

Sunday, April 15, 2007

**Non-citizen criminal defendants need to know immigration consequences.**

Â The Statue of Liberty is worth little if immigrants' rights are not vigorously protected.Â NOTE: Thanks to our immigration law partnerÂ extraordinaire Jay Marks for reviewingÂ and commenting on my following article on adverse immigration exposure from criminal cases. IÂ submitted the article for publication in the next bimonthly newsletter of the Maryland Criminal Defense Attorneys Association. I chair the MCDAA's Immigration Law Committee, with the goal of encouraging criminal defense lawyers and everyone else to know and reduce the negative immigration consequences from criminal prosecutions.Â This article weaves new information and ideas with past writings I have posted in disparate parts of our website and blog. TheÂ immigration consequences of criminal convictionsÂ present a spider's web of counterintuition, mysteries wrapped in enigmas, and too much injustice.Â Kafka could not have written a more chilling tale. Â Immigration Law and Criminal Court: Fertile ground for fatal collisions. Â By Jonathan L. KatzÂ Criminal defense lawyers constantly need to address their clientsâ€™ immigration risks from criminal cases. However, immigration law, policy, and procedure are so overgrown, fickle, complex, often impractical, often oppressive and unjust, and often without sense that not enough hours in the day exist to catch up without practicing immigration law full-time.Â A few good initial tips for addressing immigration issues in criminal court are in my â€œProtecting Immigrants in Criminal Courtâ€• article that was published in the November/December 2003 MCDAA newsletter. The article is available at <http://markskatz.com/CriminalAttorneys.htm>.Â This article will address a few recent immigration issues affecting criminal defendants and some issues that are ever-present.Â AIDING AND ABETTING THEFT IS DEPORTABLEÂ In January 17, 2007, the Supreme Court held that aiding and abetting theft is deportable. *Alberto Gonzales v. Duenas-Alvarez*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 815 (Jan. 17, 2007).Â ThisÂ *Duenas-Alvarez* decision is particularly troubling in that aiding and abetting convictions often visit the innocent who just happened to be near stolen property. For instance, in Maryland, it is a crime to be in a car with knowledge that it is stolen, Md. Crim. Code Â§ 7-203, and the police routinely arrest every occupant of a stolen car. Â A DRUG TRAFFICKING CRIME IS ANY FELONY PUNISHABLE UNDER THE FEDERAL CONTROLLED SUBSTANCES ACTÂ In December 2006, the Supreme Court held in an 8-1 decision that automatic deportation of non-citizensÂ is not permitted for a drug conviction that is a felony under state law if it is not a felony under theÂ federal Controlled Substances Act. *Lopez v. Gonzales*, \_\_\_ U.S. \_\_\_, 127 S. Ct. 625 (Dec. 5, 2006).Â The Immigrant Defense Project of the New York State Defenders Association has posted a good online legal analysis about this *Lopez* case at <http://www.nysda.org/idp/webPages/LvGPressroom.htm>. The analysis confirms that *Lopez* applies only to automatic deportation from drug convictions. Consequently, a non-citizen convicted of a drug crime is not automatically out of harmâ€™s way from the numerous non-automatic negative immigration implications from convictions merely if the conviction is not a felony under theÂ federal Controlled Substances Act. Â BEWARE EXPUNGING CRIMINAL RECORDS OF NON-CITIZENSIf a criminal defendant is not a United States citizen, usually a criminal record expungement should not be sought. A criminal record expungement only shields the record from public access, so immigration authorities will still have access to information about expunged criminal cases.Â Immigration authorities often will want to see court records confirming a caseâ€™s disposition. Therefore, non-citizens ordinarily should avoid seeking expungements, but they are also well advised to obtain multiple certified copies of favorable criminal case dispositions in the event that the courtâ€™s file eventually becomes lost or destroyed. Â HANDLING IMMIGRATION DETAINERSImmigration and Customs Enforcement (ICE) often lodges immigration detainers against people jailed pretrial. Sometimes ICE fails to file charging documents along with the detainers, which can become a basis for invalidating the immigration detainer. Â In any event, a two-prong integrated attack should be mounted when a criminal defendant is both being held on a criminal court bond and on an ICE detainer. Beware paying the criminal court bond if no chance exists to release the defendant from the immigration detainer. Otherwise, the defendant will not earn incarceration credit while held only on an immigration detainer, and may be transferred to a detention facility farther from the county jail. Â At the same time, it is a mistake automatically to advise a defendant not to pay a criminal court bond merely when an immigration detainer exists. The best approach is to consult with an immigration lawyer on the chances and approach for striking the immigration detainer or obtaining an affordable bond with the immigration authorities. Â WHEN THE FEDS GO LOOKING FOR UNAUTHORIZED WORKERSFederal authorities have been making well-publicized workplace raids seeking people unauthorized to work and live in the United States. Such raids raise legal exposure not only for the workers, but also for their employers. Â By meticulously adhering to the I-9 law that requires employers to obtain work authorization proof when employment starts (as much as this amounts to forced deputization of private employers by the federal government), employers can reduce exposure to penalties for hiring unauthorized workers even if the worker has presented the employer with false or forged documents that look regular on their face. Â SILENCE IS GOLDENWith raids and all other contacts with authorities, people need to know that they have the right under the Fifth Amendment and other applicable laws to refuse to state their immigration status. Unfortunately, police, pretrial services employees and probation personnel repeatedly ask defendants their immigration status. A natural human tendency is to provide such information at least to people working

for the court system. This state of affairs makes it all the more important for lawyers to accompany their non-citizen clients to initial probation intake meetings and to interviews for presentence investigation reports. **Â LACKING A SOCIAL SECURITY NUMBER IS NOT THE END OF THE WORLD** Unfortunately, many undocumented people (a phrase preferable to **â€œillegal alienâ€•**) commit crimes involving lying and identity theft that are not necessary in the first place to obtain bank accounts and to conduct other daily affairs. **Â Fraudulent social security numbers and false identifications** are in rampant supply, and are rampantly purchased. Let alone criminal exposure, the immigration consequences for going down such a path can be very serious. **Â The temptation by undocumented people to provide false information to motor vehicle administration authorities can be strong and must, of course, be avoided.** Furthermore, people should beware using international driversâ€™ licenses in the United States if actually living full-time in the United States. **Â Undocumented people need to know that even when asked for a social security number, some acceptable alternatives to social security numbers may be available.** For instance, some banks, lenders, and other businesses will accept a tax identification number in place of a social security number. One does not need to be in the United States lawfully in order to obtain a tax identification number from the Internal Revenue Service. **Â Similarly, undocumented people should not avoid paying taxes merely for not having a social security number.** In fact, the payment of taxes (and payment of back taxes) often is an important factor in obtaining immigration benefits from the government. **Â BEWARE NOTARIES** In many countries, becoming a notary is an accomplishment backed up by significant education, and involves providing law-related services. People need to know that being a notary in the United States means nothing other than that the notary paid for a notary license and was not found to have had any convictions for theft or crimes of moral turpitude. Negligence (or worse) of a notary or anybody else in providing incorrect factual information in draft applications for immigration benefits can end up seriously harming the non-citizen who signs but does not correct the application, thinking s/he is in good hands with the notary. **Â CARRY YOUR IMMIGRATION LAWYERâ€™S CELL NUMBER** Nothing beats consulting a qualified immigration lawyer well in advance about any immigration risks from a criminal case. Better yet is to have immediate access to an immigration lawyer on the court date, in case any unexpected guilty plea offers are made that were not contemplated by the immigration lawyer (e.g., to convert a spousal assault charge to a property destruction plea, which could still involve negative immigration implications). **Â CONCLUSION** Immigration laws, practice and procedure become more complex and overwrought by the month. One blink can miss out on critical immigration law changes that might have a lasting and material impact on the life not only of a non-citizen criminal defendant, but on the defendantâ€™s family, as well. These landmines can be minimized through close teamwork between criminal defense and immigration lawyers. **Â Jon Katz is the criminal defense partner at Silver Springâ€™s Marks & Katz, LLC.** He is the chair of the MCDAAâ€™s Immigration Committee, and welcomes **Â new committee members and ideas for defending non-citizens.** Jon Katz.

Posted by Jon Katz in Jon's news & views at 00:02

Are undocumented parents liable to deportation procedures if found guilty for truancy charges against their children in the public school system in Maryland?  
Anonymous on Apr 24 2008, 09:58

Many factors need to be considered about the extent to which various convictions will create immigration problems, and are beyond the scope of my doing so here. That question is properly answered by consultation with a qualified immigration lawyer. As you might imagine, such prosecutions do not seem common, and I have not needed to look up your question yet. Jon  
Anonymous on Apr 25 2008, 07:14