Representing Noncitizens in Criminal Matters

By Priscilla J. Lim, Maxwell E. Lim, and Edgar E. Lim

Many a lawful permanent resident ("LPR"), who has continuously resided in the U.S. for decades, can still be deported or "removed"[1] from this country. Unlike a U.S. citizen, an LPR is still an alien and subject to our immigration laws on removal.[2] Only citizens of the U.S., which includes naturalized aliens, are safe from removal. In fact, Immigration and Customs Enforcement (ICE) has no jurisdiction whatsoever over natural born citizens of the U.S.

Hence, the first thing a criminal defense attorney should inquire of his or her client is the client's immigration status, and the client's accent should be their first clue. The second thing defense counsel should do is consult with an immigration attorney. If an immigration attorney is consulted early, then charges (assuming the prosecutor is willing) may be plea-bargained down to a reduced offense or a non-deportable crime. In some cases, even a more serious charge (outside of ICE's removable offenses) may save an alien from removal.

Removal from the U.S. is particularly onerous where aliens have literally grown up in this country and have little to no ties with their country of birth. What exacerbates the removal of aliens are the ten-year, fifteen-year, and sometimes permanent bars to ever returning to this country.[3] The Supreme Court said it best and as early as 1945, in *Bridges v. Wixon*, when it stated that, "although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling" and, most significantly, that, **"deportation may result in the loss of all that makes life worth living."**[4] (Emphasis added.)

Even a simple misdemeanor charge of sexual misconduct in the first degree, a class A misdemeanor, depending on the alien's particular circumstances, can be a removable offense.[5] Because our immigration laws are complex and the average defense attorney does not practice immigration, the Immigration and Nationality Act (INA) and immigration case law are fraught with traps and pitfalls for the unwary defense counsel.

Many a defense counsel has inadvertently advised his or her clients that they would unlikely face jail time or be deported, especially first offenders, and defendants have routinely entered a plea of guilty based on this advice. What is unbeknownst to counsel is that as a result of this guilty plea, and even the receipt of a term of imprisonment of six months, a suspended execution of sentence, "x" number of years probation, and/or "x" number of days shock time, a

1. The term "removal" applies to all deportation cases commenced on or after 4-1-97.
2. INA §§212(a), 237(a), and 240, just to name a few.
3. INA §212(a)(9).
4. 326 U.S. 135, 147 (1945).
5. INA §237(a)(2)(A)(i) for aliens who commit a crime involving moral turpitude within five years of entering the U.S. for which a sentence of one year or longer may be imposed.

Priscilla J. Lim graduated from Saint Louis University School of Law in 2001. She worked with her father, Edgar E. Lim, and practiced immigration law exclusively for seven years. She now works at Amdocs in Chesterfield, MO as its Immigration Manager for the Americas. Priscilla is a member of the Missouri Asian American Bar Association and the American Immigration Lawyers Association.

Edgar E. Lim received his B.S. in Finance from Saint. Louis University in 1972, his J.D. from Saint Louis University in 1974, and his LL.M. in Tax from Washington University in 1975. He worked at Peat, Marwick, Mitchell & Co. from 1976-1977, General Dynamics from 1978-1980, and has been in private practice since 1981. Ed is also a member of MAABA, and currently maintains his office in Shrewsbury, MO where he practices exclusively in immigration.

Maxwell E. Lim has been a paralegal at Lim Law Office since 2007. President of Alpha Kappa Psi, Delta Sigma Chapter in 2010, he received his B.S.B.A. from Saint Louis University in 2011, and plans to go to law school.


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defendant can still be removed from this country.[6]

Under this scenario, but mainly based on this guilty plea versus the sentence imposed, ICE can and will initiate removal proceedings against the defendant under our immigration laws. The basis for removing a defendant from the U.S. is his guilty plea to the charge. The good news is new counsel can file a motion to withdraw the defendant's guilty plea, based on ineffective assistance of counsel and manifest injustice, and can then request a trial on the merits.

Crimes Involving Moral Turpitude

Immigration law has two classifications of crimes that are removable offenses, plus specific crimes as well. The two main classes are crimes involving moral turpitude (or CIMT) and aggravated felonies.[7] The specific crimes are controlled substance violations, firearms offenses, money laundering, domestic violence, alien smuggling, visa and passport fraud, and export violations.[8]

Neither CIMT nor moral turpitude is defined by statute. Case law has defined these crimes as any crime involving an element of evil or predatory intent; one which demonstrates a baseness or depravity under current mores, in other words, a lack of good morals or moral turpitude. Obvious crimes, such as murder, rape, blackmail, and fraud are clearly CIMTs, whereas a simple assault has been held otherwise in the immigration arena. A misdemeanor can also be a CIMT and can even be for writing a bad check because fraud is involved. One CIMT may or may not be a deportable offense since there is a petty offense exception, but two CIMTs fall under the realm of "multiple CIMTs"[9] and can definitely cause an alien to be removed from this country.

The petty offense exception[10] is important to know about because it gives the criminal defense attorney something to work toward. If an alien has committed only one CIMT offense where the maximum possible sentence of imprisonment does not exceed one year, and the alien is not sentenced to more than six months of imprisonment (regardless of whether said sentence is suspended or the alien is released early on parole), then he is not removable. This exception does not apply to controlled substance offenses or other inadmissibility crimes.

Aggravated Felonies

In 1988, over growing concerns about drug abuse, Congress added a new deportation ground that would expand well beyond the drug context.[11] It created a new concept called "aggravated felony" and rendered deportable any alien who, after entry into the U.S., had been convicted of a certain felony, which is now embodied in the INA.[12] Aggravated felonies, unlike CIMTs, have been defined by Congress,[13] and the category generally covers all major felonies and then some. The biggest problem with aggravated felonies is mandatory detention by ICE. This means no bond at one's removal hearing before the Immigration Court and a potential lengthy detention at an ICE facility, which could easily be hours away from a client's home and family.[14]

A nonimmigrant (or alien who is not an LPR) who commits an aggravated felony is also subject to expedited removal proceedings[15] or administrative removal without the protection or participation of the Immigration Court. This is ICE's fast track out of the U.S. and basically deprives an alien of all forms of discretionary relief generally afforded one before an Immigration Judge. The federal court of appeals is the only remedy,[16] but generally there is not enough time to act before the alien is placed on a plane bound for his or her home country.

A "Conviction" for Immigration Purposes

Immigration law defines a "conviction" as requiring two things: an admission of guilt or a finding of guilt by a judge, and the imposition of some form of punishment by the judge.[17] In other words, both of these components must exist, an admission or a finding of guilt and some form of punishment (e.g., probation), for there to be a "conviction" for removal purposes. Pleading *nolo contendere* or no contest is still con-

6. When convicted of a CIMT within five years of an admission of a crime in which a sentence of one year or longer may be imposed, INA §237(a)(2)(A)(i).

7. INA §237(a)(2)(A)(iii).

8. INA §212(a)(2)(A)(i)(II), §237(a)(2)(C), §212(a)(2)(I), domestic violence falls under CIMT, §212(a)(2) and §237(a)(2)(E), §237(a)(1)(E), §237(a)(3)(B), and §237(a)(4)(A)(i), respectively.

9. INA §237(a)(2)(A)(ii).

10. INA §212(a)(2)(A)(ii)(II).

11. The Anti-Drug Abuse Act of 1988, Pub.L. 100-690, §7341, 7344, 102 Stat. 4181, 4469-71 (Nov. 18, 1988).

12. INA §237(a)(2)(A)(iii).

13. INA §101(a)(43)(A)-(U), 8 USC §1101(a)(43)(A)-(U).

14. St. Louis ICE generally houses their detainees in Mississippi County or Charleston, MO, approximately three hours from St. Louis.

15. INA §238(a).

16. INA §242(b), 8 USC §1252(b).

17. INA §101(a)(48).

sidered an admission of guilt, but where the court imposes no form of punishment other than court costs, there is no conviction for removal purposes.

A suspended execution of sentence (or SES) is the imposition of a sentence or a conviction of a crime for removal purposes. Although a suspended imposition of sentence (SIS) would be expunged from his record if a defendant successfully completed his period of probation, it is *also* a "conviction" in ICE's eyes. ICE views an SIS as a "conviction" because the immigration laws define the word "conviction," for purposes of removal or deportation, as any judicial adjudication of guilty coupled with some form of restraint on the person's liberty, such as an SIS plus probation. Expungment and the sealing of a conviction do not cancel out the conviction for removal purposes.[18]

Misdemeanor

ICE makes little or no distinction between a misdemeanor and a felony; a misdemeanor conviction can be a deportable offense. In *Matter of Martin*,[19] the Board of Immigration Appeals (BIA) held that the offense of third-degree assault in violation of Connecticut General Statutes §53a-61(a)(1) constitutes a crime of violence under INA §101(a)(43)(F), even though it is classified as a misdemeanor under Connecticut law. The BIA also reasoned that the offense qualifies as a "crime of violence" under 18 USC §16(b).

A crime of violence is a removable offense when the charge an alien is convicted of contains elements of specific or evil intent or knowledge (or a CIMT). An assault with the use of a weapon has generally been held to be a CIMT where an element of the charge involved contains a vicious motive or a corrupt mind. In other words, was there a specific intent to harm the victim; i.e., was the crime committed knowingly and intentionally? For example, a misdemeanor assault with bodily injury under Texas law has been found to be a CIMT.[20] Willful infliction of corporal injury on a spouse, cohabitant, or parent of the perpetrator's child in violation of §273.5(a) of the California Penal Code has also been found to constitute a CIMT.

According to INA §237(a)(2)(E), a conviction of a "crime of domestic violence," as defined by 18 USC §16, is a deportable offense. Accordingly, the Supreme Court's holding in *Leocal v. INS*[21] found that the "the use of force" phrase in §16(a), against the person or property of another, naturally suggests a higher degree of intent than mere negligent or accidental conduct. Misdemeanor assaults and batteries, and even aggravated assaults that involve more than mere negligent or reckless conduct (i.e., with a specific intent), are likely to fall under this ground of removability because such offenses will meet the federal definition of a "crime of violence."[22] A crime of violence in a "domestic" context may also be a CIMT. On the other hand, a crime of simple assault or battery in a domestic situation will probably not be considered to involve moral turpitude. However, an offense involving bodily injury to a spouse, cohabitant, or child has regularly been found to involve moral turpitude.

Manifest Injustice

All criminal defendants are afforded, by the Sixth Amendment of the United States Constitution, the right to assistance of counsel. However, when a defendant enters his guilty plea and did not receive *effective* assistance of counsel, then he should be permitted to withdraw the same.

> Such relief [permitting a defendant to withdraw a guilty plea] is reserved only for extraordinary circumstances that indicate manifest injustice, and these extraordinary circumstances include involuntariness, fraud, fear, and the holding out of false hopes.[23]

Missouri Rule 29.07(d)[24] and the principles of fundamental fairness also support the proposition that such a plea of guilty in this case should be set aside to correct a manifest injustice.

Even before *Padilla v. Kentucky*,[25] St. Louis County Circuit Courts have recognized the serious consequences for non-U.S. citizen criminal defendants caused by their defense attorneys' lack of knowledge regarding our immigration laws, and have begun to remedy this situation by allowing such defendants to withdraw their guilty pleas. In a locally famous case, *State of Missouri v. Florian Brown*,[26] Circuit Judge John A. Ross, on October 7, 2003, set aside a defendant's guilty plea finding, "that principles of fundamental fairness dictate that the plea of guilty in this case be set aside."[27]

18. *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999).

19. 23 I&N Dec. 491 (BIA 2002).

20. *Matter of Deanda-Romo*, 23 I&N Dec. 597 (BIA 2003).

21. *Leocal v. INS*, 543 U.S. 1 (2004). Where the Supreme Court analyzed 18 USC §16 (crime of violence) and concluded that the particular crime did not meet the definition.

22. 18 USC §16(b).

23. *State v. Taylor*, 929 S.W.2d 209, 215 (Mo. *en banc* 1996).

24. Mo. Rule 29.07(d), Withdrawal of plea of guilty based on manifest injustice.

25. 559 U.S. No. 08-651 (S. Ct. March 31, 2010).

26. *State v. Florian Brown*, St. Louis County Circuit Court Cause No. O1CR-5970B.

27. In fact, this writer personally interviewed Judge Ross concerning his decision to permit Brown to withdraw his earlier guilty plea, who said, "It was just the right thing to do."

Brown had pled guilty to "acting together to manufacture and sell a controlled substance." ICE viewed Brown as a *convicted aggravated felon* due to his guilty plea and despite his SIS. The St. Louis County Circuit Court allowed defendant Brown to withdraw his guilty plea because his initial defense counsel expressly misinformed him of the immigration consequences of his guilty plea. Brown had asked his attorney how his plea would affect his immigration status and was told that it would not affect it at all.

Ineffective Assistance of Counsel

Manifest injustice occurs whenever a defendant receives ineffective assistance of counsel. Manifest injustice also results from the acceptance of a defendant's guilty plea if said plea was not voluntary. A plea cannot be considered voluntary if a defendant is not being afforded his Sixth Amendment Constitutional right to assistance of counsel. The right to counsel presumes that counsel is effective or competent. In *Padilla v. Kentucky*,[28] the court held that counsel must inform a client whether his plea carries a risk of deportation and failure to do is ineffective assistance of counsel.

Ineffective assistance of counsel occurs whenever a defense attorney misinforms his client about the consequences of pleading guilty to a charge that would adversely affect his immigrant status. Furthermore, if counsel affirmatively gives his client erroneous advice,

> then the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'[29]

The ABA Standards for Criminal Justice state that,

> defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any pleas, as the possible collateral consequences that might ensue from entry of the contemplated plea.[30]

In *Redeemer v. State*,[31] the Missouri Court of Appeals stated that:

> When a Defendant inquires of his trial counsel concerning a collateral consequence, counsel misinforms him or her regarding that consequence, and the Defendant relies upon the misrepresentation in deciding to plead guilty, then counsel's action may rise to the level of constitutionally ineffective assistance of counsel.

Moreover, the Supreme Court has long been moving towards a broader view of attorney responsibility as well.[32]

> Even if the defendant was not initially aware of [possible waiver of deportation under the Immigration and Nationality Act's prior] §212(c), *competent defense counsel*, following the advice of numerous practice guides, would have advised him concerning the provision's importance.[33] (Emphasis added.)

In *U.S. v. Couto*,[34] the court of appeals held that an alien convicted of an aggravated felony should be permitted to withdraw her plea of guilty on the ground of ineffective assistance of counsel because her attorney's affirmative misrepresentation about the deportation consequences of her guilty plea fell below an objective standard of reasonableness. The court further held that Ms. Couto's overriding concern in remaining in the U.S. rendered it very unlikely that she would have pleaded guilty if she had understood the deportation consequences of that plea; hence, her plea was rendered involuntary by her counsel's ineffective assistance.

Involuntary Plea

At most trials and hearings, there is generally never a discussion, by the judge or his defense counsel, of a defendant's immigration status or the immigration consequences of his pleading guilty to said charge. However, a defendant's plea of guilty is not voluntary if the defendant or any *reasonably prudent person*, knew or would have known that his plea of guilty would result in him being deported from the U.S. *Not* until ICE initiates removal proceedings against them do they consult an immigration attorney and realize that they should never have pled guilty in the first place, and that because of this plea they will be deported back to their home country.

An attorney has an obligation to inform his client of the immigration consequences of a guilty plea, especially when a defendant is a noncitizen and his defense attorney is aware of his client's immigrant status. Not to address such concern is tantamount to malpractice especially when a defendant expressly informs counsel of his immigration status and counsel misinforms him of the true immigration consequences of pleading guilty to such a charge. In other words, a defendant should be permitted to prove that he entered his guilty plea involuntarily because his criminal defense attorney grossly misinformed him of the dire consequences of such a plea as this clearly amounts to ineffective assistance of counsel.[35]

28. *Padilla, supra* note 25.

29. *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970) and *Hill v. Lockhart*, 474 U.S. at 56, 106 S. Ct. at 369.

30. ABA Stds. of Criminal Justice, Guilty Pleas §14-3.2.

31. 979 S.W.2d 565, 572 (Mo. Ct. App. W.D. 1998).

32. *INS v. St. Cyr*, 533 U.S. 289, 323 n. 50, 121 S. Ct. 2271 (2001).

33. Citing Amicus Br. For Nat'l Assoc. Criminal Defense Lawyers at 6-8; *id.* at 322 n. 48, 121 S. Ct. 2271, noting that "the American Bar Association's Standards for Criminal Justice provide that, if a Defendant will face deportation as a result of a conviction, defense counsel 'should fully advise the Defendant of these consequences'" (citing ABA Standards for Criminal Justice, 14-3.2 Comment, 75 (2d ed.1982)).

34. 11 F.3d 179 (2nd Cir. 2002).

35. *State v. Abernathy*, 764 S.W.2d 514 (Mo. Ct. App. 1989).

A criminal defense attorney provides ineffective assistance of counsel in that an effective counsel would have known of the dire consequences an LPR would suffer if he pled guilty to a deportable charge, and would never have allowed him to do so. An attorney also misleads his client by not informing him that pleading guilty to a certain charge would greatly and adversely affect the client's immigrant status. Furthermore, whenever an attorney erroneously advises his client to plead guilty in order to obtain an SIS, which is still a conviction for immigration purposes, counsel is generally unaware of the serious consequences such a plea would have on his client's immigration status.

A defense attorney also does not know that the immigration laws define sexual assault in the first degree as a CIMT for purposes of deportation or else he would never have advised his client to plead guilty to such a charge. An effective counsel would have consulted with an immigration attorney first and then informed his client of the dire immigration consequences of a CIMT conviction. Generally, defense counselors are unaware of the fact that immigration law has its own standards and definitions, which differ from Missouri law; and, if the defendant did not have any prior felony convictions, the attorney should have negotiated the charge down to a different misdemeanor and/or had his client pay a greater fine to avoid a CIMT conviction for immigration purposes.

Most defendants plead guilty based on their defense attorney's recommendation. In some cases, it is solely based on the defense attorney's advice that a defendant decides to enter a guilty plea. However, if a defendant would have been informed of the dire consequences to his immigration status that such a guilty plea would have caused, it is safe to assume that a defendant would never have entered such a plea and the results of the proceeding would have been vastly different.

Furthermore, the U.S. Embassy may not allow him back into this country until after a ten-year or fifteen-year period of exile (and sometimes never). In some cases, a defendant, if removed, may never be allowed to return to the U.S. in spite of his Sixth Amendment Constitutional right to effective assistance of counsel. Removal is therefore unusually cruel for a defendant as he may also be permanently barred from reentering the U.S. and, in most cases, the charge that makes a defendant removable is usually grounded on a single guilty plea.

Granting Defendant's New Motion

A court should permit a defendant to withdraw his guilty plea especially if he was misinformed by his defense counsel of the direct and dire immigration consequences of such a plea. For example, a defendant who is convicted in state court of sexual misconduct in the first degree, a crime that is a misdemeanor under state law, can also be considered to have committed a CIMT for purposes of immigration law and removed from this country. If his said plea was in effect involuntary due to the poor counsel that he received, this is tantamount to ineffective assistance of counsel. If a defendant's motion to withdraw his guilty plea is granted, and he is permitted to plead to a lesser offense, ICE and the Immigration Court will have no basis in which to order the defendant be removed from this country. It is crucial to note that such a motion must be based on constitutional grounds or substantive defects versus immigration hardship or the vacation of a conviction will largely be ignored for removal purposes.[36]

Padilla v. Kentucky

The Supreme Court has held this year, in a landmark immigration case entitled *Padilla v. Kentucky*,[37] that such a plea is constitutionally defective. The Court stated that:

> It is our responsibility under the Constitution to ensure that no criminal defendant - whether a citizen or not - is left to the 'mercies of incompetent counsel.' *Richardson*, 397 U.S., at 771. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.[38]

The Court did not distinguish between direct and collateral consequences in defining the scope of constitutionally "reasonable professional assistance" required. This distinction was not considered by the Court because of the unique nature of deportation. The Court stated that:

> Although removal proceedings are civil, deportation is nevertheless intimately related to the criminal process [and] because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.[39]

In other words, when the deportation consequence is clear, a criminal defense attorney now has a duty to give his client correct immigration advice.

Conclusion

A defendant, especially a LPR facing a criminal charge, should never plead guilty without first consulting an immigration attorney. Many a criminal defense counsel, who rarely practices immigration law, merely assumes, from the length of their client's stay in this country, that their status would be unaffected, especially if the charge is only a misdemeanor. Unfortunately, many an LPR has found himself locked out of this country for in excess of a decade based on his defense counsel's erroneous immigration advice or the lack thereof.

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36. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

37. *Padilla, supra* note 25.

38. *Id.* at p. 17 of slip opinion.

39. *Id.* at p. 8 of slip opinion.