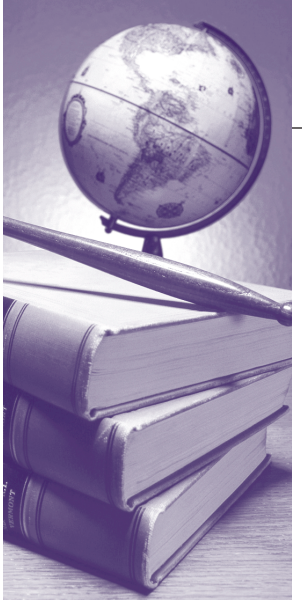


Aliens, Guilty Pleas, and the Risk of Deportation: Time for Legislative Action

By Moira K. Moran and Patrick M. Kinnally

The authors recommend that the General Assembly require judges to admonish noncitizen defendants who could be deported if they plead guilty.

Roberto has been arrested for possessing cocaine. He is a permanent resident alien but not a citizen. His arrest report reveals his birth in Mexico.

His lawyer negotiates with the prosecutor on the drug charge, stipulating that if Roberto pleads guilty he will receive a reduced sentence. Roberto agrees, and the parties set a court date. Roberto never asks about whether he might be removed or deported if convicted. At the plea hearing, the judge accepts Roberto's plea and admonishes the defendant.

These admonishments include a myriad of repercussions stemming from Roberto's guilty plea. Even though all three professionals dealing with Roberto in effectuating his plea know he will probably be deported at the conclusion of his sentence, no one tells him. Even though Roberto is the only one in the courtroom who does not know his likely fate, the plea proceeds in accordance with Illinois law.

This article proposes that the Illinois General Assembly require judges to admonish aliens when pleading guilty to an offense that carries with it the possibility of removal upon conviction. A legislative response would produce a benefit far outweighing the slight burden it imposes.

I. Guilty Pleas and Aliens: The Process

In the typical scenario, the alien defendant pleads guilty to the crime. The court's job in part is to determine that defendants' waivers of their constitutional rights are knowing and freely given and to admonish defendants about the direct consequences of their crimes. Unfortunately, in Illinois, unlike in many other states, the trial judge's advisory need not include information to the noncitizen defendant that his or her plea could result in removal.[1] Once the court accepts the plea, the alien is sentenced.

Upon incarceration, the penal institution notifies the Immigration and Naturalization Service ("INS") of the defendant's noncitizen status. In turn, the INS serves a detainer on the jailkeeper, who releases the alien defendant to the custody of the INS. The INS may proceed with removal hearings while the alien defendant serves his or her sentence or when he or she is released from jail into INS custody. For certain aggravated felons who are aliens, upon release from incarceration for their criminal sentences the INS may take them into custody pending a removal hearing and not authorize bail.[2]

An immigration judge convenes removal hearings, which are initiated by the INS by issuing a notice to appear to the alien.[3] In certain cases, the INS will permit release of the alien prior to the hearing only upon posting cash delivery bonds.[4] Ten percent of the face amount,

1. See Cal Penal Code §1016.5; Conn Gen Stat 54-1j; DC Code Ann §16-713; Fla R Crim P Rule 3.172; Haw Rev Stat § 802E-2; Mass Gen L ch 278, § 29D; Mont Stat § 46-12-210; Ohio Rev Code Ann § 2943.031; Or Rev Stat § 135.385; RI Gen Law § 12-12-22; Tex Crim Pro Code Ann § 26.13.
2. 8 USC § 1226; 8 CFR § 236.1(c). The INS bail bond program is currently under attack because it is incarcerating noncitizens indefinitely who may be removable. *Phan v Reno,* 56 F Supp 2d 1149 (WD Wa 1999) aff'd, sub nom, *Ma v Reno,* 208 F3d 815 (9th Cir 2000); 8 USC § 1231; cert granted, *Reno v Ma,* 121 S Ct 297 (2000).
3. 8 USC §§ 1229(d), 1229a.
4. 8 CFR § 236.1(c).

a standard requirement in criminal cases, is not enough. The full amount must be posted. The alien defendant is entitled to an administrative hearing before an immigration judge, who determines whether the alien is removable. Proof of the state criminal felony conviction often results in banishment at the culmination of such a hearing.[5]

INS rules challenge the most seasoned attorney. With so many confusing caveats to the Immigration and Nationality Act, made even more forbidding by recent amendments (see sidebar), alien defendants must be made aware that a guilty plea may send them to a land they do not know and from which they cannot return. For aliens, a removal order is the equivalent of forced exile. Ironically, the alien defendants may be unaware this action could be a consequence of their guilty pleas. It is anomalous that no one has to tell the defendant about the most serious "punishment" for his or her crime.

II. Duty to the Defendant in Guilty Pleas

Although neither judges nor attorneys are required to inform noncitizen defendants that they may be deported, both must inform the defendant of certain factors so that the plea comports with constitutional standards. Both the court and the attorney have a duty to advise the criminal defendant of the direct consequences of pleading guilty.[6]

For a consequence to be direct, however, it must affect the case in which the defendant enters the plea. A future or contemplated, but uncertain, result is irrelevant to the validity of the guilty plea in the eyes of the judiciary. The judiciary need neither foresee nor explain every ramification of a guilty plea.

To require state trial court judges to imagine every possible consequence of a guilty plea and then inform every defendant about each is probably impractical. Yet this does not mean that requiring the court to admonish a noncitizen defendant of something so obvious and significant as the possibility of removal to a foreign land is unduly burdensome. Many states require it.[7]

Under the Illinois Supreme Court Rules, court and counsel have the obligation to ensure that a defendant who pleads guilty does so knowingly and voluntarily.[8] Part of satisfying the "knowingly and voluntarily" standard is informing the defendant of the direct consequences of his guilty plea.

According to the Illinois Supreme Court, however, failure of the defendant's counsel to inform the defendant of the collateral consequence of a guilty plea is not enough to constitute a basis for withdrawal of the guilty plea.[9] Instead, counsel must have actively misrepresented whether the guilty plea could result in removal.[10]

Clients depend on their attorneys and the court to inform them of the full ramifications of a guilty plea. Although technically removal is not considered a punishment, the consequences of being forced to leave the United States may be more punitive than time served in jail. Long-term residents are separated from their families. Others are sent to countries where they have no relationships, personal or business, and may not even speak the language.

Because the consequence of removal is so severe, courts began deciding on Fifth and Sixth Amendment grounds that lawyers were ineffective in assisting their clients if they failed to recognize that they were aliens and neglected to inform them of the effect of a guilty plea on their right to remain in this country.[11] Thus, courts in many states placed the burden on the attorney to inform his or her client of the collateral consequences of a guilty plea. But, as the following review of Illinois case law shows, our courts have imposed no such requirement on either lawyers or judges.

III. Illinois Case Law Involving Guilty Pleas

In *People v Correa*,[12] *People v Huante*,[13] and, most recently, *People v Williams*,[14] the Illinois Supreme Court discussed forewarning the alien defendant in cases of possible removal, ultimately opting not to require such admonishments of lawyers and judges.

A. People v Correa

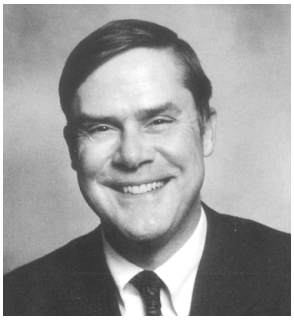
In *Correa*, the defendant was denied effective assistance of counsel when his attorney specifically misrepresented to him the effect of his guilty plea upon his immigrant status in response to the defendant's direct inquiry.[15] In other words, counsel incorrectly informed the defendant that a guilty plea would not affect his status as an immigrant when in fact it did.

In its decision, the court hinted that the judicial trend tended to favor hold-

5. 8 USC § 1229a(c)(3)(B).
6. *People v Williams*, 188 Ill 2d 365, 370-71, 721 NE2d 539 (1999).
7. See note 1 above.
8. SCR 402.
9. *Williams*, 721 NE2d at 543-44. Note that this article does not address a lawyer's duty to his or her immigrant client under the Rules of Professional Conduct, nor does it speak to potential malpractice liability for failing to accurately represent the consequences of a guilty plea.
10. Id, 485 NE2d at 312.
11. Brent K. Newcomb, *Immigration Law and the Criminal Alien: A Comparison of Policies for Arbitrary Deportations of Legal Permanent Residents Convicted of Aggravated Felonies*, 51 Okla L Rev 697, 711 (1998); *Strickland v Washington*, 466 US 668 (1984); *People v Albanese*, 104 Ill 2d 504, 473 NE2d 1246 (1984).
12. *Correa*, 485 NE2d 307.
13. *People v Huante*, 143 Ill 2d 61, 71, 571 NE2d 736, 741 (1991).
14. *Williams*, 721 NE2d at 543-44.
15. *Correa*, 485 NE2d at 312.

ABOUT THE AUTHORS

Moira K. Moran is an associate with Cannon and Dunphy in Milwaukee. She graduated from Valparaiso University School of Law in 1999, where she was an executive editor of the *Law Review.*



Patrick M. Kinnally is a partner in the Aurora firm of Murphy, Hupp & Kinnally, P.C., where he practices in the areas of civil litigation, local government, and immigration law. He clerked for Justice James D. Heiple in the Illinois Appellate Court and is an adjunct professor of law at Northern Illinois University. He graduated from John Marshall Law School in 1980. He and Moira Moran are father and daughter.

Recent Changes to the Immigration and Nationality Act Raise Stakes for Alien Defendants

In a nutshell, recent amendments to the INA have increased the number of crimes for which defendants can be deported, apply retroactively to crimes committed before the enactment of such amendments, and apply to many types of convictions. *Matter of Lettman,* Int Dec 3370 (BIA 1998) aff'd, *Lettman v Reno,* 207 F3d 1368 (11th Cir 2000); see also *Lewis v INS,* 194 F3d 539 (4th Cir 1999). Because of all of the recent changes, noncitizens have an even greater need than before to be admonished before entering a plea to a criminal charge.

Crimes of moral turpitude. Noncitizens "convicted of a crime involving moral turpitude" within five years of the date of admission "for which a sentence of one year or longer may be imposed" are removable. 8 USC § 1227(a)(2)(A)(i). The maximum sentence possible for the crime controls, not the actual sentence the alien received. 8 USC § 1227(a)(2)(A)(ii).

Also, aliens "convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct" are removable regardless of the sentence and whether the convictions resulted from a single trial. 8 USC § 1227(a)(2)(A)(ii). Two shoplifting convictions, one in 1988 and another in 1998, might be enough.

Retroactivity. Moreover, an alien is subject to removal for convictions regardless of when they occurred. New amendments to the INA apply to a criminal conviction on, before, or after the passage of such amendments. 8 USC § 1101(a)(43) (see *Matter of Truong,* Int Dec 3416 (BIA 1999)).

Also, such amendments may act as a bar to obtaining citizenship. (But see 8 CFR§ 316.10(b)(1)(ii), which does not bar obtaining naturalization if the aggravated felony conviction occurred prior to November 29, 1990.) This repercussion is a serious concern for lawful permanent residents who want to travel outside the United States, since it may make them inadmissible upon return.

Aggravated felonies. Most aliens, whether lawful permanent residents or otherwise, are removed because of convictions for "aggravated felonies." The INA defines an aggravated felony by reference to more than 20 separate subdivisions and at least 50 federal statutes. 8 USC § 1101(a)(43).

Aggravated felonies are of two types: character and punishment. The former are aggravated felonies regardless of the term of imprisonment. A domestic violence assault conviction – a misdemeanor – may be an aggravated felony. 8 USC § 1227(a)(2)(E). Certain driving-while-intoxicated convictions may also be considered aggravated felonies. *Matter of Magallanes,* Int Dec 3341 (BIA 1998); *Matter of Puente,* Int Dec 3412 (BIA 1999); but see *U.S. v Chapa-Garza,* 99-51199 (5th Cir March 1, 2001); *United States v Rutherford,* 54 F3d 370 (7th Cir 1995).

Indecency with a child by exposure is an aggravated felony. *Matter of Rodriguez,* Int Dec 3411 (BIA 1999). An attempted fraud conviction and the "crime of stalking" are also considered aggravated felonies under the INA's definition.

Punishment crimes, on the other hand, are aggravated felonies that require an ordered sentence of at least one year and include crimes of violence. 18 USC § 16; *Xiong v INS,* 173 F3d 601, 604 (7th Cir 1999). In determining whether a crime of violence is tantamount to an aggravated felony under the INA, one must analyze the state statute upon which the conviction rests. *Solorzano-Patlan v INS,* 207 F 3d 869 (7th Cir 2000). In any crime defined or interpreted as an aggravated felony under the INA, an alien is removable and is conclusively presumed to be deportable. 8 USC § 1227(a)(2)(A)(iii); *Matter of Sweetser,* Int Dec 3390 (BIA 1999).

Convictions. If defining a deportable crime under immigration law appears daunting, determining what constitutes a conviction under the INA can be equally difficult. A conviction for immigration purposes occurs when a defendant pleads guilty or nolo contendere. In immigration parlance, a conviction is a formal judgment of guilt of the noncitizen entered by a court.

A conviction for INA purposes results when the defendant admits facts sufficient to warrant a finding of guilt and the judge orders some form of punishment, penalty, or restraint on the noncitizen's liberty. *Matter of Roldan-Santoyo,* Int Dec 3377 (BIA 1999), rev'd, sub nom, *Lujan-Armendariz v INS*, 222 F3d 728 (9th Cir 2000).

If the noncitizen evades removal upon conviction, he or she must still pass the hurdle of the sentencing element of a conviction. This component, depending on its length, may be determinative as to whether that conviction results in removal.

Remedies. The INA has rendered the ameliorative sentencing schemes of deferred adjudication, conditional discharge alternatives, and their counterparts largely illusory. The INA states succinctly that "[a]ny reference to a term of imprisonment of a sentence with respect to an offense [includes] the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or part." 8 USC § 1101 (a)(48)(B); see *Matter of Punu,* Int Dec 3364 (BIA 1998).

For example, a judge may sentence a noncitizen defendant to two years in prison. Subsequently, the sentence is probated for two years in lieu of imprisonment. This is a two-year sentence for immigration purposes.

Historically, the INA provided a multitude of remedies in deportation hearings. These remedies might have cured a noncitizen's criminal conviction. They were known as waivers. An immigration judge had discretion in granting these waivers, depending on factors that tended to show the alien's ties to the United States.

The recent amendments to the INA have curtailed and eliminated the authority of an immigration judge to grant such waivers. For the most part, noncitizens convicted of an aggravated felony are not eligible for such remedies.

ing counsel responsible for informing clients of the collateral consequence of deportation because of its severity. However, the court ultimately avoided discussing the passive conduct of an attorney who fails to inform the client of the consequences of a guilty plea. Based on the successful ineffective assistance of counsel claim waged against his attorney, Correa was entitled to withdraw his plea in a post-conviction setting, effectively keeping the INS out of his life.

Subsequent appellate courts interpreted *Correa* as suggesting that an attorney has a duty to inform a noncitizen client of the possibility of deportation in response to a guilty plea even if the defendant does not raise the issue.[16] These courts, extrapolating from *Correa*, found no difference between passively or actively misrepresenting the possibility of removal to a client. But the supreme court would soon prove these courts mistaken.

B. People v Huante

In the wake of these post-*Correa* appellate court rulings, the Illinois Supreme Court ultimately opted not to require an admonishment in the 1991 case of *People v Huante*.[17] In *Huante*, the defendant pled guilty to felony drug charges. He filed a post-conviction petition to set aside the guilty plea based on ineffective assistance of counsel, claiming that he would not have pled guilty had his attorney first determined his noncitizen status and advised him that he would be subject to deportation as a result of his convictions.

The defendant had been a lawful permanent resident for 13 years at the time of his arrest. His attorney never questioned him about his citizenship status, and the defendant never divulged that he was a noncitizen. The attorney testified that he was not aware of the defendant's status.

The *Huante* court noted that it was being asked to address an attorney's failure to inform a noncitizen client, which the *Correa* court declined to address previously. The court determined that a defendant did not have to be informed of the collateral consequences of a plea for it to be "knowing and voluntary," the standard that a guilty plea must meet to comply with Supreme Court Rule 402.[18] Rule 402 does not require that the judge inform the criminal defendant of the collateral consequences of a guilty plea, including the possibility of deportation upon the entry of that plea.

"Because the judiciary has refused to do so, the Illinois General Assembly should require judges to admonish alien defendants when they plead guilty that deportation is a retributive consequence."

Once again, the court noted that neither counsel nor the court had the responsibility to the defendant to inform him of the collateral consequences of his guilty plea.[19] As the court stated in *Correa* and *Huante*, only active misrepresentation of a collateral consequence, like deportation, constituted ineffective assistance of counsel.

In the *Huante* decision, the supreme court specifically overruled appellate court decisions that granted a defendant's claim for ineffective assistance of counsel because the attorney did not make himself aware of the client's immigrant status,[20] finding that such a consequence is only collateral. Accordingly, counsel and court need only admonish the defendant of the direct consequences of a guilty plea even though the attorney can still not actively misrepresent the implications of pleading guilty.

The result, although perhaps legally sound, makes little practical sense. If lawyers and the government negotiate plea agreements, the defendant who enters into that contract has an expectation about what the performance entails. That expectation is hardly realized when the performance of the contract results in deportation.

C. People v Williams

In November 1999, the Illinois Supreme Court addressed a judge's duty in *People v Williams*.[21] In this decision, the court emphasized that a judge must admonish a defendant pleading guilty of the direct consequences of his or her guilty plea. If, however, a consequence of the plea is collateral, then the defendant does not have a right to be advised of it before entering the plea. In other words, a defendant can enter a knowing and intelligent guilty plea without being advised of its collateral consequences.

Jettie Williams claimed that his original guilty plea to the attempted murder of Leroy Wade could not be used against him when he was retried for the murder of Wade. Wade died five years after Williams' original plea to the attempt charge. His attorney moved, in limine, to bar use of the former plea when the state sought to try Williams for Wade's murder. In reversing the trial and appellate courts, the supreme court concluded that the original plea was admissible in the murder trial.

The court concluded that it would be too unwieldy to require that the defendant be informed of every foreseeable consequence stemming from a plea of guilty. The trial court's obligation to inform encompasses only direct consequences of the sentence, i.e., those that the trial judge can impose.

A collateral consequence is not defined by the length or nature of the sentence imposed on the basis of the plea. Generally, a collateral consequence results from action taken by an agency that the trial court does not control. "Collateral consequences include, 'loss of public or private employment, effect on immigration status, voting rights, possible auto license suspension, possible dishonorable discharge from the military, or anything else.'"[22]

The direct consequences of the plea are limited to its penal consequences, the court found. Deportation cannot be a penal consequence because it is not criminal punishment.

---

16. See *People v Padilla*, 151 Ill App 3d 297, 502 NE2d 1182 (1st D 1986); *People v Sak*, 186 Ill App 3d 816, 542 NE2d 1155 (1st D 1989); *People v Miranda*, 184 Ill App 3d 718, 540 NE2d 1008 (2d D 1989); *People v Rodriguez*, 202 Ill App 3d 839, 841, 560 NE2d 434, 436 (3d D 1990); *People v Maranovic*, 201 Ill App 3d 492, 559 NE2d 126 (1st D 1990); and *People v Luna*, 211 Ill App 3d 390, 570 NE2d 404 (1st D 1991).
17. 571 NE2d 736.
18. Id, 571 NE2d at 740-41.
19. See *United States v George*, 869 F2d 333, 336-37 (7th Cir 1989), where the seventh circuit interpreting Illinois law also concluded that the consequence of possible deportation upon an alien who pled guilty to a criminal charge which rendered him deportable was collateral in nature.
20. *Huante*, 571 NE2d at 742, overruling *Padilla*, 502 NE2d 1182; *Miranda*, 540 NE2d 1008; and *Maranovic*, 559 NE2d 126.
21. *Williams*, 721 NE2d 539.
22. Id, 721 NE2d at 544.

IV. Legislative Response

The judiciary has clearly delineated its duty to defendants in terms of collateral and direct consequences. Simply stated, no matter the significance of the collateral consequence, the judiciary and the attorneys who represent the defendant have no duty to inform the defendant about it.

Because the judiciary has refused to do so, the Illinois General Assembly should require judges to admonish alien defendants when they plead guilty that deportation is a retributive consequence. The need for an admonishment requirement is greater than ever, because removal for an aggravated felony is effectively a lifetime ban from the United States.

The state and federal criminal trial judge typically asks a set of standard questions to elicit whether a defendant's plea is knowing and voluntary. A simple judicial admonishment concerning deportation consequences surely would not be burdensome.

Other states and the District of Columbia have concluded that the collateral consequence of removal is important enough to require that the court and counsel advise the noncitizen defendant that he or she may suffer immigration consequences as a result of a plea bargain or conviction.[23] Some of those states, like Illinois, have large noncitizen populations.

"The need for an admonishment requirement is greater than ever, because removal for an aggravated felony is effectively a lifetime ban from the United States."

The legislatures from these states, in their service to the state's residents, recognized the need to inform defendants in view of the serious adverse consequences a removal order entails. With the recent amendments to the INA, the need is even greater. The alien defendant's only real chance to avoid removal is largely in the state criminal trial court, not the immigration court. The trial court is the place where the parties agree to the plea. A simple statement, such as the one mandated by the California penal code, is sufficient to allow a defendant to plea knowingly and voluntarily:

> 1016.5(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
>
> (b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section.[24]

This is hardly burdensome. As a state resident, the noncitizen should be afforded this important constitutional guarantee.

Now that a commission is being appointed to rewrite the Illinois Criminal Code, this problem should be considered. Alien defendants deserve such a law and the information it would provide. In the meantime, however, lawyers and judges should, in the name of basic fairness and justice, assume this responsibility of their own volition. ■

23. See note 1 above.
24. Cal Penal Code § 1016.5.

Reprinted from the *Illinois Bar Journal*
Vol 89, No. 4, April 2001
www.isba.org