

PADILLA V. KENTUCKY:

WHAT IT MEANS FOR CRIMINAL DEFENSE
LAWYERS

“Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court, or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.”

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INTRODUCTION

PURPOSE:

- Provide lawyers with a basic understanding of the immigration consequences of a criminal conviction for non-U.S. citizens and the duties of criminal defense lawyers representing non-U.S. citizens after *Padilla v. Kentucky*.

SUMMARY OF *PADILLA v. KENTUCKY*:

Jose Padilla, a native of Honduras, had been a lawful permanent resident (“green card” holder) of the United States for more than 40 years. He served the United States with honor as a member of the U.S. Armed Forces during the Vietnam war. Padilla faced deportation after pleading guilty to drug distribution charges in Kentucky. In postconviction proceedings, he claimed that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. Padilla alleged that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the Sixth Amendment’s effective assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a “collateral” consequence of a conviction.

The U.S. Supreme Court reversed and remanded the case holding that counsel must inform a client whether his plea carries a risk of deportation, and that failure to do so constitutes sufficient constitutional deficiency to satisfy the first prong of *Strickland*.

DUTIES OF COUNSEL POST-*PADILLA*:

- The Sixth Amendment Requires Affirmative and Competent Advice regarding Immigration Consequences. Non-advice is Insufficient (Ineffective).
- Informed Consideration of Deportation Consequences by Both the Defense and the Prosecution during plea-bargaining.

ABA PROFESSIONAL STANDARDS CITED BY THE COURT:

- Duty to Inquire about Citizenship and Immigration Status at Initial Interview

- Duty to Investigate and Advise about Immigration Consequences of Proposed Plea and Sentence.

A. WHO IS AFFECTED?

1. Permanent Residents: immigrants with a “green card”;
2. Visitors (B-1 visa): non-immigrants;
3. Students (F-1 visa): non-immigrants;
4. Professionals (H-1B visa): non-immigrants;
5. Undocumented aliens (Note: their mere unlawful presence is a ground for removal);
6. Any other person lawfully in the United States who is NOT a U.S. citizen.

PRACTICE TIP:

- *“WHERE WERE YOU BORN?” You must ask all of your clients this question during your initial consultation. Put the question on your client intake sheet. WARNING: Your client doesn’t have to have an accent to be a non-U.S. citizen! ALWAYS ASK!*

B. WHAT DO WE MEAN BY “IMMIGRATION CONSEQUENCES”?

1. Deportation (Removal): Client is physically removed from the United States and sent back to his/her country of birth at the conclusion of any active incarceration imposed. Client is barred from ever re-entering the United States.
2. Inadmissible: Client leaves the United States (ex: for a vacation) and is not allowed back in when he/she returns.
3. Ineligible for a “green card” and/or a non-immigrant visa (inadmissible).
4. Ineligible for U.S. citizenship (even if serving in the U.S. military).
5. Lifetime separation from family and friends.

C. CRIMES RESULTING IN DEPORTATION (REMOVAL):

1. Aggravated Felonies.

- a. Murder, rape, sexual abuse of a minor
- b. Drug trafficking (sale, distribution, possession with intent to distribute, manufacturing) punishable by more than 1 year.
- c. Firearms and Explosive materials offenses.
- d. Crimes of violence for which a sentence of at least 1 year is imposed.
- e. Offenses relating to RICO or gambling for a sentence of at least 1 year is imposed.
- f. Theft or Burglary for which a sentence of at least 1 year is imposed.
- g. Fraud or Tax evasion for which the loss to the victim(s) exceeds \$10,000.00.
- h. Child pornography offenses.
- i. Offenses relating to owning, controlling, managing or supervising a prostitution business and offenses related to involuntary servitude.
- j. Offenses related to gathering or transmitting national defense information or disclosure of classified information.
- k. Commercial bribery, counterfeiting, forgery, or trafficking in vehicles with altered identification numbers for which a sentence of at least one year is imposed.
- l. Obstruction of justice, bribery of a witness or perjury for which a sentence of at least 1 year is imposed.
- m. Alien smuggling, except if a first offense and the offense is only to help a family member obtain an immigration benefit.
- n. Unauthorized reentry into the U.S. if a non-citizen who was previously deported for an aggravated felony.
- o. Document fraud for which a sentence of at least 1 year is imposed, except when the purpose is to help a family member obtain an immigration benefit.

- p. Failure to appear for service of a sentence if the underlying offense is punishable by imprisonment of 5 years or more.
 - q. Attempt or conspiracy to do anything that is an aggravated felony.
2. Crimes Involving Moral Turpitude (CIMT) committed within five years of the date of admission and for which a sentence of one year or longer may be imposed.
 3. Two CIMT's committed at any time after admission.
 4. Controlled Substance Offenses. Exception: a single offense of simple possession of 30 grams or less of marijuana.
 5. Certain firearms offenses.
 6. Offenses Involving Domestic Violence, Crimes Against Children, Stalking, or Violation of a Protective Order (criminal or civil).

D. CRIMES RESULTING IN INADMISSIBILITY:

1. Fraud Offenses.
2. Crimes in which an intent to steal is an element.
3. Crimes in which bodily harm is caused or threatened by an intentional act, or serious bodily harm is caused or threatened by a reckless act. Most sex offenses.
4. Petty Offense Exception: for one CIMT if the person has no other CIMT and the offense is not punishable for more than 1 year **and** the offense does not involve a jail sentence of more than 6 months.
5. Prostitution and Commercialized Vice.
6. Conviction of two or more offenses of any type with an aggravated sentence of 5 years or more.

PRACTICE TIP:

- *For non-U.S. citizens, the immigration consequences of a criminal conviction usually far outweigh traditional defense goals!*

E. DEFINITION OF “CONVICTION”: INA § 101(a)(48)(A); 8 USC § 1101(a)(48)(A)

1. A formal judgment of guilt by a court, OR if adjudication of guilt has been withheld where:
 - a. A judge or jury has found the alien guilty, or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
 - b. the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty.
2. Deferred findings under Virginia code § 18.2-251 (first offender status for drug possession) and § 18.2-57.3 (first offender domestic violence counseling) **are** convictions for immigration purposes.
3. Findings of juvenile delinquency in Juvenile Court are generally **not** convictions for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000). However, a conviction of a juvenile in Circuit Court pursuant to § 16.1-278.8 will likely constitute a conviction for immigration purposes.
4. A conviction that a trial court vacates to avoid immigration consequences remains a conviction for immigration purposes. *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

PRACTICE TIP:

- *In the wake of Hernandez, a judge has the authority to defer proceedings on essentially any charge, but it will still likely constitute a conviction for immigration purposes if the judge has made a finding.*

F. Definition of “Sentence”: INA § 101(a)(48)(B); 8 U.S.C. § 1101(a)(48)(B)

1. Includes the period of incarceration or confinement ordered by a court regardless of any suspension in whole or in part.
2. The sentence imposed is important because there are many convictions that will result in deportation for non-U.S. citizens based solely on the amount of jail time (suspended or active) received. See Aggravated Felonies, *supra.*, where at least 1 year of jail is required.

3. A sentence reduction, even where the express justification is to avoid immigration consequences, is considered valid for determining immigration consequences. *Matter of Cota*, 23 I&N Dec. 849 (BIA 2005); *Matter of Song*, 23 1 I&N Dec. 173 (BIA 2001).

G. HYPOTHETICALS:

1. Laura was born in Panama and has been a lawful permanent resident of the United States since the age of 7. She has served in the U.S. Navy since she was 18 years old and is now 33. She recently decided to become a U.S. citizen and filed a naturalization application.

At her naturalization interview with the United States Citizenship and Immigration Service (USCIS), a 2001 domestic assault and battery conviction comes up – Laura had hit her husband with a bottle during a fight. She had been charged with malicious wounding, but pled guilty to assault and battery per her lawyer’s advice. She received a 12-month jail sentence, with all 12 months suspended on condition of 2 years good behavior.

Since Laura was in the Navy, her attorney assumed she was a U.S. citizen.

IMMIGRATION CONSEQUENCE: Laura will likely be referred to Immigration and Customs Enforcement (ICE) and placed in deportation (removal) proceedings.

- WHY?
- WHAT COULD HER LAWYER HAVE DONE DIFFERENTLY?
- WHAT WERE HER LAWYER’S DUTIES?
- WHAT CAN LAURA DO NOW?

2. Gabriel came to the United States from Spain on a student visa when she was 19 years old to attend Virginia Tech. That is where she met her U.S. citizen husband. They married 6 years later when Gabriel was 25 years old. Gabriel is 39 now and has been a permanent resident of the United States for 14 years. She and her husband have 3 children ages 8, 6 and 3.

Gabriel was recently charged with grand larceny after stealing 3 bottles of cologne from Dillard’s.

At her Preliminary Hearing, she pleads guilty to petty larceny pursuant to a Plea Agreement negotiated by her lawyer. The agreement calls for 12 months in jail, with all of it suspended on condition of 1 year of good behavior.

Two years later, Gabriel renews her “green card” with USCIS. She gets fingerprinted and the conviction is revealed.

IMMIGRATIONS CONSEQUENCE: USCIS might detain her because of her conviction and she will be turned over to ICE and put into removal proceedings.

THE GOOD NEWS: The 4th Circuit Court of Appeals recently held that Virginia’s grand larceny offense is not a “theft offense” constituting “aggravated felony” because it includes fraudulent conduct. *Omargharib v. Holder*, 775 F.3d 192 (4th Cir. Dec. 23, 2014).

PRACTICE TIP:

- *Let the judge and/or Commonwealth’s attorney know about the immigration consequences. Many are receptive and are now required to consider immigration consequences pursuant to Padilla.*

H. SAFE HAVENS:

1. A Safe Haven is a disposition in a criminal case that will not trigger deportation/inadmissibility for your non-U.S. citizen client.
2. Remember to ALWAYS inquire about your client’s immigration status during your initial meeting.
3. For your non-U.S. citizen client, the immigration consequence may be far more devastating than the criminal sentence imposed. Thus, your client may prefer to serve 6 months in jail rather than have 12 months suspended if it will result in the client being able to stay in the country.

EXAMPLES:

1. Mia, born in Italy, was adjusting her status to LPR through marriage to her USC husband – the interview was 4 months away. She was charged with grand larceny from K-mart.

SAFE HAVEN: Commonwealth's attorney agreed to a 3 month general continuance with Mia banned from all K-marts as a condition of her bond. Charge was *nolle prossed* before Mia's interview. Her immigration case was approved!

2. Toby, born in Nigeria, was adjusting his status to LPR. He was charged with Failure to ID to Police and Obstruction of Justice. He was convicted in General District Court and received a 12 month suspended jail sentence plus a small fine for each charge (aggravated felony and CIMT problems).

SAFE HAVEN: Noted his appeal to Circuit Court. Commonwealth's attorney agreed to allow Toby to plead guilty to Resisting Arrest. In exchange, Toby received a \$250.00 fine and a 6 month jail sentence with all but 10 days suspended (served on weekends). Toby was happy to serve 10 days given the alternative: deportation back to Nigeria.

I. POST-CONVICTION RELIEF:

1. Pardon
2. Vacate Conviction (have 21 days)
3. Amend Sentence – 12 months to 364 days (takes it out of aggravated felony category); 6 months (petty offense exception). Order must amend sentence *Nunc Pro Tunc*
4. *Habeas Corpus* – Must be filed within 2 years from the date of final judgment.
5. *Coram Vobis* and/or *Audita Querela*?
 - a. Virginia Supreme Court says these common-law writs are not the vehicle for *Padilla* claims seeking to modify a sentence or vacate a conviction after the 21 day period proscribed by Rule 1:1 has elapsed. See *Commonwealth v. Morris* (2011); *Commonwealth v. Chan* (2011).

CONCLUSION

Know your client's immigration status. Know what types of crimes are the most problematic for a non-citizen (Examples: theft, drugs, violence, fraud). If deportation will result from the contemplated plea or you're uncertain if it will, consult with an immigration attorney so you can properly advise your client and avoid a *habeas* petition.