ABA International Committee:
Criminal Justice Section
CLE Panel

NON-CITIZEN CRIMINAL DEFENDANTS: THE DIRECT AND COLLATERAL CONSEQUENCES OF THEIR CONVICTIONS

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I. INTRODUCTION

The number of immigration cases heard by the Immigration Court has steadily increased within the last decade. According to a study conducted by the University of Syracuse, “the number of pending cases on the court's active docket topped eight-hundred thousand cases.” As a border State, Texas inevitably ranks at the top concerning the number of immigration cases heard in the United States. Even so, Texas only saw a 30% increase cases heard from 2017 to 2018; with a backlog of more than 119,000 cases.

Within the last two years, Texas has passed some of the most stringent laws in the country related to immigration. From voter identification to “show me your papers” legislation, Texas remains at the forefront of recent immigration policies, enforcement measures, and controversy. Despite the facts that immigrant persons share equal rights with citizens, our criminal justice system continues to treat non-citizens disparately. Therefore, it is important for defense counsel to understand the legal protections afforded to non-citizens, the various grounds for removal, direct and collateral consequences of criminal convictions, and any available defenses to prevent deportation. However, with the large numbers of immigrants confronting the criminal justice system because of immigration policies and enforcement here, it is important to make certain that these persons are provided competent representation and are not only advised of their rights, but also afforded their rights.

II. LAWS

A. Rights and Privileges

Decades of Supreme Court cases extend constitutional protections to undocumented immigrants. For example, in *Wong Wing v. United States*, the Supreme Court held that non-citizens

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2 Id.
3 *Wong Wing v. United States*, 163 U.S. 228 (1896).
convicted of illegal entry could not be imprisoned to hard labor without Fifth and Sixth Amendment protections. More recently, in *Reno v. Flores*, the Supreme Court reaffirmed that non-citizens are entitled to Fifth Amendment “due process of law in deportation proceedings” as well. In *Reno*, several juveniles challenged Immigration and Nationalization Service (INS) regulations governing release procedures for unaccompanied minors. In upholding the INS procedures, the Court reasoned that the juveniles were provided sufficient due process because they were given “the right to a hearing before an immigration judge.”

In *Padilla v. Kentucky*, the Supreme Court made it clear that foreign nationals are entitled to correct advice about the collateral immigration consequences of their criminal convictions. Padilla was a Honduras native and lawful U.S. permanent resident who pled guilty to transporting “a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.” Before entering his guilty plea, Padilla’s attorney advised that he need not worry about the guilty plea affecting his immigration status “since he had been in the country so long.” Unfortunately, Padilla’s conviction results in automatic removal. Padilla challenged his guilty pleas, arguing he was deprived effective assistance of counsel. The Supreme Court agreed. According to the Court, “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”

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5 *Id.* at 295.
6 *Id.*
8 *Id.* at 359.
9 *Id.*
10 *Id.* at 364.
11 *Id.*
12 *Id.*
adverse immigration consequence is not sufficient.”\textsuperscript{13} Instead, “plea counsel must tell the defendant that she will be deported.”\textsuperscript{14}

Since the nation’s policies on immigration enforcement have brought more non-citizens into criminal court for illegal entry and illegal re-entry, the need for criminal defense counsel to advise their clients of the adverse consequences of a criminal conviction have has become critical. And yet the exponential increase in non-citizens confronting criminal convictions has resulted in less process and the inadequate advisement of rights that is going without remedy. Thus, large numbers of non-citizens’ immigration status is being impacted without their true appreciation of the consequences of resolving their pending criminal cases.

\textbf{B. Grounds for Removal}

The Immigration and Nationality Act (“INA”) is contained in title 8 of the United States Code and governs all immigration related matters. Included in the INA are immigration related criminal offenses and several grounds for removal. One ground for initiating removal proceedings is “inadmissibility.”

1. Crimes of Moral Turpitude

Title 8 U.S.C. § 1227 outlines several deportable offenses including crimes of moral turpitude and aggravated felonies. Specifically, any alien who –

(I) Is convicted of a crime involving moral turpitude committed within five years (or (10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) Is convicted of a crime for which a sentence of one year or longer may be imposed is deportable.\textsuperscript{15}

\textsuperscript{13} Ex parte Rodriguez, 378 S.W.3d 486, 491 (Tex. App.—San Antonio 2012, pet. ref’d).
\textsuperscript{14} Id.
A crime of moral turpitude conviction can have consequences such as precluding the court of appeals from exercising jurisdiction to entertain a petition for review of a removal order. However, a crime of moral turpitude will not disqualify the non-citizen from immigration relief. It will also not require mandatory detention, without bond, during removal proceedings.

2. Aggravated Felonies

In addition, “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.”

Aggravated felonies under immigration laws are not the same as aggravated felony is under the criminal law. In fact, what is an aggravated felony for immigration purposes is in constant flux based on courts of appeals' and United States Supreme Court opinions.

3. Improper Entry vs. Illegal Reentry

Immigrants who seek to enter the United States illegally are subject to penalties under 8 U.S.C. § 1325. Specifically,

Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under Title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under Title 18, or imprisoned not more than 2 years, or both.

First time offenders face a six-month maximum sentence, while subsequent offenses are subject to a two-year maximum sentence under 8 U.S.C. § 1326.

any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his embarkation at a place outside the United States or his application for

16 Id. at § 1227(a)(2)(A)(iii).
admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act, shall be fined under Title 18, or imprisoned not more than 2 years, or both.\(^\text{18}\)

Several issues arise under § 1326 cases. For example, the Government must prove the defendant is an “alien” under the statutory definition, meaning any person who is not a national or citizen of the United States. Additionally, the defendant must have previously been removed from the U.S. This is typically demonstrated by reviewing the individual’s “A-File,” or alien file, which is the record kept about that individual by Immigration and Customs Enforcement (“ICE”). Any individual previously arrested by Immigration and Customs Enforcement will be assigned a nine-digit number, which is used to identify current and former aliens. Further, evidence the defendant entered, attempted to, or was found in the U.S.; is typically demonstrated by border patrol agent’s testimony. Importantly, the Government must satisfy a general intent requirement—voluntary action by the defendant.\(^\text{19}\)

C. Right to Bail

Under Title 18 U.S.C. § 3142(a)(3) and (d), one may be temporarily detained pending exclusion or deportation from the United States. However, the INS must place a hold (take a person into custody) within 10 days from arrest. If INS do not place a hold, it may not thereafter do so.

(a) In General. - Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be –

\[\ldots\text{(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; }\ldots\]

\[\ast\ast\ast\]

\(^{18}\) 8 U.S.C. § 1326

\(^{19}\) See United States v. Berrios-Centeno, 250 F.3d 294 (5th Cir. 2001).
(d) **Temporary detention to permit revocation of conditional release, deportation, or exclusion.** –

(1) such person –

. . . (B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20)); and

(2) such person may flee or pose a danger to any other person or the community

such judicial officer shall order the detention of such person, for a period of not more than ten days, . . . and direct the attorney for the Government to notify . . . the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section . . . .”

The only distinction between citizens and non-citizens under the Bail Reform Act is that, if a non-citizen is deemed a flight risk or danger to the community, he or she will be temporarily detained for 10 days to allow the Government’s attorney to notify INS. Thereafter, INS and the U.S. Attorney’s Office must choose how to proceed. They may either move to deport or prosecute the defendant, but not both. If they choose to ultimately deport the defendant, they must defer doing so until a conviction is secured. Under the INA, once ordered released, a non-citizen is subject to removal within 90 days from release of confinement. So, the two agencies must decide whether to deport the non-citizen, or comply with the Bail Reform Act.

**D. Texas’s Treatment of Undocumented Immigrants**

In 2017, the Texas legislature passed Senate Bill 4, which sought to punish local law enforcement agencies in so-called “sanctuary cities,” who failed to enforce Immigration and Customs Enforcement detainers. Under SB4, if law enforcement failed to enforce ICE detainers, they were subject to a $25,000 daily fine, jail time, or removal from office. Local entities may “not prohibit or

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20 18 U.S.C. § 3142(a), (d).
materially limit” persons who have authority that may impact immigration from “assisting or cooperating with a federal immigration officer as reasonable or necessary.”\textsuperscript{23} Additionally, public officials who made public statements endorsing a sanctuary policy could potentially face prosecution for a Class A misdemeanor and removal from office. The highly controversial Bill was immediately challenged upon Governor Abbott’s signing it. Although the Fifth Circuit Court of Appeals upheld the majority of SB4, the Court did strike down the portion that criminalized “endorsing a sanctuary policy.”\textsuperscript{24}

E. Preventing Removal

Non-citizens can rely on the following procedures to avoid removal.

1. Asylum
2. Withholding removal
3. Protection under the U.N. Convention Against Torture
4. Juvenile Status
5. Survivors of Domestic Violence
6. U-Visas
7. T-Visa

However, criminal convictions, even for illegal entry or re-entry based in an underlying aggravated felony will bar access to most of these avenues to prevent removal.

III. COLLATERAL CONSEQUENCES

The intersection of immigration and criminal law can be treacherous for the unsuspecting criminal defense attorney as non-citizens facing criminal charges also face collateral consequences that

\textsuperscript{23} Id.
\textsuperscript{24} City of El Cenizo, Texas v. Texas, 890 F.3d 164 (5th Cir. 2018).
jeopardize immigration status. Defending an individual who is not a citizen presents special challenges precisely because of these collateral consequences. As such, a criminal defense attorney handling immigration cases must familiarize themselves with the INA to properly advise their clients of potential risks they may be facing.

A. What Constitutes a Valid Conviction?

For immigration purposes, a conviction can be defined in one of two ways: as a formal conviction, as a formal judgement of guilt entered by a court, or the final judgement ordered by the district judge containing the formal judgement of guilt. An invalid conviction cannot trigger collateral immigration consequences. Therefore, a conviction which is vacated or set aside because of substantive or procedural defects in the proceedings is no longer considered a conviction.

The collateral consequences a defendant faces from a criminal conviction can include a negative effect on a non-citizen’s status; making them deportable or inadmissible. Whether the defendant is un-documented or a lawful permanent resident, it is important that counsel be aware of the potential negative implications for their clients in the event of a criminal conviction. As the Padilla Court explained, while deportation is viewed as a “severe penalty . . . it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process.” 25 Due to the relationship and seriousness of criminal conviction to immigration status “counsel must advise a criminal defendant of the risk of deportation. Failure to do so constitutes ineffective assistance of counsel. The type of crime committed will determine the type of consequences to which the defendant is exposed. For instance, crimes of moral turpitude will generally trigger two major types of adverse immigration consequences; inadmissibility and removal.

25 Padilla, 559 U.S. at 365.
Federal Courts have limited jurisdiction over cases involving an alien ordered removed based on certain criminal activity, unless the alien raises a constitutional claim or question of law. Allegations of an aggravated felony require the use of the “categorical approach” in determining whether there is a comparable offense in the immigration and naturalization Act.\textsuperscript{26} It is also important for an attorney to understand that because a deportation hearing is not a criminal proceeding that the government does not have to prove its claim beyond a reasonable doubt. The proper standard would be clear and convincing evidence.\textsuperscript{27}

IV. CONCLUSION

A criminal lawyer representing a non-citizen must either have a deep understanding of immigration consequences and U.S. citizenship; or they must associate immigration counsel in the representation. The terminology used in immigration cases and criminal law are not interchangeable. And allowing a client to proceed to a plea without proper advise concerning the immigration consequences of a conviction is unconscionable. Because of the large numbers of non-citizens being swept up in criminal proceedings by the nation’s immigration and enforcement policies, they are being deprived of adequate process and effective counsel. Thus, countless persons are losing important opportunities to remain in this country without an understanding that they are being adversely impacted by choosing a resolution to their criminal cases that results in their earliest release from custody and, in many cases, the soonest opportunity to seek to be reunited with their families.

\textsuperscript{26} Nijhawan v. Holder, 557 U.S. 29 (2009).
\textsuperscript{27} Id. at 42.