



## Practice Advisory: Gathering Criminal Records for Immigration Matters

August 31, 2022<sup>1</sup>

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### **I. Introduction**

This practice advisory provides an overview of how to effectively gather criminal records for immigration matters. The advisory briefly reviews considerations for conducting a criminal contacts screening and for evaluating the possible implications of a noncitizen’s criminal history if they are applying for benefits before the United States Citizenship and Immigration Services (“USCIS”) or seeking a defense from removal in immigration courts (Section II). It then

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<sup>1</sup> Copyright 2022, Ready to Stay. The author of this practice advisory is Tanika Vigil, Consulting Attorney with the National Immigration Project of the National Lawyers Guild (NIPNLG). It was formatted by Arianna Rosales. The author would like to thank the following individuals for their contributions to this advisory: Michelle Mendez, Director of Legal Resources and Training, NIPNLG; Jennifer Riddle, Senior Attorney, Catholic Legal Immigration Network, Inc. (CLINIC); and Matt Vogel, Supervising Attorney, NIPNLG. This advisory is intended to assist lawyers and accredited representatives. It does not constitute legal advice nor is it a substitute for independent analysis of the law applicable in the practitioner’s jurisdiction.

provides a summary of common criminal record terms (Section III) before reviewing steps and processes for conducting record searches both locally and federally (Section IV). Finally, it responds to some commonly asked questions about criminal record searches for noncitizens (Section V).

It is important to note that criminal record searches can vary significantly based on the relevant locality or entity, and unique requirements for making requests in certain jurisdictions may exist. Accordingly, practitioners should always conduct case-specific research and connect with other local practitioners to better understand best practices for making record requests.

## **II. Background**

### **A. Screening a noncitizen for possible criminal history**

Every noncitizen client should be screened for possible criminal history. This is true regardless of whether they are preparing to apply affirmatively for benefits or are in removal proceedings. While the process for conducting a thorough intake and identifying eligibility for relief is outside the scope of this practice advisory, several tips for conducting effective criminal history screenings are provided below:

- Emphasize to your client the importance of being completely honest about their criminal history. Clients may feel shame or discomfort. They might also feel concern about ruining their chances of success by disclosing prior criminal system contacts. Consider how language, culture, and fear might inform a given client's inclination, or lack thereof, to discuss their criminal history. Discuss with the client any applicable confidentiality or privilege considerations that may attach to their criminal history disclosures.
- Explain that complete honesty is essential because the government runs its own background checks and will likely be privy to the noncitizen's criminal history, regardless of whether they choose to affirmatively disclose it to their representative or not.
- Consider asking about criminal history in several different ways and without relying solely on technical terms such as "conviction" or "arrest." For example, some possible questions include:
  - "Have you ever spoken to a police officer for any reason?"
  - "Have you ever been handcuffed?"
  - "Have you ever had to pay a ticket?"
  - "Have you ever spoken to a judge?"
  - "Have you ever been in jail?"
  - "Have you ever appeared in court?"
  - "Have you ever had a lawyer?"
  - "Have you ever had a probation officer?"
- Explain that even seemingly insignificant contacts are important to disclose. It is not uncommon for criminal defense attorneys or other governmental officials to tell noncitizens that their criminal case has been "dismissed" or "closed" and that they need not worry about it any further. This may or may not be accurate advice for immigration

purposes. For example, it is possible for “dismissed” criminal cases to still constitute convictions for immigration purposes.<sup>2</sup> It is also increasingly common for certain offenses—such as marijuana possession—to result only in a fine or ticket that does not require any arrest or appearance in court. Such tickets, however, can still carry profound consequences for immigration purposes. For all of these reasons, it is essential to conduct a thorough screening regarding any and all contacts a noncitizen has had with law enforcement entities.

## **B. Why should I care about criminal records?**

Regardless of whether a noncitizen client is applying affirmatively for benefits or defending themselves in removal proceedings, criminal system contacts can have significant implications for their status moving forward. Gathering accurate and comprehensive criminal records is, therefore, essential to understanding the nature of those implications.

For example, criminal records may be necessary in the affirmative context for:

- Evaluating relief eligibility or screening for possible removability;
- Preparing an application that requires certain criminal history disclosures;
- Responding to a request for evidence (“RFE”) or notice of intent to deny (“NOID”) from USCIS; or
- Considering the likelihood of a grant on discretionary applications for relief.

Additionally, criminal records may be necessary in the defensive context for:

- Reviewing removal charges on a Notice to Appear and/or filing to terminate proceedings;
- Preparing for bond hearings (both when evaluating whether the noncitizen is subject to mandatory detention and/or when considering how criminal history might impact the immigration judge’s discretionary decision to grant bond);
- Preparing and filing parole requests with Immigration and Customs Enforcement (“ICE”);
- Screening for relief eligibility and preparing related applications; or
- Considering the likelihood of a grant on discretionary applications for relief.

For all of these reasons, a thorough criminal history screening and related criminal records requests will be essential for providing effective representation to virtually all noncitizen clients.

## **III. Common Criminal Record Terms**

There are various records that may be created as the result of any individual’s contact with the criminal system. These different records play unique roles not only within the criminal proceedings themselves but also in immigration matters. Terminology regarding records may

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<sup>2</sup> For more information on the unique definition of “conviction” for immigration purposes see NIPNLG, [The INA’s Distorted Definition of “Conviction”](#) (May 14, 2021).

vary from jurisdiction to jurisdiction, but a generic overview of the most common terms and their possible import for immigration matters is provided, below:

- Police report/arrest report

*What is it?*

This document captures the alleged factual basis for an arrest or a police contact. It will often include biographic information for both the suspect and the alleged victim(s). The factual allegations referenced may be quite limited/succinct or may include a lengthy recounting. The existence of a police report may, but does not necessarily, mean that the relevant law enforcement agency brought charges against the suspect. It is very common for police reports to contain hearsay, i.e., statements from third parties such as witnesses, alleged victims, or law enforcement officers.<sup>3</sup>

*Why might this record be relevant to a noncitizen client?*

The Department of Homeland Security (“DHS”) will often seek to use police reports against noncitizen clients.<sup>4</sup> This might occur regardless of whether the criminal matter is still pending or ultimately did or did not result in a conviction for immigration purposes. For example, DHS might reference a police report during a bond hearing to make arguments regarding dangerousness. Similarly, USCIS will frequently request police reports when adjudicating applications for relief. Because police reports can contain unsavory (and often unproven) allegations about a noncitizen’s conduct, they can be particularly concerning for discretionary evaluations. Beyond discretion, police reports can also be used to establish facts for circumstance-specific inquiries such as the amount of marijuana possessed under the “30-grams or less personal-use” exception to the deportability ground at INA § 237(a)(2)(B)(i)<sup>5</sup> or the amount of loss to a victim for a fraud aggravated felony as defined at INA § 101(a)(43)(M)(i).<sup>6</sup> Police reports may also contain gang affiliation allegations<sup>7</sup> or drug trafficking allegations<sup>8</sup> that could trigger immigration consequences for certain noncitizen clients.

Therefore, it is helpful to obtain copies of police reports as soon as possible, so as to incorporate them into the noncitizen’s overall case strategy and to avoid being blindsided by the government’s reliance on their content.

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<sup>3</sup> Despite the use of hearsay in police reports, immigration courts may generally consider such reports so long as they are reliable and their use would not be fundamentally unfair. *See, e.g., Arias-Minaya v. Holder*, 779 F.3d 49, 54 (1st Cir. 2015) (“[T]here is no per se bar to the agency’s consideration of hearsay-laden police reports where convictions have not followed,” but the trier of fact must first determine that “the report is reliable and that its use would not be fundamentally unfair”).

<sup>4</sup> For more information about responding to requests for police reports see Catholic Legal Immigration Network, Inc. (“CLINIC”), [Practice Advisory: Requests for Arrest Reports in Immigration Matters](#) (July 29, 2019).

<sup>5</sup> For more information about the BIA’s application of the circumstance-specific approach to this exception see NIPNLG, [Matter of Davey & the Categorical Approach](#) (January 15, 2013).

<sup>6</sup> *See, e.g., Matter of F-R-A-*, 28 I&N Dec. 460, 462 (BIA 2022) (discussing application of the circumstance-specific approach to determine if the loss to a victim exceeded \$10,000 for purposes of section 101(a)(43)(M)(i)).

<sup>7</sup> For more information on the possible impact of gang allegations for noncitizen clients see Immigrant Legal Resource Center (“ILRC”), [Resources on Gang Allegations](#).

<sup>8</sup> *See, e.g., INA § 212(a)(2)(C)* (articulating the inadmissibility ground for when the government has “reason to believe” a noncitizen is or has been a drug trafficker).

- Charging document/indictment/complaint/information

*What is it?*

The terms “charging document,” “indictment,” “complaint,” and “information” are generally interchangeable and may vary by jurisdiction. They describe the document that a local, state, or federal authority uses to articulate and formally file the criminal charge(s) against a defendant. Such a document will often include reference to the specific law (usually identified by a statute name or number) that the defendant has allegedly violated together with a factual basis for the charge.

The fact that a prosecutor filed charges may, but does not necessarily, indicate that the noncitizen ultimately received a conviction for immigration purposes.

*Why might this record be relevant to a noncitizen client?*

In some instances, it is important to know the specific statutory subsection under which a noncitizen was convicted. For example, if a statute is divisible<sup>9</sup> and articulates multiple distinct crimes, it will often be necessary to determine which offense was at issue in the ultimate conviction so as to accurately screen for possible immigration consequences. The charging document might be one way to identify the subsection at issue. Still, a charge is not the same as an ultimate conviction. As a result, it is prudent to cross-reference charging documents with the final disposition (discussed below).

DHS may also use charging documents against a noncitizen even if the charges did not result in a conviction for immigration purposes or if the client ultimately entered a plea to a different/lesser charge. For example, consider a case where the prosecutor originally charged the noncitizen with possession of a controlled substance but subsequently agreed to a plea deal for disorderly conduct. Assume, therefore, that the noncitizen does not have a controlled substance conviction for immigration purposes. DHS might still rely on the charging document to seek admissions from a client about controlled substance possession or use, which may be sufficient to trigger inadmissibility under INA § 212(a)(2)(A)(i)(II) (admission to violation of a controlled substance offense). Other immigration consequences, such as the “reason to believe trafficking” inadmissibility ground under INA § 212(a)(2)(C), also do not require a conviction, and thus might be triggered by mere allegations on a charging document. Accordingly, noncitizens will want to review any criminal complaints filed against them, regardless of their ultimate disposition.

- Plea agreement

*What is it?*

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<sup>9</sup> For more information on divisibility and the categorical approach see ILRC, [How to Use the Categorical Approach Now](#) (October 2021); Immigrant Defense Project (“IDP”) and NIPNLG, [Practice Alert: In Mathis v. United States, Supreme Court reaffirms and bolsters strict application of the categorical approach](#) (July 1, 2016).

A plea agreement is a contract between the defendant and the prosecutor whereby the defendant agrees to enter a plea of some kind (it does not have to be a guilty plea, but instead may be a “no contest” or “nolo contendere”<sup>10</sup> plea). Not all jurisdictions use formal written plea agreements. To the extent there is a written agreement, however, the specific content will vary significantly across jurisdictions but might identify the offense to which the plea is being entered and may require the defendant to articulate a factual basis for their plea. The plea agreement may also contain various admonishments about the rights (such as the right to a jury trial) that a defendant is waiving by entering a plea. The agreement may or may not contain language warning the defendant about the possible immigration consequences of the plea.

*Why might this record be relevant to a noncitizen client?*

Noncitizens may have a conviction for immigration purposes if (1) they admitted to sufficient facts, and (2) the court imposed a punishment of some kind.<sup>11</sup> Reviewing the plea agreement may be one way to evaluate whether a noncitizen admitted to sufficient facts. The plea agreement may also be helpful for identifying the specific statutory subsection under which the plea occurred and/or may articulate the maximum possible sentence for a plea. Such information is relevant for assessing certain immigration consequences, such as whether a noncitizen qualifies for the petty offense exception for crimes involving moral turpitude at INA §212(a)(2)(A)(ii)(II).

Practitioners may also want to review a plea agreement to help screen for whether the noncitizen received ineffective assistance of counsel<sup>12</sup> during their criminal matter or whether the plea passes constitutional muster. For example, the lack of a defendant’s signature on a plea agreement may raise concerns and catalyze further inquiry into whether the plea deal was valid or whether the defendant entered the deal voluntarily.<sup>13</sup>

- Plea colloquy

*What is it?*

This record captures the dialogue between a judge, a defendant, the prosecutor, and often the defense attorney, regarding the plea entered. The colloquy may be accessible as a transcript and/or as an audio recording. Like a plea agreement, a plea colloquy will likely review the specific statute to which a defendant pleaded and the factual basis to support the plea. The judge may also review the various waivers/admonishments already referenced in the plea agreement as part of the colloquy.

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<sup>10</sup> Although there may be benefits to entering a no contest plea over a guilty plea for purposes of the criminal matter, such a plea will generally be tantamount to a guilty plea for immigration purposes. *See, e.g., Abimbola v. Ashcroft*, 378 F.3d 173, 181 (2d Cir. 2004) (no contest plea or “Alford plea” is the equivalent to a guilty plea for the purposes of creating a conviction as defined by the Immigration and Nationality Act).

<sup>11</sup> *See* INA § 101(a)(48).

<sup>12</sup> For further discussion of ineffective assistance of counsel claims for noncitizen defendants see NIPNLG & IDP, [Practice Advisory: Jae Lee v. U.S.: Establishing Prejudice under Padilla v. Kentucky](#) (July 7, 2017).

<sup>13</sup> *See, e.g., Boykin v. Alabama*, 395 U.S. 238 (1969) (concluding that the trial court plainly erred by accepting a guilty plea without an affirmative showing that the plea was intelligent and voluntary).

*Why might this record be relevant to a noncitizen client?*

The importance of a plea colloquy will be quite similar to that of a plea agreement, as discussed above. But a plea colloquy may contain even more detailed factual information about the basis for the plea, any possible ineffective assistance of counsel issues, and whether the defendant's constitutional rights were sufficiently protected.

- Jury instructions

*What are they?*

Jury instructions serve many purposes, one of which may be to specify the elements of a crime necessary for the prosecutor to have established in order to obtain a guilty verdict. Judges will generally read such instructions out loud to the jury before it retires to deliberate. Juries will also generally receive a copy of the instructions to assist in their deliberations. Jury instructions will vary by jurisdiction and by offense.

*Why might this record be relevant to a noncitizen client?*

Jury instructions may be another tool for determining the elements of an offense and/or whether a particular statute is divisible under the categorical approach. Instructions for a particular offense or case may be available as part of the noncitizen's criminal file. Model jury instructions may also be accessible through a public search but may not precisely capture the instructions used in a given case. Additionally, because jury instructions can change over time, practitioners should confirm that any sample instructions were applicable at the time of the noncitizen's conviction.

- Jury verdict form

*What is it?*

If a criminal case proceeds to a jury trial, the judge will generally ask for a completed jury verdict form at the end of deliberations. Such a form may list the charges and an indication as to whether the jury found the defendant guilty or not guilty on each count.

*Why might this record be relevant to a noncitizen client?*

A jury verdict form will likely be an accurate record for confirming the specific offense(s) of conviction in a given case.

- Sentencing order/transcript

*What is it?*

Once a noncitizen has been convicted of a crime—either through a plea or a trial—the court will sentence the noncitizen and may issue a separate order delineating the punishment parameters

(jail time, probation, fines/fees, rehabilitation classes, etc.) for each count. There may also be a transcript from the sentencing hearing in which the court reviews these details with the noncitizen, their counsel, and the prosecutor.

*Why might this record be helpful to a noncitizen client?*

As discussed above, for some removal grounds it is necessary to determine both the possible incarceration sentence that may be imposed for an offense of conviction and also the actual incarceration sentence imposed. Additionally, for example, the ground of inadmissibility at INA § 212(a)(2)(B) requires calculating whether a noncitizen's aggregate sentences to confinement for two or more offenses amount to five years or more. The same ground constitutes a conditional bar for establishing good moral character, which is required for various applications for relief.<sup>14</sup> Accordingly, it will often be necessary to access accurate sentencing records to fully screen a noncitizen for both removability and relief eligibility.

- Certified disposition

*What is it?*

This record reflects the court's official action on a given case and generally indicates how the court ultimately disposed of that matter. The specific contents of a certified disposition will vary depending on the jurisdiction but will often articulate the offenses charged, the outcome of each charge (e.g., guilty, not guilty, no contest), and the sentence imposed. A "certified" disposition is distinct from other records such as RAP sheets (discussed below) because it is an official record from the relevant court and often contains a signature or statement stating as such.

*Why might this record be helpful to a noncitizen client?*

It will likely be necessary to obtain a certified disposition for any criminal matter involving a noncitizen client. Not only does a certified disposition provide an official accounting for the outcome of a case, but it is most often the record relied on to determine whether a particular conviction triggers immigration consequences. For example, DHS may file a certified disposition with the immigration court to meet its burden of establishing charges of deportability in removal proceedings. And both immigration judges and USCIS will generally require certified dispositions to evaluate eligibility for relief applications.

- Docket sheet/minute entries

*What is it?*

Docket sheets/minute entries differ from jurisdiction to jurisdiction but often provide an accounting of the court's various actions (orders, hearing dates, etc.) in a given criminal matter. They may be quite detailed—providing a play-by-play of what happened in each hearing—or may provide only summary information. For example, a docket sheet might indicate that a charge was "dismissed" on a particular date but may not reflect the basis for dismissal.

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<sup>14</sup> See 8 C.F.R. § 316.10(b)(2)(ii).



*Why might this record be relevant to a noncitizen client?*

In some jurisdictions, docket sheets/minute entries might be the easiest records to obtain as an initial matter and may contain information quite similar to hearing transcripts. Therefore, they can serve as a helpful tool in identifying charges, pleas, and sentencing information. However, in many jurisdictions, docket information is cursory and may rely heavily on abbreviations that are difficult to discern. As a result, these records may provide helpful initial information regarding a noncitizen's criminal case but will often need to be supplemented or corroborated with other records such as a certified disposition.

- “RAP” sheet

*What is it?*

“RAP” sheet is an acronym often used for “record of arrests and prosecutions.” It is generally a summary document about an individual's criminal history. This may or may not be an official court record. Some RAP sheets emanate from private search companies that pool together records. Other RAP sheets can be accessed as official records in a particular jurisdiction. Accordingly, depending on the source of the RAP sheet, it may be more or less reliable and require cross-referencing with other records.

*Why might this record be relevant to a noncitizen client?*

RAP sheets might provide introductory information regarding a noncitizen's criminal history and may include helpful information such as case numbers, arrest dates, etc. RAP sheets are *not*, however, the same as a certified disposition. As a result, they may be a helpful starting point but not a sufficient ending point for investigating a noncitizen's criminal history.

- Body camera or dash camera footage

*What is it?*

Many law enforcement entities require officers to gather video footage from cameras either on their person or on their vehicle. Such footage might capture the interactions between law enforcement and alleged victims or suspects and/or interactions with witnesses or other members of the public.

*Why might this record be relevant to a noncitizen client?*

As discussed above, it is common for police reports to contain hearsay and other unreliable or incomplete information. Video footage might help provide a new or more complete perspective regarding law enforcement encounters related to a noncitizen's criminal matter.

## IV. Gathering Records

Once you have conducted an initial screening of a noncitizen's criminal history, you will want to corroborate that history by obtaining records. As discussed above, different records will have different import for immigration purposes. As a general rule of thumb, however, more records are better both to understand accurately a noncitizen's complete criminal history and to effectively analyze the immigration consequences of such history.

There are several possible starting points when gathering a client's criminal records. If the client recollects certain details from their arrest (e.g., year, location, etc.), it might be efficient to begin with specific record requests from the relevant local entity (e.g., the police station, the local district court, etc.). For many clients, however, it will also be beneficial and/or necessary to run state and/or federal background checks to cast a wider net and to ensure that no law enforcement contacts slip through the cracks. Indeed, if your client does not recollect certain details of their criminal system contact, or believes that they have no such contacts, it might be prudent to first run broader background checks and then home in on local searches based on the information contained therein.

### Federal background check

*What is it?*

A federal background check, referred to by the federal government as an "identity history summary check" is a criminal history report provided by the federal government after running an individual's fingerprints. The report reflects information available to the federal government as the result of database sharing between different local and federal jurisdictions.

*How do I obtain one?*

The Federal Bureau of Investigation ("FBI") has provided [instructions](#) for requesting an identity history summary check, which can be done either online or by mail. A few points to note:

- The request requires fingerprint submissions, regardless of whether you apply online or through the mail. Fingerprints can either be done privately on paper or electronically at a United States Postal Service location. Through either mechanism, it is essential that the fingerprints are complete and clear in order to avoid the request being bounced back.
- There is an \$18 fee that must be paid by money order, certified check, or credit card form. A fee waiver is possible but may slow down the response. Fee waiver requests require a claim and proof of indigence such as a notarized affidavit.
- The application form requires the subject to provide general biographic information such as complete name, date of birth, country of citizenship, and whether they are a United States Citizen or Lawful Permanent Resident.
- At the time of this advisory's publication, the FBI has been returning search results quite quickly, sometimes within a week after they are filed online.

*What information will the federal identity history summary report provide?*

- The report will provide insight into what the federal government currently knows/can glean about a noncitizen’s criminal history from their fingerprints and biographic information.
- The report will often contain information such as dates and locations of arrests or convictions, any known aliases, and possibly immigration history information such as apprehensions at the border. The report information will vary, however, for every individual, and thus the level of detail is not ensured.

These reports can be a very helpful starting point if a noncitizen does not remember their criminal history, has lived in multiple states, or does not have case numbers or dates regarding particular arrests. It is important to note, however, that federal background checks can, perhaps surprisingly, be unreliable and incomplete. The information contained within the report only reflects what has been shared with the federal government at the moment the fingerprints are run. It is not uncommon, therefore, for a criminal arrest or charge to appear on the summary but for no clear disposition to be included. It is also possible for some arrests or criminal system contacts to not appear on the summary form at all. For these reasons, federal background checks should always be cross-referenced with other documents including local background checks, the client’s own recollections, and other case-specific records.

*Is there a risk that filing an FBI identity history summary request will trigger immigration enforcement actions?*

By necessity, filing an identity history summary check requires sharing certain biographic data with the federal government. As a result, it is understandable that noncitizens may experience apprehension about running such checks. While there is no guarantee that filing an FBI request entails zero risk to a noncitizen, historically there do not appear to have been connections between such filings and ICE enforcement activity. Still, noncitizens can elect not to include their home address when submitting the request, and can instead designate an address “in care of” another individual, such as a legal representative. It is also important to note that when filing any applications for relief, noncitizens will ultimately be required to complete biometrics appointments, which are tantamount to the identity history summary check.

### State background check

*What is it?*

This process will vary state-by-state. Some states will require mailing in fingerprints while others have online options based solely on biographic data. Many states require payment of a fee to access records. Note that in many jurisdictions, a background check request will need to come from the subject of the records rather than from a third-party.

Consider also that many states will have both certified and noncertified background check options available. Accordingly, it is important for a noncitizen to consider the purpose and use of the background check and whether they will ultimately need to file the results with the federal

government—in which case certified records will likely be necessary—or are simply relying on them for initial screening purposes.

*What information will the state background check provide?*

State background checks will generally provide criminal history information from amongst the various localities within a particular state. Practitioners should beware that the same possible concerns discussed above about federal background checks—inaccuracies or incomplete information—also apply to state background checks. The reports may contain helpful and detailed information such as case numbers, dispositions, sentencing information, etc. They can also, however, contain generic or summary information that lacks the clarity necessary for doing a thorough screening. As a result, it can be important and helpful to use the state background check as a jumping off point and then to follow up and cross-reference the material included with more specific records from the local court/jurisdiction.

Making specific requests to county-level entities, law enforcement offices, and local courts or police stations

*What is it?*

To the extent that you know a noncitizen has an arrest, charge, or conviction from a particular location, you can likely get the most detailed and specific case file records by making requests directly to the relevant court or law enforcement entity. A case number is often helpful (if your client has any records or if the federal or state background checks provide one), but sometimes a full name together with a date of birth will be sufficient to run a search. Beware of duplicate names that do not belong to your client, the possibility that the court has captured records using a variety of last name combinations for individuals with two surnames, and any aliases or misspellings that might apply.

*What information will the local requests provide?*

Many of the records discussed in Section II will only be available through a direct request to the court that handled the criminal matter. Asking for the complete case file is the best way to access detailed, comprehensive, and accurate information regarding a particular criminal system encounter.

Private company searches

There is an array of private companies that offer criminal background check services. The cost and reliability of these services can vary immensely. Some private companies may contract directly with states to run checks. Other companies may operate independently from any governmental entity. It is essential, therefore, to conduct a diligent inquiry into any such company and always to cross-reference any related results with official government records.

## V. Frequently Asked Questions

*What should I do if a noncitizen is certain they have a criminal history but the common searches discussed above don't result in any records?*

- (1) Consider whether there could be any misspellings with the client's name, whether the records could be under a different combination of their last names, and whether the client may have used an alias or a.k.a. at some point.
- (2) Consider the possibility that the incident may have occurred in a neighboring county and cast a wider net by searching those courts and/or police precincts or filing a state or federal background check.
- (3) Consider contacting the noncitizen's former or current criminal defense counsel, if applicable, to see if they have retained records or have access to the criminal file.
- (4) Consider filing a state or local-level public records act request to obtain other publicly accessible records related to the client.
- (5) Obtain an official letter from all entities indicating that no records are available or that records were destroyed. At that juncture, it will be important to evaluate the implications of not having criminal records for a noncitizen's case. For example, are there risks to moving forward with an application for relief if you cannot verify whether a criminal system contact will trigger immigration consequences? Or, will the noncitizen be able to meet their burden of proof on a given relief application without such records?<sup>15</sup>

*What about sealed and expunged records?*

While it is common to use the terms “sealed” and “expunged” interchangeably, it is important to consider that those terms may be used distinctly in different jurisdictions and that they may have different implications for immigration purposes. As a general matter, a “sealed” record means that the criminal case has been nominally erased from public view. The underlying case or conviction still exists, but a curtain has been drawn around it for public purposes. A sealed conviction will almost always still constitute a conviction for immigration purposes. An “expunged” or “vacated” conviction may or may not have eliminated the conviction for immigration purposes depending on whether the action was predicated on a legal or constitutional defect in the underlying proceedings.<sup>16</sup>

A full discussion of post-conviction relief in immigration matters is beyond the scope of this advisory.<sup>17</sup> For purposes of record gathering, however, it is helpful to consider the possible implications of sealed records. At first blush, it may appear beneficial that a case file is no longer available to the public. But implications of sealed records may be more complex insofar as (1) as

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<sup>15</sup> For more information on the Supreme Court's decision in *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), and the related implications for noncitizens who cannot access sufficiently detailed criminal records see NIPNLG and IDP, [Practice Alert: Overview of \*Pereida v. Wilkinson\* for Immigration and Criminal Defense Counsel](#) (March 9, 2021).

<sup>16</sup> For more resources on understanding how different kinds of post-conviction relief may impact a noncitizen's immigration consequences, see ILRC, [AG Overturns Sentence Modification Rule: Matter of Thomas & Matter of Thompson](#) (October 2019); IDP, [Beyond Roldan And Pickering: Litigation Resources & Sample Briefing](#) (June 8, 2022).

<sup>17</sup> For additional post-conviction relief resources see IDP, [Post-Conviction Relief State Summary Chart](#) (October 21, 2020); NIPNLG and ILRC, [Practice Advisory: Post-Conviction Relief Motions to Reopen](#) (June 24, 2022).

stated above, sealed criminal cases will likely still constitute convictions for immigration purposes, (2) the FBI may still have access to sealed records and/or the government may already have obtained copies of those records before the file was sealed,<sup>18</sup> and (3) sealed records may be to a noncitizen's disadvantage if such records are needed to establish eligibility for a particular form of relief.

Ultimately, the impact of sealed records (and any discussion about attempting to unseal them) must be analyzed on a case-by-case basis. It is essential, however, not to assume that just because a case has been sealed or expunged that there are no records accessible or that the records are now irrelevant for the immigration matter.

*What about juvenile records?*

A discussion of juvenile delinquency proceedings and their implications for immigration matters is beyond the scope of this advisory.<sup>19</sup> For record gathering purposes, however, it is important to note that in many states the laws regarding access to and disclosure of juvenile records are distinct from those that govern adult criminal records. For example, some states have confidentiality laws that prohibit releasing a juvenile's records to third parties without a court order.<sup>20</sup> It is important, therefore, to conduct research in the relevant jurisdiction and determine whether and how juvenile records might be made available to the noncitizen and/or to the government.

Remember too, that a juvenile's point of contact with law enforcement regimes might be different than an adult's point of contact. For example, it is common for schools and universities to have a law enforcement presence. Accordingly, incidents on school grounds or campuses might be handled directly by the school and result in records kept separate and apart from the traditional criminal systems. It is also common for gang allegations against noncitizens to derive from such contacts with school enforcement regimes.<sup>21</sup>

## VI. Conclusion

Helping a noncitizen gather thorough and detailed criminal records can be invaluable for their immigration matter. While specific record gathering steps may vary from case to case, practitioners should always seek to (1) conduct thorough criminal history screenings, (2) consider the possible import of a noncitizen's criminal history depending on the nature of their

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<sup>18</sup> Freedom of Information Act ("FOIA") requests are another tool for accessing the records of various federal agencies. For more information on filing FOIA requests with DHS see ILRC, [A Step by Step Guide to Completing FOIA Requests with DHS](#) (December 14, 2021).

<sup>19</sup> As a general matter, juvenile adjudications will not constitute convictions for immigration purposes. For a more thorough discussion of juvenile delinquency adjudications see ILRC, [FAQ: Deferred Action for Childhood Arrivals \(DACA\) and Juvenile Delinquency Adjudications and Records](#) (May 2021).

<sup>20</sup> For more information about juvenile record confidentiality policies across different jurisdictions see Juvenile Law Center, [Failed Policies, Forfeited Futures](#).

<sup>21</sup> See, e.g., New York Civil Liberties Union, [New Report: False Gang Allegations Deny NY Teens' Access to Immigration Status and Bond Services](#) (February 13, 2019); GBH News, [Civil Rights Groups Say Police in Schools Are Source of False Gang Alerts. Not So Says Boston Police](#) (June 17, 2018); ILRC, [The School to Prison Deportation Pipeline](#) (February 2018).

immigration claim, (3) understand the common criminal record terminology so as to conduct helpful searches, (4) cast a wide net for criminal documents and cross-reference between local, state, and federal records to ensure accuracy of information, and (5) consult with local advocates to better understand best practices for smoothly and efficiently seeking criminal records.