

Crimmigration – The Crossroads of Immigration & Criminal Law

By Erin Brown

When criminal defense and immigration practitioners speak a common language, this intersection is known as *crimmigration*. A noncitizen is effectively represented in a criminal matter where the attorney is able to advise the client on both the criminal and immigration consequences of a plea and finality to a prosecution. Given that the implications of a criminal process can have drastic consequences on a noncitizen's immediate liberty interests, as well as long-term options of remaining in the United States, it behooves practitioners to have a general understanding as to the immigration consequences of a criminal proceeding.

In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court held that the Sixth Amendment requires defense counsel to advise a noncitizen client of the risk of deportation arising from a guilty plea. Defense counsel's failure to advise, or defense counsel's erroneous advice regarding the immigration consequences of the plea, could be considered ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Padilla*, it is essential for prosecutors, defense counsel, judges and other interested parties at the federal, state and local levels to have a basic understanding of the immigration consequences when representing foreign nationals. Knowledge of immigration consequences will ensure that defendants enter knowing and intelligent pleas, a virtual cornerstone afforded through due process protections in a criminal setting. As the Supreme Court noted in *Padilla*, "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process." 130 S. Ct. at 1486.

"By bringing deportation consequences into this process," the parties may not only preserve the finality of pleas, but may also negotiate better agreements on behalf of the government and the foreign national defendant. *Id.*

In many instances following a criminal conviction, a noncitizen is likely to face removal proceedings before an immigration judge. At issue in a removal hearing is the noncitizen's right to remain in the United States. Removal proceedings consist of two phases. First is determining whether the

foreign national is removable (inadmissible or deportable) from the United States and if so, whether the foreign national is eligible for relief or protection from removal.

Through the Immigration and Nationality Act (INA), Congress has established grounds for a noncitizen's removal based on numerous immigration violations, some of which are related to criminal activity, but may also implicate national security, concerns regarding fraud and a host of other grounds. Therefore, a removal action against a noncitizen may be the most immediate and significant consequence of a guilty plea or conviction. Therefore, in evaluating a plea offer for a noncitizen, it is essential to determine whether the conviction may make the defendant removable or deportable from the United States. Under 8 U.S.C. §1227(a)(2), crimes that prompt removability include, controlled substance offenses; crimes involving moral turpitude; aggravated felonies; firearm and destructive device convictions; espionage, sabotage, treason and other related crimes; crimes of domestic violence, stalking, child abuse, child abandonment or neglect; failure to register as a sex offender; violating a protective order; high speed flight from an immigration checkpoint; and failure to register or falsification of documents. The immigration courts focus on convictions, not charges; although, a conviction can entail both a traditional guilty plea/verdict, as well as circumstances in which a defendant admits to sufficient facts warranting a finding of guilt.

Moreover, immigration court generally avoids reviewing the facts and circumstances associated with a conviction, often defaulting to the statutory language of the offense to determine whether such language is encompassed within the federal immigration statute. Immigration case law has grown into a miscellany of differing opinions as local and state laws often change dramatically; thus, convictions from different municipalities within the same state can result in different immigration consequences, thereby placing additional significance on ensuring that a defendant is aware of possible immigration sanctions that may result from a plea or finding of guilt.

Additionally, there are other grounds of removal that are based on criminal con-

duct, but do not require a conviction. Any noncitizen who engaged in such activity may be placed in removal proceedings even if they are not criminally prosecuted. These grounds include crimes of moral turpitude; controlled substance offenses; prostitution; fraud or misrepresentation; false claim to U.S. citizenship; alien smuggling; marriage fraud; human trafficking; money laundering; espionage, sabotage and treason; terrorism; alien with physical or mental disorder who poses danger to self or others; unlawful voters; polygamy; and international child abduction. This becomes increasingly important for foreign nationals that are traveling to the United States following travel abroad, as the burden is on the foreign national to prove that he did not commit actions that could reasonably lead to a finding of guilt. This burden-shift onto the foreign national places significant pressure on defense counsel to ensure that any plea be fashioned in a way that avoids any lasting immigration damage.

Essentially, what may be a good deal for a client in criminal court may be a bad deal in immigration court. However, ensuring that defense counsel takes simple and practical steps of conferring with immigration counsel *before* taking a plea could help a defendant avoid piling on a disastrous immigration outcome to an already unpleasant criminal proceeding.

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