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IRLI IMMIGRATION REFORM LAW INSTITUTE

Investigative Report:

Plea Bargaining Laws Discriminate Against U.S. Citizens

Key Takeaway:

INTRODUCTION

A total of 31 jurisdictions within the United States, including the District of Columbia and Puerto Rico, have enacted laws that require their courts to warn non-citizen defendants that they may be deported if they plead guilty to a criminal offense.

In at least 20 of those jurisdictions, a court's failure to provide immigration-related plea warnings can serve as a basis for overturning an otherwise valid conviction. This is true even if the alien defendant has admitted guilt, in good faith, under oath, and on the record.

Of the remaining eleven: Four jurisdictions require judges to provide warnings about the potential immigration consequences of a guilty plea, but in those four jurisdictions it is unclear whether an alien can move to vacate a guilty plea on the basis of a judicial failure to provide said warnings. Seven jurisdictions require immigration warnings to be given by a judge presiding over a plea hearing but do not permit aliens to withdraw their pleas based upon a failure to provide the requisite warnings. Yet, even when the relevant statute states that the failure to provide such warnings is not a basis for vacating a plea such legislation is troublesome. The mere existence of a law requiring immigration-related plea

warnings raises the possibility that an appellate court will judicially create a requirement that guilty pleas be overturned whenever a defendant is not advised of potential immigration consequences.

Most states break down their criminal justice statistics by race and ethnicity, not by country of citizenship. So it is difficult to tell how many aliens pled guilty to a criminal offense and how many later attempted to withdraw that plea. Still, a 2019 study, conducted by the Federation for American Immigration Reform, concluded that "illegal aliens are incarcerated up to five and a half times as frequently as citizens and legal immigrants." A U.S. Department of Justice study found that roughly half of defendants in the federal criminal justice system are non-citizens, despite the fact that aliens make up only about 13 percent of the total U.S. population. And, according to the National Association of Criminal Defense Lawyers, over the last five decades fewer than three percent of federal criminal cases have proceeded to trial, while 97 percent have been decided by plea bargains. (In other words, the defendant entered a plea of guilty in exchange for a reduced sentence, less severe charges, an agreement not to consider the death penalty, etc.) Finally, according to the Bureau of Justice Statistics, "while there are no exact estimates of the proportion of cases that are resolved through plea bargaining," scholars estimate that approximately 90 to 95 percent of state court cases end with a guilty plea.

What can a reasonable observer infer from the foregoing data? Currently, large numbers of aliens wind up as defendants before the criminal courts of the United States. And, just like their U.S. citizen counterparts, the vast majority of those foreign defendants, resolve their cases by pleading guilty. But, unlike similarly-situated citizens, many foreign defendants will later attempt to sidestep the consequences of their plea by claiming that they were not properly informed of the immigration consequences that attach to a criminal conviction.

Illegal alien advocates portray laws requiring state courts to provide immigration-related warnings before accepting a guilty plea as a benign attempt to preserve due process rights. In reality, however, these laws are utterly absurd. By increasing the time that is generally necessary to bring cases involving foreign defendants to a full and fair conclusion, they place undue burdens on courts that are already struggling with overloaded dockets.

Additionally, such laws constitute a vain attempt to preserve a purported due process interest that simply doesn't exist. Throughout the immigration process,

foreign nationals are repeatedly placed on notice by the Department of State and the Department of Homeland Security that criminal acts will result in their exclusion or deportation from the United States. Illegal aliens don't get this information because they deliberately evade the immigration process to enter the United States undetected. And they are not entitled to rely on their violation of U.S. immigration law as a basis for claiming they were unaware that a criminal conviction could result in deportation.

In short, all aliens who have not naturalized as U.S. citizens are subject to removal from the United States. Even if an alien has been convicted of a crime in an American court, prior to removal he/she still undergoes additional legal processes that are separate and distinct from either state or federal criminal proceedings. As such, aliens simply do not have an immigration due process interest that must be protected in criminal proceedings. Any immigration interests will be fully and fairly addressed in the proceedings that Congress has mandated prior to the deportation of an alien; proceedings which include review by the Board of Immigration Appeals and the federal circuit courts.

Furthermore, immigration-related plea warning laws discriminate against U.S. citizens, who aren't accorded a similar get-out-of-jail-free pass. In essence, plea warning laws for immigrants, masquerading as due process protections, create a special, elevated standard of criminal guilt for foreign nationals. This is particularly ironic, since so-called "immigrant rights activists" regularly insist that neither judges, nor juries should be aware of the immigration status of a criminal defendant, lest this knowledge cause a judge or jury to engage in undue bias against foreign nationals. Yet, the very same activists will, in the same breath, insist that a defendant's immigration status (or lack thereof) creates a due process interest that is significant enough to overturn a legally sufficient guilty plea should an alien defendant balk at being placed in removal proceedings on the basis of said plea.

Finally, overturning the convictions of alien criminals who have already made a formal admission that they are guilty of a crime – merely because they don't want to be deported – strikes us as a major threat to America's public safety. Setting the guilty free, especially when the blameworthy parties have admitted their own culpability in a court of law, is generally bad policy.

So, the Immigration Reform Law Institute investigated. Here's what we found:

ALIENS AND CRIMINAL CONVICTIONS

According to the Supreme Court in *Ekiu v. United States*, "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions or to admit them only in such cases and upon such conditions as it may see fit to prescribe." In plain English, that means: As an independent nation answering to no higher authority, the United States can decide whether or not to admit foreigners; how long to let them stay; and what rules they must obey while here.

Generally speaking, the rules applicable to immigrants are aimed at protecting the American populace from public safety and national security risks. In addition, those rules ensure that the limited number of slots available for lawful migration go to deserving foreigners who are of good moral character.

According to Oxford University's OUPblog, "Historians have long assumed that immigration to the United States was free from regulation until the federal government started restricting Chinese immigration in the late nineteenth century. This is a myth. In fact, local and state governments regulated immigration since the foundation of the nation in the eighteenth century." And, for the entire history of the Republic, conviction of a crime has been a basis for deportation.

One of the earliest legislative acts of the First Congress (1789-1791) was the formulation and passage of the Naturalization Act of 1790. This was only the initial installment in a series of bills passed by Congress that were intended to establish control of America's borders and ensure that government agencies possessed the authority necessary to remove foreign intelligence agents and other foreign nationals whose presence is considered deleterious to the good order of the United States, including criminal aliens.

If an alien is convicted of a crime in the United States, he/she will generally be subject to deportation. For foreign nationals convicted of crimes which are characterized within the Immigration and Nationality Act as "aggravated felonies," relief is limited and removal is common. However, even certain lesser crimes – particularly those involving drugs, theft or violence – may result in the deportation of an alien.

ALIENS AND PLEA BARGAINING

A criminal defendant may be found guilty following a trial; or he/she may decide to admit to the commission of a crime and enter a guilty plea. As part of a process called "plea bargaining," prosecutors may offer a criminal defendant a shorter sentence if he/she agrees to forego a trial and plead guilty.

Arguably, plea bargaining accomplishes several positive goals: Criminal defendants minimize the amount of time they spend in jail. Prosecutors preserve scarce resources by avoiding a trial when the defendant is willing to admit guilt. Defendants avoid the costs associated with a lengthy trial. And both the prosecution and defense avoid the uncertainty inherent in waiting for a jury verdict.

Like other defendants in criminal proceedings, aliens may wish to offer a plea of guilty in exchange for a lesser sentence and to avoid the fiscal burdens of a trial. Nevertheless, even a negotiated plea of guilty results in the entry of a criminal conviction that may serve as the basis for deportation proceedings. Therefore, unlike other defendants in criminal proceedings, aliens may have second-thoughts upon learning that their conviction is likely to result in their removal from the United States.

Laws requiring immigration-related plea warnings are nothing but an attempt to pander to alien criminals and give them an opportunity to try and sidestep the immigration consequences of their criminal conduct. And the state legislatures that have passed these laws have written into statute the absurd presumption that foreign criminal defendants are incapable of making the logical, and nearly universal, presumption that the commission of a crime is likely to result in their deportation. Moreover, state legislators have done this despite the fact that the Supreme Court of the United States has clearly held that immigration is a pre-empted federal field, over which states exercise virtually no legal authority,

Now, compare the treatment of foreign criminals with that of U.S. citizens who experience "buyer's remorse" after entering into a plea bargain that exerts unpleasant secondary and tertiary effects. Americans have no choice but to roll with the punches, unless they can persuade a court that their plea was somehow legally defective.

DUE PROCESS AND LAWS GOVERNING THE ACCEPTANCE OF CRIMINAL PLEAS

When it comes to Fifth Amendment due process and Fourteenth Amendment equal protection concerns, the Supreme Court has repeatedly held that the Constitution applies equally to all persons. That includes both lawfully admitted and unlawfully present aliens. The first in this line of cases was *Yick Wo v. Hopkins*, decided in 1886.

The Fifth Amendment to the Constitution of the United States says that no one shall be "deprived of life, liberty or property without due process of law." The Fourteenth Amendment makes the Fifth Amendment applicable to the states: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

In the criminal context, due process is a fancy way of saying that prosecutors charging someone with an offense, and the reviewing court, must follow established procedures that: inform accused individuals of what they have allegedly done wrong; give the accused a chance to rebut the charges against them; and explain how they may be affected by a guilty finding.

Aliens may occasionally encounter Fifth Amendment and Fourteenth Amendment issues during removal proceedings. Generally though, due process and equal protection issues most frequently arise for foreign nationals if they are arrested, charged with a crime and placed on trial before a state or federal criminal court.

Plea bargains are subject to the same Fifth and Fourteenth Amendment due process concerns as criminal trials. A defendant who enters into a plea bargain foregoes his/her constitutional rights against self-incrimination, to a jury trial, and to confront and cross-examine the government's witnesses. Therefore, because of the life and liberty interests at stake, criminal pleas are a serious matter. The courts who oversee the implementation of plea bargains must be assured that defendants are knowingly, voluntarily and intelligently giving up their right to force the prosecution to prove their guilt beyond a reasonable doubt.

Accordingly, the federal government, all 50 states, and all U.S. territories have laws on the books dictating how courts must accept guilty pleas. The theory behind these laws is relatively simple: A criminal trial imposes a significant burden on the

accused. Accordingly, some defendants may be tempted to plead guilty in order to avoid the stress and expense of a trial. Still, it is not in the interests of justice that innocent parties admit to crimes they did not commit simply to overcome logistical difficulties (*e.g.,* time, cost, damage to reputation, etc.) Thus, in order for both Fifth Amendment due process and Fourteenth Amendment equal protection concerns to be properly resolved, the court must ascertain that the defendant is actually guilty and that he/she understands the downstream consequences of a criminal conviction.

In a case where a defendant wishes to enter a guilty plea, the rules typically require the presiding judge to provide the defendant with a series of warnings and ask him/her a series of questions to determine that the warnings were understood. This exchange is known as a "plea colloquy" or a "plea allocution." It is intended to make sure that a court does not inadvertently accept coerced or unknowing pleas. Generally, if a guilty plea is accepted without the appropriate plea colloquy having been entered into the record of proceedings, the defendant's conviction is considered legally invalid and the defendant can move to have it overturned.

THE CONSEQUENCES OF CRIMINAL CONVICTIONS: DIRECT AND COLLATERAL

There are two kinds of after-effects associated with a criminal conviction: "direct consequences" and "collateral consequences." Direct consequences are those punishments imposed on a defendant by a court pursuant to a judicial finding of guilt. They include fines, imprisonment and, in the case of very serious crimes, the death penalty.

Collateral consequences are not imposed by a court as punishment for a crime. Rather, they are general legal disabilities that apply to everyone who is convicted of a particular type of crime, regardless of whether jail time is served. Collateral consequences are imposed legislatively and typically cannot be mitigated by a court during criminal sentencing. Examples of collateral consequences include: losing the right to vote after being convicted of a felony; being unable to purchase, own or carry a firearm; becoming ineligible to practice certain professions; and being barred from public housing.

In addition, the term "collateral consequences" is sometimes used to refer to downstream consequences associated with a criminal conviction that have nothing to do with either judicially imposed penalties or legislatively mandated disabilities

– such as loss of a current job, inability to gain future employment, effects on one's credit rating, etc.

Normally, it is the responsibility of a defendant's lawyer – not the courts – to make him/her aware of both the direct and collateral consequences that flow from a criminal conviction. Courts do, nonetheless, have an obligation to inform criminal defendants of the *direct* consequences of a criminal conviction in order to satisfy due process requirements.

While it is necessary for a sentencing court to ensure that a defendant understands the immediate consequences of a guilty plea, the tribunal is generally not obligated to inform the defendant of the indirect, collateral consequences of a guilty plea. For example, a court has no responsibility to point out that a criminal conviction may serve as a basis for a fault-based divorce in many jurisdictions. Nor does a court have an obligation to point out that a criminal conviction may result in the loss of certain jobs or ineligibility for certain employment opportunities.

In short, the purpose of a plea colloquy is to ensure that the defendant is making a knowing and voluntary guilty plea. It is not to make sure that the respondent is made fully and completely aware of any and all potential after-effects that may flow from a criminal conviction.

The immigration consequences of a plea bargain are collateral consequences. They fall outside the sentencing authority of the tribunal hearing a criminal case (*i.e.,* they are not penalties that are imposed by the trial court in punishment for an offense). In fact, with the exception of ordering a foreign national to be turned over to federal immigration authorities, a state court has no authority to take any action whatsoever with regard to the removal of an alien from the United States. While a criminal conviction in a state or federal court may serve as the basis for an Immigration Court proceeding, a deportation hearing is an independent federal, civil, administrative proceeding that is concerned only with the question of whether a foreign national has legal authorization to remain in the United States. Moreover, the Immigration Court lacks any capacity to reverse or modify either the conviction or sentence imposed by the criminal court.

CRIMINAL DEFENSE *ATTORNEYS*, NOT *COURTS*, HAVE AN OBLIGATION TO INFORM ALIENS ABOUT THE POTENTIAL IMMIGRATION CONSEQUENCES OF A GUILTY PLEA OR CONVICTION

In *Padilla v. Kentucky*, the Supreme Court held that the effective-assistance-of-counsel guarantee inherent in the Sixth Amendment requires *criminal defense attorneys* to advise their clients of the potential immigration consequences of pleading guilty to a criminal charge. However, the Court did not impose any obligation on *judges* to provide such warnings. Nor did it indicate that the failure of a judge to provide information regarding deportation after a criminal conviction would constitute the basis for the reversal of a criminal conviction. Accordingly, there is no constitutional obligation requiring courts to give special warnings to foreign criminal defendants indicating that pleading guilty to a crime might result in deportation.

In fact, the *Padilla* decision is a bit of an outlier. And it runs contrary to at least two earlier, significant Supreme Court cases on immigration:

The *Padilla* court cited *Fong Yue Ting v. United States*, for the proposition that "deportation is a particularly severe 'penalty.'" Yet, the justices who decided *Fong Yue Ting* were at pains to point out that the removal of an alien is anything but a "penalty" or "punishment." Justice Gray wrote:

> The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the Government of the nation, acting within its constitutional authority, and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty, or property without due process of law, and the provisions of the Constitution securing the right of trial by jury and prohibiting unreasonable searches and seizures and cruel and unusual punishments have no application.

Furthermore, back in 1799, in *Fries Case*, Justice James Iredell noted that, "…any alien coming to this country must, or ought to know, that this being an independent nation, it has all the rights concerning the removal of aliens which belong by the law of nations to any other…." In other words, foreign nationals – like everyone

else – are presumed to know that they are obligated to obey the laws of the United States and that there are consequences for breaking the law.

As the ancient legal maxim goes, "*Ignorantia legis neminem excusat*" (Ignorance of the law excuses no one from its violation). Laws apply to everyone within a particular jurisdiction. Whether a violator knows of the law's existence or not is irrelevant. Allowing foreign nationals to have their convictions overturned because they allegedly didn't know that a criminal conviction might result in deportation sets a dangerous precedent. And when taken to its logical conclusion, this line of logic tends to undermine the integrity of the law as a whole. Should a foreign national be permitted to evade prosecution for say, drunk driving, because operating a motor vehicle while intoxicated isn't illegal in his/her country and he/she was unaware that it is unlawful here in the United States?

Most reasonable observers would answer that question with a resounding, "No!" Therefore, if foreign nationals are presumed to understand their obligations to pay taxes, observe the terms of contracts, obtain motor vehicle insurance and a license – legal concepts that are just as complicated as immigration law – why would anyone presume that aliens are unable to understand that a criminal conviction may lead to deportation from the United States?

31 JURISDICTIONS HAVE GIVEN ALIENS AN UNNECESSARY BASIS FOR ATTACKING CRIMINAL CONVICTIONS

Nevertheless, as noted above, 31 jurisdictions, including the District of Columbia and Puerto Rico have enacted laws requiring their courts to warn non-citizen defendants that they may be deported if they plead guilty to a criminal offense. In most of these jurisdictions, if appropriate immigration warnings are not provided prior to the acceptance of a guilty plea, then an alien defendant may move to have his/her conviction vacated on the grounds that he/she was unable to make a knowing, intelligent and voluntary waiver of the right to a criminal trial. (And, as noted above, even in the jurisdictions where a failure to provide immigration warnings is not a statutory basis for overturning a guilty plea, these statutes are still cause for concern. The very existence of a statute requiring immigration-related plea warnings leaves open the possibility that a court will judicially create a requirement that guilty pleas be vacated in the absence of the requisite advisals.)

Overall, these statutes are highly problematic. They create a method for attacking criminal convictions that exists solely because the defendant's status as a non-citizen *may* trigger removal from the United States. But, this is something that

aliens should be aware of before they ever set foot in criminal court. As we have noted, everyone within a given jurisdiction is presumed to know what the law requires and lack of knowledge of a particular law is no defense to its violation. Yet, statutes requiring courts to provide immigration warnings to alien defendants, in effect, set up ignorance of the law as an affirmative defense. They permit a foreign national to claim that because he/she was unaware that a criminal conviction might lead to deportation, his/her admission of guilt, should be overturned. In jurisdictions with these laws, foreigners get a do-over, just because they are foreigners.

And in many cases (arguably the vast majority of these cases), this is an utterly pointless exercise, that adds an unnecessary layer of complexity to criminal trials, while utterly failing to preserve any legally protected interests. In a nutshell, alien plea warning laws place a heavy administrative burden on overworked courts. They do so, on the off chance that a foreigner who has already pleaded guilty to a criminal offense *might* have prevailed at a trial. And they do so, even in cases where the alien defendant has no significant ties to the United States and no valid claims to remain here lawfully.

U.S. CITIZENS DON'T GET THE SAME TREATMENT

Moreover, plea laws that give foreign nationals a special opportunity – based entirely on their status as foreigners – to obtain a "do-over" after entering a guilty plea inherently discriminate against U.S. citizens.

Americans who plead guilty to a crime may not be subject to removal from the United States. However, they are likely to encounter a number of serious collateral consequences as the result of a criminal conviction, ranging from the loss of professional licenses to loss of child custody. Despite the seriousness of these potential after-effects, courts have been remarkably consistent in holding that it would be unreasonable, as well as wholly impractical, to expect a trial judge to extrapolate all of the potential consequences of a guilty plea and provide warnings about them.

If an American court has no obligation to inform a U.S. citizen that a guilty plea could affect a fundamental right like voting, in addition to significant interests such as child custody, employment or a marital relationship, why should it be obligated to point out the obvious to misbehaving foreigners? In effect, alien plea warning laws send a message that there are two separate and distinct standards for criminal culpability in the United States – one that applies to Americans and one that

applies to foreign nationals. Americans are presumed to be responsible for their criminal acts, regardless of how knowledgeable they are about the U.S. legal system. On the other hand, foreigners are deemed to be so ignorant of the law that it is unfair to hold them accountable for their criminal acts, even when they make a strategic decision to plead guilty to an offense in order to reduce the amount of time they spend in jail and avoid the costs of going to trial. In brief, Americans get the short end of the stick, when it comes to criminal pleas, simply because they are American. And quite frankly, we can't think of a more backward way of thinking.

IMMIGRATION VIOLATORS ARE GETTING AWAY WITH CRIME – *LITERALLY*

So, what happens when a court in a jurisdiction with an alien plea warning law fails to provide an immigration warning to a foreign national who has chosen to plead guilty to a criminal offense? A certain number of alien defendants who succeed in having their pleas vacated will attempt to negotiate another more favorable plea bargain after receiving appropriate due process warnings from the reviewing court. A larger percentage, though, will request a trial.

Ideally, in these situations, the local prosecutor re-charges the foreign offender, a jury or bench trial is held, and the court renders a verdict on the matter. Because the alien has already admitted guilt, one would assume that a jury would vote to convict. However, that is not always the case, some aliens do later succeed in securing an acquittal before a jury.

Of greater concern are situations where an alien is permitted to withdraw a guilty plea and the prosecutor drops the charges rather than re-trying the alien. Where these cases involve misdemeanors or low-level felonies, there is a significant chance that prosecutors will not re-file charges after a conviction is vacated. That is because a criminal defendant is not obligated to prove anything at all. He/she may simply remain silent. The burden of proof in a criminal case rests entirely on the prosecution, which must present persuasive evidence of guilt beyond a reasonable doubt in order to secure a conviction. And, for a variety of reasons, after the expiration of a lengthy period of time, the force of that evidence may be diminished: exhibits may have been misplaced or have decayed in storage; witnesses may have died, moved outside the United States or have otherwise become unavailable; and the investigating police officers may have retired or moved to another agency. As such, it may be difficult, or impossible, to effectively build a case against an alien defendant who initially pleaded guilty but later

succeeded in vacating his plea in order to obtain a trial. And in many cases where continued prosecution might actually be feasible, the alien defendant may have already served the maximum sentence following his/her guilty plea – meaning that a retrial will not result in continued incarceration.

The attorneys who represent aliens in criminal proceedings are aware of the fact that it may be difficult to secure a conviction against an alien defendant in a trial that occurs months or years after the initial plea was entered. Therefore, they exploit plea warning laws to obtain a *de facto* exoneration of clients who are *de jure* guilty and have admitted as much, on the record, under oath, in a court of law. This results in an absurd waste of scarce judicial resources and taxpayer funds – all in the name of preserving a "due process interest" that doesn't actually exist. Ultimately, large numbers of foreign criminals, many of whom are also immigration violators, are quite literally getting away with crime, simply because of the fact that they are foreign.

CONCLUSION

Like everyone else in the United States, foreign nationals are deemed to be aware of both American laws and their obligation to obey them. Therefore, state laws that require courts to warn foreign nationals that they may be deported if they plead guilty to a crime place an unnecessary burden on an already stressed court system. When those laws enable a foreign national to overturn his plea on the grounds that he/she failed to understand the consequences of admitting criminal culpability, they go from being merely problematic to outright pernicious.

Plea bargains serve a useful purpose, to the extent that they keep an overloaded justice system moving. But when aliens are allowed to withdraw their pleas, based solely on their status as foreigners, plea bargains fail to serve their intended purpose. Instead, they become a mechanism by which a particular class of people – foreign nationals – may manipulate the criminal justice system in order to accomplish a particular immigration aim.

Furthermore, this is patently unfair to U.S. citizens. American criminal defendants who plead guilty to a criminal charge are not permitted to withdraw their pleas in order to avoid the collateral consequences of a conviction – many of which are more deleterious than removal from the United States (*e.g.* loss of the right to vote). Meanwhile, aliens are explicitly permitted to withdraw a plea on the basis of immigration consequences, despite reams of judicial precedent indicating that courts have no obligation to inform defendants of more directly relevant collateral

matters, such as the effects a criminal conviction may have upon things like: access to various publicly-funded benefits, ranging from government subsidized housing to tuition assistance; employment in various fields that require state licensure; registration as a sex-offender; or the ability to obtain a driver's license.

And the disadvantage at which such laws place U.S. citizens becomes even more apparent when one considers the fact that virtually all aliens who sustain a criminal conviction are entitled to a hearing before the U.S. Immigration Court, prior to the entry of any order of removal. Whereas American citizens may be utterly without a forum in which to contest things like the refusal of employment licensure on the basis of a criminal conviction.

As such, Americans who are concerned with the both the security of our borders and the integrity of our justice system should be asking an important question: Why are state legislatures passing laws that, at best, give preferential treatment to foreign criminal defendants, while prejudicing their U.S. citizen counterparts; and which, at worst, allow foreigners to get away with crime in the United States?