Legal issues in Criminal Court: When a Defendant, Victim or Witness is an Immigrant

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Topics will be covered in the order they might arise during a criminal case, starting shortly after an arrest.

I. Pretrial Issues.

A. Detention and bail – Source of right – USC Amendment 8 – "Excessive bail shall not be required…." Applies without any regard to citizenship or alienage.

1. Factors influencing detention and bail. N.C. Gen. Stat. §15A-534:

> (b) The judicial official in granting pretrial release must [release] unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. Upon making the determination, the judicial official must then impose condition (4) in subsection (a) above instead of condition (1), (2), or (3), and must record the reasons for so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to G.S. 15A-535(a).
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> (c) In determining which conditions of release to impose, the judicial official must, on the basis of available information, take into account the nature and circumstances of the offense charged; the weight of

> the evidence against the defendant; the defendant's family ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

How could immigration status affect these factors? (1) Risk of flight might be greater if the result of a conviction would be deportation, rather than just jail or a fine. (2) The items in sub-section (c), particularly family ties and employment will weigh heavily often in such cases. (3) Merely being in the U.S. without authorization is not evidence of previous flight to avoid prosecution or failure to appear at court; however, the person's immigration file might show such factors. If I were a judge weighing a bond question, I'd at least check with ICE.

2. Realities: If there's a "Detainer" filed by U.S. Immigration & Customs Enforcement with the custodian (see 8 CFR §287.7(d)), then release of any kind (on bond or otherwise) will be superseded by that order, which requires the custodian to notify ICE and hold the person for 48 hours, weekends and holidays excluded, in order to allow ICE to take custody.

B. *Miranda* issues and admissibility of statements.

1. *Miranda* warnings must be presented in a language that effectively communicates their import to the person being questioned. *United States v. Yunis*, 273 U.S. App. D.C. 290, 859 F.2d 953, 965 (D.C. Cir. 1988).

However, mere alienage and limited ability to weigh fully all the tactical advantages of speaking or remaining silent or of waiting for a lawyer are not enough to invalidate a waiver given after such warnings are presented. Id. Quoting:

> The fact that courts define "knowing and intelligent" in this circumscribed manner does not mean that a defendant's alien status is irrelevant to the inquiry. On the contrary, courts use an "objective standard" for evaluating a defendant's waiver, and this takes into account "the education, experience and conduct of the accused." *Pettyjohn v. United States*, 136 U.S. App. D.C. 69, 419 F.2d 651, 654 n.7 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1058, 90 S. Ct. 1383, 25 L. Ed. 2d 676 (1970). Clearly, a defendant's alienage and unfamiliarity with the American legal system should be included among these objective factors. However, the significance of these factors will be limited to determining whether a defendant knew and understood the warnings that were read to him. The fact that a defendant's alien status may have prevented him from understanding the full, tactical significance of his decision to confess will not invalidate his waiver.
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> In what ways might a defendant's status as an alien affect his understanding of the rights read to him and, thus, the knowing and intelligent quality of his waiver? The facts of one federal case illustrate the interplay between foreign background and knowing waiver. In *United States v. Nakhoul*, 596 F. Supp. 1398 (D. Mass. 1984), *aff'd sub nom. United States v. El-Debeib*, 802 F.2d 442 (1st Cir. 1986), the defendant was informed of his *Miranda* rights in a police van, at the time of his arrest in Boston. He was later transported to a windowless holding cell, where he was interrogated in a much more aggressive fashion and during **[**39]** which time he was "visibly upset and wept." 596 F. Supp. at 1401. The judge found that, because defendant was a Lebanese national whose "understanding of American law, customs, and constitutional rights may be limited," he might not have realized that he could invoke the rights he received at the time of his arrest when he was subsequently questioned by different police officers in the different setting. *Id.* at 1402. Accordingly, the judge suppressed statements made in the holding cell.

2. Complications when admissions are made to Immigration agents or others. Since immigration proceedings are civil, not criminal, in nature, the failure of ICE officers to give *Miranda* warnings does not bar use of statements obtained from the immigration proceedings. *U.S. v. Solano-Godines*, 120 F.3d 957 (9th Cir. 1997). ICE guidelines require that such warnings be administered anyway (See 8 CFR §287.8(c)(v)), but officers have less incentive to be meticulous in following those guidelines than regular law enforcement officers. Consequently, especially where a language barrier exists, a more thorough hearing may be needed to address *Miranda* issues than otherwise.

C. Fourth Amendment issues.

1. Does it always apply? Probably so, where the search took place in the United States. The Fourth Amendment speaks of the "right of the people to be secure" in their privacy, not the right of citizens alone. However, the Supreme Court has suggested that "the people" is a term of art referring only to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *United States v. Verdugo-Urdiquez,* 494 U.S. 259, 265 (1990). If this suggestion were followed through, might it be that the 4th Amendment does not protect illegal aliens?

The case that raised this question, *United States v. Verdugo-Urdiquez,* 494 U.S. 259 (1990), actually addressed a different issue, whether an illegal

search conducted by DEA agents in Mexico, on the residence of a Mexican citizen who was being tried for drug violations in the U.S. So any suggestion that the 4th Amendment's reach is limited to some subclass of U.S. residents was *obiter dicta* at best.

2. Applicability of exclusionary rule when initial investigators are operating under Immigration Law. The exclusionary rule does not apply in removal procedures. *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). As with *Miranda* issues, ICE agents are supposed to follow proper criminal procedure in obtaining permission to search or obtaining a search warrant, but they are not absolutely meticulous in this. However, when they have obtained evidence that a prosecutor seeks to use at a criminal trial, it is most likely subject to suppression.

D. Vienna Convention.

1. Article 36(1)(b) of the Vienna Convention on Consular Relations (1963) requires that an authority arresting a foreign national notify the consulate of that country and permit communications between the consulate and the detainee. American police, state troopers and sheriff's departments have generally ignored this requirement. The Supreme Court has ruled that a confession made by a foreign national who was not informed of his right to communicate with his home consulate may not be suppressed on that ground. *Sanchez-Llamas v. Oregon*, U.S. (2006). The Court expressly refused to rule on whether the Vienna Convention creates rights which may be asserted by an

individual in his or her criminal case, but did hold that it could not impose an exclusionary rule based on the Convention upon state courts. Moreover, the Court held that state procedural default rules barring, for example, a Vienna Convention objection to evidence that is not raised timely at trial, apply.

2. However, still open is the question whether a criminal defendant who credibly asserts that his constitutional rights were violated by noncompliance with the Convention can attack his conviction on that basis. The case was argued on 30 April 2007 - *Medillin v. Texas* (2007). Beyond that issue, there is also the fact that President Bush has ordered state and local law enforcement to comply – and they're still not complying. Does he have power to do that? The Court spent most of its oral argument time on that interesting question.

3. Bottom line: A Vienna Convention violation does not *per se* justify suppression of evidence, but *might*, if the defendant can show that the violation compromised his or her rights otherwise.

II. Issues at trial

A. Evidence – Immigration status and immigration violations: Admissible?

1. Directly against a defendant who does not testify. It's hard to imagine a case in which the immigration status of a non-testifying defendant would stand the twin tests of Rules 402 and 403 – "Evidence which is not

relevant is not admissible," and "although relevant, evidence ay be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…." N.C. Gen. Stat. §8C-1, Rules 402 and 403, respectively. Only if immigration status were an element of a particular case could that status be made part of the State's case in chief without clearly violating a rule of evidence. I could imagine that in a prosecution for carrying a concealed weapon (N.C. Gen. Stat. §14-269), the defense might argue possession of a concealed handgun permit and the State would be allowed to ask whether the defendant is a citizen, a requirement for obtaining such a permit. See N.C. Gen. Stat. §14-415.12(a)(1). Similarly, a permit to sell crossbows or pistols cannot go to an illegal alien. N.C. Gen. Stat. §14-404(c)(5).

2. When a defendant stands up to testify, is his or her immigration status relevant and admissible? *Sandoval v. State*, 442 S.E.2d 746 (Ga. 1994); *State v. Avendano-Lopez*, 904 P.2d 324 (Wash. Ct. App. 1995). In both of these cases, State appellate tribunals held that immigration status could not be introduced even in cross-examination of a defendant. In both of those cases, the courts compared immigration status with race, nationality, or color as a subject which does not bear upon character or credibility and is intended to arouse irrational animosity. See also *State v. Mehralian*, 301 N.W.2d 409, 418-419 (N. Dak. 1981); *Riascos v. State*, 792 S.W.2d 754, (Tex. App. 1990), in which the prosecutor's references to the defendant's nationality and immigration status were so pervasive and prejudicial that a Texas court found the defense attorney's failure to object ineffective assistance of counsel.

3. In impeachment of a witness (government or other), mere immigration status by itself is likely inadmissible to impeach a witness's credibility. Twice the North Carolina Court of Appeals has affirmed convictions in which the defendant was disallowed to elicit testimony that a prosecuting witness was an illegal alien. *State v. Hatcher*, 136 N.C. App. 524 (N.C. App. 2000); *State v. Little*, N0. COA 06-289 (6 March 2007). Other jurisdictions similarly follow the North Carolina rule, including a couple of courts which have considered the question under the U.S. Constitution's Confrontation Clause. *See Scales v. Harrison*, Case 05CV1940-LAB (1 February 2007), slip. Op. at 18; *Toliver v. Hutlick*, 470 F.3d 1204, 1207-08 (7th Cir. 2006).

However, evidence that a prosecution witness is an illegal alien might be introduced to suggest that he or she has cut a deal with the government for testimony – thus evidence of bias. See *People v. Austin*, 123 Ill. App. 3d 788, 463 N.E.2d 444 (1984).

4. However, N.C.G.S. § 8C-01, Rule 608(b) allows use of specific conduct to challenge a witness's credibility in cross examination; hence, if the witness is an illegal alien who obtained admission to the United States through an affirmative act of misrepresentation or fraud, then that fact might be brought out on cross-examination. *See State v. Morgan* 315 N.C. 626, 634 (1986). The various immigration related criminal acts which might be involved include:

- Unlawful, surreptitious and fraudulent entry. An alien who entered the United States at a time or place not designated by immigration officers

or without inspection by such officers or by misrepresentation of any kind is subject to a fine and imprisonment for up to two years under INA § 275(a); 8 U.S.C. § 1325. As noted above, more than mere presence without authorization must be proven to sustain this charge. *U.S. v. Doyle*, 181 F.2d 479 (2nd Cir. 1950).

- Violation of terms of supervision for an alien under supervision of immigration officers pending removal. INA § 241(a)(3), 8 U.S.C. § 1231 (a)(3).
- Failure to depart the US under an order of removal based upon criminal misconduct or failure to register under INA § 243(a)(1), 8 U.S.C. § 1253(a)(1).
- Stowaways under 18 U.S.C. § 2199, alien crewmen who stay in the United States after expiration of their conditional landing permits, INA § 252(c), 8 U.S.C. § 1282(c), are also subject to criminal action.

However, since an alien might be out of status for a number of reasons other than affirmative misrepresentation (e.g., walking across an unpatrolled border, staying longer than the authorized period of employment, or working without authorization), a court should probably conduct a *voir dire* examination before admitting evidence of this sort. Moreover, if the misconduct leading to illegal presence was criminal, the alien is also able to invoke the 5th Amendment privilege against answering the question.

B. Pleas that are *really, truly* voluntary and informed:

1. Language issues. In reference to language, a guilty plea must fit the same understandability rules as *Miranda* warnings; 14th Amendment due process rights are directly implicated in any waiver that is not informed and voluntary, and any plea entered without adequate translation is bound to be overturned. *See, e.g., United States v. Mosquera*, 816 F. Supp. 168 (E.D.N.Y. 1993); *see also* Deborah M. Weissman, BETWEEN PRINCIPLES AND PRACTICE: THE NEED FOR CERTIFIED COURT INTERPRETERS IN NORTH CAROLINA, *78 N.C.L. Rev. 1899 (2000).* It is very important to be sure that a foreign defendant operating in the context of a judicial process which is strange to him or her have clear and accurate translation at all critical points in a trial, particularly if he or she waives the rights involved in a trial of the case and seeks to enter a plea.

2. Beyond the standard advisements which are given to any defendant entering a plea, State law (N.C.G.S. §15A-1022(a)(7)) requires that a defendant who is not a citizen of the United States be told that "a plea of guilty or no contest may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law…." This advisement is a good thing, although of course it is generally delivered in a somewhat liturgical monotone unlikely to penetrate most defendants' haze of relief at getting the court procedures over with.

State law does not require overturning a plea which lacks perfect compliance with the advisements of this section. *State v. Williams*, 133 N.C. App. 326, 515 S.E.2d 80 (1999). Its most important function is to insure that a

defendant understands the direct consequences of his or her plea. *Bryant v. Cherry*, 687 F.2d 48 (4th Cir. 1982), *cert. denied*, 459 U.S. 1073 (1982). Immigration consequences are clearly not direct consequences of a plea, but collateral. Consequently, neither federal nor North Carolina authorities have held that failure to advise a defendant of immigration consequences will invalidate a guilty plea. It is pretty clear from federal decisions and dicta in North Carolina cases, however, that if a court affirmatively and egregiously misstated the immigration consequences of a plea, such a gross mistake could require reversal of the conviction on appeal. [See below, discussion of *Goforth*.]

C. Sentencing for those with immigration consequences. The 14th Amendment's Equal Protection clause forbids a state, including the judicial branch thereof, to discriminate against a person based on alienage. Consequently, a court may not base a sentencing decision upon a defendant's nationality. *United States v. Gomez*, 797 F.2d 417, 419 (7th Cir. 1986):

> It is clear that both the government and the sentencing judge noted Gomez's status as an illegal alien from a Latin American country with an illegal drug reputation. If misused those considerations could violate the constitutional protections to which aliens, including illegal aliens, are entitled under the *Fifth* and *Fourteenth Amendments*. An illegal alien comes within the scope of the word "person" guaranteed due process under the *Fifth* and *Fourteenth Amendments*. The class of persons, including illegal aliens, which also may avail itself of the equal protection guarantee is coextensive with that class entitled to due process. *Plyler v. Doe, 457 U.S. 202, 210-216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982).*

However, consideration of "other illegal acts" perpetrated by the defendant and other information relevant to ordinary sentencing protocol is appropriate, even though some such data will be the result of alienage or of unlawful status. When

considering probation, a judge may well be aware that ICE plans to seize the convict for deportation as soon as he or she is out of state physical custody. May the judge therefore choose against a community punishment, purely because the offender's immigration status will make participation in community service impossible? That's still an open question, but seems likely to be allowed by the current state of thought. *See Yemson v. United States*, 764 A.2d 816 (D. C. Ct. App. 2001).

See also: *State v. Liviaz*, 389 N.J. Super. 401, 913 A.2d 151 (2007) (Although a Pretrial Intervention Program (PTI) application was not subject to per se denial due to a defendant's status as an illegal alien, such status was relevant. As such, the orders granting defendants' PTI applications over the prosecutor's objections were reversed since the rejections were based on other facts).

III. Postconviction – Assessing claims of ineffective assistance and other issues.

Occasionally a lawyer will represent a foreign defendant in a Motion for Appropriate Relief, most often in order to undo an improvident plea bargain for which original criminal counsel didn't know the immigration consequences. When such a case arises, two important features will interplay:

A. In order for such a MAR to have the effect of reversing an adverse immigration consequence, the court's order vacating a judgment must not only

vacate that judgment, but must do so for legal error in the original proceeding. "Compassion for the poor alien" is not a ground which immigration authorities will accept. Compassion for aliens is somewhat anathema to their whole life's purpose. Consequently, postconviction counsel will need to advance legally sufficient grounds to vacate the judgment, such as the plea being invalid for inadequate translation or ineffective assistance of counsel.

B. North Carolina law does not yet impose a duty upon criminal defense lawyers to inquire into the immigration consequences of a guilty plea. There simply is no appellate law on the subject. 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." ABA Standards for Criminal Justice, 14-3.2 Comment, 75 (2d ed. 1982). Moreover, there is at least one North Carolina appellate decision in the malpractice area that holds that a real estate attorney might be liable for failing to investigate tax consequences of a land transaction – if such investigation is the ordinary thing done by other competent real estate lawyers. *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657 (N.C. App. 1984). Even so, malpractice and ineffective assistance of counsel are not coextensive concepts.

While North Carolina law is yet undeveloped in this area, there is significant jurisprudence on ineffective assistance in the crossroads of criminal and immigration law. Generally, federal and state courts have held that failure to

inform a client of possible immigration consequences is not, by itself, ineffective criminal representation, because such consequences are collateral, rather than direct effects of a criminal judgment. However, most jurisdictions which have considered the issue also find that a lawyer's erroneous advice concerning immigration consequences in a criminal case may be ineffective assistance of counsel, especially where the immigration consequences are particularly serious.

This seems likely to be the rule in North Carolina. The Court of Appeals has held that a lawyer's performance is ineffective when he egregiously errs in explaining a critical collateral consequence of the plea, such as the appealability of the sentence imposed. *State v. Goforth*, 130 N.C. App. 603, 503 S.E.2d 676 (1998). The *Goforth* case cited Fourth Circuit precedent, *Strader v. Garrison,* 611 F.2d 61, 64 (4th Cir. 1979), for that proposition. Interestingly, in *Strader*, the Fourth Circuit had called two cases "aberrations" which refused to hold a lawyer's incorrect advice about immigration consequences to be constitutional ineffectiveness. Based both upon analogy to *Goforth* and its approval of *Strader*, North Carolina would probably hold bad advice concerning a serious immigration consequence to be ineffective representation for purposes of vacating a plea. Cf. *Rollins v. State*, 591 S.E.2d 796 (Ga. 2004) (Affirmative mistake in advising of immigration consequences is ineffective assistance.).

A stronger position still is that held in Oregon. The Oregon Supreme Court concluded in *Lyons v. Pearce*, 298 Or. 554, 694 P.2d 969 (1985), that, for attorneys to provide constitutionally adequate representation to clients who are

considering whether to accept a guilty plea, Oregon attorneys must tell their alien clients about the risk of deportation. In *State v. Creary*, 2004 Ohio 858 (Court of Appeals, 2004), the Court of Appeals held that an attorney's inaccurate advice concerning the immigration consequences of a criminal plea could constitute ineffective assistance of counsel, justifying withdrawal of that plea. Accord: *Gonzalez v. State*, 191 Or. App. 587, 83 P.3d 921 (2004); Further accord: Trial counsel's failure to advise defendant that his guilty plea to theft carried possible deportation consequences constituted ineffective assistance of counsel; trial counsel acknowledged that he failed to inquire as to defendant's immigration status, and defendant established special circumstances showing that if his attorney had advised him of the penal consequences of his guilty plea there was a reasonable probability that he would have chosen to proceed with trial through evidence that defendant had lived in the United States for over 20 years and had a wife and 13-year-old daughter. *Sial v. State*, 862 N.E.2d 702 (Ind. Ct. App. 2007).]