

# *Padilla in Practice Series*

## Immigration Consequences of Criminal Cases: Overview of Concepts and Emerging Issues

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**National Association of Criminal Defense Lawyers  
and the Defending Immigrants Partnership**

# Presenters

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# Why Do I Need to Know This?

## Padilla v. Kentucky

March 31, 2010

6<sup>th</sup> A duty to advise client of immigration consequences prior to pleading guilty

Failure to advise is  
ineffective assistance of counsel

# 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)

# Topics of Discussion

Types of Immigration Status

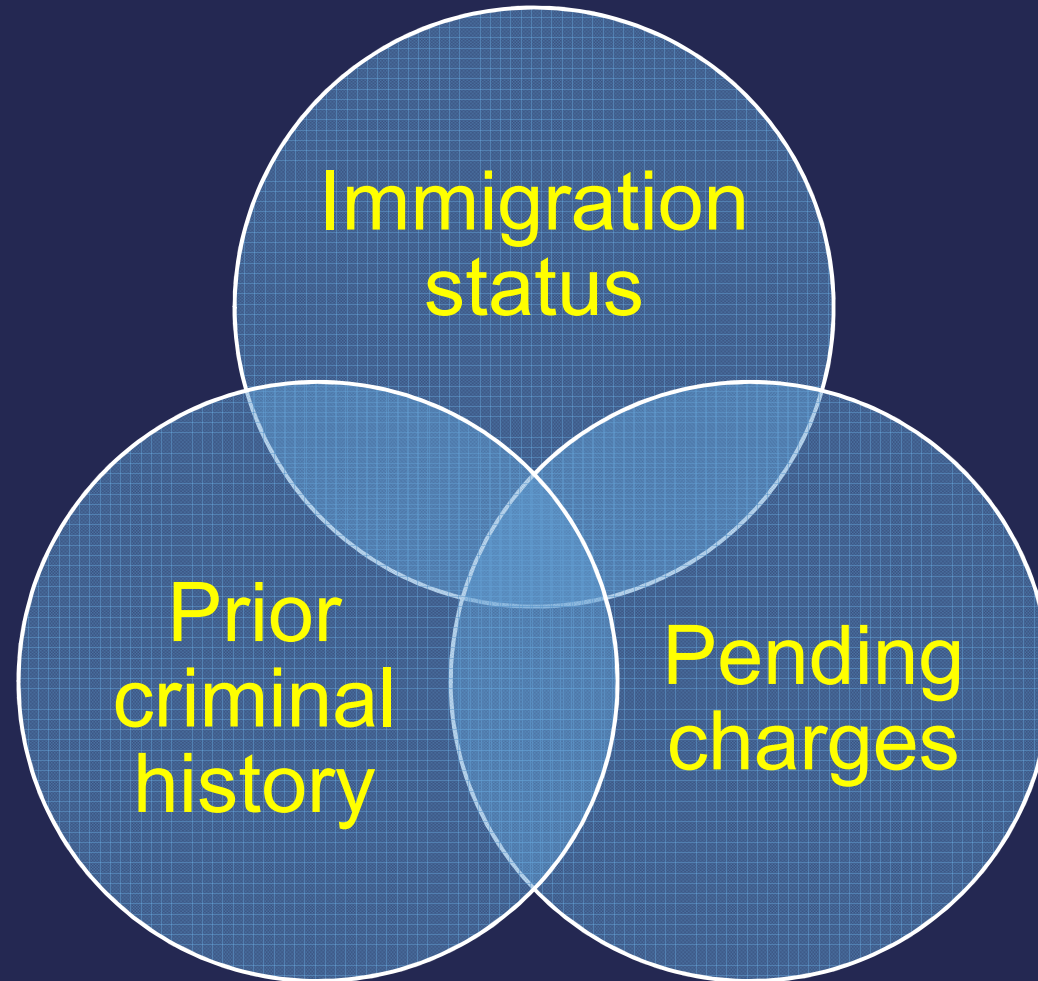
Immigration Terms of Art

Immigration Consequences of Criminal Offenses

Defense Steps

Immigration Enforcement

To advise your client you need to  
know:



# 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

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# Conviction

A formal judgment of guilt  
or

Where no formal finding of guilt:

- If defendant pleads guilty, *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, AND
- The judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48)

# Juvenile Dispositions

- ❑ A finding of delinquency is *not* a conviction for immigration purposes
- ❑ A youthful offender adjudication *is not* a conviction for immigration purposes *if* analogous to the Federal Juvenile Delinquency Act



Juvenile dispositions can still have imm. conseq. because some immigration consequences are triggered by conduct alone.

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# Sentence

Under immigration law, a “sentence” includes any term of imprisonment whether committed or suspended.

# The Record of Conviction

- Elements of offense (statute & case law)
- Criminal charge (information, complaint, etc. **if incorporated into plea – i.e. pled as charged**)
- Written plea agreement
- Transcript of plea hearing
- Transcript of judgment
- Sentence
- Jury instructions

# The Record of Conviction Does NOT Include:

- Police reports, probation or pre-sentence reports
- Statements by non-citizen outside of judgment and sentence transcript (to police for example)
- Information from co-defendant's case

**WARNING:** Stipulating to facts in a document not otherwise part of the ROC incorporates them by reference into the ROC (i.e., stipulation to police reports)

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# Primary Crime Related Provisions of Immigration Law

- Grounds of Inadmissibility, 8 USC 1182(a)(2).
- Grounds of Deportability, 8 USC 1227(a)(2).
- Aggravated Felony Definition, 8 USC 1101(a)(43).



# Inadmissibility v. Deportability

- ❑ If client has been lawfully admitted to the U.S. (LPR, Visa, etc.), may be charged with grounds of deportability (e.g., loss of status) pursuant to 8 USC 1227.
- ❑ If client is seeking entry or admission to the United States, may be charged with grounds of inadmissibility (bar to obtaining an immigration benefit) pursuant to 8 USC 1182.

# Grounds of Inadmissibility and Deportability

## Inadmissibility (INA 1182)

## Deportability ( INA 1227)

Crimes involving moral turpitude

Crimes involving moral turpitude

Controlled Substance Offense

Controlled Substance Offense

Prostitution related offenses

Conviction of multiple offenses (5 years or more)

Firearms offenses

Domestic Violence offenses

Aggravated Felonies

# 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

# 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*

# Aggravated Felony



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



# Establishing Defense Priorities

- Generally, LPRs care *most* about avoiding grounds of deportability – esp. aggravated felonies.
- Undocumented care *most* about avoiding grounds of inadmissibility.
- Aggravated felonies are bad for most people!
- Everyone wants to preserve eligibility for discretionary relief.

***The Point: To determine defense priorities, you need to know immigration status and the potential grounds of removability.***

# 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.

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# Defense Steps

- Step 1: Investigate & Gather the Facts
- Step 2: Analyze the immigration impact of the case by consulting with immigration expert and advise the defendant
- Step 3: Ascertain defendant's wishes
- Step 4: Defend against the immigration consequences

# Step 1

## Investigate the Facts:

### Questionnaire

- Immigration status (what, when)
- Criminal history (*everything*, including low-level, vacatur, sealed)
- Prior deportations
- Family ties

# 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.

# Step 3: Ascertain Client's Wishes

- Does the client want to prioritize mitigation of immigration consequences or a lesser criminal penalty?

## 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 imm. benefit
- d) Get out of jail/custody ASAP
- e) Immigration consequences not a priority
- f) Desire to be deported as part of resolution

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

1. If current offer fits client goals = take offer
2. 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



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**THIS IS IMMIGRATION  
ENFORCEMENT**

**CRIMINAL  
ALIEN  
PROGRAM**

**SECURE  
COMMUNITIES**



**287(g)**



**ICE HOLD**

# Dispelling the Myths about ICE Holds

1. Not mandatory, characterized as a “request”
2. Not equivalent to a criminal warrant b/c no standard of proof; frequent errors
3. Not a summons to immigration court or proof person is deportable
4. No authority for detention beyond 48 hours



# What can you do?

- Inform your client of the right to remain silent when any officer questions them about place of birth, documentation, legal status
- Get your client out of custody asap if an ICE hold is not already in place
- Challenge ICE detainer practices in your jail, placement of detainers and violations of the 48 hour rule, e.g., call jail and/or ICE, file habeas or false imprisonment actions

# Most Important Things to Remember

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

# Resources

- ❖ Defending Immigrants Partnership [www.defendingimmigrants.org](http://www.defendingimmigrants.org)
- ❖ National Association of Criminal Defense Lawyers [www.nacdl.org](http://www.nacdl.org)
- ❖ Immigrant Defense Project
  - ❖ Hotline (212) 725-6422, [info@immigrantdefenseproject.org](mailto:info@immigrantdefenseproject.org)
  - ❖ [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)
- ❖ Immigrant Legal Resource Center
  - ❖ [www.ilrc.org](http://www.ilrc.org)
- ❖ National Immigration Project of NLG
  - ❖ [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org)
- ❖ CPCS Immigration Impact Unit
  - ❖ [www.publiccounsel.net/Practice\\_Areas/immigration/immigration\\_index.html](http://www.publiccounsel.net/Practice_Areas/immigration/immigration_index.html)