



No More “Safe” Deals

Where Criminal Defense and Immigration Law Collide

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Julio's Story

Julio is 17 years old when he emigrates, alone, to the United States.

His father had lived in the Bay Area for some time and had settled down with his new wife and their daughter. When his father came to the United States, Julio stayed in Guatemala with his mother and sisters and an abusive grandfather. After MS-13 gang members stab Julio in his back, just missing his spine, for not joining the gang, Julio makes the long and uncertain journey to the United States.

He lives with his father, who he hadn't seen in many years. He attends high school. And he holds inside of him the traumatic beatings from his grandfather, the near-death experience of his stabbing, the voices and noises in his head that were starting to hound his waking hours, his difficult travels from central America, his childhood sexual abuse and incest, and his missing of his mother.

Enter Marie, a 72-year-old woman with an interest in young boys. Marie employed Julio's father as a gardener and helper and, after Julio arrived, she begins to employ Julio to help out at her home and her storage units. What started out as sporadic work every few weeks turns into daily time together. Marie expresses her interest in 17-year-old Julio, tall and handsome, lanky, with black curly hair. And Julio is curious.

One night, Julio returns past his curfew from spending time with Marie at one of her storage units (she is a hoarder by everyone's accounts). His father confronts him, and they argue. Julio leaves his father's home and moves in with Marie. Two of her three bedrooms are so full that the only place he can sleep is in her bed, with her. Marie becomes Julio's legal guardian for the

purposes of school and, while driving him home from school one day, parks her car in the driveway and asks him if she can give him oral sex. Julio says yes and a sexual relationship ensues.

Fast forward thirteen months. Julio has turned 19 years old. His mental health is deteriorating. He starts seeing coded messages on license plates and “hearing” his sister and his mother being abused in Guatemala. According to Marie, he suspects her of cheating on him with an older neighbor, and he grows violent and threatening over the course of a few months. Marie's sister contacts the police, who arrest and jail Julio. He is charged with elder abuse and criminal threats; there are uncharged assault and domestic violence charges, and he violates the emergency protective order immediately by contacting Marie from jail.

Prior to his arrest, Marie has paid for an immigration lawyer for Julio. The immigration lawyer has filed an application for what is commonly conflated with asylum, but is in fact called “withholding of removal,” a close cousin of an asylum petition. This application is based first on the abuse Julio faced in his country from the MS-13, and second on the abuse his grandfather inflicted upon him.

Julio's criminal bail is enhanced to \$250,000 due to the age of the victim and the severity of the allegations. Even with an 8 - 10% payment to a bail bonds company, this amount is way out of his league and he will remain in custody until the criminal case is resolved. He now risks being taken in front of an immigration judge by United States Immigration and Customs Enforcement (“ICE”) after his release from jail. In the immigration court, he risks denial of bond, which will hinder his pursuit of his immigration petition. He risks deportation and denial of any grounds for withholding of removal and/or asylum, even

new grounds that have arisen during the investigation of this case such as being the victim of a crime or being the victim of sex trafficking as a minor.

Changes to Immigration Consequences of Criminal Cases

Things seem to be getting worse for my immigrant clients. All of my clients are indigent persons facing felony charges. They are already trapped in a critically negative time in their lives. They are charged with a felony, counsel appointed for them, facing the real possibility of prison (and possibly already incarcerated). Even if they avoid prison, felony probation and felony conviction will change the course of their lives as citizens and employees. They have stories to tell and choices to make, and they hope to emerge from this experience with some positive vision for the future.

My clients with immigration consequences have an added layer. We are often speaking through a translator. They have often experienced significant trauma: border crossing trauma, gang violence and persecution trauma, ICE detention trauma, and the trauma of separating themselves, because they have no other choice, from their homeland, their immediate families and their culture. When I tell them that the offer is 179 days, I am not including the time that they will wait for ICE “*La Migrá*” to come and pick them up. I am not including the time they will wait for a detention hearing to try to get bond *una fianza*. I am not including the time that they will have to “fight their case” from in custody if they do not get *fianza*. I am not including the time they will be banished from the U.S. and told they cannot return. I am not including the time it will take them to remake the voyage from their country. I am not including the time they might be re-arrested and detained and charged for a federal crime for illegal entry after deportation.

Why do I say things are getting worse? This has been the story for years. This group of people has always had to manage extra consequences and hardships. There are more unknowns in their cases, more risks, more sadness. But lately, there is also a new reality that is not reflected in the Immigration Law Resource Center charts for “immigration-safe” deals or my immigration attorney consults’ “safe” charges, *e.g.*, outcomes that do not have consequences for the client’s immigration status. What has become a truth is that “immigration-safe” is no longer safe at all. The types of charges and deals that we have always sought for our clients—a misdemeanor battery, a felony false imprisonment by menace, deleting the age of the victim, deleting language describing the nature of the relationship, using the disjunctive “or”, deleting the name of the specific controlled substance—now, none of that will prevent denial of bond and deportation. And this actuality, the “real” consequences v. the “safe advice,” is a space where I am currently living and struggling with my clients.

Manuel’s Story

Take Manuel, a man with minimal criminal history who has lived in the United States for almost 20 years. He has a 16-year-old son. Manuel comes forward to some elders at his

church about an inappropriate relationship he developed with a 14-year-old churchgoer almost a year prior. He has developed feelings for her and on at least one occasion hugged her inappropriately and touched her buttocks outside her clothing. The church elders encourage Manuel to tell the girl’s mother, who is a family friend, and so he does, asking for her forgiveness. She in turn questions her daughter. Her daughter confirms the dynamic and says that she let Manuel do these things to her and didn’t report him because he was kind and was helping her cope with her parents’ recent divorce.

Manuel is charged with felony and misdemeanor sex crimes, requiring life-time sex registration. Manuel doesn’t have an immigration attorney. He never obtained a green card, and hasn’t made any efforts to adjust his status after a few run-ins with the law. I consult with an immigration lawyer. This means that I interview the client about his history, his dates of entry, his status, his family members, and his goals. I relay that personal client information as well as the charges and possible negotiation outcomes I can expect to the immigration attorney who advises me what the consequences for Manuel will be based on his status, his history, his time in the U.S., his relief prospects and this case. The district attorney is willing to work with us, so we explore a plea to “false imprisonment by menace” in an agreement that will include no reference to the victim’s age. There are some classes Manuel will need to do but no sex-offender registration. Manuel should be eligible for cancellation of removal, and he won’t be automatically precluded from getting a bond. This deal contemplates that he can serve his jail time at home on an ankle monitor, so ICE might not even notice Manuel ... even better.

The first reality check hits when the judge doesn’t like what he reads in the presentence report. The victim’s description of Manuel’s conduct is more extensive than what Manuel admits, and the probation officer feels Manuel is minimizing the situation. The judge says he wants Manuel to serve his jail time in custody, and he gives Manuel a remand date. This means that he doesn’t put him in custody immediately, but gives Manuel a day to come back to turn himself in a month or two down the line. We beg to keep him out. *Double the jail time he will do on the ankle monitor! Explain about his teenage son needing him at home!* It is all for naught. Manuel is taken into custody by the Marin County Sheriff’s to serve his time. His sentence is 90 days in custody, which will be the even-number rounded up from half, so 46 actual days. These 46 days will be what causes Manuel to not be “safe” any more from the harsh immigration consequences.

Manuel’s family hires an immigration lawyer once he gets to ICE custody. A date for a bond hearing is set. We work together. I send his attorney all the positive stuff—character letters, the reports, mental health documents, all the equities. I am proud of the deal we got. I think it’s going to work. But then comes the second reality check: his request for bond is denied. And the third reality check is that Manuel doesn’t want to sit in ICE custody while he fights a hard case of cancellation of removal. I don’t know the wait time he was advised; but whatever months or years he risked for the proceedings to drag on, he didn’t want

it. He asks for a removal order and is told, "ten years." Meaning, *ten years until you are allowed to come back to the United States.*

And now he's there, in Nogales. At his mother's house, far from his son, just across the border from his sister's house in Arizona. He can't get a job because he doesn't have an ID and in Mexico, it takes months to get one. He can't take sex offender classes because they don't offer those and you need to pay for anything you want to do in Mexico. The programs aren't the same. So now Manuel faces a probation violation petition here for not properly reporting. We are fighting this. And his depression. And his separation. And his son. And the ten years until he can regain the life he had here.

And so here it is, the sad epiphany. A plea agreement can seem "immigration safe," but that isn't good enough. If I want to save my client from deportation, I need to achieve the impossible.

Losing Hold of Our Clients

So, what feels impossible? *Avoiding ICE notification requests. Avoiding denial of bond. Avoiding deportation.* It is increasingly difficult to prevent ICE from identifying that my clients are in custody. Manuel's last name was sufficiently American-sounding that I hoped maybe they'd overlook him. I advise him, *don't answer any questions. Don't tell them your place of birth. Don't lie. Just say nothing.* Great advice. Except I realize that on a prior arrest several years ago, he said Nogales, Mexico (or it's in the system somehow), so that avenue is closed.

And ICE finds Manuel. They know he was born elsewhere. *Okay, how about I delay sentencing until the day that he is credit-for-time-served so that there is so little time between 9am court and an evening release time that ICE won't know he's getting out?* This one doesn't work anymore. I tried this tactic for a client but either the sheriff's office relayed the information to ICE or else ICE has enough of a presence in the jail that they know everything that's happening immediately.

Until January of 2018, none of our clients' release dates were made public. The sheriff's office had to directly inform the ICE agents if a client was being released; and the sheriff was not supposed to delay that release. With regularity, ICE managed to get there and apprehend our clients. Then, starting in January 2018, the sheriff's offices made all the release dates public, which remedied a hitch in the law that had prevented them from disclosing to ICE any information that wasn't public information. Now ICE knows exactly when someone is being released.

Thus avoiding ICE notification requests and avoiding actually getting into ICE custody is challenging if the person is in custody. Clients are sometimes able to avoid custody: Manuel and others sometimes come to court from out of custody, after being notified by the prosecutor that charges are pending. If we negotiate for "ankle-monitor ok", it is not a guarantee they stay out of custody. But most people who are working, have a place to live and are generally responsible do obtain approval for the ankle monitor and never have to be booked into the jail. This method tends to avoid detection by ICE, and it is one of our best strategies in avoiding the horrific consequences that follow the ending of the criminal case.

What feels impossible after ICE picks up our clients? Avoiding denial of bond. This is an area where we have been given advice about what types of convictions automatically lead to a bond denial. For many years, I took that advice and felt like I had done my duty: *this won't automatically preclude you from getting bond and so it's immigration-safe.* And in the past, more people got bonds. And then they had time, years of time, to fight their cases, to marry legal permanent residents and citizens, to become victims of crime, to wait better law or policies. They got to be here and put together their defenses and their applications for cancellation of removal and it didn't seem so bleak.

But the new reality is that judges are denying bond more frequently, for unknown reasons. In Manuel's case, he hired a lawyer. We sent all the positive equities in the case to the immigration lawyer to present to the Judge however he strategized was best. His immigration lawyer requested time to prepare for the bond hearing. We were hopeful and thought that this was a safe deal. But the reality is that bond is discretionary. And the current political climate is that this discretion is more frequently exercised to deny bond, rather than to grant it. Manuel's request for bond was denied, with nothing we could do about it.

Despair: When Clients Give Up

And what will happen to Julio? I discovered what appeared to be three sex crimes perpetrated on Julio by Marie when he was a minor; but with the complexities and risks accompanying his immigration status, I don't know how to win the case. Nor does Julio desire to wait any longer. When he first started the case, his delusions persisted and he was found incompetent, waited for a treatment bed, was restored to competency, has returned to the jail. He now has been incarcerated for over a year.

The negotiations include the immigration attorney hired by Julio's perpetrator Marie, our office's in-house "crimmigration" consultant, and the assistant district attorney and her supervisor, who are both researching what they consider to be "immigration-safe." Although they think Julio's cruelty to an elder and criminal threats and domestic violence could elevate this to a prison case, they have found that they want to work with us—due to the mitigation, the victim's own criminal conduct and the overall bad flavor of the case. They'll offer us immigration-safe options that take into account the mitigation and his circumstances and age. He can get 179 days and waive credits (under 180 days is a boon in the immigration context). He can choose between a couple different charges that don't sound like domestic violence, that aren't "aggravated felonies" or "crimes involving moral turpitude." They are crimes that haven't categorically been determined to be "particularly serious crimes" for the purposes of asylum (which is the type of crime that will disqualify him).

But the circumstances of Julio's life, and even victim/perpetrator Marie's victimization of him, do not provide a defense to his alleged violence. Julio doesn't want to take the risk of prison or more charges. He wants a final resolution.

He is competent. He understands the reality that there is nothing immigration "safe". There is no guarantee—only some hope, and that hope is likely to evaporate. Julio's mother has

since moved to the United States with his younger sister. If he is returned to Guatemala, his only family there are an older sister and the grandfather who abused him ... and there is a murderous gang that is still out to get him. Julio tells me his plan is to go find his sister, she attends college. He will do that and work in Guatemala. Although he is trying to reassure me at this point that it'll be okay, I have little faith that things will be as rosy as he paints them.

The Lessons I'm Learning

My duty under *Padilla v. Commonwealth of Kentucky* is to *mitigate* and *advise: mitigate* adverse immigration consequences, and *advise* the client about the immigration consequences in their particular case. In recent years, we have focused heavily on mitigation. This means consulting the client's immigration attorney, consulting outside immigration attorneys, reviewing the online resources prepared by the IRLC, learning the decisional authority. It means gathering information about the client and their story and presenting it to the district attorney or the judge. It means educating people to obtain a result that is mitigated, that is "safe."

But as we move into the new reality, *advisement* is becoming a more significant aspect of my practice. I can't give a client the same assurance that "this will work" and "I've achieved this for you". It is much more crucial to have longer conversations with my clients about what the realities are. What the standards are. What the immigration judges will be considering. What is truly likely to happen. And to help and empower this group of clients to really understand their choices, of course as it relates to prosecution evidence, likely trial outcomes and also the reality of their experience after they leave our custody.

For Julio, even if we were able to prevail on the substantive charges, there was that pesky violation of a domestic violence restraining order. The district attorney could prove that charge without Marie's testimony, as a jail deputy can simply play the jail recording. That little misdemeanor restraining order violation has automatic, and significant, negative immigration consequences as reflecting a crime of domestic violence. There is no "safe" here. There is no easy answer for Julio.

What Can We Do?

There are ways to encourage a district attorney's office to send citations and orders to appear to our clients that aren't arrested at the scene instead of seeking arrest warrants. Public defenders' offices could have institutional meetings with leaders of the district attorney's office, and can continue to push for citations and orders to appear instead of arrest warrants that can completely change the life of a client or their family. If the district attorney can assure the appearance of people by this system rather than reflexively arresting everyone, then we should be advocating for this approach and helping more people avoid custody.

In states where sentencing does not immediately follow the entry of a plea, we need to communicate proactively with the probation departments during the course of presentence investigations. In Manuel's case, I couldn't change what the victim and

her mother told the probation officer; but I could commit more time to preparation with the clients about their own statements. I could present positive facts that are not included in the police reports. I could help attain character letters. If a positive presentence report prevents a judge from wishing even one client to spend time in custody instead of apply for the ankle monitor, that is a win.

We can reach out into communities and teach this client population their rights. This is knowledge that could help clients avoid damaging statements to police upon arrests, damaging pretext phone calls, and confessions without the representation of counsel. Anything we can do to mitigate criminal activity or mitigate criminal cases is helpful.

We can get politically active and push for immigration reform; we can use our voices to tell these stories and show the voting citizens of this country what is happening to our neighbors and coworkers and friends.

We need to seek hope in these realities. As a public defender, I have never conceived of my job as "winning all my cases." Most of my cases are resolved through plea agreement and I win some of my trials, and lose others. My job is to listen, to teach, to guide, to empower, to advocate and represent clients so that they come out of the process feeling like they have achieved a result that gives them a new outlook for the next phase of their lives.

I can meditate and find spiritual guidance. I can love my family. I can take care of myself and can make myself stronger and better. I can connect with others in my field and share my pain and my victories. If I feel defeated, my clients will as well. And so I accept that this new grim reality *is* reality, but I am searching for new solutions. I do not want to avoid it nor wholly lament it. I embrace the new reality and adapt my Warrior skills for myself, for Manuel, for Julio. 🙏

Tamara has been a deputy public defender in Marin County for twelve years. She has a felony practice including a special circumstances homicide case, has done over 40 jury trials, and is the Bay Area Trial Lawyers College working group. Tamara graduated from the three-week TLC course in 2013. She lives in San Francisco with her husband and two kids, and she has recently taken up piano lessons.

