



UPDATE: HOW TO AVOID MANDATORY DETENTION IN THE NINTH CIRCUIT

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Mandatory ICE Detention:

A Guide for California Defenders and Removal Defense Advocates

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I. OVERVIEW

What is mandatory detention? Noncitizens with certain criminal records are subject to “mandatory” immigration detention under INA § 236(c), 8 USC § 1226(c). This means that they will not be released on bond and do not even have the right to a bond *hearing*. With some exceptions, they will remain in ICE detention during their entire immigration case, which can take months or years. Detention often is under terrible conditions, hundreds of miles from their families, and with no counsel. It can be triggered by conviction of a minor criminal offense. The real effect of mandatory detention is to cause people to give up trying to fight the removal case and ask for deportation.

Of course, getting a bond hearing is no guarantee of release from detention, but many people are released on bond, and it is a critical right. This long-term civil detention with no chance to request release on bond is arguably unconstitutional, but we do not yet have a ruling to that effect.

How did the Supreme Court decision in *Preap* change mandatory detention in the Ninth Circuit? Until March 2019, the Ninth Circuit had held that mandatory detention applied only if the person was *arrested by ICE directly from criminal custody*, and that criminal custody must have been for an offense that subjected the person to mandatory detention. *Preap v Johnson*, 831 F.3d 1193 (9th Cir. 2016). The Ninth Circuit rule had meant that old

convictions, or any conviction where ICE did not arrest the person at the jail, did not trigger mandatory detention.

The Supreme Court reversed that in *Nielsen v. Preap*, 139 S.Ct. 954 (March 19, 2019). It held that any qualifying conviction, regardless of date of release from criminal custody, will subject the person to mandatory detention, as long as the conviction was on or after October 9, 1998. For example, two separate theft convictions, or a drug possession conviction, from ten years ago will automatically trigger mandatory detention if ICE detects the person today.

What convictions trigger mandatory detention? Generally, noncitizens are subject to mandatory detention if their criminal record, from on or after October 9, 1998, brings them within one of these categories:

- 1) They *were admitted* into the United States in any status, and now are *deportable* for crimes (with two beneficial exceptions: the domestic violence deportation ground does not cause this, and a single moral turpitude conviction must have a year's sentence *imposed*, not a *potential* sentence of a year), **or**
- 2) They were *not admitted* to the United States, and now are *inadmissible* for certain crimes. The petty offense and youthful offender exceptions to the crime involving moral turpitude inadmissibility ground apply.¹

See further discussion of these grounds in Section III, below.

Remember that a noncitizen who is not removable cannot be detained by ICE at all. People who are removable include all undocumented people; permanent residents who have become removable; and people with other forms of lawful status or benefits who no longer are eligible for those, due to a conviction or other factor. Importantly, it is the Government's duty to prove that a person is removable on any of these grounds. A permanent resident who has not yet become removable cannot be detained, even if the person has been charged with, but not convicted of, a removable offense.

Example: Monique has been a lawful permanent resident (LPR) since 2005. In 2015 she committed and was convicted of a petty theft, California Penal Code § 490, which is a crime involving moral turpitude (CIMT). Now she is charged with a second petty theft. The first CIMT conviction did not make her deportable, but the second CIMT would (based on having two CIMT convictions any time after admission).

Because Monique is not yet a deportable LPR, she cannot be detained at all. But if she *is* convicted of the second CIMT, she will become deportable *and* subject to mandatory detention. Fortunately she appears to have a strong case for relief, such as LPR cancellation of removal. Unfortunately, she may have to fight her case for months or even years while detained, in very bad conditions, hundreds of miles from her family, and without an attorney.

Note that an informed criminal defense lawyer may well be able to prevent this from happening. They can try to get the charges dismissed or to win at trial, or they can plead to an alternative offense that is not a CIMT (for example, PC § 496 with a sentence imposed of less than a year).

When and where does mandatory detention not apply? See discussion in Section IV, below. To summarize, currently people detained in counties within the federal Central California District can request a bond hearing after six months of detention. Anyone within the Ninth Circuit's jurisdiction whose appeal has gone up to the

¹ See INA § 212(a)(2)(A)(ii), 8 USC § 1182(a)(2)(A)(ii) (moral turpitude inadmissibility ground exceptions); INA § 237(a)(2)(B), 8 USC § 1227(a)(2)(B) (controlled substance deportation ground and exception).

Ninth Circuit can ask for a bond hearing. Special rules may apply to people who only are applying for withholding of removal (an asylum-like relief). Mandatory detention does not apply to people who have a final order of removal.

What can criminal defenders do? For noncitizen defendants, generally criminal defenders strive to get a disposition that doesn't harm immigration status or prospects: that avoids making the person removable and/or that does not destroy eligibility to apply for some immigration relief. This is the classic "crim/imm" defense.

Unfortunately, if the person is subject to mandatory detention, that good work can go to waste. Immigrants in detention have a low chance of winning their cases, even with strong legal arguments and good equities. They are likely to be detained hundreds of miles from home, in bad conditions, and put through video hearings in a removal proceeding whose focus is to compel deportation, when they have no lawyer.

Defenders can help avoid detention in two ways. First, they can make avoiding mandatory detention one of the defense goals. Often the goals of a good crim/imm defense and avoiding mandatory detention are perfectly in line – much of crim/imm defense is based on avoiding inadmissible and deportable crimes, and those are the triggers for mandatory detention. But in some cases, the choices are more complex and it is wise to seek expert advice. Defenders should also ensure that a trusted individual (e.g., family) is provided with a copy of the record of conviction or legal argument relevant to the crim/imm analysis. Second, defenders should seek post-conviction relief for prior convictions that trigger mandatory detention. See Part III. Third, defenders can work to lower the probability that defendants will be arrested by ICE, by providing them with education about their rights under California law and the Fourth and Fifth Amendment. See Part IV and see www.ilrc.org/red-cards.

What can removal defense advocates do? Immigration advocates also can work to lower the probability that defendants will be arrested by ICE, by providing them with education about their rights under California law that limits local law enforcement's ability to cooperate with ICE, and under the Fourth and Fifth Amendment. See www.ilrc.org/red-cards. They can seek post-conviction relief to eliminate convictions that trigger mandatory detention. See Part V.

In addition, they can assert that the person is not subject to mandatory detention. ICE may allege that clients are subject to mandatory detention at the initial ICE arrest or later in front of the immigration judge. Advocates should always do their own analysis and push back on ICE's assessment wherever possible. The person can request a bond hearing to assert that it is likely that they (a) are not subject to mandatory detention, and/or (b) are not removable at all. See *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). Making these arguments requires a skilled crim/imm analysis as well as a knowledge of mandatory detention rules, and advocates should seek expert help if needed. See Parts III, IV.

If we avoid mandatory detention, is the client guaranteed to get release on bond? No! Avoiding mandatory detention means that the person can get a bond *hearing* before an immigration judge. Unfortunately, thousands of people get a bond hearing but don't get a bond, or they get a bond they have difficulty paying.² This has been especially true under the Trump administration, but this bad effect may last beyond it. Still, many people – especially those with positive equities, eligibility for relief, and representation – are released on bond and it is far, far better to have that opportunity.

In a bond hearing the immigration judge should weigh positive and negative factors to make an individual finding as to whether the person is a danger to the public or a flight risk. Family ties, ties to the community, employment, good behavior, and especially being eligible for relief are key positive factors. Negative factors include criminal convictions and immigration misconduct, especially recent events. Certain convictions are

² Immigration bonds must be paid in full, not 10%. But see *Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017), holding that immigration judges and ICE must consider a respondent's ability to pay.

especially bad: a recent conviction of drunk driving will be is a serious negative factor.³ For more information, see the online ILRC Guide, *Representing Clients in Bond Hearings* (2017).⁴

II. Convictions and Conduct That Trigger Mandatory Detention

If you already understand the crimes removal grounds, the mandatory detention (MD) analysis is fairly simple, because in almost all cases being inadmissible or deportable under the crimes grounds is what triggers MD.⁵ To protect their clients, criminal defense counsel should try to avoid a plea to a triggering offense. Get expert help if you need it. Immigration advocates should be prepared to contest that the conviction triggers MD, where appropriate. You can demand a bond hearing to assert that the offense does not trigger MD, under *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999). All of us should consider the possibility of eliminating a triggering offense by postconviction relief. See Section V, below.

A. First, Determine Whether the Client Was *Admitted* to the United States in Any Status

Different mandatory detention (MD) standards apply to noncitizens depending upon whether they were or were not admitted to the United States. A person who was admitted in any status is subject to MD if they are *deportable* under the crimes grounds, with some exceptions. A person who was not admitted will be subject to MD if they are *inadmissible* for crimes.

How can you tell if your client was admitted for this purpose?

A noncitizen was admitted into the United States for this purpose if: the person adjusted status to LPR, or was admitted at the border with any kind of visa (e.g., LPR, student, visitor, refugee) or border crossing card, even if they are no longer in lawful status.

A noncitizen was not admitted into the United States for this purpose if: the person entered the United States without inspection, or was paroled in under INA § 212(d)(5).

In some cases the answer may not be clear. Consult an expert in the following situations:

- A grant of a T, U, or V visa should be held an admission for this purpose.⁶

³ See, e.g., discussion in *Matter of Siniauskus*, 27 I&N Dec. 207 (BIA 2018) (finding that drunk driving poses a serious threat to safety, and holding that multiple convictions for DUI with injury 10 years ago, coupled with a current arrest for DUI with injury, show that the respondent is a danger to the community and that no bond should be set).

⁴ See the bond hearing Guide at www.ilrc.org/sites/default/files/resources/bond_practice_guide-20170919.pdf

⁵ See INA § 236(c)(1)(A)-(C), 8 USC § 1226(c)(1)(A)-(C). People who are inadmissible or deportable under terrorism grounds also are subject to MD. See INA § 236(c)(1)(D), 8 USC § 1226(c)(1)(D).

⁶ In unpublished opinions, the BIA has held that a grant of a U visa (*Matter of Alejandro Garnica Silva*, A098 269 615 (BIA June 29, 2017)), a T visa (*Matter of E-A-M-Z-*, AXXX XXX 207 (BIA June 4, 2019)), or a V visa (*Matter of A-M-U-*, AXXX XXX 567 (BIA Nov. 8, 2018)) is an admission for purposes of determining whether the person was subject to inadmissibility or deportability grounds. Unpublished opinions are accessible, among other places, at the Immigrant and Refugee Appellate Center, www.irac.net.

- Advocates can consider arguments that a grant of Special Immigrant Juvenile Status (SIJS)⁷ or even a grant of Temporary Protected Status (TPS) is an admission for this purpose.⁸
- The Fifth and Ninth Circuits held that a person who was “waved in” at the border has made an admission in some contexts. The BIA disagrees with this rule, but will apply it in cases arising within the Fifth and Ninth Circuit.⁹

B. If the Person was Admitted, MD is Triggered by Being Deportable For Crimes (With Some Exceptions)

A noncitizen who was admitted in any status is subject to MD if they are “deportable by reason of having committed any offense” set out in the crimes deportation grounds,¹⁰ based on conviction of:

- two or more crimes involving moral turpitude (CIMT) that did not arise as part of a single scheme;
- an aggravated felony;
- a controlled substance offense (*except* for one or more convictions arising from a single incident involving possession for personal use of 30 grams or less of marijuana);
- a qualifying firearms offense;
- offenses in the “miscellaneous grounds,” relating to espionage, sabotage, etc.

The MD triggers are *different from* the crimes deportation grounds in that:

- Being deportable under the domestic violence deportation ground is *not* listed and thus does not trigger MD. That deportation ground includes conviction of a crime of domestic violence, of stalking, or of a crime of child abuse, neglect, or abandonment, or a civil or criminal court finding of a violation of a DV stay-away order.

Post-Conviction Relief: Under California Pen C § 18.5(b), a judge may reduce a misdemeanor sentence to 364 days. If effective, that order would prevent a single CIMT conviction from triggering mandatory detention for a person who was admitted (and prevent other offenses from becoming an aggravated felony). However, at this time immigration authorities will *not* recognize an § 18.5(b) reduction order. Instead, counsel should try to reduce the sentence or vacate the conviction under relief based on legal error, for example Pen C § 1473.7.¹¹

⁷ See *Garcia v. Holder*, 659 F.3d 1261 (9th Cir. 2011) (SIJS grant is an admission, distinguishing SIJS “parole” under INA § 245(h) and parole under INA §212(d)(5)). However, this case was based partly on the Ninth Circuit’s finding that Family Unity status was an “admission” for this purpose, and the court later deferred to the BIA and withdrew from that holding. *Medina-Nunez v. Lynch*, 788 F.3d 1103, 1104 (9th Cir. 2015). But there is a potential independent argument, separate from Family Unity, based on the parole and other language in the SIJS statute.

⁸ The Sixth, Eighth, and Ninth Circuits held that under the plain language of 8 USC § 1254(f)(4), a grant of Temporary Protected Status (TPS) is an admission for purposes of adjustment of status. See *Flores v. USCIS*, 718 F.3d 548 (6th Cir. 2013), *Velasquez v. Barr*, --F.3d-- 2020 WL 6290677 (8th Cir. Oct. 27, 2020), and *Ramirez v. Brown*, 852 F.3d 954, 960 (9th Cir. 2017). While § 1254(f)(4) specifically references adjustment, advocates may consider arguments that it extends to this purpose. The BIA will reject this argument: outside of the above circuits, it holds that TPS is not an admission even for purposes of adjustment. *Matter of Padilla Rodriguez*, 28 I&N Dec. 164 (BIA 2020), *Matter of H-G-G-*, 27 I&N Dec. 617 (AAO 2019).

⁹ See *Saldivar v. Sessions*, 877 F.3d 812 (9th Cir. 2017), *Tula-Rubio v. Lynch*, 787 F.3d 288, 291-96 (5th Cir. 2015), finding that a waive-through is an admission, but see *Matter of Castillo Angulo*, 27 I&N Dec. 194, 199-202 (BIA 2018) (disagreeing and holding that outside of that jurisdictions the person must prove they possessed some form of lawful immigration status at the time of admission to meet the “any status” requirement).

¹⁰ See INA § 236(c)(1)(B), 8 USC § 1226(c)(1)(B), identifying some grounds at INA § 237(a)(2), 8 USC § 1227(a)(2).

¹¹ Attorney General Barr reversed prior law and ruled that a criminal court’s reduction or elimination of an imposed sentence will have immigration effect only if the order was based on legal error. Legal error is not required for PC § 18.5(b), and thus in most cases the court’s order will not qualify. See *Matter of Thomas & Matter of Thompson*, 27 I&N Dec. 674 (AG 2019) and see materials at <https://www.ilrc.org/amicus-brief-zaragoza-v-barr-challenging-thomas-thompson>.

C. If the Person was *Not Admitted*, MD is triggered by Being Inadmissible for Crimes

A person who was not admitted is subject to MD if they are “inadmissible by reason of having committed any offense” set out in the inadmissibility crimes grounds.¹² Inadmissibility is triggered by:

- A conviction of, or qualifying admission of committing, a single CIMT, **unless** it comes within the petty offense or youthful offender exception.¹³ If it comes within an exception it does not trigger MD.
 - Petty offense exception: The person must have committed just one CIMT, the potential sentence was one year or less, and any sentence imposed was not more than six months.
 - Youthful offender exception: The person must have committed just one CIMT, while under the age of 18, and been convicted as an adult. The conviction or release from imprisonment must have occurred at least five years before the current application.
- A conviction of, or qualifying admission of committing, a controlled substance offense.
 - This includes conviction or admission of possessing 30 grams or less of *marijuana*. (The deportation ground does not include this, but the inadmissibility ground does)
- Conviction of two or more offenses of any kind with a total sentence imposed of at least five years.
- Being found to have engaged in prostitution in the last ten years, or coming to the United States to engage in prostitution or commercialized vice.
- Immigration authorities have reason to believe that the person aided or participated in:
 - Trafficking in a controlled substance (plus certain family members who benefitted from this);
 - Severe trafficking in persons (plus certain family members who benefitted from this); or
 - Money laundering.
- Foreign government officials who committed severe violations of religious freedom.

Note that some inadmissibility grounds do not require a conviction. The person is inadmissible who is convicted of, or who *admits that they committed* a drug offense or an inadmissible CIMT. The drug offense could include admitting that they used legalized marijuana, in accordance with state law (because marijuana still is a federal controlled substance). Warn the client against making any admissions and consult online advisories.¹⁴

D. Case Examples that Illustrate Mandatory Detention Triggers

Here are examples that illustrate when mandatory detention (MD) applies.

Example: I entered without inspection. I don’t have a criminal record: I am inadmissible simply because I have no immigration status. If ICE picks me up, will I be subject to MD?

¹² See INA § 236(c)(1)(B), 8 USC § 1226(c)(1)(B), identifying inadmissibility grounds at INA 212(a)(2), 8 USC 1182(a)(2).

¹³ See the petty offense and youthful offender exceptions at § 212(a)(2)(A)(ii).

¹⁴ Possessing and growing even a small amount of marijuana remains a federal offense, and therefore making a qualifying admission of this conduct can make a noncitizen inadmissible. See materials about marijuana and admissions in general, including a Practice Advisory, at <https://www.ilrc.org/warning-immigrants-about-medical-and-legalized-marijuana>.

No. I am subject to the inadmissibility grounds, because I entered without inspection. But I am not subject to mandatory detention, because I am not inadmissible for crimes.

Example: I entered without inspection. I was convicted a few years ago of one CIMT, misdemeanor Pen C § 245 from a fight in a bar. I was sentenced to 30 days. Will I be subject to mandatory detention?

I will not. Because I was not admitted, I am subject to MD if I come under the crimes inadmissibility grounds. This CIMT will not make me inadmissible for crimes because it comes within the petty offense exception to the CIMT inadmissibility ground: I committed just one offense, it does not have a potential sentence of more than a year, and I was not sentenced to more than six months. Therefore, I would not be subject to mandatory detention and I could get a bond hearing before an immigration judge and at least try to win release on bond.

Remember that even where mandatory detention does not apply, the person might not succeed in getting released from detention. And other factors may affect the case on the ground – for example, whether the person has protection under SB 54 that limit jailors’ ability to help ICE take the person into custody (see Part IV, below), whether the person can get counsel, their knowledge of legal self-defense, their equities, etc.

Example: I am an undocumented person who entered without inspection many years ago, so I am subject to the grounds of inadmissibility. I was convicted of a misdemeanor DUI. My case is a fortunately / unfortunately story that could go in different directions.

Fortunately, a DUI does not make me inadmissible for crimes, so even if ICE picks me up I will not be subject to mandatory detention and I will have a right to a bond hearing. Unfortunately, I may well not be granted bond at my bond hearing, because a recent DUI is considered a very serious negative factor.

Fortunately, ICE might not pick me up from jail because misdemeanor DUI does not destroy my SB 54 protection,¹⁵ so the Sheriff cannot work with ICE to arrest me upon my release. Unfortunately, some Sheriffs are providing release dates to ICE anyway, on the grounds that it is publicly available for all inmates.

Unfortunately, even if I am not picked up at jail, ICE may come to arrest me at my home or work. Fortunately, if I have received “Know Your Rights” information¹⁶ I might be able to resist them.

Fortunately, I may be eligible for relief. Unfortunately, if I am not released on bond I will have to pursue that relief while detained and the case could take months or even years.

Unfortunately, my lawful permanent resident mother is on dialysis and I am her only caretaker. Fortunately, that could help me in getting released on bond.

Fortunately, if I am in California I might get free representation by a nonprofit advocate. Unfortunately, if I am detained and transferred out of state, it is likely that I will have no lawyer.

¹⁵ Under SB 54/California Values Act, local law enforcement cannot share a person’s release date with ICE unless the person’s criminal record brings them within an exception. A “straight” (non-wobbler) misdemeanor such as misdemeanor DUI does not bring them within the exception. See *ILRC Practice Advisory: SB 54 and the California Values Act: A Guide for Criminal Defenders* at https://www.ilrc.org/sites/default/files/resources/sb54_advisory-gr-20180208.pdf

¹⁶ Any noncitizen who might be removable should understand their basic Fourth and Fifth Amendment rights to refuse to talk to immigration officials. Defenders, advocates, and community members can go to www.ilrc.org/red-card where they will find materials in English and other languages to assist them. They can order laminated, wallet-sized “red cards” in bulk, or simply download and print out the red card text for free. There also is a graphic in multiple languages describing how to use the red card.

III. Exceptions: When and Where Mandatory Detention Is Not Completely Enforced

Bond hearings after six months in the California Central District? The federal Central District of California includes the following counties: Los Angeles, Orange, San Bernardino, San Luis Obispo, Santa Barbara, Riverside, and Ventura. Individuals detained in these counties may be able to have a bond hearing after six months of detention. The reason is: In *Rodriguez v. Robbins*, 804 F.3d 1060, 1074-77 (9th Cir. 2015), the Ninth Circuit had held that everyone in the Ninth Circuit, including those subject to mandatory detention, is entitled to a bond hearing after six months in ICE custody. But the United States Supreme Court reversed *Rodriguez* and held that the mandatory detention statute itself does not provide the right to periodic bond hearings. *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018), interpreting INA § 236(c), 8 USC § 1226(c). However, owing to a permanent injunction in California's Central District, at this time individuals in that district continue to receive hearings after six months of detention -- in other words, *Rodriguez* hearings.¹⁷

The only other good news from *Rodriguez* is that the Court remanded the case back to the Ninth Circuit to consider whether the Fifth Amendment Due Process Clause requires a hearing during prolonged detention. Litigators for immigrants are working to get a more just rule. For information on representing immigrants in bond hearings after *Jennings*, see [Practice Advisory](#).¹⁸

Bond hearings once case is on appeal to the Ninth Circuit? At this time in the Ninth Circuit, people in ICE custody who are subject to mandatory detention will not have access to bond hearings *until* their removal case is on appeal at the Ninth Circuit, which could take years. *Casas-Castrillon v. Dep't of Homeland Security*, 535 F.3d 942 (9th Cir. 2008), provides bond hearings at this stage.

Bond hearings in withholding-only proceedings. Individuals in "withholding-only" proceedings¹⁹ should receive bond hearings under *Diouf v. Napolitano (Diouf II)*, 634 F.3d 1081 (9th Cir. 2011), as *Jennings* did not repeal *Diouf*. A class action was filed in California's Northern District, challenging the Government's practice of denying bond hearings in withholding-only proceedings. Petitioners secured a preliminary injunction requiring that individuals in the Ninth Circuit receive bond hearings if detained for more than 180 days and pursuant to 8 U.S.C. § 1231(a)(6), INA § 241(a)(6). *Gonzalez v. Sessions*, 325 F.R.D. 616 (N.D. Cal. 2018).²⁰ The Ninth Circuit affirmed the District Court's Order in *Aleman Gonzalez*, as well as in a companion case out of Washington. *Aleman Gonzalez v. Barr*, 955 F.3d 762 (9th Cir. 2020).

Bond hearings for certain asylum seekers. Asylum seekers now have a new avenue to secure bond hearings, in addition to securing release through parole. A class action was filed in Washington State's Western District, eventually resulting in a nationwide class action requiring immigration courts to provide bond hearings to people who entered the U.S. without inspection, are placed in expedited removal proceedings, and establish a credible fear of persecution. *Padilla v. U.S. Immigration & Customs Enforcement*, No. 2:18-cv-00928-MJP (W.D. Wash.). Prior to this, Attorney General Barr issued *Matter of M-S-*, 27 I&N Dec. 509 (A.G. 2019), which would

¹⁷ See discussion of *Rodriguez v. Marin*, No. CV 07-3229 (March 5, 2018), in *Practice Advisory: Prolonged Detention Challenges after Jennings v. Rodriguez*, ACLU, ACLU Southern CA, Mills Legal Clinic of Stanford Law School (March 21, 2018) Part II.A), at <https://www.aclu.org/other/practice-advisory-prolonged-detention-challenges-after-jennings-v-rodriguez>.

¹⁸ Please see *Practice Advisory: Prolonged Detention Challenges after Jennings v. Rodriguez*, cited above.

¹⁹ There is a circuit split regarding which statute governs the detention of this population. In *Padilla-Ramirez v. Bible*, 882 F.3d 826 (9th Cir. 2017), the Ninth Circuit held that 8 U.S.C. § 1231(a)(6) controls. The Second Circuit, however, found that that 8 U.S.C. § 1231 applies. *Guerra v. Shanahan*, 831 F.3d 59 (2d Cir. 2016).

²⁰ enforcement denied sub nom. *Gonzalez v. Whitaker*, No. 18-CV-01869-JSC, 2019 WL 330466 (N.D. Cal. Jan. 25, 2019), and aff'd sub nom. *Aleman Gonzalez v. Barr*, 955 F.3d 762 (9th Cir. 2020), and amended sub nom. *Gonzalez v. Barr*, No. 18-CV-01869-JSC, 2020 WL 3402227 (N.D. Cal. June 19, 2020).

have eliminated bond hearings previously established during this same litigation. Fortunately, plaintiffs in the *Padilla* litigation successfully defended the right to bond hearings for *Padilla* class members, despite *Matter of M-S-*.²¹

People with final removal orders. Many people have a final order of removal but have not been removed, because the United States does not have a repatriation agreement with their country of origin. They are not subject to the type of mandatory detention discussed in this advisory, 8 USC § 1226(c). That applies only until there is a final order in the removal proceeding, or the case is terminated. Instead, persons with final orders who are detained have a right to release after a “reasonable time,” considered to be six months. However, release may occur earlier during the “custody review” process and individuals kept past six months should seek habeas relief in federal district court. See *Zadvydas v. Davis*, 533 U.S. 678 (2001).

Note, however, that the U.S. now is deporting people to more countries. For example, now certain people are being deported to Cambodia, Vietnam, and Cuba, whereas before they were not. Clients who for years just had to report for periodic interviews now may find themselves deported.

IV. Constitutional and California State Law Protections for Immigrants

Clients should be informed about the California laws and constitutional provisions that protect them from identification and arrest by ICE. Some people in California will not be taken into ICE custody directly from jail, for a variety of reasons. For example, the case may be so minor that they never are booked into jail, or ICE might lack a strong presence in the area and not get to them. Also, while all defendants’ fingerprints are sent to immigration authorities, in cases where the person has had no prior contact with Immigration, the fingerprints alone do not establish that the person is not a citizen. ICE may try to interview the person in jail, but California has enacted some due process protections that require the person to sign written consent before seeing ICE without a lawyer, under the TRUTH Act.²²

California has passed laws that limit how much local law enforcement (sheriffs, probation, prosecution, police) can cooperate to help ICE arrest people directly from jail. The laws are sometimes referred to as “SB 54,” and they include the California Values Act and the TRUST Act. California jailors never are permitted to hold people for an extra 48 hours after they would otherwise be released from jail, to help ICE pick them up (an ICE hold request). They also are not permitted to share a defendant’s release date with ICE or to facilitate transportation directly from jail to ICE – although there are *many* exceptions to this protection, based on the person’s criminal record. Some cities and counties have created their own protections that are stronger than SB 54. For more information on SB 54 as well as local policies, see online resources.²³

Immigrants have rights under the U.S. Constitution to decline to answer questions and to decline to open their doors to ICE agents. Providing “Know Your Rights” trainings and handing out language-appropriate material can help. The ILRC provides “red cards,” and currently (November 2020) can provide cards in bulk for free to non-profit organizations and public defenders. Go to <https://www.ilrc.org/red-cards> to order, and go to <https://www.ilrc.org/using-your-red-cards> for more information.

²¹ For questions regarding bond hearings under *Padilla*, please see Northwest Immigrant Rights Project, American Immigration Council, ACLU, Federal Court Requires Immigration Courts to Continue to Provide Bond Hearings, Despite *Matter of M-S-*, FAQ, (August 9, 2019).

²² Govt C §7283 et seq.

²³ www.ilrc.org/local-enforcement and www.iceoutofca.org/ca-values-act-sb54

V. Removable Offenses and California Post-Conviction Relief

A. Removable Offenses, Resources

With some exceptions, noncitizens are subject to mandatory detention because they are either deportable (if they were admitted to the U.S.) or inadmissible (if they were not admitted to the U.S.) under the crimes grounds. See INA § 236(c), 8 USC § 1226(c).

Criminal and immigration advocates who do not have expertise in the complicated law on crimes and immigration (“*crim/imm*”) need to do research or get expert help to know how to approach this issue. **The most important thing to understand is *not* to guess at or “eyeball” an offense.** Many offenses (including strikes) that seem like they must trigger removal grounds actually do not. Conversely, some offenses (including infractions) that look quite minor do trigger the grounds. An offense may have the same name as a removal ground, but still not match it due to the difference in how federal and state laws define many offenses.

In short, *crim/imm* is a very technical field that also has high stakes. Effective assistance of counsel requires getting expert help or researching the issue. Because *crim/imm* law is quite volatile, the research must include up-to-date references and a search for recent cases. The ILRC provides extensive free resources on our website. Go to www.ilrc.org/chart for a series of short articles or “Notes” that provide extensive information about California law, such as how to deal with a drug charge, or requirements for immigration relief. Practice Advisories and recent updates appear at www.ilrc.org/crimes. (Always check the date of each resource, as the law changes quickly.) Defenders and immigration advocates who wish to use the free *California Quick Reference Chart* can access it by registering at <https://calchart.ilrc.org/registration/>. See other pages at www.ilrc.org on related topics, such as enforcement (ICE in jails, courthouses, and raids), youth, post-conviction relief, prosecutors, different forms of immigration relief, etc. Prior recorded webinars on a huge range of topics can be accessed at <https://www.ilrc.org/recordings> (in most cases, these require purchase).

B. California Post-Conviction Relief

If you can eliminate a conviction in a way that works for immigration purposes, you may release the person from mandatory detention and may also help them to gain or keep lawful status. California has a range of post-conviction relief, some of which were created at least partially to help immigrants, and many of which do not require the person to be present at the hearing. This is important because it may be very difficult to get ICE to bring the detained immigrant to criminal court. For extensive free materials on this topic, including a free infographic, go to www.ilrc.org/immigrant-post-conviction-relief.