

Office of the State Public Defender
2012 Annual Criminal Defense Conference

Advising Non-Citizen Clients:
Defense Counsel's Obligations

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Topics of Discussion

- *Padilla v. Kentucky*
 - Steps to representing a noncitizen defendant
 - Making the immigration analysis
- Deferred Action for Childhood Arrivals (DACA)
- 2012 case law update

Why Do I Need to Know This?

Padilla v. Kentucky
130 S. Ct. 1473 (U.S. 2010)

6th Amendment duty to advise client of
immigration consequences prior to
pleading guilty

Failure to advise is
ineffective assistance of counsel

The *Padilla v. Kentucky* Decision

- Who was Jose Padilla?
- What was he charged with?
- What did his attorney tell him?
- What did the Kentucky Supreme Court say?
- What did the U.S. Supreme Court say that affects our jobs?

Sixth Amendment Applies to Immigration Consequences

- Immigration is not merely “collateral” consequence:
- Immigration consequences are a “penalty” of the conviction, subject to Sixth Amendment protection.

Post-Conviction Relief

- Counsel must advise of the *specific* immigration consequences of a criminal disposition, based on the individual's facts.
- Failure to do this plus prejudice is basis to vacate the conviction
- *Padilla* applies retroactively, at least to convictions on or after 1996.

What is defender's duty under *Padilla*?

- Silence on immigration consequences is ineffective assistance of counsel
 - ABA, NLADA standards
- Advise on how to avoid being deportable
- Advise on how to avoid bars to relief from removal
- "Clear and unclear" questions

Judges and Prosecutors Reactions

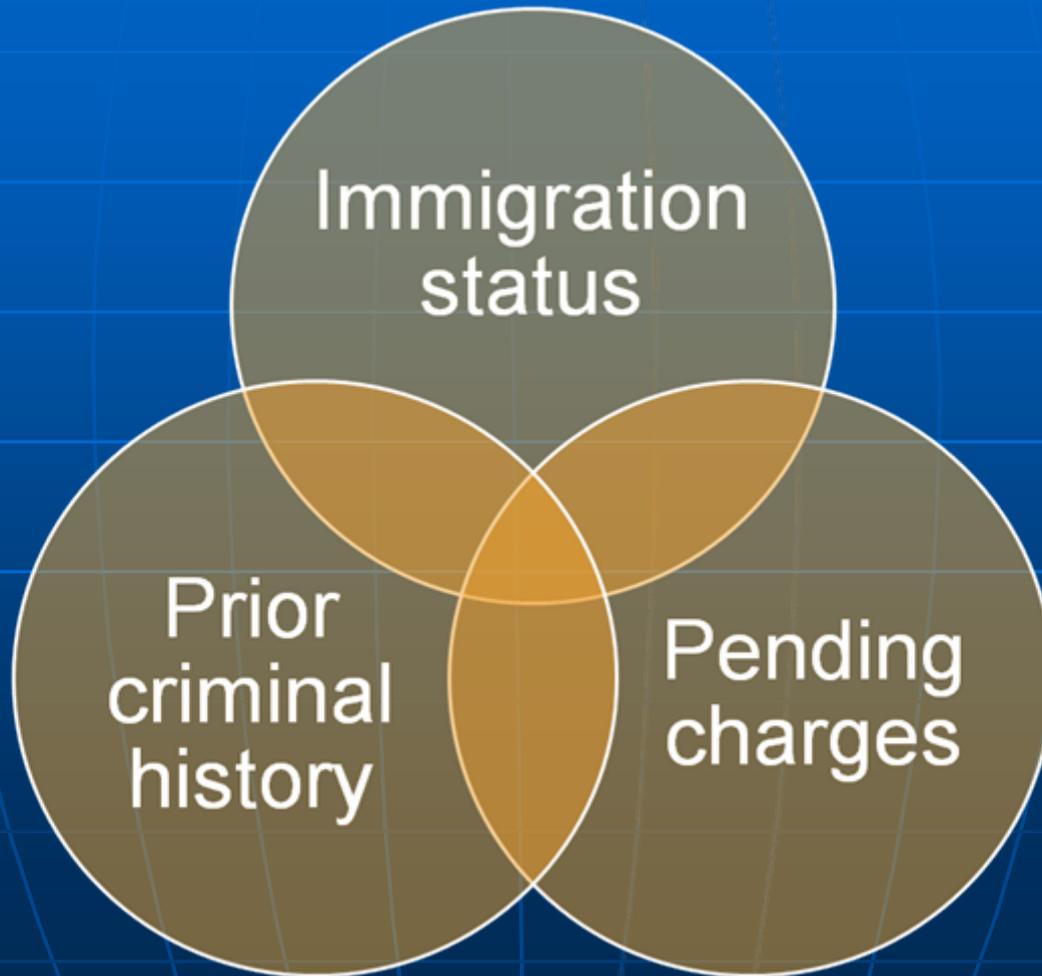
- *Padilla* threatens the validity of conviction, supports bargaining for immigration consequences
 - Judges should act appropriately.
 - *Padilla* directly states DA and defense both can benefit from plea bargaining with immigration consequences in mind.
 - “Informed consideration” of immigration consequences by the defense **AND THE PROSECUTION** during plea negotiations, in order to reduce likelihood of deportation and promote interests of justice, is appropriate.

Immigrants Subject to Second Layer of Punishment

Immigration consequences often worse than ordinary results of a criminal case

- Deportation (sometimes mandatory, often permanent)
- Bar to getting lawful immigration status (e.g., asylum, green card, student or work visas)
- Loss of current immigration status
- Bar to citizenship
- Bar to relief from deportation
- Bar to returning to U.S. after travel abroad
- Detention (sometimes mandatory, out-of-state, no fixed release date)

Getting Started



Defense Counsel Steps to Provide Effective Assistance of Counsel

- Step 1: Investigate & Gather the Facts
- Step 2: Analyze the immigration impact of the case usually in consultation with immigration expert until you gain expertise and advise the defendant
- Step 3: Ascertain defendant's wishes
- Step 4: Defend against the immigration consequences

Step 1: Investigate the Facts

- Use the Wisconsin State Public Defender Immigration Practice Group Questionnaire (provided in materials)
- Immigration status (what, when)
- Criminal history (*everything*, including low-level misdemeanors, deferred agreements, expunged)
 - Obtain date of commission and conviction, statute of conviction, and potential and actual sentence
- Prior deportations
- Family ties

Types of Immigration Status

U.S.
Citizen

Legal Permanent Resident
(Green card)

Lawful Non-Immigrants

Refugees & Asylees

Temporary Protected Status

Undocumented and Out of Status

U.S. Citizenship

- No **U.S. citizen or national** can be deported (“removed”), refused admission, or prosecuted for a crime for which alienage is an element, such as illegal re-entry
- Four basic ways to get citizenship:
 1. Born in the U.S. or territories
 2. Derivative Citizenship
 3. Acquired Citizenship
 4. Naturalize to U.S. citizenship

Become a U.S. Citizen # 1: Born in the U.S.A. (or Territories)

- Anyone born in the United States or certain territories is a USC – including if parents are undocumented
 - Puerto Rico, Guam and U.S. Virgin Islands; Northern Mariana Islands depending on date of birth
- Some persons are U.S. “nationals” by birth
 - Born in American Samoa, Swains Island, or other possession.

Become a U.S. Citizen # 2 & 3: Acquired and Derivative Citizenship

- Ask two threshold questions:
 1. When you were born, did you have a USC parent or grandparent?
 2. While under 18, (a) did you have a green card and (b) did a parent with custody of you become a citizen through naturalization? (In either order)
- If answer to either question is yes, person *might* be a USC. Use charts, or get assistance

Derivative Citizenship Recipe

How to make a USC:

- Take one juvenile delinquent with a green card
- Add a parent who has custody of the juvenile and who is eligible to naturalize to U.S. citizenship
- Naturalize the parent before the child turns 18. Child automatically becomes a USC!
 - Family should document the child's citizenship by applying for a U.S. Passport.
 - Can always raise citizenship in removal

Become a U.S. Citizen #4: Apply to Naturalize to U.S. Citizenship

- An LPR can apply to naturalize if:
 - Shows 5 yrs, or sometimes less, as LPR with "*good moral character*"
 - Meets other requirements
- If a *deportable* LPR applies, he or she could be referred to removal proceedings!
- Advantages for military personnel.

****NOTICE****

- *All non-USC's can be deported – easily – for the wrong criminal conviction. The “wrong conviction” can be a no-jail misdemeanor.*
 - Includes 20-yr LPR with 10 USC children
 - But with informed criminal defense, many non-USC's can keep or get lawful status despite having certain criminal convictions, including felonies.

Step 2: Immigration Consequences Analysis

- Requires Three Parts to Be Complete:
 - (1) Analysis of whether a criminal statute falls within the definition of one of the removal offenses described in the immigration statute.
 - (2) Analysis based on Defendant's prior criminal history.
 - (3) Analysis based on Defendant's immigration status and immigration history.
- You can use written resources to do this OR get expert help to if you are not confident that you have it right.

Step 3: Ascertain Client's Wishes

- Does the client want to prioritize mitigation of immigration consequences or a lesser criminal penalty?
 - a) The client goal spectrum
 - a) Avoid deportation triggers
 - b) Preserve eligibility to ask immigration judge to get or keep lawful immigration status
 - c) Preserve eligibility to obtain future immigration benefit
 - d) Get out of jail/custody ASAP
 - e) Immigration consequences not a priority
 - f) Desire to be deported as part of resolution

Information for a Defendant who wants to accept removal

- Immigration detention
- Never get lawful status
- ***Illegal re-entry*** = 2-3 years in federal prison
- If no aggravated felony conviction, Δ can request "voluntary departure" rather than "removal" or "voluntary removal."
 - No "removal" = illegal re-entry misdemeanor
 - *Might* have to wait to see Immigration Judge to get voluntary departure

Step 4: Defend the case according to the client's priorities

- a) If current offer fits client goals = take offer
- b) If offer doesn't fit client goals, then:
 - a) Negotiate sentencing concession (where lower sentence makes the difference)
 - b) Negotiate plea offer to non-deportable offense/particular section of statute
 - c) Make counter offer plea to other offense or specific section (sometimes conceding to higher sentence may not impact immigration)
 - d) Litigate case towards motions hearing and trial

Overview of Immigration Consequences

- Aggravated Felonies, 8 USC 1101(a)(43)
 - *"The death knell"*
- Deportation Grounds, 8 USC 1227(a)
 - *"Lose lawful status you already have"*
- Inadmissibility Grounds, 8 USC 1182(a)
 - *"Can't get new lawful status or admission"*
- Relief Requirements –
 - *Bars to eligibility for asylum, cancellation, etc., inadmissibility or other bars*

Being deportable means you can lose the lawful status you *already have*

- ***Deportable LPR***: can go to removal proceedings, lose status, & be removed!
 - Possible discretionary relief
- ***Undocumented person*** not so much
 - he or she has no status to lose.
 - Exception: applicant for non-LPR cancellation can be barred by deportable conviction

Criminal Grounds of Deportability

- Aggravated felony *conviction*
- Controlled substance *conviction*
 - Except simple possession 30 grams marijuana
- CIMT conviction
 - 1 within 5 years of admission + potential sentence of 1 year or more
 - 2 any time after admission "not arising out of a single scheme"
- Firearm or destructive device conviction
- Crime of domestic violence or stalking conviction
- Child abuse, neglect, or abandonment conviction
- Violation of order of protection - civil or criminal finding

Being inadmissible means you can be denied *new* status, admission, benefit

- ***Inadmissible undocumented*** person loses - If he or she has an application for a green card, likely inadmissibility will block it
 - Discretionary waiver might be available
- ***Inadmissible LPR*** not so much. They can't take away his or her LPR status if he or she stays in U.S.
 - But cannot leave U.S.
 - Delays applying for naturalization

Criminal Grounds of Inadmissibility

- Controlled substance offense - *conviction or admission*
- "Reason to believe" drug trafficker
- Crime involving moral turpitude (CIMT) - *conviction or admission*
 - Petty offense exception: for 1 CIMT if max possible sentence one year or less imprisonment + actual 6 months or less
- Prostitution or commercialized vice
- 2 or more offenses + aggregate sentence of 5+ years

Aggravated Felony

- Generally should be avoided!
- 8 U.S.C. 1101(a)(43) – federal statutory definition
- Minor, non-violent offense can be AF
- Misdemeanors can be AF

Aggravated Felony

Consequences

- Almost certain deportation for many imm.
- Permanent bar to returning to the U.S.
- Bar to many forms of relief from deportation
- Mandatory detention
- Significant due process restrictions
- Increased sentence enhancements in illegal reentry prosecutions under 8 U.S.C. 1326.

Aggravated Felony cont'd

Conviction-based AFs

Conviction of specified offense

Sentence-based AFs

Conviction of specified offense + sentence of imprisonment of one year or more

Circumstance-specific AFs

Conviction of specified offense + other factor (e.g. >\$10k loss to victim)

Aggravated Felony cont'd

Some Common Conviction-based

- Murder
- Rape
- Sexual abuse of a minor
- Drug Trafficking
- Firearm Trafficking

Some Common Sentence-based

- Crimes of violence
- Theft offenses
- Burglary
- Obstruction of justice

Some Common Circumstance-specific

- Fraud or deceit offense with loss > \$10,000
- Certain tax evasion with loss of revenue > \$10,000

Exercises: Deportable and Inadmissible

1. LPR **Ali** is *inadmissible* but *not deportable*, for a conviction from 20 years ago. Can he:
 - Be stripped of LPR status if he remains in the U.S.?
 - Travel outside the U.S. and safely return?
 - Be granted naturalization?

2. LPR **Barbara** is *deportable* but *not inadmissible*. Can she:

- Be stripped of LPR status and removed if she remains in the U.S.?
- Safely apply for naturalization?
- Safely renew her 10-yr green card?
- Apply for relief that requires admissibility, including to “re-adjust status” based on a family visa petition in removal proceedings?

- **3. Carlos** is undocumented and has a conviction that comes within the firearms ground of deportability. How does that affect his immigration status?

4. **David** has a conviction. Based just on what you've learned, do you think it's likely that:

- If he is convicted of an aggravated felony, he is automatically barred from asylum or LPR cancellation?
- If he is "merely deportable," he still *might* be eligible for these forms of relief?

Lawful Permanent Resident

- A/k/a LPR, "has a green card," permanent resident
- An LPR can live and work permanently in the U.S., as long as he or she does not become *deportable*.
- Can travel outside U.S. if not *inadmissible* for crimes
- Can petition for spouse, kids to become LPRs
- Someday may choose to naturalize to U.S. citizenship

Criminal defense goals for an LPR

1. Avoid an aggravated felony conviction.
 - Causes deportability with almost no possible relief; bars even voluntary departure
2. Avoid any other deportable conviction
 - LPR can be placed in removal proceedings, but *might* qualify for discretionary relief
3. If deportable, avoid a conviction that will bar relief from removal, avoid inadmissibility
4. Avoid inadmissible conviction, or else never travel outside the U.S.

What should a deportable LPR do?

A deportable LPR should avoid contact with DHS.

- Do not apply to renew your 10-year green card.
- Do not apply for naturalization.
- Do not file a visa petition for a family member.
- Do not travel outside the United States.
- Do not get arrested again!

What should an inadmissible LPR do?

- *Never travel outside the U.S., even for a very short time.*
 - Or at least get very expert advice. An LPR who is inadmissible for crimes and leaves U.S. can be stopped at the border and put in removal proceedings.
- *Just wait it out*
 - If inadmissible but not deportable, in five years the LPR can apply for naturalization.

Undocumented persons

- a/k/a undocumented workers, undoc, "illegal aliens,"
- Includes persons who entered the U.S. without inspection ("EWI"), or who entered with visa or permission that has expired or become invalid.

How the Undocumented Can Remain in the U.S.

- To stay here legally, an undoc person must qualify to apply for lawful status or relief from removal, e.g.
 - Immigrate through close USC or LPR family members, or VAWA or U Visa if there is DV.
 - Get or keep TPS (temporary protected status).
 - Win asylum, withholding, or CAT
 - Non-LPR cancellation, where immigration judge may grant LPR status based on long period in the country and other equities (very hard to get)
- Always check: might the person be a USC without knowing it??

Conviction or evidence of criminal conduct can bar undocumented person from relief.

- A conviction may bar an otherwise eligible person from getting lawful status or relief from removal. An *inadmissible* conviction is often a bar.
 - Example: Simon is married to a USC and has an approved family visa petition. He has applied to adjust his status to LPR. However, he is inadmissible because of some theft convictions. Unless he can obtain a waiver, he will be barred from becoming an LPR through his wife.

Defense goals for undocumented defendant

1. Avoid aggravated felony conviction.
 - This bars most forms of relief, including voluntary departure and may trigger immediate removal without a hearing
2. Avoid inadmissible conviction, or any conviction that is a bar to specific relief for which he or she may be eligible.
3. If will apply for non-LPR, VAWA or NACARA cancellation, avoid deportable conviction.

Neither Undoc nor LPR: *Examples of other immigration status or situation*

- Asylee, refugee
- Temporary Protected Status (TPS)
- Non-immigrant visa (F-1 student, H-1 worker)
- Has or is applying for a T or U visa
- Currently applying for ? status; "employment authorization document" ("EAD")
- Once applied for ? status; expired EAD
- Has no chance of avoiding leaving U.S.
- Has illegally re-entered after removal

Defense Goals for the Person Who Absolutely Will Be Ordered Removed

- E.g., undocumented with no hope of relief; deportable LPR with no waiver; most immigrants with prior removal/deportation
 - Avoid contact with immigration authorities. To do that: avoid jail time.
 - Warn of federal criminal penalties for illegal re-entry following removal and avoid convictions (such as agg fels) that will enhance re-entry sentences.

Most Important Things to Remember

- Determine client's immigration status
- Consider client's prior record
- Determine client's goals & defend client
- Tell client of risks of talking to ICE
- Tell client that leaving U.S. or applying for immigration benefit may be risky, should talk to immigration attorney (but advising client of immigration impact of current criminal case is criminal attorney's duty!)
- Get help from expert if you need it

Deferred Action for Childhood Arrivals (DACA)

- DACA is an Executive Order
- Exercise of Discretion by USCIS
- Temporary benefit for two years
 - May be extended or terminated at any time
- DACA is not amnesty, "Dream Act," or any legal status

Eligibility for DACA

- You came to the United States before reaching your 16th birthday
- You have continuously resided in the United States since June 15, 2007, up to the present time
- You were under the age of 31 as of June 15, 2012
- You entered without inspection before June 15, 2012, or your lawful immigration status expired as of June 15, 2012
- You are currently in school, have graduated or obtained your certificate of completion from high school, have obtained your general educational development certification, or you are an honorably discharged veteran of the Coast Guard or Armed Forces of the United States
- You have not been convicted of a felony, significant misdemeanor, or three or more misdemeanors, and do not otherwise pose a threat
- You were present in the United States on June 15, 2012, and at the time of making your request for consideration of deferred action with USCIS

DACA Considerations

- DACA does not confer legal status nor is it a means to get legal status
- Creates work authorization
 - SSN and SS card for work authorization
- Can apply for WI DL
- Can apply even if subject to final order of removal
- Gives ICE your client's entire life story
 - Bank statements, doctor visits, paycheck stubs, transcripts and attendance records, and honorable discharge paperwork
 - Possibly subject to removal if application is not approved

2012 *Padilla* Case Update

- *Arizona v. U.S.*, 132 S. Ct. 2492
 - Status checks are okay?
- *Chaidez v. U.S.* – Pending
 - Immigrants' Right to Effective Assistance of Counsel Existed Pre-*Padilla*
- *State v. Negrete*, 2012 WI 92
 - Nexus between guilty plea and immigration consequences

Special Thanks

Defending Immigrants Partnership
SPD Immigration Practice Group

If you need assistance or have questions please contact me

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