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The Clash of Immigration and Criminal Defense Law

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Our nation's immigration goals and criminal defense goals often clash when a criminal defense lawyer is representing a foreign national. It is not an exaggeration to say that the immigration consequences of a conviction and risk of deportation often are more life-changing and significant to the alien defendant than are the criminal consequences.

To begin to understand the difficult intersection of criminal and immigration law, the following definitions and concepts may be helpful:

Aliens: The Immigration and Nationality Act defines an alien as a person who is not a citizen of the United States.

Eligibility for Deportation: Any person who is not a citizen of the United States may be deported from the United States for the commission of certain crimes. To repeat: Any alien may be deported.

Timing: Aliens are characterized as either immigrants or non-immigrants. Immigrants, like students or H-1B temporary workers, for example, are in the United States for a limited period of time for a particular purpose.

Green Card: Immigrants have permanent residency or the right to stay in the United States, come and go from this country or work here on a permanent basis. Immigrants secure their status, colloquially known as a "green card," based on employment or family or other types of immigrant visa petitions.

Spousal Rights: A common misconception is that the spouse of a U.S.

citizen is a citizen of this country. Not true. The spouse of a U.S. citizen may, in most but not all instances, secure permanent residency and, eventually, citizenship.

Beyond "Looks:" Another common misconception is that because a person looks and sounds like a U.S. citizen or has been here since childhood, he or she is a citizen. Obviously, this is not always true. There are many people who have been in the United States since infancy and are not citizens because they entered the United States illegally, lived their lives and did nothing to clean up their immigration status or for any one of a number of other reasons.

No Right To Have Legal Counsel? Deportation takes place after a final adjudication or an order from an immigration judge or appellate body. The alien is entitled to due process proceedings that are characterized as civil, rather than criminal. There is no right to have counsel in removal proceedings, unlike in criminal proceedings. One major issue is how the Sixth Amendment Right to Effective Counsel applies to aliens in criminal court in comparison to aliens appearing before an immigration judge.

Conviction: Aliens may be deported for criminal convictions and a host of other reasons. A conviction is a defined term meaning a formal judgment of guilt, entered by plea or admission before a judge or jury, and the imposition of some penalty. While an expungement may erase the record of the conviction, it does not erase a conviction for immigration purposes, although a gubernatorial pardon does.

Changes to Immigration and Nationality Act: Because of recent

amendments to the Act, a great number of criminal convictions may lead to the dire and inevitable consequence of deportation.

The Act identifies the criminal offenses that are grounds for removal from the United States. These include the following:

- Convictions of one crime involving moral turpitude that was committed five years after the date of the alien's admission to the United States if the alien is sentenced to: a term of one year or longer;
- Multiple convictions for crimes involving moral turpitude;
- Convictions of an aggravated felony;
- Convictions of any law relating to a controlled substance, other than a single offense for a possession of marijuana in a quantity of less than 30 grams;
- Certain fire arms offenses; and
- Crimes of domestic violence, stalking, a violation of protection orders and crimes against children.

Where the rubber meets the road is evaluating the crime and its immigration effect. A crime of moral turpitude is not defined by law. It is generally agreed that such a crime is inherently based, vile or depraved and contrary to societal norms or morality. Some examples are voluntary manslaughter, aggravated driving under the influence and aggravated assault.

Simple Crime or Aggravated Felony? While aggravated felony is statutorily defined by the Act, evaluating whether a crime is an aggravated felony is a complicated procedure. The crimes identified as such include a wide variety of offenses, some with federal title definitions

and others without. Moreover, the federal government's definition of aggravated felonies encompasses a wide array of non-violent offenses for which the sentence imposed is a term of imprisonment of at least a year. These include:

- Passport or document fraud;
- Forgery or perjury;
- Commercial bribery;
- Trafficking in vehicles with altered identification numbers; and
- Fraud or deceit in which the loss to the victims exceeds \$10,000.

Crimes relating to controlled substances are aggravated felonies, but "relating to" controlled substances is also not defined and has been the subject of a great deal of litigation. Recently, a court held that possession of drug paraphernalia is a crime that does not "relate to" a controlled substance.

The analysis is on a conviction-by-conviction, statute-by-statute basis. But one thing is certain: if the conviction is an aggravated felony or a controlled substance violation, the alien has virtually no defense to removal.

Criminal Defense Counsel: The criminal defense attorney may be the last line of defense to removal.

That being the case, the criminal defense attorney should craft trial and plea strategies to avoid the client's conviction of crimes defined as aggravated felonies or

that may be crimes involving moral turpitude. In defending an alien, the attorney may seek lesser sentences that cause certain offenses not to be considered aggravated felonies, as the client's punishment is fewer than 365 days. Of course, in some cases, attorneys and their clients may need to take the calculated risk of going to trial.

Padilla v. Kentucky: The Supreme Court of the United States is currently considering the responsibility of the criminal defense attorney to an alien defendant. The case is *Padilla v. Kentucky*. Born in Honduras, José Padilla came to the United States in the 1960s, served in the Vietnam War and is a permanent U.S. resident, residing with his family in California. In 2001, Padilla was arrested in Kentucky for transporting marijuana and indicted on four counts of misdemeanors of possession of marijuana and drug paraphernalia, felony trafficking of marijuana and failure to have a weight and distance tax number on his vehicle.

Padilla pleaded guilty to the felony and misdemeanor marijuana counts. He accepted the plea bargain in reliance on his criminal defense attorney's representation that he did not have to worry about these convictions as he had been so long in the United States they would not have any immigration consequences. The attorney was dead wrong.

The felony drug conviction is an aggravated felony, and Padilla faces virtually

certain removal from the United States when released from his prison sentence. Did Padilla receive effective assistance of counsel as required by the Sixth Amendment? The Court is deciding the question of whether Padilla's lawyer fulfilled his constitutional responsibilities.

Before long, the Court will give the criminal bar direction of what is required of a criminal defense attorney representing an alien. In the meantime, it may be wise for criminal defense lawyers to always ask their clients whether they are U.S. citizens. By the same token, noncitizens charged with crimes *must* inform their attorneys that they are not U.S. citizens. If the accused is not a U.S. citizen, then the criminal defense lawyer should determine whether the charges being faced by the client could be considered a crime of moral turpitude, an aggravated felon or a crime "relating to" controlled substances. If a conviction of the alien could result in his or her removal from the United States, the criminal defense attorney and the criminal defendant need to develop a strategy to try to avoid that result.

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