

# Uses of State Criminal Court Records in Immigration Proceedings

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## State court criminal case records routinely provide the information needed to allow or not allow legal alien immigrants to remain in the U.S.

Over the past few years, the State Justice Institute supported national Immigration and the State Courts Initiative has identified numerous intersections among federal, state, and local immigration law, policy, and practice that impact the state courts,

as well as points of intersection where state court action can affect an individual's immigration status or the work of the federal immigration system.

As we have documented previously in the *Court Manager*, these intersections encompass numerous aspects of court operations, ranging from how federal immigration status may limit eligibility for state supported benefits and treatment services, to the role of judges in assuring that defense counsel take into account immigration status when serving immigrant clients, and even how decisions made by state courts can profoundly affect an immigrant's ability to remain in the United States or even become a naturalized citizens.

We have also raised the delicate question of how far the state courts should or may go to assist the Federal Government in regulating immigration. It is clear that meeting Federal needs may place extra burdens on the state courts and, in some instances, pose significant challenges to the ability of state courts to achieve substantive and procedural justice under state law.

Most recently our work in addressing immigration related concerns with state trial courts across the nation has revealed an extremely important nexus between the contents of state criminal court records and concurrent or subsequent federal immigration case processing that state courts need to know about. In short, state court criminal case records routinely provide (or do not provide) the information needed to allow or not allow legal alien immigrants to remain in the United States, or even eventually become or not become United States citizens.



In particular, we have previously described in detail how a criminal conviction can have a wide range of immigration consequences for any immigrant, including immigrants who are legally in the United States as lawful permanent residents. A criminal conviction that falls within one of the categories specified in Federal immigration law can affect a defendant's immigration status by making the defendant:

- Removable;
- inadmissible, including preventing the defendant from reentry if the defendant leaves the country;
- ineligible for cancellation of a removal order;
- ineligible for naturalization as a United States citizen; and
- ineligible for other types of legal status or discretionary relief, such as self-petitioner status under the Violence Against Women Act or special immigrant juvenile status.



## Justice in the immigration arena often relies on the completeness of state court records.

In this article we examine the ways in which state criminal court records may be used in immigration court to determine whether a state criminal conviction falls within a category that can affect the immigration rights of a defendant. Our primary purpose is alert all state court officials responsible for creating and storing records related to criminal proceedings, including criminal court judges, clerical staff, administrative staff, bailiffs, court reporters, and others, as to which records created in state court criminal trials might require special attention to clarity, completeness, and accuracy due to their potential impact on an immigrant defendant in a later immigration proceedings. The article begins with an over-

view of approaches to determining whether a criminal conviction falls within a category described in Federal immigration law and where state court criminal records might be used in that determination. We continue with a review of the types of evidentiary issues that might arise in determining if particular state convictions fall within specific categories in Federal immigration law. Next we review the types of criminal court records that might be used by an immigration court judge to determine how to classify a state criminal conviction. We also raise some questions with regard to issues of language and a defendant's ability to understand the trial record that he or she may be creating. Finally, we conclude this

article by stressing that justice in the immigration arena often relies on the completeness of state court records.



# I. Approaches to Determining the Elements of State Criminal Convictions

In determining whether a state court criminal conviction falls within a Federally specified ground, the immigration court must determine whether the elements of the offense for which the defendant is convicted correspond directly to the elements of a criminal ground specified in Federal immigration law and leave no possibility that the conviction might have been for a non immigration-related offense.

There are three approaches to determining whether a conviction is for an immigration-related offense:

- the categorical approach;
- the modified categorical approach; and
- the factual approach for circumstance-specific requirements.

**Categorical Approach** – The categorical approach is the first step in the analysis. The immigration court looks at the statute on which the conviction is based to determine if a conviction under the statute on its face and without reference to any additional facts contains the elements required to make the person who is convicted subject to consequences under Federal immigration law.

**Modified Categorical Approach** – If the offense as defined by the statute could include both crimes that carry immigration consequences and crimes that do not, a modified categorical approach may be employed. This permits the adjudicator to look at the record of conviction

and other records admissible to prove a criminal conviction to determine whether the elements of the offense for which the defendant was convicted constitute an immigration-related offense under federal immigration law. This means that the immigration court may consider evidence that shows what elements of the crime were necessarily found to be present by the criminal court to reach the conviction, in order to determine whether the conviction meets the required elements under Federal immigration law.

**Circumstance-specific requirements** – Certain aggravated felony offenses require proof of facts that are not tied to the statutory elements of an offense. The Supreme Court has held that existence of such non-element facts may be determined by means of reliable evidence beyond the record of conviction. Examples include cases where:

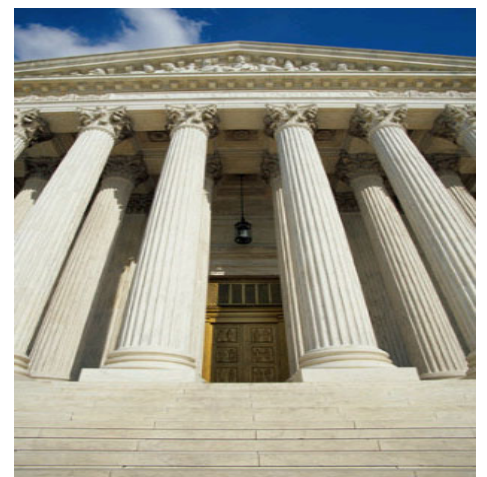
- the amount involved in the crime must exceed \$10,000, such as fraud cases; and
- the crime must be committed for commercial advantage, such as prostitution.

## II. Evidentiary Issues Affecting the Immigration Consequences of Specific Crimes

The following are examples of immigration rights affected by state criminal cases where the impact on the immigration status of the defendant depends on whether certain findings are in the state court record. The discussion below is intended to be illustrative and not comprehensive.

**Aggravated Felony: Crime of Violence** – Conviction of a crime that meets the definition of crime of violence under Federal law constitutes an aggravated felony under Federal immigration law if the defendant receives a sentence of one year or more. A crime of violence is an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense. With regard to whether an assault can be classified as a crime of violence, if the crime involves reckless causation as opposed to intentional harm, just offensive touching, or no intent to cause serious bodily harm, it will not be a crime of violence. For determining whether disorderly conduct can be considered a crime of violence, the presence of egregious or violent acts can be a factor. For determining whether unlawful imprisonment can be considered a crime of violence, the use of physical force will be a factor. All of these may require findings in the trial record.

**Crime Involving Moral Turpitude (CIMT)** – Determining



whether a conviction contains the elements of a crime involving moral turpitude is especially problematical, as “moral turpitude” is not an element of an offense under state law. Under the rule in *Matter of Silva-Trevino*, 24 I&N Dec. 687 (2008), for crimes involving moral turpitude where the crime as defined by statute includes both crimes that qualify as moral turpitude and crimes that do not, if there is a “realistic probability” that the statute could be applied to behavior not involving a CIMT, the immigration court may:



- examine the record of conviction, including the indictment, judgment of conviction, jury instructions, signed guilty plea, and plea transcript; and
- consider any additional evidence deemed necessary or appropriate to resolve the CIMT question.

Examples of issues where the *Silva-Trevino* rule might come into play include:

- finding intent to defraud (e.g. in passing NSF check);
- finding intent to cause serious bodily harm; and
- finding that a defendant was convicted of DUI while knowingly driving with license suspended or revoked due to a prior DUI.

Intent to defraud may be important for determining whether a conviction qualifies as a crime involving moral turpitude. Some issues that may affect whether a theft conviction has the requisite intent to qualify as a crime involving moral turpitude include the following:

- theft of property as opposed to theft of services;
- intent to deprive temporarily as

opposed to intent to deprive permanently;

- possibility of joyriding as opposed to theft; and
- for burglary, intent to commit theft (which is a CIMT) vs. intent to commit any felony.

Any two convictions of crimes involving moral turpitude not arising out of a single scheme make an alien deportable regardless of the possible sentence. A defendant’s prior record will be necessary to identify multiple convictions for a CIMT. This may be problematical where the defendant has been convicted under different names. People may use different names for a driver’s license, for work, and for family matters, and the court file may have multiple aliases. Determining the legal name and the order of names can be difficult. When in doubt, a court will likely enter possible alternative name combinations as aliases. Further, the time spent incarcerated may involve more than one state. Also, the convictions may involve more than one state.

**Crime Related to Controlled Substance** – Conviction of any crime related to a controlled substance makes the defendant inad-

missible or removable, with one exception. Conviction of one crime of possession of 30g or less of marijuana for personal use will not make the defendant removable. To establish the exception from removability, the record must show that amount of marijuana involved was 30g or less. Explicit mention of the specific substance or substances involved is also a crucial item of information for the immigration courts since some state law definitions of controlled substances are broader in scope than the Federal statute.

**Child Abuse** – Proving the age of victim is necessary to establish a crime that may constitute child abuse if the victim is a child. Types of crimes where this may be an issue include endangerment, indecent exposure, sexual assault, and sexual conduct with a minor.

**Smuggling of Persons** – The crime of smuggling of persons consists of encouraging, inducing, assisting, abetting, or aiding individuals to enter the United States in violation of law. The United States Department of Homeland Security may for humanitarian purposes, to assure family unity, or when it is otherwise

in the public interest, grant relief from removal in the case of any alien lawfully admitted for permanent residence if the alien's crime was limited to smuggling an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual). The record of conviction may be consulted to determine this.

### **Establishing or Rejecting Good Moral Character –**

Good moral character is a requirement for naturalization and for eligibility as a VAWA self-petitioner, as well as a prerequisite for many other immigration benefits. Federal immigration law provides that an individual who is or has engaged in any of the following is not of good moral character:

- habitual drunkard;
- prostitution or other commercialized vice;
- receiving one's primary income from illegal gambling;
- conviction of two or more gambling offenses;
- conviction of a crime of moral turpitude;
- multiple convictions with aggregate sentence of more than five years;
- drug trafficking;
- giving false testimony for the purpose of gaining benefits under Title 8, Chapter 12;
- confinement in a penal institution for an aggregate of 180 days or more;
- conviction of an aggravated felony;
- smuggling aliens into the U.S.;
- polygamy;
- crime related to a controlled substance;
- participation in Nazi persecution or religious persecution; and
- illegal voting or falsely claiming

U.S. citizenship.

Evidence of many of these disqualifying factors may arise from a state criminal case and require reference to state criminal court records. For example, state court records will be required to prove that an individual was incarcerated for an aggregate of 180 days or more in a correctional institution during the relevant time frame required. This may be problematical where the defendant has been convicted under different names. As mentioned above, people may use different names for a driver's license, for work, and for family matters, and the court file may have multiple aliases. Determining the legal name and the order of names can be difficult. When in doubt, a court will likely enter possible alternative name combinations as aliases. Further, the time spent incarcerated may involve more than one state. For all these reasons, specific and clear information regarding the exact number of days actually served is extremely helpful to the immigration court.

### **Proving Abuse for VAWA**

**Self-Petitioner** – Immigration law provides that an alien married to a citizen or lawful permanent resident (LPR) may self-petition for LPR status without the cooperation of the spouse if: the spouse or child has been battered or subjected to extreme cruelty by citizen or lawful permanent resident spouse; and the act or threatened act was one of extreme cruelty, including physical violence, sexual abuse, forced



detention, or psychological abuse against the petitioner or petitioner's child by the spouse during the marriage. The following can be used to prove abuse:

- reports and affidavits from police, judges and other court officials, medical personnel, school officials, clergy, social workers, other social service agency personnel;
- letters from advocates;
- protection orders;
- allegations in divorce petitions; or
- reports on police calls to petitioner's home.

### **Eligibility for U Visa Status**

Court records can be very helpful to demonstrating eligibility for U Visa Status. The U Visa is an important path for an unauthorized immigrant to attain lawful permanent resident status and is available to individuals who are in the U.S. as undocumented aliens but meet the following requirements:

- The individual has suffered severe physical or mental abuse as a result of being a victim of certain criminal activity as specified in Federal immigration law that violated the laws of the United States and occurred in the U.S. or a territory of the U.S.
- The individual possess information about the criminal activity.
- The individual has been, is being, or is likely to be of help to a Federal, state, or local investigation of the criminal activity causing the abuse.
- The individual has certification from a Federal, state, or local judge, prosecutor, law enforcement officer, or other justice system official involved in prosecuting the criminal activity that he or she has been, is being, or is

likely to be of help to a Federal, state, or local investigation of the criminal activity causing the abuse.

The following areas of criminal activity are specified by the statute: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; being held hostage, female genital mutilation; sexual exploitation; prostitution; peonage; unlawful criminal restraint; abduction; kidnapping; slave trade; involuntary servitude; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; and any attempt to commit any of those crimes.

The rights of the “U” visa holder include the following:

- The maximum length of the “U” visa is four years unless extended.
- The “U” visa holder may apply for any other immigration benefit or status for which he or she is eligible.
- The holder of a U visa is eligible to apply for lawful permanent resident status with three years of continuous residence after receiving U visa status.

### **Eligibility for Special Immigrant Juvenile (SIJ)**

**Status** – A juvenile (under age 18) may be eligible to petition for LPR status as a Special Immigrant Juvenile if the juvenile meets the following conditions: (1) a court with juvenile jurisdiction has taken dependency jurisdiction over the juvenile; (2) reunification with one or both parents is not viable due to abuse, neglect, or abandonment or a similar basis; and (3) there is an administrative or judicial finding that it would not be in the best interest of the juvenile to be returned to the juvenile’s or parent’s previous country of nationality or country of last habitual residence.

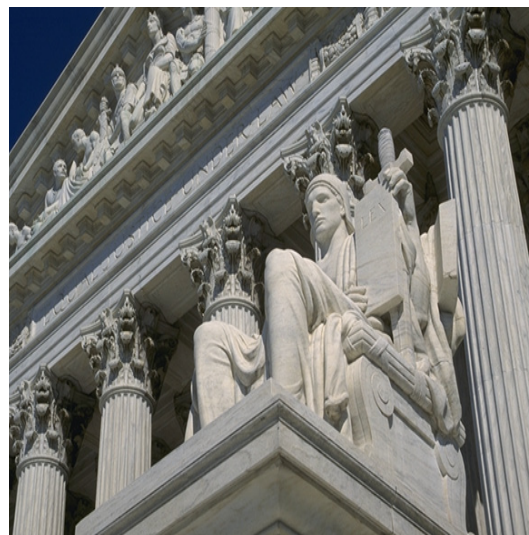
An alien juvenile who engages in the types of conduct listed below may be ineligible for SIJ status:

- drug trafficking;
- being a drug addict;
- prostitution;
- violation of protection order;
- use of false documents; or
- having a mental condition that is a threat to others.

Note that the above conduct does not require a criminal conviction to make the juvenile ineligible, so evidence giving rise to a reason to believe that the juvenile has engaged in the conduct may be enough.

### **III. What Criminal Court Records May the Immigration Court Consider?**

Immigration court judges have relied on a wide range of records from state criminal trial courts to establish that a defendant was convicted of an immigration-related offense. The following are some of the records that have been presented and the uses of them that have been permitted or not permitted. State court officials responsible for creating and storing records related to criminal proceedings, including criminal court judges, clerical staff, administrative staff, bailiffs, court reporters, and others need to be aware of the contents and accuracy of these records. Note that some records are admissible only if specifically incorporated into a plea or stipulated to by the defendant. Further, note that *sometimes what is not said in the document may be as important as what is said in the*



#### **document.**

We divide the summary of types of records into records prepared by the state criminal court as part of the processing of the case and records prepared by non-court participants in the case process without official endorsement or approval by the court. Some records prepared out of court may have been entered into the criminal court trial record by the parties. For each type of record, we also provide a summary of the required contents or circumstances necessary to make the record usable in an immigration court hearing.

The categories of records are summarized in detail in the six text figures presented at the end of this document.

- Figure 1: Records From a Plea Hearing.
- Figure 2: Records From a Bench Trial.
- Figure 3: Records From a Jury Trial.
- Figure 4: Records of Judgments and Sentences.
- Figure 5: Post-Trial Records Prepared by Clerical Staff.
- Figure 6: Records Prepared by Outside Parties.

## IV. Issues of Language And Records

A wide range of language issues can arise in a state court criminal proceeding involving non-English speaking defendants which may seriously impact an immigrant defendant's immigration rights. A full discussion of those issues will be the topic of another article, but here we want to highlight some of the language issues that relate directly to an immigrant defendant's ability to understand, participate in the creation of, and attest to the accuracy of court records that may later be considered by an immigration court to determine the immigration consequences of a specific criminal conviction. Our goal is just to raise the issues, as developing solutions will be a complex task.

As shown in detail in [Figures 1 - 6](#), there are circumstances where the admissibility of a state court record in immigration court is conditioned on whether the trial court provided the defendant the opportunity to review the record. For example, findings of fact and rulings of law by a trial judge or an abstract of judgment prepared by a court officer may be used by an immigration court if the defendant has been given the opportunity to review the documents, and police reports may be used only if specifically entered into evidence by the defendant. With regard to those records, language issues may affect a defendant's ability to read and understand the record. If the defendant does not speak English, the trial court may need to take steps to assure that the defendant understands everything that is in the record in question.

Further, language issues may come into play with defendant's ability to



understand the precise meaning of his or her in-court statements where those statements may become part of the record or serve to legitimize the use of other documents in the record. For example, a charging document can be used in immigration court if the defendant has pled to specific counts enumerated in the document. Where the defendant does not speak English, the trial court may need to take steps to assure that the defendant fully understands the specific counts that are recited in the charging document.

## V. Advising Defendants of Possible Immigration Risks

Court advisements to the defendant regarding potential immigration risks stemming from the criminal proceeding may also come into play. The U.S. Supreme Court's decision in *Padilla v. Kentucky* held that advice of counsel regarding deportation risks of a criminal conviction falls within the scope of the Sixth Amendment's right to counsel, so that failure of defense counsel to advise a defendant that a guilty plea might carry a risk of deportation deprives the defendant of effective representation under the Sixth Amendment.

While the Supreme Court in *Padilla* focused on the duty of defense counsel, a growing number of states now require that judges advise criminal defendants that a plea of guilty to the crimes charged may result in potential immigration consequences. Even without such a specific requirement, after *Padilla* it is likely that many judges will feel that they have an ethical duty to so advise defendants, to assure fundamental fairness for immigrant defendants.

The *Padilla* case involved advisements in the context of entering a guilty plea. The above discussion and the information contained in [Figures 1 - 6](#) should make it clear, however, that records created in the proceedings leading up to the guilty plea can affect how an immigration court may interpret that plea and determine the immigration consequences of the crimes involved. In circumstances where an immigration court may need to refer to state court records to determine the specific crime for which the defendant is being convicted, the defendant may be put at risk of deportation by his or her in-court statements legitimizing the record or assenting to the record after re-



view. Where such statements or assent are required for admissibility of the record, the court may consider providing advisement of immigration risks when those statements are made, as an extension of the *Padilla* requirement that the defendant be properly advised of immigration risks in the context of entering a guilty plea.

## VI. Conclusions

State court records can be important in immigration proceedings in a variety of ways. Immigration courts routinely use a wide range of records from a criminal trial in determining whether a particular conviction is for a crime that carries immigration consequences under Federal immigration law. Individuals applying for naturalization may need state court records to establish the required good moral character. In addition, if in the future some pathway to citizenship is adopted for unauthorized immigrants, they may need state court records to establish their eligibility for natural-

ization. The number of people who are potentially affected is substantial. For example, there are around 8½ million lawful permanent residents who already meet the residency requirements for naturalization, many of whom may need to use state court records in the naturalization process, and there are presently about 12 million unauthorized immigrants who may be affected by any new programs to provide pathways to citizenship.

These potential uses greatly increase the importance of accurate and comprehensive records of criminal court convictions from the state criminal courts. This also suggests that both prosecution and defense attorneys should be provided an opportunity to review any records that might affect the immigration rights of the defendant.

We recognize that with regard to record-keeping, state courts need to be concerned first with meeting the requirements of state law. Within that context, we believe that state court criminal court judges, clerical staff, administrative staff, bailiffs, and

court reporters should be aware of the effects that their records may have on an immigrant defendant and, where possible, pay special attention to the accuracy and completeness of trial records that may be of importance in a subsequent immigration proceeding.



## Figure 1: Records From a Plea Hearing

<p><b>Written Plea Agreement</b></p>	<p>The immigration court may consider a defendant's statement in a signed plea agreement, such as a Written Plea and Waiver of Rights Form, specifying that the defendant engaged in conduct constituting the elements of a crime that carries immigration consequences. The plea agreement may show that the crime does not carry immigration consequences. For example, the statement "[t]he defendant and the United States agree that the offense in Count 7 to which the defendant is pleading guilty involves a loss to the victim of \$605.30" in a written plea agreement was taken as proof that the defendant was not convicted of fraud in excess of \$10,000 such as to constitute an aggravated felony. Further, what isn't in the plea agreement may be important. One immigration court declined to rely on a complaint where Written Plea and Waiver of Rights Form did not contain "the critical phrase 'as charged in the Information'" in referring to the complaint.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing, they should:</p> <ul style="list-style-type: none"> <li>✓ Identify the specific counts pled to; or</li> <li>✓ Specifically incorporate the charges from the charging document; or</li> <li>✓ Specify the elements of the crime.</li> </ul>
<p><b>Transcript of Plea Colloquy</b></p>	<p>A plea colloquy is a formal discussion between a judge and a criminal defendant in which the judge ascertains the defendant's understanding of a proposed plea. Some examples of statements in a plea colloquy relied upon by an immigration court include: (1) admission to possessing a firearm to prove a firearm offense for the purposes of establishing deportability; and (2) admission during plea colloquy that the defendant transported or sold or offered to sell a controlled substance. The record should clearly mention the specific substance when the defendant has admitted its possession or sale.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing, they should contain:</p> <ul style="list-style-type: none"> <li>✓ Admission to elements of the crime; or</li> <li>✓ Admission to behavior constituting an element of the crime</li> </ul>
<p><b>Stipulations to Factual Basis of Plea</b></p>	<p>A stipulation is a voluntary agreement between opposing parties concerning some relevant point. Some examples of stipulations admitted by an immigration court include: (1) the contents of a police report where defense counsel stipulated during the taking of his plea that the factual basis for his plea was set forth in the report; (2) a statement of facts found in a prior motion where defense counsel had stipulated in a plea hearing colloquy that it formed the factual basis of his plea; and (3) the factual basis for a charge set forth by the prosecutor at a plea hearing, where defense counsel did not object and offered further explanation of factual basis of the plea.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing, they should contain:</p> <ul style="list-style-type: none"> <li>✓ Stipulation to the contents of another document, such as a police report or charging document; or</li> <li>✓ Stipulation to facts in a prior hearing; or</li> <li>✓ Stipulation to specific facts as part of a plea hearing.</li> </ul>

## Figure 2: Records From a Bench Trial

<p><b>Rulings of Law and Findings of Fact by a Trial Judge</b></p>	<p>The immigration court may consider any explicit factual findings by the trial judge to which the defendant assented to determine the elements of a crime.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing, they should indicate:</p> <ul style="list-style-type: none"> <li>✓ Assent by the defendant to the findings of fact.</li> </ul>
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## Figure 3: Records From a Jury Trial

<p><b>Jury Instructions</b></p>	<p>In cases where a state statute defines an offense more broadly than the offense defined in Federal immigration law, the immigration court may consider jury instructions to determine if the defendant was convicted only of the crime that carries immigration consequences. For example, in a state whose burglary statutes include entry of an automobile as well as a building, if the jury instructions show that the jury necessarily had to find an entry of a building to convict, then the immigration court may refer to the jury instruction to determine that the conviction carried immigration consequences.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing:</p> <ul style="list-style-type: none"> <li>✓ The instructions should specify the key elements of the crime; or</li> <li>✓ The instructions should not leave open a possibility for conviction of a non immigration-related offense.</li> </ul>
<p><b>Jury Verdict Forms</b></p>	<p>Immigration courts may rely on jury verdict form stating that jury found defendant guilty “as charged in the Information” but may not rely on a jury verdict form that did not indicate the facts found by the jury in convicting the defendant. The immigration court may not rely on a charging document in undertaking a modified categorical analysis where a jury verdict form merely recited that the jury found the defendant guilty of violating the statute.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing, they should:</p> <ul style="list-style-type: none"> <li>✓ Indicate that the jury found defendant guilty “as charged in the Information”; or</li> <li>✓ Include the jury’s findings of facts for conviction.</li> </ul>
<p><b>Jury Judgment of Conviction</b></p>	<p>The immigration court may rely on a jury judgment of conviction where it is clear as to the specific elements of the crime for which the jury is convicting the defendant. The immigration court may not rely on a jury judgment of conviction where it did not indicate that the conviction was for the crime as charged in the Information and no other comparable document was available to prove that the jury was called upon to decide the presence of the required elements specified by Federal immigration law.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing they should:</p> <ul style="list-style-type: none"> <li>✓ Contain the specific elements of the crime for which the jury is convicting the defendant, or;</li> <li>✓ Indicate that the conviction was for the crime as charged in the Information.</li> </ul>

## Figure 4: Records of Judgments and Sentences

<h3>Judgment of Conviction</h3>	<p>In the judgment of conviction, the court sets forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence. The judge signs the judgment, and the clerk enters it into the record. The immigration court may rely on recitations in the judgment of conviction as to the elements of the crime for which the defendant is being convicted.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing, they should contain:</p> <ul style="list-style-type: none"> <li>√ Recitations as to the elements of the crime.</li> </ul>
<h3>Sentences</h3>	<p>The use of sentences is problematical. For example, an immigration court may not rely on defendant's sentence of domestic violence counseling and stay-away order to establish the "domestic" element of a crime of domestic violence where state law gives broad discretion in sentencing judges with regard to probation conditions and does not require that the conditions be directly connected to the crime for which the defendant is convicted. Where the ages or specific relationship between the perpetrator and victim have been proven, those facts should be spelled out in the record because state definitions of majority and minority or the creation of certain relationships do not always match the Federal definitions that classify an offense as one involving domestic violence.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing, it must be clear that:</p> <ul style="list-style-type: none"> <li>√ State law requires that sentence conditions be directly connected to the crime for which the defendant is convicted.</li> </ul>
<h3>Restitution Orders</h3>	<p>The immigration court may rely on the amount of restitution specified in a restitution order in plea agreement setting an amount consistent with the complaint where state law requires that orders be calculated on the basis of actual loss. But the immigration court may not rely on a restitution order in circumstances where the sentencing court is allowed to consider conduct not charged in an indictment or proven to a jury in setting the restitution amount.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing, it must be clear that:</p> <ul style="list-style-type: none"> <li>√ State law requires that orders be calculated on the basis of actual loss.</li> </ul>

## Figure 5: Post-Trial Records Prepared by Clerical Staff

<h3 style="margin: 0;">Minute Orders</h3>	<p>When a trial judge is sitting officially, with or without a court reporter, a clerk or deputy clerk keeps minutes. When the judge makes an oral order, the only record of that order may be in the minutes. Immigration courts may rely on clerk minute orders that conform to certain procedures: if the minute order is prepared by a court official at the time the guilty plea is taken or shortly afterward, the official is charged by law with recording the proceedings accurately, and the official exercises that duty as faithfully and diligently. Care should be taken to assure that handwritten minutes are legible and local abbreviations are avoided.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing, they must be:</p> <ul style="list-style-type: none"> <li>✓ Prepared by a court official charged by law with recording accurately;</li> <li>✓ Prepared at time of plea or shortly after; and</li> <li>✓ Prepared by an official who exercises the duty faithfully and diligently.</li> </ul>
<h3 style="margin: 0;">Abstract of Judgment</h3>	<p>If the abstract of judgment is prepared by a neutral officer of the court and the defendant has the right to examine it and challenge its contents, it may be used in the modified categorical analysis. Care should be taken to assure that handwritten notes are legible and local abbreviations are avoided. On the other hand, in circumstances where an abstract of judgment is not the judgment of conviction, does not control if different from the trial court's oral judgment, may not add to or modify the judgment it purports to digest or summarize, and is prepared as a clerical, not a judicial function, it cannot be used.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing:</p> <ul style="list-style-type: none"> <li>✓ The defendant must be provided the right to examine it and challenge its contents; and</li> <li>✓ They cannot be prepared solely as a clerical function not intended to be the precise judgment of conviction.</li> </ul>

## Figure 6: Records Prepared by Outside Parties

<p style="text-align: center;"><b>Charging Document</b></p>	<p>An immigration court may use a charging document to determine the elements of a conviction if the defendant pled guilty to the specific counts charged.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing:</p> <ul style="list-style-type: none"> <li>√ The defendant must have pled specifically to the charges in the document.</li> </ul>
<p style="text-align: center;"><b>Police Reports</b></p>	<p>The immigration court may consider a police report only if it is specifically incorporated into the guilty plea or entered into evidence by the defendant. However, a defendant might use a police record to establish conduct that might warrant discretionary relief from a removal order.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing they must:</p> <ul style="list-style-type: none"> <li>√ Be specifically incorporated into the guilty plea; or</li> <li>√ Have been entered into evidence by the defendant.</li> </ul>
<p style="text-align: center;"><b>Complaint Applications</b></p>	<p>The immigration courts have refused to use claims made in applications for the issuance of a complaint or police affidavits in support of the complaint to determine the elements of a criminal conviction unless the defendant has specifically stated in a guilty plea that the court may consider them in determining if there is a factual basis for the plea and for sentencing.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing:</p> <ul style="list-style-type: none"> <li>√ The defendant must have specifically stated in a guilty plea that the court may consider them in determining if there is a factual basis for the plea and for sentencing.</li> </ul>
<p style="text-align: center;"><b>Charging Documents: Complaint, Information, or Indictment</b></p>	<p>Immigration courts may refer to the charging documents only in circumstances where the defendant has indicated that he or she is pleading guilty to a specific count or the jury is convicting the defendant of a specific count in the charging document.</p> <p><u>Summary:</u> For these records to be usable in an immigration court hearing:</p> <ul style="list-style-type: none"> <li>√ The defendant must have indicated that he or she is pleading guilty to a specific count; or</li> <li>√ The jury must have convicted the defendant of a specific count in the charging document.</li> </ul>
<p style="text-align: center;"><b>Presentence Reports and Probation Reports</b></p>	<p>The immigration courts have held that a presentence report or probation report reciting the facts of the crime is insufficient evidence to establish that the defendant was convicted of the elements of an immigration-related crime when the statute of conviction is broader than the definition of the crime in Federal immigration law.</p> <p><u>Summary:</u> These records are not usable alone in an immigration court hearing.</p>