IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: PRIMER

By Carolina Antonini

There is a current debate about the role and obligation of the criminal bar to inform and be informed of the federal civil immigration consequences of criminal convictions. Most states have held that misinformation on the part of defense counsel to the collateral consequences of a plea, including federal immigration consequences, is reversible error as ineffective assistance. Georgia is one of these states. In Rollins v State the Georgia Supreme Court found that the defendant's plea was the result of ineffective assistance of counsel because of counsel's affirmative misrepresentations of the collateral consequences of the defendant's plea met the two part Strickland test for making such determinations. 277 Ga. 488, 591 S.E. 2d 796 (2004) In Rollins, counsel advised his client that a plea for possession of cocaine under Georgia First Offender Act would have no negative collateral consequences. This was not the case, the defendant, a native of Barbados, was placed in deportation proceedings as a result of the plea. The Court held that if counsel had performed basic research, counsel would have learned that the defendant's status was subject to removal with such a plea.

The Georgia criminal bar cannot misinform, but does it have a duty to inform at all? Many jurisdictions, including the majority of federal circuits, held that immigration consequences are collateral, not direct, consequences of pleas. Further, many states passed statutes requiring the judges to inform, upon taking a plea, that such plea may have immigration consequences. That is, until the Supreme Court's 2010 decision, Padilla v Kentucky, where the Court held that before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." (citing to *McMann* v. *Richardson*, 397 U. S. 759, 771). The Court noted that "changes to immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. While once there was only a narrow class of

deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges' authority to alleviate deportation's harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."

The role of defense counsel has always been to avoid conviction and alternatively, to lessen the consequences by obtaining a lesser charge, a better sentence, counseling, work programs, and the like. Ignoring immigration consequences make null any attempt the criminal defense attorney makes to get his client a better deal. A client who is handed to immigration authorities often cannot enjoy the benefits that stemmed of their representation at criminal court. Immigration consequences may be collateral and civil in nature, but they sting with the power of a criminal sentence. To most, deportation means: banishment, separation from your loved ones, poverty, shame, and in some cases, death.

THE BASICS: WHAT THE CRIMINAL BAR SOULD KNOW

Is the defendent an alien? A citizen? How can I be sure? Why should I be sure?

Not all aliens are aliens. Some look like aliens, talk like aliens, even believe they are aliens and yet, are in fact, citizens. Conversely, you may have a client who looks like a citizen, sounds

like a citizen and believes he is a citizen but is in fact, an alien. Several years ago I had a client in removal proceedings. He had the name of a quintessential American television character, he lived in North Carolina "all of his life"; he had the deepest southern accent I ever heard and he lived in a single-wide trailer with his wife and 2 kids. He had all the trappings of a citizen. His criminal defense lawyer never asked about his citizenship and pled him to possession with intent to sale of marijuana. He got a good deal: he had to pay a fine, complete 12 months probation and he had to stop growing weed outside his trailer. He believed he was a citizen because he was adopted by US citizens when he was a baby. The citizen father never knew he had to file documents to legalize his son and also assumed that the child would automatically become a citizen. They found out they were wrong when, at the age of 42, the son was placed in removal proceedings and risked removal to Germany. In vacating this conviction, the state court admonished the criminal defense lawyer for being neglectful.

To determine citizenship, think of the following FOUR concepts: jus solis, jus sanguinis, automatic citizen and naturalization.

Jus Solis: (by land) was the defendant born in the USA? If yes, he is a citizen. This includes birth in some US possessions and commonwealths.

Jus Sanguinis: (by blood) was the defendant born of a US citizen parent, whether that parent was a native born or naturalized citizen? If so, the defendant **MAY BE** a citizen. This is called "derivative citizenship". When a person derives citizenship, that citizenship is derived back to the date of the person's birth in the foreign land.

Automatic Citizen: (by operation of law) was the defendant born abroad, has lawful permanent residency and either of his parents are citizens, whether naturalized or by birth? If so, the

defendant **MAY BE** a citizen. In this case citizenship is dated to the date the last requirement under the statute was fulfilled.

Naturalization: Aliens who are lawful permanent residents and who meet certain statutory requirements, can show good moral character and who are willing to swear allegiance to the USA can apply to become citizens. This is called "naturalization". Their minor children, under certain rules and requirement, **MAY** also obtain this citizenship, automatically, upon the parent's naturalization.

Please note: not all children are created equal. Step children and children born out of wedlock have additional requirements to meet to derive or automatically acquire citizenship. Also, until recently, adoptive children enjoyed less derivation rights than naturally born children.

Statutory Duty to Ask/Inform

Since 2000, immigration warnings are part of plea sheets in Georgia. *(O.C.Ga. Ann. § 17-7-93 (2000))* This is a warning that must be given every time. If the place of birth is other than the USA, defense lawyers should ask to see the document under which derivation is claimed. If a determination is uncertain, an immigration attorney should be engaged. What is the significance of citizenship? JURISDICTION. Immigration authorities have **no jurisdiction** over citizens, thus citizenship is the best defense against deportation. A conviction by a citizen has not immigration consequences. A conviction prior to obtaining citizenship can result in deportation. A conviction as a citizen who later reverts to permanent resident may also not have immigration consequences.(Costello v. INS, 376 U.S. 120 (1964) a person who was convicted of two crimes

involving moral turpitude while he was a United States citizen cannot be deported on account of them after he lost his citizenship through denaturalization.)

Please note: a false claim to citizenship to any government authority is a deportable offense. There is an exception to this to certain adoptive children of citizens. There is almost no statutory defense against deportation for a false claim to citizenship. This severe penalty was created by the Immigration Reform Act of 1996 (IIRAIRA) and applies to false claims made on or after September 30, 1996. Thus, it could be extremely harmful for example, to write in a judicial order or plea that a defendant is a US citizen if that is not or may not be the case indeed.

What is a conviction?

Conviction is defined by statute (INA 101(a)(48)(A)) and requires 2 things:

1) A finding of guilt by judge or jury, including an admission/plea of guilt or *nolo contendere*; and

2) Some sort of punishment, penalty or restraint.

Under this scheme, convictions include deferred adjudications and First offenders/ youthful offender adjudications under Georgia law (because the non-citizen must enter a plea). The definition does not include: juvenile delinquency adjudications and pre-trial diversion, but only where no admission of guilt/ entry of a plea, is required. Thus a defendant in Georgia who enters a state PTD will not be considered to have a conviction because there is not requirement in Georgia that there first be a plea. That same defendant in Georgia participates in the federal PTD and will be considered to have a conviction because the federal program does require a plea. The

definition also does not include the Federal Juvenile Delinquency Act because juvenile delinquency adjudications as a whole are civil in nature, even when the youth is re-sentenced to one year incarceration after he violates his probation. (Matter of Devison-Charles, 22 I&N Dec. 1362 (BIA 2000)

Please note: A conviction must be final in order to qualify as a conviction under immigration law; thus convictions subject to direct appeals, if exercised, are not final. Subsequent appeals do not impede immigration adjudications.

When there is a conviction, immigration prosecutors can meet their burden of proof of removability by mere showing of the conviction order. However, sometimes a conviction is not necessary to launch charges of removability. For example, a conviction is not necessary when:

- non-citizens arrive at a port of entry
- non-citizens apply for adjustment of status
- non-citizens apply for a visa at an American consulate abroad
- a lawful permanent resident applies for naturalization

How is this possible? Three ways: 1) admission of the essential elements of a crime, 2) discretion and 3) reason to believe.

The mere admission of the essential elements of a crime involving moral turpitude (CIMT) can be sufficient to disqualify a non-citizen from obtaining status. Also, immigration statutes and regulations give consular officers, immigration officials and judges significant discretion power. A person can statutorily qualify for a relief, such as permanent residence or DACA but can be nevertheless denied if the immigration adjudicator determines that the person does not merit a favorable exercise of discretion. Additionally, if the government has "reason to believe" that a non-citizen will engage in trafficking of drugs, for example, the government can deny

release, relief, status and so on. The concept of "reason to believe" has been the subject to much litigation. Past actions, past arrests, past related convictions, admissions and relations have been included in the permissible consideration towards the conclusion of whether there is reason to believe. This is a classic example of laying with dogs and waking up with fleas. Non-citizens who associate with traffickers can face a "reason to believe charge." Thus statements made in a court of law, even on an unrelated subject, say custody, can be used to attempt to deny o non-citizen for "reason to believe".

The myth of the 11 months and 29 days sentence

In 1996, the definition of "aggravated felony" was expanded by the enactment of the Immigration Reform Act (IIRIRA). This expansion was retroactive and included convictions entered on or before the enactment of the law. The change added to the definition, *inter alia*, applied convictions of crimes of violence and theft where the sentences of imprisonment imposed is a year or more. This change of immigration definition came in direct conflict with most Georgia convictions for misdemeanor theft or violence offenses because of the sentencing forms used in most Georgia criminal courts. The forms used indicate the amount of incarceration and then the amount of said sentence that would be probated. Thus, most misdemeanor shoplifting sentences, for example, read: *that the defendant is ordered to serve 12 months confinement and that the above sentence is to be served in probation.* The intent of the criminal court is not for the person to serve incarceration for 12 months, but rather to serve probation. However, "probated" sentences are ineffective for immigration purposes in that they are read to include the incarceration language and ignore the probation language. The result is that IIRIRA

combined with the use of this form makes an "aggravated felon" of every petty criminal. This is where the 11 months and 29 days myth was born. To avoid this definition, the criminal bar assumed that as long as 12 months are avoided, immigration consequences are also avoided. Many non-citizens, their counsel and the criminal courts who sentence them are in shock to learn that this is no magic bullet.

The reasons are that not all crimes defined as "aggravated felonies" require a sentence of 1 year or more and that there are many more grounds for deportability than "aggravated felony." There is no magic bullet. It is all on a case by case determination. For example: a non-citizen seeking to adjust his status to permanent resident would have been protected by a misdemeanor with a sentence of less than 6 months. Another non-citizen would have been better served by pleading to a specific subsection within the charge without regard to the sentence given. A permanent resident with a firearm charge or trafficking charge who received an 11 months sentence is in the same immigration boat as one who gets a 12 months sentence. So, while the 11 months 29 days sentence works in some cases, it does not work in every case.

Drink + Drive = Deported?

The immigration consequences of a criminal offense are based on the ELEMENTS of the criminal offense and not the caption or title of the code section applicable. Only by looking at the specific state or federal statute can an attorney determine what, if any, are the immigration consequences. The US Supreme Court has taught us many a lesson on the importance of reading criminal statutes to determine deportability. In Leocal v Ashcroft, 543 US 1(2004), the Supreme Court held that DUIs are not deportable offenses when they lack the *mens rea* necessary to show

intent to harm or substantial risk to harm. Leocal involved a Florida conviction for driving under the influence and causing serious bodily injury. Leocal was charged under INA 237(a)(2)(B) for committing an "aggravated felony", to wit, a crime of violence, as defined by 101(a)(43)(F). The Supreme Court held that the Florida conviction did not involve "violence" and therefore was not an aggravated felony. The definition of violence used for immigration determinations is found in 18 USC 16 which requires:

(a) An offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another **or**

(b) Any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(Examples of crimes of violence under Georgia law would be misdemeanor family violence battery and felony burglary). The Court held that the use of physical force against another found in subsection (a) suggest a higher degree of intent than negligent or merely accidental conduct. Further, the Court held that subsection (b) does not encompass all offenses which create a "substantial risk" that injury will result from a person's conduct. And that the "substantial risk" relates to the use of force, not the possible effect of a person's conduct. The Court held that the statute under which Leocal was convicted criminalized negligence and not violence.

The Georgia statute for DUI has neither an element nor a substantial risk of force. Under Georgia, DUI is a *malum prohibitum*, not a *malum in se*, thus, there is no specific *mens rea* to achieve a certain result and as a result, no Georgia DUI conviction can be considered violence or an aggravated felony. DUI arrests can nevertheless lead to a person's apprehension by immigration authorities, denial of some benefits and withdrawal of some status. For example: a

DUI can lead a person to immigration authorities who would then incarcerate the person. The Immigration Judge, in determining whether the person is a danger to the community, could consider the DUI and deny bond. A person who has DACA will receive a withdrawal of that status because of a DUI conviction. A person statutorily eligible for residence but who has several recent DUIs could be denied in the discretion of the adjudicator. Further, a DUI or multiple DUI convictions can prevent and individual from showing the good moral character necessary to naturalize or obtain lawful status. The definition of good moral character is found in INA 101(f) and defines a lack of good moral character to include "habitual drunkards" and convictions resulting in 180 days imprisonment. Finally, the current administration has made non-citizens with DUI convictions, a priority for deportation. A prime example of the drastic consequences of a DUI relates to "Temporary Protective Status" (TPS) holders. TPS is a temporary status given to nationals of certain countries designated by the President because the country has experienced disasters, natural and otherwise. Two examples of these designations are Honduras (after hurricane Mitch) and Liberia (over 10 years of civil war). A person cannot maintain TPS status if they have two or more misdemeanors. In Georgia, a TPS holder can easily lose their TPS protection if convicted of one DUI and an accompanying driving citation (all driving citations in Georgia are misdemeanors)

Mandatory Detention: the other consequence of criminal convictions

Mandatory Detention is a statutory requirement under INA 236(c) and requires immigration authorities to incarcerate non-citizens who are deportable or inadmissible under certain categories while their removal case is pending and until a final determination is made. Persons

ordered removed are released directly to their home countries. In cases where the person can not be expatriated (for example, nationals of Cuba and Vietnam and persons granted protection under the Convention Against Torture), release occurs after a favorable detention review process where flight risk and community risks are considered. There is also very limited habeas corpus review.

Mandatory detention is triggered by a release from penal custody after October 8, 1998, where the non citizen is deportable for/under:

- One CIMT where the sentence of incarceration is one year or more
- Multiple CIMTs 237(a)(2)(A)
- INA 237(a)(2)(B) controlled substances
- INA 237(a)(2)(C) firearm offenses
- INA 237(a)(2)(E) aggravated felonies (includes violence, theft, drugs, laundering, and much, much more)
- National security risks

Mandatory detention is also triggered by a release from penal custody after October 8, 1998, where the non citizen is inadmissible for/under:

- One CIMT, sentence does not matter INA 212(a)(2)
- Multiple CIMTs
- Controlled substance violations & traffickers
- Money laundering
- Prostitution enterprises
- National security risks

Mandatory detention means: mandatory detention in an immigration jail and without the possibility of bond. Immigration authorities however may release persons who subject to these rules but who are co-operating in criminal investigations or where national security benefits.

While it appears most criminal convictions will lead to mandatory detention, in fact, many will not. Who is not subject to mandatory detention?

- LPRs and others released from penal custody prior to October 8, 1998
- Non deportable convictions, such as a DUI
- Convictions of CIMT, including domestic violence, with less than one year sentence
- Alien smuggling
- Visa fraud

However, if a non-citizen has a prior order of deportation, that non-citizen is not eligible to request a bond from the immigration court and will not be released (in most cases) even when they pled to a non-mandatory custody crime. Their detention is not based on INA 236(c) mandatory detention rules, but rather under the re-instatement of removal rules and the presumption that as a fugitive, an alien with an outstanding order of removal is a flight risk. The lack of relief from removal in most re-instatement cases makes the fight for release an insignificant battle.

DRUG CRIMES

A conviction is not necessary for deportation:

INA Section 212(a)(2)(C)(i) states that an alien who the government "knows or has reason to believe- is or has been an illicit trafficker in any controlled substance… is inadmissible." The 11th Circuit has addressed the "know or has reason to believe" language. In Castano v INA, 956 F2d 236 (11th Cir. 1992) the Court held that a conviction expunged under the Federal Youth Corrections Act for trafficking, supported the government's knowledge or reason to believe. The expunged conviction was for conspiracy to distribute drugs and the defendant had previously been indicted for cocaine distribution, showing a patter of behavior. The Board of Immigration Appeals held that an individual's oral admissions can also form the basis for a "knows or has reason to believe" charge. (Matter of Favela, 16 I&N Dec. 753 (BIA 1979) (Respondent admitted to an officer his participation in an attempt to smuggle a kilo of marijuana in to the USA) In Matter of Rico, the Respondent was found driving across the USA border with 162 lbs of marijuana. While he was not convicted, his admission of being paid by known traffickers to drive the car, was sufficient to support a "knows or has reason to believe" charge. 16 I&N Dec. 181 (BIA 1977) In a 1958 case, the BIA found in favor of a " knows or has reason to believe" charge for an alien who admitted delivering marijuana cigarettes to a known drug dealer as a favor to the drug dealer. The Respondent there was also not convicted for the crime, but was deported for his admissions and relations. More recently, in Garces v Attorney General, the 11th Circuit court held that a vacated plea combined with a police report is insufficient to sustain a reason to believe charge. (7/27/2010)

Is everything trafficking and will all drug convictions result in deportation?

Drug "trafficking" is the "unlawful trading or dealing of any controlled substance." Matter of Davis, 20 I&N Dec. 536, 541 (BIA 1992) The BIA has explained that this concept includes, at its essence, a "business or merchant nature, the trading or dealing in goods." Thus, to show trafficking, the government must produce probative evidence that the non-citizen was engaged in the business of selling or dealing in controlled substances. (Davis at 541) The Government must also prove the essential element of intent, which is the specific intent to distribute controlled substances. (Rico at 186)(finding that the petitioner was a "knowing and conscious participant.") A reason to believe charge will not be sustained where proof of specific intent to distribute is lacking. Matter of McDonald and Brewster, 15 I&N Dec. 203 (BIA 1975).

Please note: just like all drug activity is not trafficking, all drugs are not deportable substances. A conviction for dangerous drugs is not the same as controlled substance. A drug is a controlled substance for immigration purposes if it is found listed in the federal schedules. A defendant can be convicted in Georgia for trafficking dangerous drugs when he brings vitamin K or penicillin from Guatemala to Georgia. However, neither substance is found in the federal schedule and as a result, that conviction is not a drug trafficking conviction under immigration law.

A simple possession conviction may or may not be a problem. Under INA Section 237(a)(2)(B)(i), which applies to aliens who have lawful status, a single simple possession of **marijuana** of 30 grams or less conviction is not a deportable offense. For a person seeking status, however, such a conviction is problematic because it requires a waiver. Simple possession of cocaine, for example, requires a waiver for lawful permanent residents but there is no waiver for those seeking status. Thus, a conviction for simple possession of cocaine would render a person ineligible to regularize their status. Trafficking offenses must meet federal definitions.

The Supreme Court answered the question as to what drug offenses constitute aggravated felonies. In Lopez v Gonzalez, 549 U.S. 47 (2006), the Court held that an "aggravated felony" includes only conduct punishable as a felony under the *federal* Controlled Substances Act, regardless of whether state law classifies such conduct as a felony or a misdemeanor. Under federal law, there are two main consequences of having a prior conviction for an "aggravated felony." One is that, if the convicted person is an alien, he will most likely be deported. The other is that, with respect to certain federal crimes, a prior conviction for an aggravated felony provides a sentencing enhancement. In this case, Lopez had been convicted of conduct that was a felony under South Dakota law but was a misdemeanor under federal law. Accordingly, the Court ruled that this conviction could not serve as a basis for deporting him.

The Supreme Court considered specifically a Georgia "trafficking" statute. In Moncrieffe v Holder, 133 S.Ct. 1678 (2013) the Court held that if a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, it is not an aggravated felony. That case involved a Jamaican citizen here legally, was found by police to have 1.3 grams of marijuana in his car. He pleaded guilty under Georgia law to possession of marijuana with intent to distribute. The Federal Government sought to deport him, reasoning that his conviction was an aggravated felony because possession of marijuana with intent to distribute but the Court disagreed because of the various elements of the offense that did not require remuneration (not transactional).

Final recommendations:

Immigration law is if complex and seems foreign to all unfamiliar with its application. Courts will do well to ensure defendant's counsel is complying with Padilla to ensure due process and avoid challenges in the future as to the constitutionality of a plea.