Their Rights.

G. Conviction Vacated via Post-Conviction Relief

The BIA has ruled that when a state court vacates a judgment of conviction based on a procedural or legal defect, the state court order must be given full faith and credit, and the conviction is eliminated for immigration purposes. *See Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2001). For example, if a conviction is vacated for ineffective assistance of counsel through a motion for appropriate relief, there is no longer a conviction for immigration purposes.

The conviction is not eliminated for immigration purposes, however, if it was vacated for reasons "solely related to rehabilitation or immigration hardships, rather than on the basis of a procedural or substantive defect in the underlying criminal proceedings." *Matter of*

Pickering, 23 I&N Dec. 621 (BIA 2003), *rev'd on other grounds*, 465 F.3d 263 (6th Cir. 2006); *cf. Yanez-Popp v. I.N.S.*, 998 F.2d 231, 235 (4th Cir. 1993) ("[U]nless a conviction is vacated on its merits, a revoked state conviction is still a 'conviction' for federal immigration purposes.").

For a further discussion of the impact of post-conviction relief, see *infra* Chapter 8, State Post-Conviction Relief.

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).