

Crimmigration: Best Practices in Representing Non-Citizen Clients



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TOPICS

- Defense Counsel Obligation under *Padilla*
- Wisconsin Supreme Court and SPD Commitment
- Screening and Getting More Information
- Negotiations
- Sentencing Considerations
- Updates Relevant to Clients

Padilla v. Kentucky, 599 U.S. 356 (2010)

Who is Jose Padilla & why does he matter?



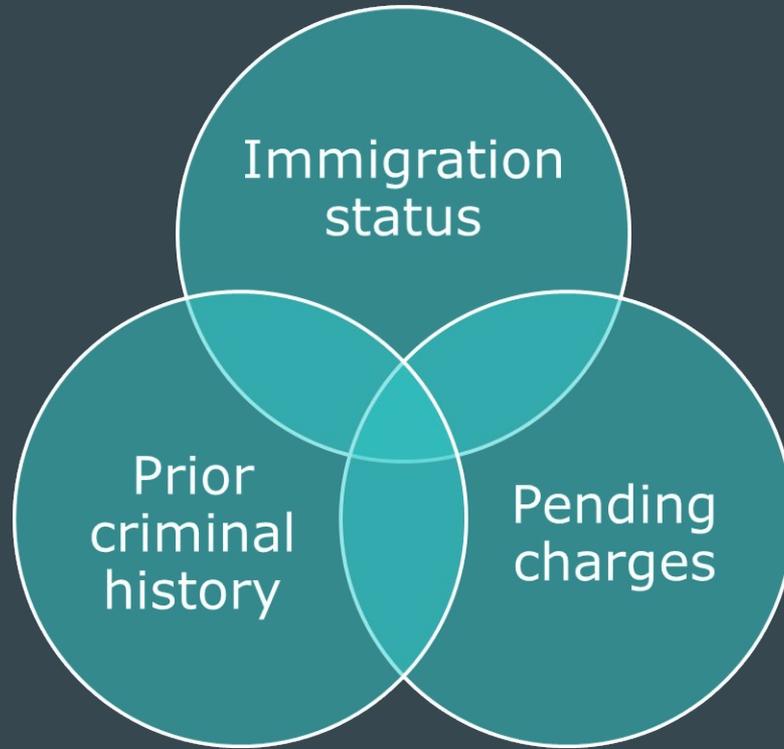
WISCONSIN SUPREME COURT PRECEDENT

- *State v. Shata*, 364 Wis. 2d 63 (2015): held a defense attorney's duty under Padilla to be the same as the court's statutory duty under Wis. Stat. §971.08(1)(c) – both are satisfied if defendant is warned that deportation “may result”
- *State v. Ortiz-Mondragon*, 364 Wis. 2d 1 (2015): held that when the immigration consequence is not clear, a defense attorney need only convey the general and equivocal immigration warning contained in the plea questionnaire
- **Not good enough** – Doesn't appear to be consistent with Padilla which created a 6th Amendment duty depending on whether an immigration consequence is truly clear

ETHICS ALERT!!

SPD COMMITMENT TO ETHICAL BEST PRACTICE

- When statute is clear & succinct, a defense attorney is obligated to explain that particular immigration consequence;
OR
- If immigration consequence is not clear – explain why and advise that it “may carry” risk of immigration consequence
- Obtain as much information as possible
- Reach out to the Immigration Practice Coordinators



Screening for Non-Citizen Clients

Revised 5/11 Wisconsin State Public Defender Applicant Case Information Form

Applicant Name (First M.I. Last)		Applicant Date of Birth
Permanent Address		Applicant Telephone Number
City, State, ZIP		Applicant Social Security Number
Ethnicity/ancestry: (Mark one or more) <input type="checkbox"/> Arab <input type="checkbox"/> Hispanic/Latino <input type="checkbox"/>		
Race: (Mark one or more) <input type="checkbox"/> American Indian/Alaska Native <input type="checkbox"/> African American/African Descent <input type="checkbox"/> <input type="checkbox"/> Asian <input type="checkbox"/> Native Hawaiian/Pacific Islander <input type="checkbox"/>		
Place of birth _____		Check if interpreter needed <input type="checkbox"/>
U.S. Citizen? <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Unknown		Language _____
Currently Detained/Incarcerated At _____		Today's Date _____ Env _____
Attorney Name _____	Approval of Opening _____	Transferred from _____
Reason for Private Bar Appointment <input type="checkbox"/> Conflict of Interest <input type="checkbox"/> Prior Pending <input type="checkbox"/> Other		Date Appointed _____ SPD Nu _____
Other Names? _____		Date/Time Arrested: _____
Alternative Means of Contact: _____		Pending Charges: _____
Family: _____		Length of Time in Area/State: _____

Screening for Non-Citizen Clients



Your client has not been identified as a U.S. Citizen.

Any conviction, including low-level misdemeanors, could have dramatic immigration consequences for your client. Your client could be ~~deported~~ or found inadmissible.

Immigration Statuses



STATUS

- U.S. Citizen
- Legal Permanent Resident [LPR – Green card]
- U-VISA
- Lawful Non-Immigrants
- Visa Overstay
- Refugees (comes in w/ status) & Asylees (must apply for status after in U.S.)
- Temporary Protected Status (armed conflict poses significant threat, epidemic or other environmental disaster, or extraordinary & temporary conditions prevents a person from returning safely)
- Undocumented & Out of Status

CRIMINAL HISTORY

Everything!

- ✓ Felonies
- ✓ All misdemeanors
- ✓ Deferred agreements,
- ✓ Expunged
- ✓ Inquire into out of state convictions & get those records

Details!

- ✓ Date of commission & conviction
- ✓ Statute of conviction
- ✓ Sentence

Advocating for Your Client

- Understand client's goal
 - Voluntarily depart
 - Avoid deportation
 - Admissibility for future benefits
 - Maybe even get deported!



Getting More Information



ETHICS ALERT!!

ETHICAL DUTIES: INQUIRE, INVESTIGATE, & ADVISE

- You **CANNOT** be silent.
- You **MUST** determine your client's status.
- You **MUST** gather information.
- You **MUST** research the legal issues and seek help if needed.
- You **MUST** advise.

What is a conviction?

LAW

Mauris magna quam, blandit a venenatis eget, rhoncus at sapien. Nullam dolor augue, pulvinar a posuere non, tempus sit amet ante. Lorem ipsum.



ACCUSED

Lorem ipsum dolor sit amet, consectetur adipiscing elit. Donec mi lorem, cursus in ornare nec, tristique at turpis. Lorem ipsum dolor sit amet, consectetur adipiscing elit. Et dolor sapien tristique at turpis.



What is a conviction?

8 U.S.C. § 1101(a)(48)(A)

- A formal judgement of guilt entered by the court OR, if adjudication of guilt has been withheld, where ----
 - A judge or jury has found the alien guilty or the alien has entered a plea of guilt or nolo contendere or has admitted sufficient facts to warrant a finding of guilty, and
 - The judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed
 - DPA
 - Drug Court
 - Expungement
 - Ordinance
 - Juvenile adjudications don't count

What is a sentence?



What is a sentence?

8 U.S.C. § 1101(a)(48)(B)

- Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include 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 in part
- Imposed or stayed – treated the same as actual incarceration
- Withheld sentence
- 180 + days of confinement during the good moral character time period

DEPORTABLE vs INADMISSIBLE

What's the difference?

- **Deportable:** person can lose status
 - A non-citizen who is convicted of an offense that makes him/her deportable can lose whatever lawful status he/she may already have and be “removed”
- **Inadmissible:** person can not get status
 - A non-citizen who is inadmissible for crimes may be barred from getting new lawful status, admission or re-admission in the U.S., relief from removal, or other new benefit that the government grants
 - A person who wants to become an LPR must be admissible

Crimes Involving Moral Turpitude

- Defined through case law
- Typically depraved or immoral act and with a *mens rea* of at least recklessness
 - Reckless Physical Abuse of a Child §948.03(3) – felony CIMT
 - Theft
- Petty offense exception: for 1 CIMT if max possible sentence one year or less imprisonment + actual sentence is 6 months or less

Common Inadmissible Offenses

8 U.S.C. § 1182(a)

- CIMT*
- Controlled substance violation
- Illicit trafficking of a controlled substance
- Prostitution related offense
- Human trafficking
- Money laundering
- Two or more convictions of any kind with aggregate sentence of five years (OWI)

Deportable Wisconsin Offenses (non-exhaustive + exceptions)

- Felony CIMT committed within 5 years after admission to U.S.
- Multiple CIMTS
- Aggravated Felony
- Controlled Substances*
- Firearms
- Some Domestic Violence Offenses
- Stalking
- Child abuse, neglect, or abandonment,
- Violation of Domestic Abuse Order

Aggravated Felonies

(non-exhaustive list)

8 U.S.C. § 1101(a)(43)

- AN AGGRAVATED FELONY CAN BE A MISDEMEANOR – i.e. misdemeanor possession of cocaine
- Murder, rape, or sexual abuse of a minor;
- Controlled substance offenses
- Firearms, destructive devices, or explosive materials related offenses
- Crimes related to money laundering, forgery, counterfeiting, etc.
- Theft or burglary which the term of imprisonment at least one year
- Fraud or deceit in which the loss to the AV exceeds \$10,000
- Child porn
- Prostitution related offenses
- Failure to appear to serve a sentence when underlying offense is punishable by imprisonment for a term of 5 years or more (BAIL JUMPING)

Aggravated Felonies

- Crime of violence for which the term of imprisonment is at least one year
Convicted of a COV, a crime of stalking, child abuse, child neglect or child abandonment is deportable
- **Crime of Violence:** 18 U.S.C § 16
 - (a) an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another, or
 - **Crime of Domestic violence:** means any crime of violence against a person committed by a current or former spouse of the person, have a child together, cohabitating or has cohabited as a spouse, etc.

Aggravated Felonies

Greatest Consequences for Non-Citizens

- Carries the most severe immigration consequences
- LPR an AF conviction bars them from relief, i.e. “cancellation of removal”
 - Even an LPR w/ lengthy ties to the U.S. can be removed
- For nonpermanent residents it can result in expedited removal 8 U.S.C. §1228(b)

Immigration Safe Offenses

- Traffic - OWL's, OAR's, OWI's
 - Potential Impact - Holds, Length of Sentence
- Disorderly Conduct
 - Ordinance Violations
- Negligent offenses
- Juvenile Adjudications

Immigration Unsafe Offenses

- Any offense with the Domestic Abuse Enhancer
- Drug and Firearms Offenses
- Crimes Involving Moral Turpitude - Obstructing an Officer, Retail Thefts, Battery
- Aggravated Felony - Homicide, Sexual Assault, Offenses Involving Children
- DPA DOES NOT COUNT



Negotiations

- What would deportation look like to your client
 - Hardship, Personal Safety Concerns, Lack of Infrastructure, Conflict, Fear of Persecution
 - “Why should I treat your client differently?”
- Confidentiality to Client
- Minor Offense with Life Consequences
- Juvenile Waivers

Sentencing Considerations

- What if the Judge asks my client's immigration status in open court?
- Can the Judge consider my client's status when making a sentencing decision?
 - State v. Leopoldo R. Salas Gayton, 2016 WI 58
 - Circuit Court - The fact that Gayton was an illegal alien "It goes to character. It's a minor character flaw very honestly." COA affirmed consideration of immigration status, not an erroneous exercise of discretion. SCOW affirmed.

Sentencing Considerations

- Likelihood of deportation can mitigate a sentence
 - Crimes of violences
 - Crimes involving children
 - Drug offenses
- Obtain your client's permission before argument in open court



Cancellation of Removal

LPR and Non-LPR

LPR

INA § 240A(a) & 8 U.S.C. § 1229b “The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

- (1) Has been an alien lawfully admitted for permanent residence for not less than 5 years;
- (2) ³⁶ (2) Has resided in the United States continuously for 7 years after having been admitted in any status, and
- (3) (3) Has not been convicted of any aggravated felony.

Cancellation of Removal

NON-LPR

INA § 240A(a)(b) & 8 U.S.C. § 1229b(b)

1. You have lived in the United States for 10 years or more;
2. You can show that you have “good moral character;
3. You have a spouse, parent or child (under age 21) who is legal permanent residents or U.S. citizen; and
4. You can show that a member of your family will suffer “exceptional”
₃₇ and “extremely unusual” hardship.

Updates Relevant to Clients

- Immigration law is in a state of flux
- INA remains intact, changes only through the legislative process
- Major changes via executive action - TPS, Asylum
- Board of Immigration Appeals (BIA) decisions
- Enforcement Priorities - Obama Era Rescinded,
 - Narrow Approach to Very Broad Approach
 - Enforcement Priorities - Broad Approach

Updates Relevant to Clients

- Deferred Action for Childhood Arrivals (DACA)
 - Obama Executive Order - June 2012
 - Rescinded by Trump - September 2017
 - Federal court ordered DHS to continue accepting applications
 - *Texas v. Nielsen* - Denied preliminary injunction

Immigration Resources

- Resources
 - Practice Coordinators
 - <http://wispd.org/index.php/legal-resources/specialty-practices/immigration-practice/questionnaire>
 - Finding an Immigration Attorney
 - National Immigrant Law Center
 - <https://www.nilc.org/>
 - Immigrant Defense Project
 - <https://www.immigrantdefenseproject.org/>

Questions

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