

Seven Questions Noncitizens Facing Criminal Charges Should Ask

BY AMOS G. TYNDALL AND HEATHER S. THOMPSON

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Being accused of a criminal offense is a life altering event for most people. The indignity of arrest, the restraints on liberty created by pretrial release conditions, and the court appearances are scary. Statutes establish maximum, and sometimes minimum, penalties. Sentencing guidelines warn of potential jail time. Investigations, motions, arraignment and, sometimes, trials are standard aspects of the criminal process, albeit unfamiliar to most people.

Collateral punishments are different than the punishments imposed for a conviction. These punishments are additional consequences that result directly from the accusations without being officially imposed under the law. Examples include the impact to a good reputation, the defense costs, and the loss of a job.

Noncitizens face collateral punishments caused by the federal statutes that regulate immigration. Immigration consequences are not criminal penalties, but they are direct consequences of the criminal proceedings.

While we cannot predict every collateral punishment, defense counsel must make every effort to advise our clients of the immigration consequences that result from criminal allegations and the decisions clients make during criminal proceedings.

Quite often, our office represents noncitizens accused of criminal offenses. Most have some form of documentation: professors with green cards, professionals with temporary visas, or students with a study visa.

This report results from our research in those cases. Of course, many other questions will arise during any particular case, but these questions are a good starting point for understanding the impact of criminal allegations to a noncitizen.

Our goal in writing this report is to help noncitizens avoid entering pleas without considering the impact of those decisions on their immigration status.

1. What am I entitled to know before I plead guilty or go to trial?

The United States Supreme Court clarified defense counsel and the Court's obligations in a case called *Padilla v. Kentucky*.¹

Immigration law is a complex and specialized area of practice.² When it is not obvious how or whether a particular decision or outcome in a criminal case will affect a person's immigration status, a criminal defense attorney must advise only that the charges and outcome may result in adverse immigration consequences.³

When the law is clear, however, counsel must advise the client of the particular consequences.⁴ These obligations seem rather straightforward, but defense counsel (and judges) sometimes fail to ensure that clients understand the impact the client's decisions have on their immigration status.

Just this past summer, the Fourth Circuit Court of Appeals issued an opinion where defense counsel failed to advise the noncitizen defendant of the immigration consequences of entering a guilty plea.⁵ Again, the Court emphasized that general, equivocal advice (that a certain conviction may have immigration consequences) is insufficient where a clear explanation of the actual consequences of a conviction is available.⁶ Recently, a North Carolina appellate court considered the implications of a similar mistake.⁷

To get a better grasp on the potential problems, consider the following questions.

2. What's my status?

For our purposes, we can break your status down into three categories.

Citizens – no immigration consequences for criminal activity in the United States.

Immigration status – a person has immigration status when he/she has documentation allowing him/her to remain in the country legally for a period of time, like a green card, a work visa, or a student visa. This person is subject to immigration consequences only if he/she becomes removable, or deportable.

Removable – a person without documentation allowing his/her presence in the country is removable; a person with immigration status becomes removable after conviction of certain offenses.

3. Can I avoid deportation?

Let's first look at what offenses cause a person to become removable, or deportable.

A person becomes deportable, meaning removed **upon order of the Attorney General**, by committing any of the following (state or federal) offenses:⁸

- Crimes of moral turpitude within five years of admission to the U.S. (or ten years in the case of Lawful Permanent Resident) and for which a sentence of one year or more may be imposed

- Multiple criminal convictions of two or more crimes of moral turpitude (no time limitation)
- Aggravated felonies (see next section)
- High speed flight from immigration checkpoint
- Failure to register as a sex offender
- Convictions related to controlled substances (except possession of thirty grams or less of marijuana)
- Being a drug addict or abuser after being admitted to the United States
- Firearms violations
- Espionage, sabotage, treason, sedition crimes
- Domestic violence crimes, including stalking, child abuse, child neglect, child abandonment, domestic violence protective order violations
- Trafficking
- Security and related grounds
- Terrorist activities

Remember, removable does not mean that you will be deported in every situation. Undocumented workers are removable, but sometimes allowed to remain in the United States.

4. Am I subject to automatic deportation?

Aggravated felonies are given special, expedited removal treatment under immigration law.

Any noncitizen (regardless of “immigration status”) convicted of an “aggravated felony,”⁹ is subject to mandatory deportation.¹⁰ An attorney must advise his client of that consequence.¹¹

Aggravated felonies¹² include state and federal law violations as follows:

- Murder, rape, sexual abuse of a minor
- Illicit trafficking in a controlled substance,¹³ including a drug trafficking crime¹⁴
- Illicit trafficking in firearms or destructive devices¹⁵ or in explosive materials
- An offense relating to money laundering if the amount of the funds exceeds \$10,000¹⁶
- Explosive materials offenses¹⁷
- Firearms offenses¹⁸
- Crime of violence¹⁹ with term of imprisonment of at least one year
- Theft/burglary offense, including receipt of stolen property, with term of imprisonment of at least one year.
- Ransom offenses²⁰
- Child pornography offenses²¹
- Racketeering²²
- Gambling²³ – for a second or subsequent offense, for which a sentence of one year or more may be imposed
- Prostitution offenses for owning, controlling, managing, supervising a business, transporting in connection with a business²⁴
- Human trafficking, involuntary servitude offenses²⁵
- Espionage, sabotage, treason offenses²⁶

- Fraud offenses and tax evasion offenses in which losses exceed \$10,000²⁷
- Alien smuggling
- Document (passport) fraud offenses
- Failure to appear by defendant for service of sentence if underlying sentence is five or more years
- Failure to appear offense under a court order to answer to or dispose of felony charge for which sentence of two years imprisonment or more may be imposed
- Commercial bribery, counterfeiting, forging offenses, and trafficking in vehicles with altered identifications, if the offenses carry a term of imprisonment of one year or more
- Obstruction of justice, perjury, subordination of perjury, bribery of a witness offenses, if the offenses carry a term of imprisonment of one year or more

5. Can I come back if I leave the United States?

The immigration consequences of a criminal allegation are (potentially) two-fold. Not only could someone be **deported** (removed from the United States and sent to his/her home country), a criminal offense could leave him/her **inadmissible** (barred from lawful entry or reentry) to the United States.

Let's now look at what offenses cause a person to be "inadmissible," or ineligible for visas and admission to the United States.

For inadmissibility purposes, a judgment of conviction to a particular offense may not be necessary. Simply admitting to the offense or admitting to acts which constitute the essential elements of the offense could prevent a noncitizen's return to the United States.

The following offenses can render a noncitizen "inadmissible:"²⁸

- A crime of moral turpitude, including attempt and conspiracy offenses;
 - An exception is granted for someone who committed ONE crime of moral turpitude under either of the following circumstances:
 - committed by someone under eighteen and more than 5 years prior to the date of application for admission to United States OR
 - for which the maximum penalty for the crime does not exceed imprisonment for one year, and if convicted, the person was not sentenced to imprisonment for more than six months (regardless of time actually served)
- A controlled substance offense, including attempt and conspiracy offenses (except possession of 30 grams or less of marijuana or possession of drug paraphernalia used with marijuana);
- Conviction of two or more offenses for which the aggregate sentences were five years or more (regardless of whether a single trial or arose from a single scheme of conduct, and regardless of whether they were crimes of moral turpitude);
- Prostitution offenses within ten years of the date of application for entry;
- Being a controlled substance "trafficker" or a "beneficiary of a trafficker";
 - A trafficker is defined as someone who the consular officer or Attorney General knows or has reason to believe is or has been an illicit trafficker in any controlled substance or is or has been a knowing aider, abettor, assister, conspirator or colluder with others in illicit trafficking of any controlled substance

- A beneficiary is defined as a spouse, son, or daughter of a “trafficker” who has, within the past five years received any financial or other benefit from the illicit activity of the “trafficker” and knew or should have known that such benefit came from illicit activity.
- Money laundering (including anyone the Attorney General or a consular officer knows or has reason to believe is engaging or has engaged in money laundering);
- Sabotage, espionage, security and international trade offenses;
- Terrorist activities; and
- Committing a “serious criminal offense”²⁹ at any time, but being granted immunity from criminal jurisdiction for that offense, and as a result of that immunity, leaving the United States and not fully submitting to the jurisdiction of the United States courts for that offense.
 - A “serious criminal offense” is any felony, any crime of violence³⁰, and reckless driving or driving while impaired or under the influence of alcohol or any other prohibited substances and causing personal injury to others.

Other acts that can bar someone from entry, but may not arise from a criminal case:

- Failure to obtain required vaccinations;
- Having a mental or physical disorder and behavior that may pose or has posed a threat to the property, safety or welfare of self or others;
- Having a mental or physical disorder and a history of behavior associated with the disorder which has posed a threat to the property, safety or welfare of self or others, and which behavior is likely to recur or lead to other harmful behavior; and
- Being a drug abuser or addict (in accordance with the Secretary of Health and Human Service’s guidelines);

6. What constitutes a “conviction” for purposes of immigration law?

A conviction is a formal judgment of guilt entered by a judge.³¹

In addition, a conviction results where the accused enters a plea of guilty, nolo contendere, or has admitted sufficient facts to warrant a finding of guilt (even if adjudication of guilt is withheld) and the judge enters some form of punishment, penalty, or restraint on the person’s liberty.³²

In a deferred prosecution agreement, having no contact with another person or requiring a person to do anything might be perceived as a restraint on the person’s liberty.

A juvenile court disposition may not be a conviction for immigration purposes.

A disposition under a diversion statute entered without a plea may not be a conviction for immigration purposes.

7. What constitutes a term of imprisonment or sentence?

Serving or being ordered to serve an active jail or prison sentence is not necessary.

Any reference to a term of imprisonment is deemed to include the period of incarceration or confinement ordered, even if the sentence or execution of the imprisonment is suspended, in whole or in part.³³

Final Thoughts

This report is based on our review of relevant federal statutes. We hope the information helps you consider these important questions.

Needless to say, these questions will not be the only ones that arise during a criminal case, and this report is no substitute for independent research specific to a particular situation. Make sure you work with qualified criminal defense counsel, consult with an immigration lawyer, and evaluate the evidence against you before making any final decisions about a plea in your case.

If we can assist you, **please call** to schedule a time to talk.

Endnotes

1. 559 U.S. 356 (2010).
2. *Id.* at 369.
3. *Id.*
4. *Id.*
5. See *United States v. Murillo*, 927 F.3d 808 (4th Cir. 2019).
6. See *United States v. Swaby*, 855 F.3d 233, 240 (4th Cir. 2017).
7. See *State v. Marzouq*, __ N.C. App. __, 836 S.E.2d 893 (2019).
8. 8 U.S.C. § 1227.
9. 8 U.S.C. § 1101 (a)(43)(B).
10. See 8 U.S.C. § 1228(c).
11. See *Murillo*, 927 F.3d at 811.
12. 8 U.S.C. § 1101 (a)(43)(B).
13. 21 U.S.C. § 802(6).
14. 18 U.S.C. § 824(c).
15. 18 U.S.C. § 921.
16. 18 U.S.C. § 1956.
17. 18 U.S.C. § 824(h) or (i).
18. 18 U.S.C. § 922(g)(1)(2)(3)(4)(5), (j), (n), (o), (p), (r), 924(b) (h); 26 U.S.C. § 5861.
19. 18 U.S.C. § 16.
20. 18 U.S.C. § 785, 876, 1202.
21. 18 U.S.C. § 2251, 2251A, 2252.
22. 18 U.S.C. § 1962.
23. 18 U.S.C. § 1084, 1955.
24. 18 U.S.C. § 2421, 2422, 2423.
25. 18 U.S.C. § 1581-1585, 1588-1591.
26. 18 U.S.C. § 793, 798. 2153, 2381, 2382.
27. 26 U.S.C. § 7201.
28. 8 U.S.C. 1182 (a)(2).
29. 8 U.S.C. 1101(h)
30. 18 U.S.C. § 16
31. 18 U.S.C. § 1101(a)(48)(A).
32. *Id.*
33. 18 U.S.C. § 1101(a)(48)(B),