



Immigration Consequences in Domestic Violence and Drug Cases

Bradley J Schraven
Immigration Practice Coordinator



Office of the State Public Defender Immigration Practice Coordinator

- Immigration protocols to screen for non-citizen clients
- What I can generally do for you and your clients



Topics of Discussion

- Padilla v. Kentucky, 559 U.S. 356 (2010)
- Domestic violence ground of deportability
8 U.S.C. § 1227(a)(2)(E)(i)
- Controlled Substance ground of deportability
8 U.S.C. § 1227(a)(2)(B)(i)
- Controlled Substance ground of inadmissibility
8 U.S.C. § 1182(a)(2)(A)(i)(II)



Padilla v. Kentucky

559 U.S. 356 (2010)

- Who was José Padilla ?
- What was he charged with?
- What was his attorney's advice?
- What did the U.S. Supreme Court say?

Domestic Violence

Ground of Deportability

8 U.S.C. § 1227(a)(2)(E)(i)

Crime of Violence

18 USC § 16(a)

- an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another

Crime of Violence

18 USC § 16(b)

- any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense



Who is a domestic violence victim?

- current or former spouse
- someone they share a child with
- similarly situated to a spouse
- any other individual protected from family violence laws of any State



Domestic Violence Deportation Ground





Getting Started on Solutions

- Early detection as non-citizen is important
- *Padilla* applies to Judges as well
- *Padilla* definitely applies to prosecutors, but it is often glossed over in many jurisdictions



Defense Strategies

How to get started...



Can you avoid the domestic relationship

- Plead to a COV against a specific non-DV victim
 - Friend
 - Ex's new boyfriend/girlfriend
 - Neighbor
 - Police

Plead to a COV Against Property



- Violence against TV, furniture, car tires
- Remember non-COV property offenses
 - Theft, credit card



Keep the victim's relationship out of the record of conviction

- Some courts applied categorical approach to proof of domestic relationship.
 - See, e.g., Tokalty v. Ashcroft, 371 F.3d 613 (9th Cir. 2004)
 - Perhaps still okay under Descamps. v. United States, 570 U.S. ____ (2013)
- A vague record may no longer be safe
 - United States v. Hayes, 129 S.Ct. 1079 (2009); Matter of Velasquez, 25 I&N 278 (BIA 2010)
- But try it, if nothing else is available.



Domestic Violence Waiver for Cross-Charged Victim

- Client may qualify for waiver under 8 USC§1227(a)(7) if
 - a victim of DV, but
 - “cross-charged” and convicted of DV offense
- Waiver eliminates DV ground of deportation & preserves eligibility for relief (both non-LPR and VAWA cancellation of removal)
- No waiver for child abuse crimes

Domestic Violence Crime Waiver

Alien is
also a
victim

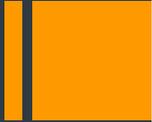
Not
primary
perpetrator

And acted in
self defense,
or violated
order to
protect the
alien, or no
serious injury
and alien
subjected to
having been
battered or
extreme
cruelty



Easy DV Solutions

- Plead to an ordinance
- Non-plead style DPA
- DC, even with a DV modifier?



Violation of a Protective Order, 8 USC § 1227(a)(2)(E)(ii)

- Deportable if civil or criminal court finds violation of order protecting against
 - Credible threats of violence
 - Repeated harassment
 - Bodily injury
- No conviction required
- Protection order = injunction to prevent violent or threatening acts of domestic violence
 - Not child support or child custody order



DV Court Order Solutions

- Plead to generic court order violation statute, or to a new conviction rather than violation of no-contact order
- Avoid record showing that violation was for portion of the order involving threats, repeated harassment, etc.
- If possible, construct DV protection orders to include some non-DV aspects, e.g., visitation, payment of support

Drug Deportability

8 USC 1227(a)(2)(B)(i)



Alien



any time after admission



As defined in 21 USC § 802



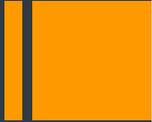
Convicted of any law relating to controlled substances



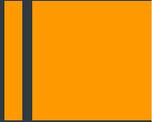
Not single offense of possession for personal use of 30 grams or less of marijuana



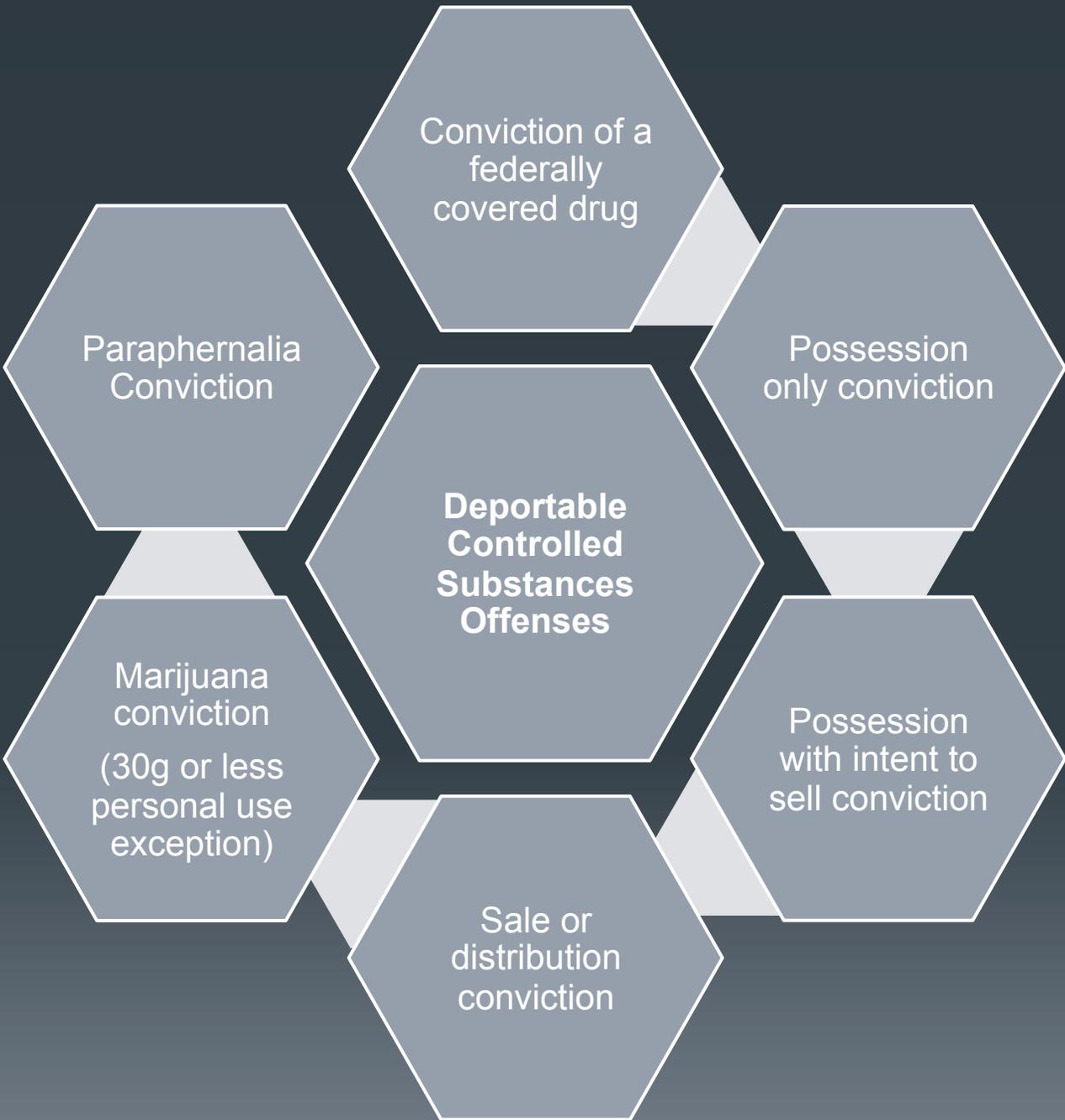
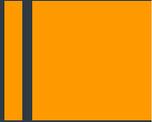
Is deportable under 8 USC § 1227(a)(2)(B)(i)



“Controlled Substance” Element



- 21 USC § 802 says that “controlled substance” means “a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V” of the federal Controlled Substances Act.
- The government has the burden to prove that the substance involved is included in 21 USC § 802. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).



Marijuana Exception





Not everything is covered

- Conviction for drug that is not covered under federal law
- Think prescription drugs in particular
- Not deportable because it's not a controlled substance under 21 USC § 802



Drug Trafficking Aggravated Felony 8 USC § 1101(a)(43)(B)

- Alien
- After admission
- Is convicted of “Any illicit trafficking” of a controlled substance (as defined in 21 USC § 802)
- Including any drug trafficking crime (as defined in section 924(c) of title 18, United States Code)”



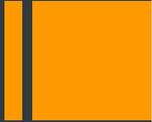
Drug Trafficking Crime

- The term “drug trafficking crime” means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.



Possible Drug AF Safer havens

- Type of drug is not in the record
- Sale, manufacturing or distribution not in record
- Possession case and prior not at issue
- Offer to sell only
- Gratuitous marijuana distribution (small amount)
- But remember to analyze whether it's still a controlled substance offense!



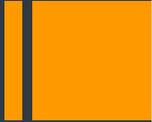
Avoid “controlled substance offense” deportability:

- Avoid any drug-related conviction.
- Specify a substance that is not covered under 21 U.S.C. 802. If impossible, then keep record clear of substance involved (WI punishes non-CSA drugs).
- If cannot avoid drug conviction in marijuana case and client has no prior drug convictions, take a possession for personal use of 30 grams or less of marijuana (preferably on record, else leave record ambiguous).



Undocumented clients and everyone else on inadmissibility

- Undocumented clients are primarily concerned about avoiding inadmissibility
 - Is it a controlled substance offense?
 - Does it trigger “reason to believe drug trafficker” ground?
 - This is also why aliens with status should not leave the country.



Strategies to Counter Drug Inadmissibility

- Best practice is to avoid any drug-related conviction!
- Specify a substance that is not covered under 21 U.S.C. 802.
- If client with citizen/LPR parent/spouse/child is facing a marijuana charge and you absolutely cannot avoid conviction, it may help to limit conviction to simple possession of 30 grams or less of marijuana

General Strategies to Counter Immigration Consequences of Drug Offenses

- Negotiate diversion *without* a guilty plea (to avoid “conviction”)
- In some cases, plea to accompanying non-drug charge may be better
- Ordinances can count because it’s a conduct based ground that doesn’t require a conviction



Special Thanks

- Immigration Advocates Network
- Defending Immigrants Partnership
- Immigrant Legal Resource Center



Thank you

Bradley Schraven
Immigration Practice Coordinator
Office of the State Public Defender

715-582-1193
schravenb@opd.wi.gov