



© Carlos André Santos | stock.adobe.com

Noncitizens in Criminal Investigations and at Sentencing

A. Introduction to the Problems Facing Noncitizens at Sentencing

Sally Schultz,¹ a German citizen, was living in Germany when her employer asked her to transfer to the United States. That was in 2000. She transferred and steadily worked her way up the corporate ladder to chief financial officer. Her company was an investment firm with \$200,000,000 in funds under management.

Shortly after Sally moved to the United States, she met George, a fellow employee, and they eventually married and had three children. George was an American citizen as were the children, all born in the United States. Germany frowns on dual citizenship, so Sally saw no reason to give up her citizenship from her country of birth by seeking United States citizenship. Since her parents and extended family still lived in Germany, she visited often. Sally's immigration status was that of a permanent resident alien. With this status, Sally was able to legally work and live in the United States.

Over the years, her company's expenses grew out of proportion to revenue, and senior-level management decided on an aggressive campaign to attract new

investors. The campaign involved shifting some non-performing assets to a new company and overvaluing the new company on Sally's company's balance sheet.

New investor money went to pay old investor obligations; expenses continued to grow; and revenue from performing assets continued to shrink. The savvy investors started asking questions. Soon, the SEC began investigating. Then, the local U.S. Attorney's Office (USAO) got involved, and Sally, along with several other senior-level managers, were indicted on fraud charges.

Sally hired counsel who quickly negotiated a plea agreement and a separate cooperation agreement. A final order of removal quickly followed. The plea agreement came with a bite: Sally could not argue for any sentence under four years. Since the sentencing guideline calculation for the loss amount resulted in a range of over 87 months of incarceration, four years did not look unreasonable.

What Sally and her counsel did not contemplate were the conditions a noncitizen must endure upon entering the Bureau of Prisons (BOP). Sally knew she would be subject to deportation upon serving her sentence and that once deported she might never be able to return to the United States, but she had no idea what a noncitizen faces in a BOP facility.

Importantly, as a white collar offender with no criminal history, Sally and her counsel assumed she would be assigned to a camp. Federal camps are the ones made famous by celebrities like Laurie Laughlin and Martha Stewart. At a federal camp, there are few fences or walls. Most inmates have jobs, some even in the local

BY EDWARD F. NOVAK, ALEXANDRA BROOKS,
AND ANGELA C. POWERS

community. A few federal camps are located on former college campuses. Noncitizens, however, are not eligible for assignment to a camp.

Instead, Sally would be assigned to a low-security facility — if there is room for her.² When the federal government ceased using private prisons, overcrowding at federal facilities increased.³ It is possible Sally could begin her sentence in a medium-level facility, filled with prisoners convicted of violent crimes.

i. First Step Act Eligibility Concerns

BOP policy has been in flux as to whether noncitizens are eligible to receive earned time credits. For a period, noncitizens were not eligible for the earned time credit program. Then, in 2023, BOP changed its policy.⁴ Now, if a person is not otherwise disqualified due to the offense of conviction, that person can earn and apply earned time credits if she has an unresolved immigration status or an unresolved state detainer. If there is a final order of removal, however, the person still cannot use earned time credits for early release.

Due to her offense and deportation order, Sally is not eligible for all First Step Act relief or related programs that offer significant reductions for time served.⁵ She is not eligible for residential housing or “halfway housing” at the end of her confinement. The First Step Act incentivizes incarcerated individuals to complete “recidivism reduction programming or productive activities” by providing earned time credits.⁶ But individuals with unresolved immigration status have historically been precluded from applying earned time credits under the First Step Act.⁷

Precluding individuals with immigration detainees from the First Step Act has led to Equal Protection litigation. While national origin is generally considered an immutable characteristic triggering strict scrutiny, an immigration detainer itself does not trigger strict scrutiny. Federal courts have held that “[r]ational-basis review is appropriate because the classification of prisoners based on whether they have [immigration] detainees is not a suspect classification.”⁸ Because rational-basis review favors the government, courts find that excluding individuals with immigration detainees is rationally related to the legitimate government interest of preventing flight from confinement.

While the initial BOP procedures did not violate Equal Protection, BOP

	U.S. Citizen	Non-U.S. Citizen
Security Level	Minimum Security Prison	Low or Medium Security Prison
Sentence 48 Months (Full-Term)	1,460 days	1,460 days
Good Conduct Time Credits	(216) days	(216) days
Eligible/Allowable First Step Act Credits	(380) days	0
Days to Serve with Allowable Credits	864 days	1,244 days
Amount of Time Eligible for Halfway House/Home Confinement Prior to Release	Up to 365 days	0
Days in Institution	499 days	1,244 days

** This table is for illustrative purposes only. Please consult with the Bureau of Prisons for the most updated guidance, as it is subject to change.*

still recently issued a change notice stating that “federal prisoners subject to immigration detainees are no longer automatically prohibited from applying their earned time credits.”⁹ Unfortunately, this change only applies to “inmates [who] are not subject to a final order of removal under immigration laws.”¹⁰ Once that final order is entered, eligibility ceases.

But Sally’s attorney did not advise her of the nuanced immigration consequences of her plea, including that ICE will put a hold on her once her sentence is completed. Similarly, the court did not delve into details. But upon completion of her sentence, ICE will pick her up, put her in one of its facilities, and deport her — eventually, ICE does not face any temporal limitations when holding a noncitizen to arrange deportation, although certain constitutional limits do exist.¹¹

What does all this mean for Sally as compared to a U.S. citizen? A sentence of similar length for a U.S. citizen could be as little as one-third the sentence Sally would serve before being handed over to ICE.

What could she do to mitigate this situation before sentencing?

ii. Withdrawal from the Plea

Even if counsel did not comply with *Padilla v. Kentucky* and Sally alleges ineffective assistance of counsel, withdrawal is challenging. If the plea has been accepted by the court but prior to sentencing, the defendant would need to meet the “fair and just reason” standard pursuant to Fed. R. Crim. P. 11(d)(2)(B). Generally speaking, the defendant bears the burden of convincing the court that her reason is fair and just. Erroneous or inadequate legal advice may constitute fair and just reason if she can show a “gross mischaracterization” of possible sentence motivated the decision to enter the plea agreement.¹²

In Sally’s case, her plea agreement contained a provision which stated:

Except under circumstances where the Court, acting on its own, fails to accept this agreement, defendant agrees that, upon defendant’s signing of this

agreement, the facts that defendant has admitted under this plea agreement as set forth above, as well as any facts to which defendant admits in open court at defendant's plea hearing, shall be admissible against defendant under Fed. R. Evid. 801(d)(2)(A) in a subsequent proceeding, including a criminal trial, and defendant expressly waives defendant's rights under Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 with regard to the facts defendant admits in conjunction with this plea agreement.

That means if Sally does successfully withdraw from the plea, the government can use her previous statements against her in its case-in-chief. Sally would have given the government all it needed to convict her at trial. Any perceived leverage derived from the withdrawal will be lost if the plea agreement contains the language above. Whether citizen or noncitizen, counsel should resist inclusion of this paragraph when negotiating the client's plea agreement.

B. Cooperation Agreement and Waiting for Trial

Plea agreements in multidefendant cases may call for cooperation from defense counsel's client, which holds particular value for noncitizen defendants. A USAO's favorable determination of cooperation can help the sentencing judge find that the client was genuinely remorseful and pave the path for a more compassionate sentence. Further, noncitizen criminal defendants may be offered a recommendation for an "S" visa — a special visa commonly referred to as a "snitch visa" — in exchange for providing information about other defendants.¹³

In this case, Sally will be explaining to the jury at her co-defendants' trial the details of the fraudulent conduct. Thus, an articulate, well-spoken client at trial can set the stage for the argument that her testimony was indispensable at sentencing.

The cooperation agreement typically gets filed under seal and contains the admonition on nondisclosure for the client. In some cases, the wait for the trial may take years. During this time, the government should be aggressively working with the client in preparation of her testimony. Trial testimony that is informative and credible is far more valuable than any sentencing memo or allocution. Counsel can best

prepare clients to comply with a cooperation agreement by advising them on what constitutes valuable and credible trial testimony — that is, testimony that will favorably impact the jury, prosecutor, and sentencing judge.

At the same time, working with the government requires a measured amount of restraint and resistance. Prosecutors, like all trial lawyers, will push for the testimony that helps their case. The client needs to be resolutely truthful, while trying to assist the government to the fullest possible extent.

The delay before trial will be mentally and emotionally taxing on a defendant who faces the uncertainty of potential jail time and deportation. Defendants will generally be required to stay in the United States until their sentencing, leaving them unable to put down roots in the face of deportation but also unable to start building their new reality in their home country. Defense counsel often feels like a therapist. Referral to a professional is best and may help with mitigation at sentencing, even for the noncitizen.

In order to maximize the benefit of the delay in trial and any cooperation agreements, counsel should review the United States Sentencing Guidelines, which outline sentencing ranges, and the relevant federal statute, which provides guidance for federal judges.¹⁴ Certain factors, such as the defendant's characteristics, can be illustrated by how the defendant chooses to interact with the community where she resided prior to the investigation and pending sentencing.

Defendants may choose to proactively make restitution payments before being required to at sentencing, engage with their communities by giving back to address the harm caused to society, or handle feelings of remorse through re-engagement with family or community ties. In the case of a noncitizen defendant, this period may also be the defendant's last opportunity to leave a hands-on impact before leaving the community after sentencing. Chances to make amends with the community and mitigate harm should be considered opportunities, not hurdles.

For example, white collar defendants may have unique skills in legal, medical, or financial areas. These skills can benefit individuals lacking access to this expertise.¹⁵ If a client is plagued with guilt and remorse, volunteering to help those in the community may provide some personal absolution. Sally could put her financial skills to proper use and help people in the community who struggle with financial literacy. While

recognizing that she played a role in causing financial harm, Sally can have a positive impact on her community that may benefit her at sentencing.

Counsel should also begin to have the defendant think about who — friends, family, and community members — can provide character letters. The judge will generally review letters, videos, or testimony from the character witnesses prior to or at the sentencing hearing. Once the individuals have been identified, Sally can take steps to make sure the letters will be helpful by highlighting how she has accepted responsibility and how she positively impacts her community. While friends and family may want to believe Sally is completely innocent or wrongfully persecuted by the justice system, that perspective will not present well to the judge. As soon as the plea and cooperation agreement are signed, any arguments of innocence are untenable, and assertions of innocence cut against remorse and acceptance of responsibility.

Sally must avoid the appearance that she is telling the court one thing and her family another by being candid about her role in the offense. Allowing her family and friends to accept her role in the offense and likely immigration consequences will not only save them hurt and confusion but will make their character letters more coherent and credible. A character witness who does not know the facts underlying Sally's conviction but offers an opinion on hearsay or lawfulness is not going to be helpful, but a character witness who speaks on Sally's remorse and positive impact is helpful.

These letters can also provide the unique insight friends and family have on Sally's background as an immigrant. Her childhood in Germany may have been very different from the sentencing judge's background. Further, as a wife of a United States citizen and parent to three United States citizens, the details of how her deportation will vastly alter her life can be highlighted by her family members and those who know her best.

C. Testimony at Trial

One of the most valuable resources for the prosecution in any criminal proceeding is favorable trial testimony from a cooperative witness who can explain complex facts or impeach trial defendants.¹⁶

This is when defense counsel wants the client on the stand, as it will allow separate evaluation and positive contrast from the defendants who opted for trial. Sally can help the prosecution

paint a picture of the conduct of senior-level employees who opted for greed over disclosure.

Sally's credibility while testifying will be closely examined. Cultural differences between testifying noncitizens and a likely United States-based jury pool or judge, in the case of a bench trial, may impact perceived credibility. Concerns include Sally's willingness to curry favor with the prosecution or prioritize her plea agreement over her duty to the court. While there is no way to remove these doubts, Sally is best advised to avoid exaggeration and hyperbole, maintain composure, and be herself.

One drawback of cooperating with the government, particularly in a federal investigation, is the sheer amount of time dedicated to the process, where a noncitizen defendant will largely have to remain in the United States. For example, Sally may have to meet frequently with the prosecutor to establish facts, timelines, and prepare charts or graphs. Additionally, these meetings, while cordial, are still emotionally and mentally taxing, as they will likely focus on Sally's adversarial posture to her former colleagues. Counsel may have to remind Sally that any feelings of loyalty to her

former colleagues need to be set aside.

Unlike other trials, conspiracy trials operate under a different set of rules. The Federal Rules of Evidence apply uniquely to conspiracy in two instances: relevance and hearsay. Federal courts hold that "evidence relevant against one conspirator can be admitted against all" conspirators.¹⁷ The streamlining of conspiracy trials is also reflected in hearsay rules. The Federal Rules of Evidence exempt from hearsay statements "made by the party's co-conspirator during and in furtherance of the conspiracy."¹⁸ There will still be objections and defense counsel may help the client understand how to rephrase her responses during counsel's prep sessions.

A defendant who is diligent in working with the prosecution can better convey her desire to comply with the cooperation agreement and to get the truth before the jury. However, accepting responsibility and pointing to the criminal actions of others are minefields for the unprepared.

Sally's assistance needs to be measured. Indeed, the judge will quickly realize if Sally's actions are based on anything other than genuine guilt and remorse. The first interaction Sally has

with the judge may very well set the stage for sentencing since the same judge will likely oversee both proceedings.

By cooperating, a noncitizen defendant is a friend, not a foe, to the very government handing out the deportation order. This is especially true if the other defendants are combative or obstinate. This is something to remember at sentencing.

D. Sentencing and Beyond

The sentencing judge has considerable discretion when issuing a sentence, including issuing split sentences (defined below), or ordering that probation or home confinement may be served outside the United States.

Defendant's objections to the presentence report and sentencing memorandum provide the opportunity to educate the probation officer and judge regarding the defendant's background and any collateral consequences related to her immigration status. Objecting to the presentence report provides an opportunity to give examples or statistics on how other judges may have departed from the guidelines range in similar cases. For example, as described further below, federal courts have evaluated whether to allow defendants to serve sentences in their home countries, depending on whether supervision is possible.

In Sally's case, she wants to return to Germany as soon as possible, even if that means serving her sentence there. Many countries, including Germany, participate in an international prison transfer program. The transfer decision lies with the Office of Enforcement Operations at the Department of Justice. The best defense counsel can get out of the local USAO is a recommendation. The paperwork will not commence until Sally is in BOP custody and can take "up to 12 months to complete."¹⁹ That USAO recommendation will be dependent upon the government's evaluation of Sally's cooperation.

A split sentence is a sentence of imprisonment that includes a term of supervised release with a condition of community confinement or home detention as a substitute for a portion of the guideline minimum.²⁰ Judges issue split sentences in a small number of cases in the federal criminal justice system, in part due to the high number of defendants with mandatory minimum sentences. Split sentences only apply to Zone B or Zone C offenses, as defined by the USSG. Zone B offenses carry one to six months' imprisonment, whereas Zone C offenses carry a minimum of eight, nine, or ten



ETHICS HOTLINE

Need guidance on ethical questions arising in your practice?

Ellen Yaroshefsky | Co-Chair

516-463-5882 • yaroshef@hofstra.edu

Evan A. Jenness | Co-Chair

213-630-5088 • Fax 213-683-1225 • evan@jennesslaw.com

Vince Aprile | Co-Chair

502-589-4215 • Fax 502-589-4994 • vaprile@lcgandm.com

Timothy P. O'Toole | Co-Chair

202-626-5800 • Fax 202-626-5801 • totoole@milchev.com

Contact the NACDL® Ethics Advisory Committee for insight and guidance on ethical issues in individual cases. All requests are handled in confidence. Ethics Hotline available for emergency situations. Written opinions may be available.

08182022

months' imprisonment.²¹ Noncitizens, as a practical matter, are ineligible for most alternatives because of their status as deportable aliens (resulting in immigration detainers that prevent their release into the community).²² However, "there is no direct legal impediment to prohibit a court from allowing a defendant to serve his supervised release abroad. . . ."²³ Several courts have ruled that supervised release survives deportation.²⁴

In 2008, then-District of Columbia Circuit Court Judge Kavanaugh affirmed a district court's sentence of probation to be served in Belgium in *United States v. Gardellini*.²⁵ Defendant Gardellini pled guilty to filing a false income tax return in violation of 26 U.S.C. § 7206(1). The government had appealed the sentence as substantively unreasonable under *United States v. Booker* and *Gall v. United States*.²⁶ Given Gardellini's offense and offender characteristics, the applicable advisory Guidelines range was 10 to 16 months of imprisonment.

Gardellini, who was sentenced almost 10 years after the offense conduct, asked the district court for a below-Guidelines sentence. Gardellini argued that he had offered extraordinary cooperation by providing information to

investigators, thereby waiving his attorney-client privilege, agreeing to toll the statute of limitations, and paying restitution before sentencing.²⁷ In his dissent, Senior Judge Williams wrote that because Defendant Gardellini's sentence of probation would be served in Belgium, he would not be subject to the usual restrictions inherent in probation, such as susceptibility to searches, which the Supreme Court had found important in evaluating the reasonableness of a probation sentence.²⁸

In determining whether to order probation or home confinement to be served abroad, courts consider whether the requirements of supervision can be met in the defendant's home country.²⁹ In *United States v. Porat*, the Third Circuit found that the supervision requirements could not be met in Israel.³⁰ This evaluation may vary by district or change over time.

While federal judges rely on a set of statutory factors when determining a defendant's punishment, the defendant's sentencing memorandum must address how the sentencing factors apply to noncitizens. Of particular interest to noncitizen defendants are those statutory factors regarding the history and char-

acteristics of the defendant, protecting the public, ensuring just punishment, and avoiding sentencing disparities.³¹ Sally's history and characteristics include her extensive ties to the United States, including George and the children.

Sally's education, professional achievements, and history as a contributing member of society within the United States should also be discussed in her history and characteristics. Judges consider these factors and how the defendants' noncitizen status impacts their families.³² Similarly, just punishment for Sally may include consideration of her deportation. Sally's deportation is non-negotiable at this stage, and even a federal judge cannot intervene.³³ Assuming Sally's colleagues are U.S. citizens, if Sally engaged in similar conduct and thus received the same or a similar sentence, it would be unjust for Sally alone to also face deportation.

Still, it is worth noting that no single factor is dispositive, and discretion ultimately lies with the judge. A noncitizen's certain deportation *allows* the judge to consider alternative sentencing within the applicable range, but it does not *require* a judge to incorporate deportation into the analysis. As always, the best advice will rely on the facts of the case, and some arguments will be better served by some statutory factors rather than others.

Counsel should keep in mind when crafting arguments comparing the sentences of other defendants that the sentence of a U.S. citizen and the sentence of a noncitizen are not a one-to-one comparison. For example, as with all cooperating defendants, counsel should highlight to the probation office, prosecutor, and the sentencing judge the timeliness, extent, and value of a cooperator's assistance. Each of these individuals retains substantial discretion prior to and at sentencing.

The government usually retains the right to determine whether to make a substantial assistance motion. In evaluating a cooperator, the sentencing judge will consider factors such as the nature of the assistance, including whether the defendant testified at trial and the credibility of the testimony. In making these determinations and evaluations, the prosecutor and judge consider the sentences imposed on the trial defendants and other cooperators involved in the investigation. Therefore, prompt education that a noncitizen will likely face a longer, harsher period of incarceration for an identical sentence is imperative.

At the sentencing hearing, the defendant will have the right to speak

Are you looking for a way to share your legal knowledge and practical tips with other criminal defense lawyers? Write an article for *The Champion*!

The Champion is seeking practical "here's how to do it" articles. The magazine is sent to all NACDL members as well as NACDL state and affiliate members.

Manuscripts of practical use in all criminal defense categories are welcome, including the following:

- ❖ Coerced confessions
- ❖ Collateral consequences
- ❖ Forensics
- ❖ Forfeiture
- ❖ Identification issues
- ❖ Jury issues
- ❖ Juvenile justice
- ❖ Search and seizure
- ❖ Sex offender registration
- ❖ Social media evidence



Editorial guidelines are available at www.NACDL.org. Send your manuscript to Quintin Chatman (qchatman@nacdl.org).

directly to the judge before the judge imposes the sentence. Judges generally consider the defendant's allocution to be important to their sentencing decision, potentially even more important than anything the lawyers say at the hearing.³⁴ Judges may ask questions of the defendant to determine whether she is genuinely remorseful or likely to reoffend. Counsel should prepare their clients for this statement just as diligently as for testimony at trial. Noncitizens may choose whether to highlight their collateral immigration consequences during this statement, particularly where her ties to the United States are deep and the court has no discretion to prevent or mitigate those impacts.

If the judge chooses not to impose a sentence of incarceration, such as a sentence of probation in or outside the United States only, this might mitigate the immigration impacts on a noncitizen defendant, but only in specific circumstances. When the defendant knows deportation is a consequence following conviction, she may seek permission to leave the country voluntarily to avoid the lengthy deportation process.

E. Conclusion

Immigration pitfalls during criminal investigations and sentencing can be catastrophic because of the scope of potential collateral consequences to noncitizen defendants.

The brief advisory the court gives the defendant at the change of plea is too little too late. When a U.S. citizen commits a crime, the permanency of punishment is generally limited to what was intended by the legislature in drafting the penal code. For noncitizens, like Sally, immigration consequences cast a long shadow. These consequences are based on immigration status alone.³⁵ Further, any lawful status they have obtained, from work permits to legal residency, is often predicated on maintaining a clean record.³⁶

Deportation often precludes noncitizen defendants' ability to start over and rebuild their lives after a period of incarceration. Instead, defendants like Sally face permanent and life-changing consequences: being torn away from the lives they have established in the United States and any U.S.-based family, missing graduations and other milestones, and having to restart from scratch in another country. Even if Sally were a permanent resident, she would not be impervious to immigration consequences. Aggravated felonies always trigger deportation pro-

ceedings.³⁷ Certain misdemeanors can also result in deportation.³⁸

Thus, for noncitizen defendants convicted of a deportable offense, the punitive and rehabilitative undertones of the American justice system play out differently than they do for U.S. citizens. Instead of rehabilitation, Sally is exposed to the most punitive undertones of the penal code, even for many nonviolent offenses, without the same opportunity to put the mistake behind her. Counsel must take these special considerations facing their noncitizen clients into account at all parts of a criminal investigation, conviction, and sentencing.

© 2024, National Association of Criminal Defense Lawyers. All rights reserved.

Notes

1. All names used are fictitious.
2. U.S. DEP'T JUSTICE, BUREAU OF PRISONS (Sept. 4, 2019), *Change Notice 5100.08, Inmate Security Designation and Custody Classification*.
3. BUREAU OF JUST. ASSISTANCE, EMERGING ISSUES ON PRIVATIZED PRISONS (2001) ("Prison overcrowding is one of the most burdensome problems plaguing our criminal justice system and a major catalyst for privatizing correctional facilities.").
4. U.S. DEP'T JUSTICE, BUREAU OF PRISONS (Mar. 10, 2023), *Change Notice 5410.01 CN-2, First Step Act of 2018 — Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d)(4)* at 3-4, https://www.bop.gov/policy/progstat/5410.01_cn2.pdf.
5. U.S. DEP'T JUSTICE, BUREAU OF PRISONS (Mar. 10, 2023), *Change Notice 5410.01 CN-2, First Step Act of 2018 — Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d)(4)* at 3-4, https://www.bop.gov/policy/progstat/5410.01_cn2.pdf.
6. Marquez-Huazo v. Warden, No. 2:21-cv-1540 KJN P, 2022 WL 1241363 (E.D. Cal. Apr. 27, 2022).
7. Arellano-Cigfuego v. Warden, No. 1:23-cv-01351-SAB-HC, 2023 WL 6850314, slip op. at *1 (E.D. Cal., Oct. 17, 2023).
8. Gallegos-Hernandez v. United States, 688 F.3d 190, 196 (5th Cir. 2012).
9. Alatorre v. Derr, No. 22-00516-JMS-WRP, 2023 WL 2599546, slip op. at *5 (D. Hawaii, Mar. 22, 2023).
10. *Id.*
11. Immigr. Legal Res. Ctr., *End Extreme Punishment for "Aggravated Felonies,"* <https://www.ilrc.org/sites/default/files/resources/ijn-aggravated-felony-fact-sheet.pdf> (outlining the immigration fallout of an aggravated felony, including that the "person will be detained, sometimes for years until ... deported"); Immigr. Legal Res. Ctr.,

§ N.6 Aggravated Felonies, https://www.ilrc.org/sites/default/files/resources/n.6-aggravated-felonies_0.pdf (detailing certain aggravated felonies). *But see Sessions v. Dimaya*, 138 S.Ct. 1204, 200 L.Ed.2d 549 (2018) (holding that "aggravated felony" as applied to immigration proceedings is impermissibly vague); *see also Zadvydas v. Davis*, 533 U.S. 678 (2001).

12. *United States v. McTierman*, 546 F.3d 1160 (9th Cir. 2008).

13. *See, e.g., BRAD GERSHEL, SHINING A LIGHT ON THE 'S' VISA: A LONG HISTORY OF UNFULFILLED PROMISES AND BUREAUCRATIC RED TAPE*, NAT'L ASS'N OF CRIM. DEF. LAWS (June 29, 2021), <https://www.nacdl.org/getattachment/91baa4d2-05d0-42b3-833c-d466a544ca93/shining-a-light-on-the-s-visa-a-long-history-of-unfulfilled-promises-and-bureaucratic-red-tape.pdf>.

14. 18 U.S.C. § 3553.

15. U.S. JOINT ECON. COMM., PEOPLE OF COLOR AND LOW-INCOME COMMUNITIES ARE DISPROPORTIONATELY HARMED BY BANKING AND FINANCIAL EXCLUSION, https://www.jec.senate.gov/public/_cache/files/2756e78d-cd64-4413-8d26-a4f9c2756947/embargoed-jec-banking-and-financial-exclusion-brief.pdf.

16. Not all defendants will get the opportunity to testify after entering into a cooperation agreement. Such situations are outside the scope of this article.

17. *Goins v. Clarke*, No. 7:19-CV-00548, slip op. at *9 (W.D. Va. Mar. 10, 2021).

18. FED. R. EVID. 801(d)(2)(c).

19. U.S. DEP'T OF JUSTICE, BUREAU OF PRISONS, No. 5140.42, *Transfer of Offenders to or from Foreign Countries* (Aug. 10, 2015), https://www.bop.gov/policy/progstat/5140_042.pdf.

20. *United States v. Caplinger*, No. CR 21-0342 (PLF), 2022 WL 2045373 (D.D.C. June 7, 2022) (discussing the effect of the Sentencing Reform Act of 1984 on split sentencing); *see also U.S.S.G. § 5C1.1(c)(2), (d)(2)*.

21. U.S.S.G., Staff Discussion Paper: Sentencing Options under the Guidelines at 6, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/working-group-reports/simplification/SENTOPT.pdf> ("Zone B requires that only one month of imprisonment be served. Zone C requires that one-half of the minimum term be served in prison before switching to intermediate confinement.").

22. Courtney R. Semisch, *Alternative Sentencing in the Federal Criminal Justice System*, U.S. SENTENCING COMM. (May 2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/alternatives/20150617_Alternatives.pdf.

23. *United States v. Brown*, 54 F.3d 234

(5th Cir. 1995); see also *United States v. Porat*, 17 F.3d 660 (3d Cir. 1994), cert. granted, vacated on other grounds, 515 U.S. 1154 (1995) (finding no direct legal impediment to authorizing a person to serve supervised release outside the United States); *United States v. Delgado*, 994 F. Supp. 143, 146 (E.D.N.Y. 1998) (holding that “[s]ince defendant will be deported, the five-year period of supervised release need not be served in this country”).

24. See, e.g., *United States v. Ramirez-Sanchez*, 2003 WL 21692980 at *3, 4 (9th Cir. Jul. 22, 2003) (citing previous cases indicating that supervised release survives deportation and expressly holding same); *United States v. Diaz-Diaz*, 135 F.3d 572, 578-79 (8th Cir. 1998) (ruling government’s cross-appeal from sentence not mooted by defendant’s deportation because supervised release survives deportation); *United States v. Akinyemi*, 108 F.3d 777, 780 (7th Cir. 1997) (supervised release not terminated by deportation); *United States v. Brown*, 54 F.3d 234, 237-39 (5th Cir. 1995) (same); see also *United States v. Cuero-Flores*, 276 F.3d 113, 117-19 (2d Cir. 2002) (finding terms of parole are not terminated by deportation).

25. 545 F.3d 1089, 1091 (D.C. Cir. 2008).

26. 543 U.S. 220 (2005); 552 U.S. 38 (2007).

27. *Id.* at 1090-91.

28. *Id.* at 1097 (citing *Gall v. United States*, 552 U.S. 38 (2007)).

29. *Id.*; see also *Porat*, 17 F.3d at 660; *United States v. Pugliese*, 960 F.2d 913 (10th Cir. 1992) (same regarding Thailand); *United States v. Stewart*, Case No. 14-cr-272-JSR (S.D.N.Y. Feb. 8, 2017 and Feb. 22, 2017) (defendant to serve probation in United Kingdom); *United States v. Yagami*,

Case No. 14-cr-272-JSR (S.D.N.Y. Feb. 21, 2017 and Mar. 13, 2017) (defendant to serve probation in Hong Kong); *United States v. Robson*, Case No. 14-cr-272-JSR (S.D.N.Y. Nov. 21, 2016) (defendant to serve probation in United Kingdom); *United States v. Connolly*, Case No. 16-cr-370-CM (S.D.N.Y. Oct. 24, 2019) (defendant to serve probation and home confinement in United Kingdom); *United States v. Yabe*, 18 CR 726, (D.N.J. May 22, 2019) (defendant to serve probation in Japan); *United States v. Curtler*, Case No. 15-cr-670-CM (S.D.N.Y. April 9, 2019) (defendant to serve probation in United Kingdom).

30. See, e.g., *Porat*, 17 F.3d at 660; *United States v. Saltsman*, Case No. 07-cr-641-NGG (E.D.N.Y. July 28, 2010) (imposing non-custodial sentence of probation and community service, to be served in the defendant’s home country of Israel).

31. 18 U.S.C. § 3553(a)(1), (2)(A), (C), (6).

32. See, e.g., *United States v. Saltsman*, Case No. 07-cr-641-NGG (E.D.N.Y. July 28, 2010) (finding that “[s]entencing Mr. Saltsman to prison time in the United States would impose further harm on innocent members of his family [including his five minor children located in Israel] who already suffered from his long absence” over the three years leading up to sentencing).

33. Counsel should consider the possibility of a non-deportable resolution when negotiating with the prosecution. Alternative dispositions for aggravated felonies are beyond the scope of this article. See, e.g., HILLEL R. SMITH, CONG. RSCH. SERV., R45151, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 13 (May 28, 2021), <https://sgp.fas.org/crs/homesecc/R45151.pdf>.

34. Mark W. Bennett, *Heartstrings or Heartburn: A Federal Judge’s Musings on Defendants’ Right and Rite of Allocution*, THE CHAMPION, March 2011, at 26.

35. Gabriel J. Chin & Margaret Love, *Status as Punishment: Padilla v. Kentucky*, 28 GPSolo 26 (March 2011) (“[T]he characteristics the Court recognized as important in *Padilla* ... follow automatically from conviction and thus are tied directly to the criminal case; they are important to the individuals involved; and they may therefore drive plea bargains.”).

36. Daniel A. Arellano, *Keep Dreaming: Deferred Action and the Limits of Executive Power*, 54 ARIZ. L. REV. 1139, 1142 (2012) (“Individuals in lawful status have defined statutory benefits permitting their presence in the United States subject to a ... conditions, [including] refraining from committing a crime of moral turpitude.”).

37. 8 U.S.C. § 1227(2)(A)(iii) (“Any alien who is convicted of an aggravated felony at any time after admission is deportable.”); see also *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566 (2010) (stating that aggravated felonies comprise “a category of crimes singled out for the harshest deportation consequences”). But see, e.g., HILLEL R. SMITH, CONG. RSCH. SERV., RL45151, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY (2021) (outlining exceptions to removal following conviction, including CAT).

38. Maureen Sweeney & Hillary Scholten, *Penalty and Proportionality in Deportation for Crimes*, 31 ST. LOUIS U. PUB. L. REV. 11, 40 (2011) (“In 2011 alone, Immigration and Customs Enforcement removed 215,698 persons convicted of felonies or misdemeanors.”). ❄

About the Authors

Edward Novak is a shareholder at Polsinelli



NACDL MEMBER

in the Government Investigations group. His practice includes government investigations, white collar criminal defense, attorney discipline and judicial complaint defense and related civil litigation.

Edward F. Novak

Polsinelli PC
Phoenix, Arizona
602-650-2020

EMAIL ENovak@Polsinelli.com

WEBSITE www.polsinelli.com

Alexandra Brooks represents clients in complex federal and state



government and internal investigations involving white collar criminal defense and other civil, criminal, and regulatory matters. She advises clients regarding compliance with the False Claims Act, Anti-Kickback Statute, Foreign Corrupt Practices Act, agency regulations, and more.

Alexandra Brooks

Polsinelli PC
Washington, DC
202-777-8981

EMAIL ABrooks@Polsinelli.com

WEBSITE www.polsinelli.com

Angela Powers represents clients facing government investigations



NACDL MEMBER

involving business, regulatory, healthcare, and tax concerns. She uses her background in economics and accounting to help clients navigate complex white collar and corporate fraud allegations.

Angela C. Powers

Polsinelli PC
Dallas, Texas
214-661-5534

EMAIL APowers@Polsinelli.com

WEBSITE www.polsinelli.com