TEXAS'S STATE IMMIGRATION CRIMES (SB4)

A RESOURCE FOR CRIMINAL DEFENSE ATTORNEYS

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In 2024, Texas created new state immigration crimes and a deportation-like apparatus. You can review the legislation here. This is an outline of the legislation's five major provisions, including trial defenses to the criminal provisions and potential constitutional challenges.

THE ILLEGAL-ENTRY CHARGE

A person who is an alien commits an offense if the person enters or attempts to enter this state directly from a foreign nation at any location other than a lawful port of entry.

Tex. Penal Code § 51.02(a).

Crime's context

The legislature borrowed the crime's language from part of the federal illegal-entry statute, which makes it a crime for an "alien" to "enter[] or attempt[] to enter the United States at any time or place other than as designated by immigration officers." 8 U.S.C. § 1325(a)(1). Congress passed the statute's original version in 1929. *See generally* Doug Keller, *Re-thinking Illegal Entry and Re-entry*, 44 Loy. U. Chi. L. J. 65 (2012) (tracing crime's history and its enforcement).

The statute's origins are important. When a state statute "borrow[s]" language from a federal statute, Texas courts "consider the construction placed upon the federal statute by other courts." Castillo v. State, 810 S.W.2d 180, 183 (Tex. Crim. App. 1990). Texas courts, then, will look to federal case law on the federal statute's meaning to interpret the state statute.

As you'll see, this is a technical crime with technical defenses. It's also ineptly drafted. In many cases, a prosecutor will struggle to negate these technical defenses. Moreover, while this statute shares similarities with the federal illegal-entry statute, the state statute differs materially from the federal statute.

Illegal Entry's Statutory Elements

(1)"Alien"

The statute defines "alien" with reference to 8 U.S.C. § 1101(a)(3), which defines the term as "any person not a citizen or national of the United States." Remember, the accused need not prove that he or she *is* a U.S. citizen. The accused just need to raise a reasonable doubt about whether they are. There are many avenues to raising reasonable doubt.

Because the word "alien" can have a negative connotation, courts sometimes use the word "noncitizen" as "equivalent to the statutory term 'alien.'" *Barton v. Barr*, 590 U.S. 222, 226 n.2 (2020). You should follow their lead unless quoting statutory language. Do not use "illegal immigrant" or "illegal" to refer to your client. It's often used as a putdown. It's also used to dehumanize.

Under the Fourteenth Amendment, "[a]ll persons born . . . in the United States . . . are citizens of the United States[.]" And the Supreme Court affirmed over a century ago that this clause means that those born "within the territory" of the United States are U.S. citizens. *United States v. Wong Kim Ark*, 169 U.S. 649, 694 (1898). That is, the "amendment, in clear words and in manifest intent," establishes that "the children born within the territory of the United States" are U.S. citizens. *Id.*

Without a confession, can the State prove that the client wasn't born in the United States? It's often hard for a prosecutor to prove the place of the client's birth. Does the State have a foreign birth certificate? Immigration documents showing that the client isn't a U.S. citizen?

- If the State finds the birth certificate, a hearsay rule might cover it. "A record of a birth[,] if reported to a public office in accordance with a legal duty," is not hearsay under Texas Rule of Evidence 803(9). The State, however, might have trouble establishing the predicate to this rule. Was the birth certificate reported to a public office?

- The State might also not be able to meet the self-authentication rules for a foreign document found in Texas Rule of Evidence 902(3), if they can't find a proper witness to authenticate the document.

- If the document isn't in English, the State must meet the translation requirements in Texas Rule of Evidence 1009.

Even if client confesses that they are not a U.S. citizen, the State must still satisfy the "corpus delicti" rule. That rule requires the State to offer "independent evidence" that "tend[s] to prove" the confession. *Fisher v. State*, 851 S.W.2d 298, 302–03 (Tex. Crim. App. 1993); *see also Batterbee v. State*, 537 S.W.2d 12, 15 (Tex. Crim. App. 1976) (holding that State introduced insufficient evidence to sustain its conviction under corpus delicti doctrine).

The State, then, must have some evidence that corroborates that the client is not a U.S. citizen, such as a birth certificate or federal immigration documents. *See, e.g., United States v. Valdez-Novoa,* 780 F.3d 906, 924 (9th Cir. 2015). Indeed, federal courts have applied this doctrine to convictions involving the federal illegal-entry statute. *E.g., United States v. Gonzalez-Godinez*, 89 F.4th 1205, 1210 (9th Cir. 2024).

Derivative or acquired citizenship

Some individuals not born in the United States are still U.S. citizens from birth. This is called derivative or acquired citizenship. These rules come into play for individuals who have a U.S. citizen parent or grandparent. You generally need to know when the client was born; what relative is a U.S. citizen; and when the U.S. citizen relative's residence or physical presence in the United States occurred. If your client meets the various requirements, they will have been a U.S. citizen from birth and not qualify as an "alien."

These rules are complicated. See here. If you have a client with a U.S. citizen parent or grandparent, consult an immigration attorney.

- If the client is a derivative or acquired citizen, that's a defense to a charge with alienage as an element. *See, e.g., United States v. Sandoval-Gonzalez*, 642 F.3d 717, 721–22 (9th Cir. 2011); *United States v. Smith-Baltiher*, 424 F.3d 913, 920–21 (9th Cir. 2005).
- Failing to research this defense can be ineffective assistance of counsel. United States v. Juarez, 672 F.3d 381,387–88 (5th Cir. 2012).
- People are U.S. citizens through these rules and don't realize it. **Always ask the client about the citizenship of their parents and grandparents.**
- If the client is a U.S. citizen, you can help them claim their citizenship through the filing of a N-600. See here. Helping clients learn that they are a U.S. citizen and can lawfully come to the United States is among the most rewarding parts of working on cases like this.

(2) "Enter[ed]" or "attempt[ed] to enter"

It's important to recall that the state statute copied language from a nearly 100-year-old federal statute. As you'll see, federal courts crafted a technical definition of "entry" for purposes of immigration law. By using the same term, the Texas legislature has adopted that technical definition too.

Entry crime

"Enter" is a technical immigration term. It has two components. It means "both physically present in the United States and free from official restraint." *United States v. Carranza*, 289 F.3d 634, 642 (9th Cir. 2002) (emphasis added); *accord Matter of Martinez-Serrano*, 25 I. & N. Dec. 151, 153 (BIA 2009).

Thus, for over 100 years, federal courts have recognized that the bare act of crossing into the United States alone does not mean that the individual has "entered" the country. *United States v. Pacheco-Medina*, 212 F.3d 1162, 1163–64 (9th Cir. 2000) (citing *Ex parte Chow Chok*, 161 F. 627, 628-29, (N.D.N.Y.), aff'd, 163 F. 1021 (2d Cir. 1908)); *accord United States v. Villanueva*, 408 F.3d 193, 198 n.5 (5th Cir. 2005).

Official-restraint doctrine

No entry occurs until the individual is "free from restraint," a phrase broadly defined to include "surveillance, unbeknownst to the alien." *Pacheco-Medina*, 212 F.3d at 1164. That is, noncitizens who cross into the United States while being surveilled by law enforcement have not entered the country because they "lack[] freedom to go at large and mix with the population." *Id.* (quoting *Matter of Pierre*, 14 I. & N. Dec. 467, 469 (BIA 1973)); *accord United States v. Oscar*, 496 F.2d 492, 493–94 (9th Cir. 1974). As a result, the State must prove that there was some break in surveillance by law enforcement before the arrest.

- A client who crosses the border in the presence of law enforcement and turns themselves in (for, say, asylum), hasn't entered Texas because they weren't free from official restraint.
- The State might push back against this definition of "enter" on policy grounds. But the purpose of statutory construction is to "discern the fair, objective meaning of the text," and the text is the law, not unstated policy. *State v. Hardin*, 664 S.W.3d 867, 872 (Tex. Crim. App. 2022). If the legislature didn't intend to incorporate the ancient definition of "enter," it wouldn't have used that term. Indeed, it likely wanted courts to adopt the federal immigration term to lessen the chance that the state would be preempted by federal law.

Physical entry

Along with proving that the client was free from official restraint, the State must prove that the client physically crossed into Texas. *Carranza*, 289 F.3d at 642. For clients apprehended right at the border, this can be hard to do because there's no clear demarcation between Texas and Mexico. You can try to raise doubt about whether the client physically crossed into Texas before their arrest.

- There's a separate question of whether the client "knowingly" crossed into Texas. *See United States v. Salazar-Gonzalez*, 458 F.3d 851, 855–56 (9th Cir. 2006). If your client was found near the border, can the State prove that the client knew where he or she was found was Texas?

Attempted-entry crime

For an attempt offense, the State must prove that the client had the "specific intent to commit an offense." Tex. Penal Code § 15.01(a). Accordingly, to prove a client attempted to enter Texas, the State must prove that the client had the specific intent to enter Texas. That is, the client had to intend to physically cross into the state and to be free from official restraint.

- If a client intended to turn themselves in to law enforcement—for example, to ask for asylum—the client has not committed the attempted entry offenses. That's because the client will not have intended to enter Texas free from official restraint. *See, e.g., United States v. Lombera-Valdovinos*, 429 F.3d 927, 928–30 (9th Cir. 2005).

Illegal Entry's Statutory Elements

(3) Entered or attempted to enter "state directly from a foreign nation"

Can the State prove beyond a reasonable doubt that the client entered Texas from Mexico? Did they enter from another state?

- A client who crossed into the United States in New Mexico and then came to Texas would not have committed this offense.

(4) Entered or attempted to enter outside a "lawful port of entry"

This is among the most important elements for the illegal-entry charge, and you will often have a defense based on this element.

Port of entry for purposes of the federal illegal-entry statute is defined by reference to 8 C.F.R. § 235.1(a), an immigration regulation. *United States v. Aldana*, 878 F.3d 877, 882 (9th Cir. 2017).

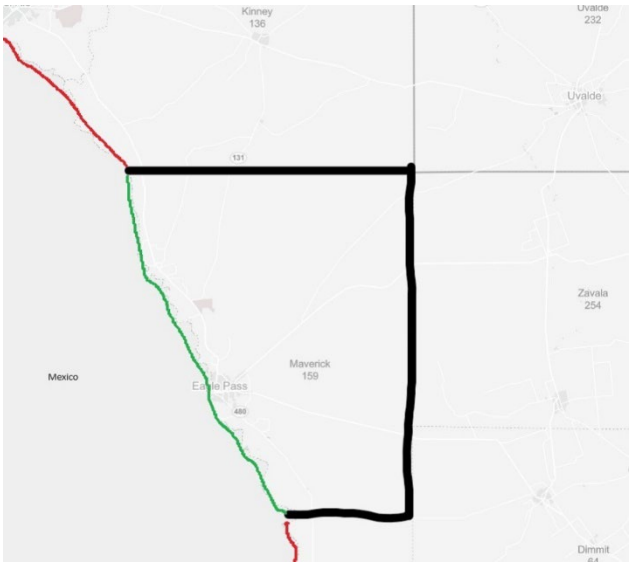
State law inexplicably defines "port of entry," however, with reference to 19 C.F.R. § 101, a customs regulation. You can exploit this choice.

- The customs regulation defines "port of entry" to include "the geographical area under the jurisdiction of a port director." 19 C.F.R. § 101.1 (emphasis added).
- For example, here is how a regulation defines the "Eagle Pass" port of entry:

> Beginning at the point of intersection of the Rio Grande River and the county line between Maverick County and Kinney County proceed in an easterly direction to the intersection of the county lines of Maverick County, Kinney County, Uvalde County and Zavala County; then in a southern direction along the county line between Maverick County and Zavala County to its intersection with F.M. 2644; then in a westerly direction along F.M. 2644 to its intersection with F.M. 1021; then due west to the water's edge of the Rio Grande River; then in a northwesterly direction along the meanders of the Rio Grande River to its intersection with the county line between Maverick County and Kinney County and Point-of-Beginning.

Extension of Eagle Pass, Texas Port Limits, 56 FR 57487-01, 1991 WL 231138 (Nov. 12, 1991).

With the above, you can create the following map of the "Eagle Pass" port:



The black border outlines the outer rim of the port for purposes of customs law.

As you can see, it encompasses nearly all of Maverick County, including all of Eagle Pass.

If your client passed into Texas from Mexico across that green line, they have crossed at a "port of entry."

There are six customs ports that are defined to include large geographic areas.

- Eagle Pass
- Rio Grande City
- Laredo
- Hidalgo & Progreso
- El Paso
- Brownsville

Unless the State sees exactly where your client crossed into Texas, it will be nearly impossible for them to prove that the client entered Texas outside a port of entry. Even the client likely won't know where they crossed.

The State's use of the wrong regulation to define port will make it hard for them to convict anyone of illegal entry. This is especially true for clients who they find in the interior of the state. How can the State prove *where* your client entered Texas?

Penalty

Class B misdemeanor, except a state jail felony if previously been convicted of the same offense. Tex. Penal Code § 51.02(b). Community supervision, including deferred adjudication, is unavailable to individuals charged with illegal entry. Tex. Code Crim. Proc. art. § 42A.059.

Affirmative defenses

(1) An affirmative defense if the "defendant's conduct does not constitute a violation of 8 U.S.C. Section 1325(a)." Tex. Penal Code § 51.02(c)(2). Thus, even if courts rely on policy to hold that the "entry" doctrine doesn't apply to the state offense, you can still rely on that doctrine (including its requirement that the client have been free from official restraint) as an affirmative defense.

(2) An affirmative defense if the federal government "has granted the defendant . . . lawful presence in the United States." Tex. Penal Code § 51.02(c)(1).

- While the statute doesn't define "lawful presence," a federal regulation—45 C.F.R. § 152.2—does define "[l]awfully present." That regulation broadly defines the term to include nearly any immigration status. Among other things, subdivision (5) includes those who have received work authorization, which a noncitizen can obtain 180 days after their asylum application is pending. Thus, if the client comes to the United States, is arrested for illegal entry, and obtains a work permit, they likely have an affirmative defense to the criminal charge.

- You should work with an immigration attorney to determine whether your client might qualify for any of these statuses.

(3) An affirmative defense if the federal government "has granted the defendant . . . asylum under 8 U.S.C. Section 1158." Tex. Penal Code § 51.02(c)(1). That said, it takes some time to get a final decision on an asylum application, and it will be hard to obtain this relief during the criminal case. *See below* re: abatement provision.

(4) An affirmative defense if the "defendant was approved for benefits under the federal Deferred Action for Childhood Arrivals program between June 15, 2012 and July 16, 2021." Tex. Penal Code § 51.02(c)(3). That is, if your client is a "DACA" recipient, they have an affirmative defense to an illegal-entry charge. For more about DACA, see here.

Other notes on affirmative defenses

The statute says that those who obtained deferred action under the "Deferred Action for Parents of Americans and Lawful Permanent Residents program"—"DAPA"—do not qualify for the affirmative defense. Tex. Penal Code § 51.02(d). That said, DAPA was never enacted, so no client will fall under this affirmative defense. For more on DAPA, see here. This underscores how little thought went into crafting SB 4.

While federal immigration relief can establish an affirmative defense, the new legislation also prohibits a court from "abat[ing] the prosecution" for illegal entry "on the basis that a federal determination regarding the immigration status of the defendant is pending or will be initiated." Tex. Code Crim. Proc. art. 5B.003. Thus, if you intend to meet an affirmative defense through obtaining an immigration status, you will need to do so quickly.

These are odd affirmative defenses. Nothing about the way they are written suggests that the client must have established them before they committed the charged offense. They are not temporally limited in that way. That is, you can first commit the offense—illegally enter—and then establish the affirmative defense—for example, obtain a lawful status. It is fairly clear, in context, that the legislature intended this result though. This explains why the State doesn't allow you to abate the prosecution. It also wouldn't make sense for someone with lawful presence in the United States to be sneaking into the country from Mexico. This again suggests that the State expects the client to obtain the status after the unlawful entry.

Venue

The State must prove venue by a "preponderance of the evidence." Tex. Code Crim. Proc. art. 13.17. Because the illegal-entry offense is not listed in the venue statute, venue is proper in the county "in which the offense was committed." Tex. Code Crim. Proc. Art. 13.18. But if it "cannot readily be determined within which county or counties the commission [of the offense] took place, trial may be held in the county" where the client is "apprehended." Tex. Code Crim. Proc. art. 13.19.

The illegal-entry offense will be committed in the county in which the client "enters" Texas. And if there's factual uncertainty about that, the State can prosecute the client where he or she was found.

Statute-of-limitations defense

When charged as a misdemeanor, the statute of limitations for the offense is two years. Tex. Code Crim. Proc. art. 12.02(a). When charged as a felony, the limitation period is three years. Tex. Code Crim. Proc. art. 12.01(9).

Don't forget that the time the client is "absent from the state shall not be computed in the period of limitation." Tex. Code Crim. Proc. art. 12.05(a). Thus, if the State can prove the client entered Texas from Mexico but then left the state, the statute of limitations will be tolled.

Constitutional Challenge: Preemption

The U.S. Constitution's Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI. This clause empowers Congress to "pre-empt, i.e., invalidate, a state law through federal legislation." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015).

There are two main species of preemption—"express" and "impli[ed]." *Oneok*, 575 U.S. at 376–77. Federal law expressly preempts state law when a federal statute includes a provision that "explicitly state[s]" what state laws are preempted. *Gade v. Nat'l Solid Wastes Management Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Federal law can impliedly preempt state law when the "structure and purpose" of federal law preempts state law. Id. (quoting *Jones*, 430 U.S. at 535).

Whether the state entry crime is preempted by federal law has been heavily litigated in federal court. Initially, a federal district court in a civil case brought

by legal service providers and the County of El Paso held that the state illegal-entry crime is preempted under two species of implied preemption—field preemption and conflict preemption. *United States v. Texas*, 719 F. Supp. 3d 640, 663–67 (W.D. Tex. 2024).

Initially, a Fifth Circuit panel upheld the district court's ruling. *United States v. Texas*, 144 F.4th 632, 667–79 (5th Cir. 2025). More recently, however, the Fifth Circuit sitting en banc overturned the panel's decision, holding that the parties who sued lacked standing to challenge the laws. *United States v. Texas*, --- F.4th ----, 2026 WL 1122127, at *3–5 (5th Cir. April 24, 2026) (en banc).

That said, Judge Richman (who wrote the original panel opinion) explained in a thorough dissenting opinion both why the plaintiffs had standing and why the state illegal-entry crime is preempted. *See Texas*, 2026 WL 1122127, at *16–32 (Richman, J., dissenting).

Whether the state illegal-entry crime is thus preempted is currently an open question.

A preemption challenge would be a facial constitutional challenge, and the claim can thus be raised—and appealed before trial—in a "pretrial habeas" petition. *Ex parte Ellis*, 309 S.W.3d 71, 79 (Tex. Crim. App. 2010).

The field preemption argument should be especially strong in state court. The Court of Criminal Appeals has already recognized that "the matter of entry into the United States" is an area in which states are "wholly preempted by federal law." *Hernandez v. State*, 613 S.W.2d 287, 290 (Tex. Crim. App. 1980) (citing *DeCanas v. Bica*, 424 U.S. 351 (1976)).

Constitutional Challenge: Foreign Commerce Clause

Congress may "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The "federal commerce power surely encompasses the movement in interstate commerce of persons as well as commodities." *United States v. Guest*, 383 U.S. 745, 758–59, (1966).

The entry crime violates the foreign commerce clause. For details, see *Texas*, 2024 WL 861526, at *23–24.

This is a facial constitutional challenge, and the claim can thus be raised—and appealed before trial—in a "pretrial habeas" petition. Ellis, 309 S.W.3d at 79.

Constitutional Challenge: Selective enforcement based on national origin

While a state may choose when to enforce its criminal laws, this discretion is not "unfettered." *United States v. Batchelder*, 442 U.S. 114, 125 (1979) (internal quotation marks omitted). Instead, the "enforcement of criminal laws is . . . subject to constitutional constraints." *Id*.

The U.S. Constitution limits this discretion by prohibiting states from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Likewise, the Texas Constitution promises that "Equality under the law shall not be denied or abridged because of sex, race, color, creed, or national origin." Tex. Const. art. I, § 3a.

Those promises of equal treatment mean that, even when a statute is "fair on its face[] and impartial in appearance," the law is violated when a state actor applies it "with an unequal hand," thereby making "unjust and illegal discriminations between persons in similar circumstances[.]" *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886).

- Be on the lookout for the State applying the entry crime only against those of a certain national origin. If they are, you might have a selective prosecution claim based on national origin. Claims alleging discrimination based on national origin receive strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988).
- Selective-prosecution claims can be raised in pretrial habeas, and they can thus be raised and appealed before trial. *See Ex parte Aparicio*, 707 S.W.3d 189, 201–03 (Tex. Crim. App. 2024).

THE ILLEGAL-REENTRY CHARGE

A person who is an alien commits an offense if the person enters, attempts to enter, or is at any time found in this state after the person: (1) has been denied admission to or excluded, deported, or removed from the United States; or (2) has departed from the United States while an order of exclusion, deportation, or removal is outstanding.

Tex. Penal Code § 51.03(a).

Crime's context

Like with the illegal-entry crime, the legislature borrowed this crime's language from federal law, 8 U.S.C. § 1326. That said, there are again differences between this statute and the federal illegal reentry statute. Most notably, under the federal statute, a noncitizen can return to the United States, despite being ordered removed before, in certain narrow situations, including when the U.S. "Attorney General" permits it. 8 U.S.C. § 1326(a)2). Under the state statute, you can never lawfully come back to Texas. That is, this statute creates a permanent bar under state law for noncitizens who have been previously ordered removed.

Because the state statute "borrow[s]" language from a federal statute, Texas courts should consider federal interpretations of the federal statute in trying to decipher the meaning of the state law. *Castillo*, 810 S.W.2d at 183.

This statute differs from the state's illegal-entry statute in several important ways. It doesn't require the State to prove that the entry took place outside a lawful port of entry, and it doesn't require the State to prove that the entry occurred directly from Mexico. This statute doesn't have any statute-specific affirmative defenses. Thus, even asylum seekers can be convicted of this crime.

As with illegal-entry, this is a technical crime with lots of technical defenses, including some of the same defenses as the illegal-entry statute. Moreover, while this statute shares similarities with the federal illegal-reentry statute, as just noted, the state statute differs materially from the federal statute.

Illegal Rentry's Statutory Elements

(1) "Alien"

Refer to discussion above in Illegal Entry section.

(2) "Enter[ed]" or "attempt[ed] to enter," and "found in" Texas

Refer to discussion above in Illegal Entry section for information on "enter[ed]" or "attempt[ed] to enter" provisions.

The "found in" provision is not in the illegal-entry statute. This element requires the State to prove the State "found" the client "in" Texas. This is a charge you are more likely to see away from the border.

The found-in offense "continues until" law enforcement "discovers the defendant." *United States v. Hernandez*, 189 F.3d 785, 789 (9th Cir. 1999) (citing *United States v. Santana-Castellano*, 74 F.3d 593, 598 (5th Cir. 1996)). That is, the offense is not complete until the "alien is discovered and identified" by law enforcement. *Id.* at 791.

(3) Prior Removal – two alternative methods

"[H]as departed from the United States while an order of exclusion, deportation, or removal is outstanding."

- This provision requires the State to prove that the client "departed" from the country—that is, left the United States—after the issuance of an order of (1) exclusion, (2) deportation, or (3) removal.
- The statute specifically defines "removal" to include state removal orders, discussed in this outline below. Tex. Penal Code § 51.03(c).
- This provision, then, requires the State to prove beyond a reasonable doubt two things: (1) a departure—that the client left the country; and (2) the presence of an outstanding order, state or federal, requiring the client to leave the country. As a practical matter, the State might struggle to prove that the client departed the country after being ordered to leave.

"[H]as been denied admission to or excluded, deported, or removed from the United States."

Lawful port of entry

Unlike with the illegal-entry statute, the illegal-reentry statute doesn't require the State to prove that your client entered outside a lawful port of entry. This means that, even if your client went up to the actual physical port of entry and was admitted by immigration officials, they can still have committed illegal reentry under state law.

Penalty

Generally, a Class A misdemeanor. Tex. Penal Code § 51.03(b).

Can become a third-degree felony with certain prior convictions or if previously removed for certain reasons. *See generally* Tex. Penal Code § 51.03(b)(1). For example, if the client's "removal was subsequent to a conviction for commission of two or more misdemeanors involving drugs, crimes against a person, or both[.]" Tex. Penal Code § 51.03(b)(1)(A).

Can become a second-degree felony "if the defendant was removed subsequent to a conviction for the commission of a felony." Tex. Penal Code § 51.03(b)(2).

Community supervision, including deferred adjudication, is unavailable to individuals charged with illegal reentry. Tex. Code Crim. Proc. art. § 42A.059.

Affirmative defenses

Unlike with the illegal-entry statute, there are no special statutory affirmative defenses with the illegal-reentry statute.

Found-in offense

It is worth flagging just how far reaching the found-in offense is. It doesn't matter if the client lawfully entered Texas from Mexico. It doesn't matter if your client has lawful status to be in the United States. This crime just requires the State to prove that they found your noncitizen client in Texas, and the client was previously removed, excluded, denied admission, etc. Thus, if your noncitizen client was denied admission into the United States 20 years ago, they are forever banned from being in Texas, even if they now have lawful permission to be in the United States under federal immigration law.

One quirk of the found-in offense is that your client didn't have to enter the United States from Mexico. A client who entered from, for example, Canada and then was found in Texas after being ordered removed will have violated this statute. Or a client who flew into Texas from, say, France, can have violated this statute.

Venue

Refer to discussion above in Illegal Entry section.

Statute-of-Limitations defense

Mostly see above discussion.

One distinction is with the found-in offense: The offense isn't complete until the client is "found in" Texas. That typically happens when the client's "physical presence is discovered" by law enforcement, and the officers either knew, or "through the exercise of diligence typical of law enforcement authorities," should have known that the client was here without legal status. *United States v. Gunera*, 479 F.3d 373, 376 (5th Cir. 2007).

If you have a client charged with the found-in offense, then, investigate whether he or she came to attention of the authorities at least three years before. If the client did, that might have triggered the running of the limitations period.

Constitutional Challenge: Preemption

Refer to discussion above in Illegal Entry section.

Constitutional Challenge: Foreign Commerce Clause

Refer to discussion above in Illegal Entry section.

Constitutional Challenge: Due Process

In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), the Court addressed an earlier version of 8 U.S.C. § 1326, the federal illegal reentry statute. That prior version of the statute didn't permit a defendant to challenge the validity of the prior removal order in the criminal case. *Id.* at 834–37. The Court held that this raised a due process problem.

"Our cases establish that where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be some meaningful review of the administrative proceeding." *Id*. at 837–38.

That is, the Court held that a defendant needed to have the chance for judicial review of an administrative order before it could serve as a predicate to a crime.

The Court then grafted onto the statute the ability for the defendant to challenge the removal order's validity. *Id.* at 838–40. Later, Congress amended the federal reentry statute to expressly provide for a process to challenge the validity of the removal order. *See* 8 U.S.C. § 1326(d).

The State's illegal reentry statue contains no avenue to challenge the validity of the prior removal order, *see* Tex. Penal Code § 51.03, and that should also present due process problems, at least when the predicate order is a federal order, *Mendoza-Lopez*, 481 U.S. at 837–38.

- There will be no way for a state court to effectuate a legal challenge to a federal removal order. Why? Because a state court can't invalidate a federal order under the Supremacy Clause.
- It doesn't seem like this would apply to a state removal order because it would have been part of a judicial, not administrative, process. The rationale of Mendoza-Lopez is that you need judicial review of an order before it could be used as an element of a criminal offense, and the state removal orders would have been entered through a judicial process.

ARREST AUTHORITY

The statute prohibits "a peace officer" from "arrest[ing]" for illegal entry or reentry if the person is on the premises or grounds of:

(1) A public or private primary or secondary school for educational purposes;
(2) A church, synagogue, or other established place of religious worship;
(3) A health care facility . . . or the office of a health care provider[,] provided that the person is on the premises or grounds of the facility or office for the purposes of receiving medical treatment; or
(4) A SAFE-ready facility . . . or another facility that provides forensic medical examinations to sexual assault survivors[,] provided that the person is on the premises or grounds of the facility for purposes of obtaining a forensic medical examination and treatment.

Tex. Code Crim. Proc. art. 5B.001.

A "peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view." Tex. Code Crim. Proc. art. 14.01.

Arresting officers should consider whether the client can prove an affirmative defense in their probable-cause calculus. *See, e.g., Reyes v. Greer*, 2023 WL 5167812, at *8 (W.D. Tex. Aug. 11, 2023) (discussing relevant legal authorities). For a helpful discussion on this issue, *see* Ryan P. Sullivan, *Revitalizing Fourth Amendment Protections: A True Totality of the Circumstances Test in § 1983 Probable Cause Determinations*, 105 Iowa L. Rev. 687 (2020). Thus, if the client can prove to state law enforcement that they have asylum, for example, state law enforcement should be unable to arrest the client. Tex. Penal Code § 51.02(c)(1).

Constitutional Challenges: Preemption & Foreign Commerce Clause

Refer to discussion above in Illegal Entry section.

STATE RETURN-TO-MEXICO ORDER

A state judge or magistrate can order a noncitizen charged or convicted of state illegal entry or reentry "to return to the foreign nation from which the person entered or attempted to enter[.]" The order must be written.

Tex. Code Crim. Proc. art. 5B.002(c)

Practice Considerations

Where will your client be returned to? For illegal-entry clients, the return order will always be for Mexico, since the client must have entered illegally from Mexico. But as flagged above, a client can enter Texas from a country other than Mexico and be convicted of the illegal-reentry statute. That said, as a practical matter, these returns will nearly always be a return to Mexico.

As noted above, a state removal order can serve as a predicate to a state illegal reentry charge under Texas Penal Code § 51.03(c).

Try not to refer to these as "deportation orders," especially when speaking with clients. While it's easy to think of them as such—they basically are deportation orders, after all—it could confuse clients into thinking that they are going to be removed through a federal removal process. Try to always refer to them as "state return-to-Mexico" orders.

Two Methods for Return Orders

The statute has two separate processes for returning clients to Mexico. One process is an *agreed*, *pre-conviction* return order; the other is a *mandatory*, *post-conviction* return order.

(1) Pre-conviction, agreed return-to-Mexico order

For clients arrested for illegal entry or reentry under state law, a state judge can order the client returned to Mexico in lieu of prosecution. Tex. Code Crim. Proc. art. 5B.002. **The client must "agree[] to th[is] order**." Tex. Code Crim.

Proc. art. 5B.002(c)(1). This is important. The client cannot be returned under the pre-conviction return order unless they consent. In exchange, the Court must "discharge" the client. Tex. Code Crim. Proc. art. 5B.002(c)(1).

Nothing requires the judge, however, to issue the order. The statute also doesn't give the prosecutor standing to object to the order.

There are two paths for the client to accept this return order:

- The magistrate judge during the client's initial appearance at magistration can order the client to return to Mexico "after making a determination that probable cause exists for arrest" for illegal entry or reentry. Tex. Code Crim. Proc. art. 5B.002(a). Nothing in the statute prevents the State from proceeding to file charges, but the language of the magistrate's order might be different.
- The "judge in a person's case at any time after" magistration may order the client removed and the criminal case "dismiss[ed]." Tex. Code Crim. Proc. art. 5B.002(b). Thus, after magistration, the client cannot be returned to Mexico until charges are filed. It's unclear, however, whether this dismissal is with prejudice.

Who is ineligible for these orders?

- A client cannot benefit from this option if the client is charged with another offense "that is punishable as a Class A misdemeanor or any higher category of offense." Tex. Code Crim. Proc. art. 5B.002(c)(3).
- A client previously convicted for illegal entry or reentry under state law or who previously was ordered returned under this provision cannot be returned under this provision. Tex. Code Crim. Proc. art. 5B.002(c)(2).

Should a client agree to return to Mexico? Some points to consider:

- If the client wants to apply for federal immigration relief, like asylum, they shouldn't agree to their return to Mexico.
- If the client is not from Mexico, it's not clear whether Mexico will even accept them. In general, then, clients not from Mexico shouldn't be advised to accept this order.
- If the client might have a claim to U.S. citizenship, they might not want to accept the order until you've determined whether they do have a claim.
- If the client plans to try to return to Texas, they might not be a suitable candidate for this order. By agreeing to the order, they will be subject to a more serious penalty if they return under the illegal-reentry statute. The State could also charge the client with that prior illegal entry.

When advising clients about whether to accept the order, make sure to let them know that, if they refuse to return to Mexico, they can be subject to a separate criminal charge. That refusal-to-obey charge—discussed below—is a second-degree felony. Tex. Penal Code § 51.04(3).

The client should also know that, if they return, they will be subject to a more serious illegal reentry charge—which can be a felony, if the client has sufficient criminal history, as discussed above.

(2) Post-conviction, mandatory return-to-Mexico order

If a client is convicted of illegal entry or reentry, "the judge **shall** enter in the judgment in the case an order requiring the person to return to the foreign nation from which the person entered or attempted to enter." Tex. Code Crim. Proc. art. 5B.002(d) (emphasis added).

Thus, unlike with the prior order, this is mandatory and can be entered without the client's consent. It will take "effect on completion of the term of confinement or imprisonment imposed by the judgment." Tex. Code Crim. Proc. art. 5B.002(d).

Under *Padilla v. Kentucky*, 559 U.S. 356 (2010), you must advise your client that a conviction for illegal entry or reentry will result in one of these return orders.

Constitutional Challenge: Preemption

Refer to discussion above in Illegal Entry section.

There is also good Texas-specific case law on this point. The Court of Criminal Appeals has held that "there can be little doubt that for a state-court judge unilaterally" to order a defendant removed from the country would "violate[] the principle that the removal process is entrusted to the discretion of the Federal Government." *Gutierrez v. State*, 380 S.W.3d 167, 173 (Tex. Crim. App. 2012). Thus, "a state trial court may no more order a convicted defendant to leave the State than it may punish him with a sentence that is beyond the statutorily applicable range of punishment." *Id.* at 176. And given that a court lacks authority to order a defendant removed, a defendant can even challenge a state removal order on appeal even without objecting in the trial court (though you should object). *Id.* at 176–77.

Constitutional Challenge: Foreign Commerce Clause

Refer to discussion above in Illegal Entry section.

Violates Texas law

This mandatory, post-conviction return-to-Mexico order violates the Texas Constitution too. The Texas Constitution provides that "No person shall be transported out of the State for any offense committed within the same." Tex. Const. art. I, § 20. This provision prevents the State from ordering a client to be removed from Texas following conviction. *Gutierrez*, 380 S.W.3d at 176. And like the preemption argument, it is not waivable. *Id*. at 176–77. Thus, even if the client pleads guilty, they can appeal this return order as unlawful.

How will the Return Orders occur?

Before the order can be entered, "the arresting law enforcement agency" must collect identifying information about the client and cross-reference it with various local, state, and federal databases. Tex. Code Crim. Proc. art. 5B.002

The order must include: "(1) the manner of transportation of the person to a port of entry[]," and (2) the law enforcement officer or state agency responsible for monitoring compliance with the order." Tex. Code Crim. Proc. art. 5B.002(e).

- This extra burden on law enforcement might be something to point out to the prosecutor. That might persuade some not to pursue this charge, since state rather than federal authorities will bear the cost of removal.

The order "must be filed . . . with the county clerk of the county in which the person was arrested" or with the county clerk of the "court exercising jurisdiction in the case." Tex. Code Crim. Proc. art. 5B.002(f).

According to declarations Texas has filed in the federal litigation, they intend to "have an officer escort the alien to a port of entry." Escalon Decl. ¶ 9. Before they do that, they claim they will contact both U.S. and Mexican immigration officials to coordinate with them. Escalon Decl. ¶ 9–13.

Within seven days of the order being issued, law enforcement must let DPS know about the order, so it can be included in the client's criminal history check. Tex. Code Crim. Proc. art. 5B.002(g).

It is unclear how Mexico will handle clients who aren't Mexican. *Will they accept them and deport them to their home country? Will they deny them entry altogether? If the client is denied entry, will DPS pick them back up? Will federal immigration authorities pick them up?*

FAILURE-TO-COMPLY WITH RETURN ORDER OFFENSE

A person who is an alien commits an offense if (1) the person has been charged with or convicted of an offense under this chapter; (2) a magistrate or judge, as applicable, has issued an order under Article 5B.002, Code of Criminal Procedure, for the person to return to the foreign nation from which the person entered or attempted to enter; and (3) the person refuses to comply with the order.

Tex. Penal Code § 51.04

This provision makes it a crime to "refuse[] to comply with" a return order. Tex. Penal Code § 51.04(3). The statute, then, doesn't make it a crime to simply not comply with the order, but to refuse to comply with the order.

- That the client must refuse to comply with the order suggests that, if the client can't return to Mexico through no fault of his own—if Mexico won't accept the client, for example—then the client hasn't violated this statute. That said, if the client somehow gets into federal immigration custody and applies for asylum rather than return to Mexico, the client likely would have violated this provision.
- Related to this last point, state officials must honor ICE detainers. Tex. Code Crim. Proc. art. 2.251(a). Failure to do so is a crime. Tex. Penal Code § 39.07(a). Thus, if your client is convicted of illegal entry or reentry, and if the client has an ICE detainer, the client will (a) be ordered to return to Mexico; and (b) sent to federal immigration custody post-state detention.

- Even if courts interpret the statute to cover situations in which the client couldn't comply through no fault of their own, due process might prevent conviction. "Due process may . . . be violated if a statute makes it nearly impossible to comply with its provisions[.]" *Robinson v. State*, 466 S.W.3d 166, 174 n.2 (Tex. Crim. App. 2015) (Keller, J. concurring). "Holding an individual criminally liable for failing to comply with a duty imposed by statute, with which it is legally impossible to comply, deprives that person of his due process rights." *Doe v. Snyder*, 101 F. Supp. 3d 722, 724 (E.D. Mich. 2015) (collecting cases); *accord De Ren Zhang v. Barr*, 767 Fed. App'x 101, 103-04 (2d Cir. 2019); *United States v. Dalton*, 960 F.2d 121, 124 (10th Cir. 1992); *Brunetti v. New Milford*, 350 A.2d 19, 31 (N.J. 1975).

As explained above, the return orders are themselves void. *Guiterrez*, 380 S.W.3d at 176–77. You can then argue that the client had no duty to follow a void order.

Penalty

Committing this offense is a second-degree felony. Tex. Penal Code § 51.04(b).