

# TrialBarNews

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# Immigration Law and Criminal Law Collide: Immigration Law Wins

When someone is arrested, generally the first thing she wants to know is how soon she can get out of custody. For criminal clients who are not citizens the news is tough to give and tougher to receive. In federal cases there are two hurdles – the federal criminal bond and the Immigration and Naturalization Service (INS) bond. However, in certain cases the INS will not set a bond, even when a federal judge sets a bond amount and conditions specific to the defendant and releases the defendant under strict supervision.

Imagine this scenario. Carla is a 24-year-old mother to a seven-year-old son. She is a Legal Permanent Resident (LPR — known in the vernacular as a green card holder) who has been living in the U.S. since she was eight years old. Her family started the citizenship application process but never completed it. She lives in a San Diego suburb with her parents and son and she cleans houses with her mother for a living. Strapped for cash, she agrees to cross from Mexico into the United States with about five kilos of methamphetamine strapped to her body in exchange for \$500.

As might be expected, drug-sniffing dogs alert to the drugs as she attempts to cross by foot. She is arrested at the border and charged with importation of a controlled substance and faces a minimum mandatory sentence of 10 years. She has no criminal record, not even juvenile.

The court sets bail at \$50,000. Carla's family scrambles to find property with equity of \$50,000 to post as security on her appearance. After cobbling together the proof that several friends and family have a total net worth of that amount, the magistrate offers a stern admonition that if Carla fails to appear at any hearing, or if she violates even the most minor of bail conditions (such as a violation of curfew), the court will swiftly and without pause seize all assets necessary to satisfy the bond amount. Just for safe measure, the judge imposes GPS monitoring on Carla which will be overseen by Pre-trial Services (the federal version of probation). The family is happy to accept these terms and have Carla home with them until she is sentenced. Carla is overjoyed at the opportunity to spend four months or so with her son as he is scheduled to undergo surgery for cataracts.

Let's pause for a moment and ask: Why should she get bail in the first place? She's not a citizen. She made a full confession that she knowingly brought drugs from Mexico into this country. She is a Spanish-speaker; she could survive if she fled to Mexico. Consider that when explaining the Bail Reform Act of 1966 (the 1984 version currently governs bail in the federal system), Congress stated: "The purpose of this Act is to revise the practices relating to bail to assure that all persons, regardless of their financial status, shall not needlessly be detained pending their appearance to answer charges, to testify, or pending appeal, when detention serves neither the ends of justice nor the public interest." Pre-trial detention is not about punishment for the charged crime. Pre-trial detention is supposed to be reserved for cases in which the court cannot be reasonably assured that the defendant will come back to court and cases in which the public would be in great danger if the defendant were released. 18 U.S.C. §3142(c). The provision that conditions "reasonably assure" appearance and safety does not require a guarantee of appearance or safety. *See, United States v. O'Brien* (1<sup>st</sup> Cir. 1990) 895 F.2d 810;

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*United States v. Fortna* (5<sup>th</sup> Cir. 1985) 769 F.2d 243, *cert. denied*, 479 U.S. 950 (1986). It requires an "objectively reasonable" assurance of community safety and the defendant's appearance at trial. *Id.* The Bail Reform Act authorizes numerous conditions of release that the court may impose – GPS monitoring and a personal surety bond, as in Carla's case, are examples – to reasonably assure appearance. Unlike in state court, federal judges can require that the bond be secured by property rather than cash. This adds to the judge's ability to impress upon the defendant that her family's actual property, usually a home, will be seized.

However, even with all of these safeguards in place, the INS can and *will* take custody of Carla after she posts bond on the criminal side and is released from U.S. Marshal custody, and hold her until final disposition of her case. This is despite receiving assurance from an INS agent that the INS would "street release" Carla from their custody after processing her because she does not have any prior convictions.

Under the Immigration and Nationality Act (INA) §212(a)(2)(C) and 8 U.S.C. §1182(a)(2)(C), a non-citizen who an immigration officer knows or has reason to believe is or has been an illicit trafficker in a controlled substance is ineligible for admission into the United States as drug trafficking is a crime of moral turpitude. Legal permanent residents arrested at the international border or a port of entry may be charged with being inadmissible and removed from the United States, even if they are not charged with a criminal offense, if the government can show they committed a crime of moral turpitude. Had Carla been caught with the same quantity of drugs anywhere in the interior of the country the crime would not be a "removable" one and she would be eligible for an INS bond.

The first problem with the statute for Carla is the "reason to believe"

clause. A conviction is not necessary, merely a reason to believe the conduct constituted drug trafficking. The arrest itself gives the immigration officer sufficient reason to believe that the person is a drug trafficker. Therefore any non-citizen who is arrested for a drug trafficking offense is not going to have an INS bond set even if a federal judge sets conditions that would reasonably assure the court of the defendant's appearance.

The second problem for Carla is that she is not eligible for custody credits while in INS custody as she would be in federal custody. Defendants receive custody credits toward their sentence for each day they are in jail prior to final disposition. If the client bonds out on the criminal side, but is unable to bond out from INS for any reason, it is crucial to immediately exonerate the criminal bond and alert the INS so that the client can be transferred back to the custody of the U.S. Marshal as soon as possible. The criminal side controls, and the INS must return the person to federal custody.

In the past, legal permanent residents who had accrued seven years of lawful unrelinquished domicile, and had not served a total of five years or more for one or more aggravated felony convictions were eligible for relief from deportation or removal under INA §212(c). However, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), passed by Congress in 1996, eliminated INA §212(c) entirely. Under the old law, a judge could impose a sentence of less than five years and save the person from deportation. Now deportation is automatic with a drug trafficking conviction, no matter the amount of time served.

The key for criminal defense practitioners, especially in San Diego, is to always be aware of potential immigration consequences. The Supreme Court recently held that a criminal defense attorney's failure to advise his client of the immigration

consequences of pleading guilty to transportation of drugs constituted Ineffective Assistance of Counsel (IAC). *Padilla v. Kentucky* (2010) 559 U.S. \_\_\_, 130 S.Ct. 1473. This holding does not require the criminal attorney to know all of the immigration consequences of all criminal plea deals, but must, at a minimum know that there are immigration consequences for non-citizens once they are in the criminal system and advise the client to seek immigration counsel.

So what happens to Carla? She serves 85% of a five-year sentence in federal prison far from her family in San Diego and then is immediately deported to Mexico where she has no friends or family, and her son who is a citizen by birth, and now beginning middle school, stays in San Diego with his grandparents. He sees his mother some summers when his grandparents can afford it. **TBN**



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