



Representing  
Immigrant  
Defendants  
After  
Padilla v.  
Kentucky

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# Training Agenda

- Padilla v. Kentucky (130 S. Ct. 1473)
- How to integrate immigration consequences into your practice
- Basic introduction to immigration consequences of criminal conduct
- Crafting plea agreements
- Secure Communities
- Resources



# PART I

**Padilla v. Kentucky**  
(130 S. Ct. 1473)

# Padilla v. Kentucky

## The Facts

- Who was Jose Padilla?
- Lawful permanent resident for 40 years
- Vietnam War veteran
- Charged with marijuana possession and trafficking for having marijuana in his commercial truck
- Pled guilty (plea agreement) for marijuana trafficking after defense attorney told him he did not have to worry about deportation because he had lived in US for so long

# Padilla v. Kentucky

## Holding

- Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea
- Absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.

# Padilla

## Key Points -- 1

- Analysis based on Strickland v. Washington (*104 S. Ct. 3562*)
- The Sixth Amendment requires affirmative, competent advice regarding immigration consequences.
- Non-advice (silence) is insufficient (ineffective).

# Padilla

## Key Points – 2

- Every noncitizen client must be advised as specifically as the law allows of the immigration consequences of pleading guilty.
- “Lack of clarity in the law . . . does not obviate the need to say something about the possibility of deportation, even though it will affect the scope and nature of counsel’s advice.” 130 S. Ct. at 1483 n.10.

# Padilla

## Key Points – 3

- The Court endorsed “informed consideration” of deportation consequences by both defense and the prosecution during plea-bargaining” 130 S. Ct. at 1486.



## PART II

Duties of the Criminal  
Defense Bar:  
Integrating  
Immigration Advisal

# Steps to Effective Representation After Padilla

- 1) Intake form: Gather Information. Copy all documents.
- 2) Use Intake form to Make Immigration Analysis
- 3) Identify Client's Priorities and Advise Client
- 4) Defend Case According to Client's Priorities

To facilitate consultations, please have the following information when you call, along with a record of **all prior charges** from all states/countries and information about the **current criminal case**.

Client's Name: \_\_\_\_\_ Date of Birth: \_\_\_\_\_

<b>Nationality</b>	
<b>When did the client enter U.S.?</b>	
<b>How did the client enter U.S.? (examples at right)</b>	Lawful permanent resident (LPR)/ Green card Temporary visa (e.g., tourist, student, business) Cross border without documents Refugee Other ( _____ )
<b>What is the client's current status? (examples at right)</b>	Lawful permanent resident (LPR)/ Green card (date client became LPR _____) Temporary visa (in status) Undocumented (visa overstay/expired) Undocumented (crossed border, never got status) Asylee/Refugee Temporary Protected Status (TPS) Other ( _____ )
<b>Has the client ever been ordered deported/ removed?</b>	
<b>Immigration status of family members:</b> - spouse - parents - children	

# Step 1: Intake: Determine Your Client's Status

Routinize: "Where were you born?"

Be sensitive:

- From the client's perspective you are part of the system.
- Establish trust and explain why you're asking.

Avoid asking for legal conclusions:

- Ask "Where were you born," not "Are you a citizen?"
- Ask "Do you have a green card," not "Are you legal?"

Never assume status from rap sheet, name, appearance, language, accent or anything else

# Step 1: Intake (cont.)

## Types of Immigration Status

- U.S. Citizen
  - Birth; Naturalization; Automatic Derivation/Acquisition
- Lawful Permanent Resident (“green card”)(LPR)
- Nonimmigrant Visa (tourist, student, business professional, seasonal worker)
- Asylee/refugee
- Temporary Protected Status
- Visa Overstay
- Entered Without Inspection (“EWI”)

# Step 1: Intake (cont.)

## Immigration/ Criminal History

For all clients, obtain:

- Copy all documents

- Date of first entry into U.S. (dates of all departures and re-entry)

- First lawful admission in any status

- How the client entered the U.S.

- Immediate family members' status

- Complete prior criminal history

- Has the client ever been deported or removed

For LPRs:

- Date received LPR status

## Step 2: Determine Immigration Consequences

- Investigation + crim history + goal =advisal
- Develop expertise yourself (assistance from resources) or consult with criminal immigration experts
  - And
- Advise on both clear and unclear immigration consequences of the charge, the offer and any alternate plea dispositions that may be attainable in the case

# Consequences of Criminal Offenses

- Mandatory removal from the U.S.
- Inability to return to the U.S.
- “Good moral character” bar to naturalization (INA §101 (f))
- Denial of LPR status
- Bar to asylum/withholding of removal
- Inability to renew green card or travel
- Mandatory detention

## Step 3: Identify Client's Priorities

- Client may need to choose whether immigration consequences or criminal sentence concerns are most important
- Give client immigration analysis regardless of their stated desire to fight deportation, give the client the basic information as to what might happen next

## Step 4: Defend the Case According to the Client's Priorities

- If immigration consequences are client's priority, conduct defense with this in mind: Padilla, 130 S. Ct. at 1484
- a) If current offer fits client goals with most favorable immigration outcome = take offer
- b) If offer doesn't fit client goals, maybe:
  - Negotiate plea offer to particular section of statute
  - Litigate case towards motions hearing and trial if less risky than immigration consequences of the plea
  - If applicable, negotiate sentencing concession
  - Remember Padilla's instruction on prosecutor's duty



## PART III

# Overview of the Immigration Consequences of Criminal Offenses

# Inadmissibility v.

INA § 212, 8 U.S.C. § 1182

# Deportability

INA § 237, 8 U.S.C. § 1227

## INADMISSIBILITY

- Applies to noncitizens seeking lawful admission (or readmission) to the US
- Non-LPRs (including refugees, asylees, and undocumented people) should focus on avoiding inadmissibility
- LPRs traveling outside the US may also need to focus on inadmissibility

## DEPORTABILITY

- Applies to noncitizens lawfully “admitted” into the US
- LPRs in the US should focus primarily on deportability

## Immigration Consequences of Crimes Summary Checklist \*

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CRIMINAL INADMISSIBILITY GROUNDS	CRIMINAL DEPORTATION GROUNDS	CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP
– Will or may prevent a noncitizen from being able to obtain lawful status in the U.S. May also prevent a noncitizen who already has lawful status from being able to return to the U.S. from a trip abroad in the future.	– Will or may result in deportation of a noncitizen who already has lawful status, such as a lawful permanent resident (LPR) green card holder.	– Will prevent an LPR from being able to obtain U.S. citizenship.
Conviction or admitted commission of a <b>Controlled Substance Offense</b> , or DHS reason to believe that the individual is a drug trafficker	Conviction of a <b>Controlled Substance Offense EXCEPT</b> a single offense of simple possession of 30g or less of marijuana	Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years: > <b>Controlled Substance Offense</b> (unless single offense of simple possession of 30g or less of marijuana) > <b>Crime Involving Moral Turpitude</b> (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months) > 2 or more offenses of any type + aggregate prison sentence of 5 years > 2 gambling offenses > <b>Confinement</b> to a jail for an aggregate period of 180 days
Conviction or admitted commission of a <b>Crime Involving Moral Turpitude (CIMT)</b> , which category includes a broad range of crimes, including: <ul style="list-style-type: none"> <li>◆ Crimes with an <i>intent to steal or defraud</i> as an element (e.g., theft, forgery)</li> <li>◆ Crimes in which <i>bodily harm</i> is caused or threatened by an intentional act, or <i>serious bodily harm</i> is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes)</li> <li>◆ Most sex offenses</li> </ul> <i>Petty Offense Exception</i> – for one CIMT if the client has no other CIMT + the offense is not punishable > 1 year + does not involve a prison sentence > 6 mos.	Conviction of a <b>Crime Involving Moral Turpitude (CIMT)</b> [see Criminal Inadmissibility Gds] > One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed > Two CIMTs committed at any time “not arising out of a single scheme”	> <b>Crime Involving Moral Turpitude</b> (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months) > 2 or more offenses of any type + aggregate prison sentence of 5 years > 2 gambling offenses > <b>Confinement</b> to a jail for an aggregate period of 180 days
<b>Prostitution and Commercialized Vice</b> Conviction of two or more offenses of any type + aggregate prison sentence of 5 yrs.	Conviction of a <b>Firearm or Destructive Device Offense</b>	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship
<b>CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY</b> based on extreme hardship to USC or LPR spouse, parent, son or daughter	Conviction of a <b>Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order</b> (criminal or civil)	“CONVICTION” as defined for immigration purposes
> Conviction or admitted commission of a <b>Controlled Substance Offense</b> other than a single offense of simple possession of 30 g or less of marijuana > Conviction or admitted commission of a <b>violent or dangerous crime</b> will presumptively bar 212(h) relief > In the case of an LPR, conviction of an <b>Aggravated Felony</b> [see Criminal Deportation Gds], or any <b>Criminal Inadmissibility</b> if removal proceedings initiated before 7 yrs. of lawful residence in U.S.	Conviction of an <b>Aggravated Felony</b> > <i>Consequences</i> , in addition to deportability: <ul style="list-style-type: none"> <li>◆ Ineligibility for most waivers of removal</li> <li>◆ Permanent inadmissibility after removal</li> <li>◆ Enhanced prison sentence for illegal reentry</li> </ul> > <i>Crimes included</i> , probably even if not a felony: <ul style="list-style-type: none"> <li>◆ Murder</li> <li>◆ Rape</li> <li>◆ Sexual Abuse of a Minor</li> <li>◆ Drug Trafficking (including most sale or intent to sell offenses, but also including possession of more than 5 grams of crack or any amount of flunitrazepam and possibly including certain second or subsequent possession offenses where the criminal court makes a finding of recidivism)</li> <li>◆ Firearm Trafficking</li> <li>◆ Crime of Violence + at least 1 year prison sentence **</li> <li>◆ Theft or Burglary + at least 1 year prison sentence **</li> <li>◆ Fraud or tax evasion + loss to victim(s) &gt;10,000</li> <li>◆ Prostitution business offenses</li> <li>◆ Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence **</li> <li>◆ Obstruction of justice or perjury + at least 1 year prison sentence **</li> <li>◆ Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.)</li> <li>◆ Other offenses listed at 8 USC 1101(a)(43)</li> <li>◆ Attempt or conspiracy to commit any of the above</li> </ul>	A formal judgment of guilt of the noncitizen entered by a court, OR, if adjudication of guilt has been withheld, where: <ol style="list-style-type: none"> <li>(i) A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or <i>nolo contendere</i> or has admitted sufficient facts to warrant a finding of guilt, and</li> <li>(ii) The judge has ordered some form of punishment, penalty, or restraint on the noncitizen’s liberty to be imposed</li> </ol> <b>THUS:</b> > A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition <b>IS</b> a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated) > A deferred adjudication without a guilty plea <b>IS NOT</b> a conviction > NOTE: A youthful offender adjudication <b>IS NOT</b> a conviction if analogous to a federal juvenile delinquency adjudication
<b>CRIMINAL BARS ON ASYLUM</b> based on well-founded fear of persecution in country of removal OR <b>WITHHOLDING OF REMOVAL</b> based on threat to life or freedom in country of removal	Conviction of a <b>Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order</b> (criminal or civil)	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship
Conviction of a “Particularly Serious Crime” (PSC), including the following: <ul style="list-style-type: none"> <li>&gt; <b>Aggravated Felony</b> [see Criminal Deportation Gds]                             <ul style="list-style-type: none"> <li>◆ All aggravated felonies will bar asylum</li> <li>◆ Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding</li> <li>◆ Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding of removal</li> </ul> </li> <li>&gt; <b>Violent or dangerous crime</b> will presumptively bar asylum</li> <li>&gt; <b>Other PSCs</b> – no statutory definition; see case law</li> </ul>	Conviction of a <b>Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order</b> (criminal or civil)	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship
<b>CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY</b> based on humanitarian purposes, family unity, or public interest (only for persons who have asylum or refugee status)	Conviction of a <b>Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order</b> (criminal or civil)	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship
> DHS reason to believe that the individual is a drug trafficker > Conviction or commission of a <b>violent or dangerous crime</b> will presumptively bar 209(c) relief	Conviction of a <b>Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order</b> (criminal or civil)	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship
<b>CRIMINAL BARS ON LPR CANCELLATION OF REMOVAL</b> based on LPR status of 5 yrs or more and continuous residence in U.S. for 7 yrs after admission (only for persons who have LPR status)	Conviction of a <b>Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order</b> (criminal or civil)	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship
> Conviction of an <b>Aggravated Felony</b> > Offense triggering removability referred to in <b>Criminal Inadmissibility Grounds</b> if committed before 7 yrs of continuous residence in U.S.	Conviction of a <b>Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order</b> (criminal or civil)	Conviction of an <b>Aggravated Felony</b> on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship

\*For more comprehensive legal resources, visit IDP at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org) or call 212-725-6422 for individual case support.

\*\* The “at least 1 year” prison sentence requirement includes a suspended prison sentence of 1 year or more.

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# Criminal Grounds of Inadmissibility INA § 212(a)(2)

Does not always require conviction

- Crime involving moral turpitude (CIMT)- conviction or admitted commission
  - CIMT: intent to steal or defraud; bodily harm by intentional act; serious bodily harm by reckless act; most sex offenses
  - Petty Offense Exception: single CIMT if max. possible penalty is not greater than 1yr and actual penalty ≤ 6mos.
- Controlled Substance Offense- conviction or admitted commission (substance enumerated in federal CSA)(controlled substance act)
  - NO marijuana exception
- Multiple convictions w/ aggregate sentence of 5 years
- Reason to Believe Drug Trafficker- no conviction required
- Prostitution & Commercialized Vice- no conviction require

# Criminal Grounds of Deportability

## INA § 237, 8 U.S.C. § 1227

- Controlled substance conviction (substance numerated in federal CSA)
  - Or drug abuser or addict
- CIMT conviction
  - CIMT: intent to steal or defraud; bodily harm by intentional act; serious bodily harm by reckless act; most sex offenses
  - 1 within 5 years of admission + potential sentence of 1 year or more
  - 2 CIMTs after admission “not arising out of a single scheme”
- Firearm or destructive device conviction
- Domestic violence
  - Crime of domestic violence
  - Stalking conviction
  - Child abuse, neglect, or abandonment
  - Violation of order of protection (civil or criminal finding)
- Aggravated felony conviction (AF)

# Examples of Montana Offenses That Are or May Be a CIMT

- Probable/definite CIMTs:
  - Assault with a weapon:  
mca § 45-5-213
  - Misdemeanor assault:  
mca § 45-5-201
  - Theft:  
mca § 45-6-301
  - Forgery:  
mca § 45-6-325
- Sexual offenses:  
mca§ 45-5-502
- Possible CIMTs:
  - Both DUI(alcohol) and  
Driving While  
Suspended.

# Examples of Montana Offenses That Are Aggravated felony (AF)

- Sexual abuse of children:  
mca § 45-5-625
- Criminal Possession with intent to distribute:  
mca § 45-9-103
- Deliberate homicide:  
mca § 45-5-102
- Promoting Prostitution  
mca § 45-5-602



# PART IV

## Crafting Plea Agreements

# What is a conviction?

- Deportability usually requires “conviction”
  - INA § 101(a)(48); 8 U.S.C. § 1101(a)(48)
- A conviction is:
  - A formal judgment of guilt entered by a court
  - or
- Where adjudication of guilt has been withheld,
  - Δ admits facts sufficient to warrant a finding of guilt
  - and
  - Court has ordered some form of punishment, penalty, or restraint on liberty.

# Definition of “Conviction”: MONTANA

MCA§ 45-2-101 (16)

Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or nolo contendere or upon a verdict or finding of guilty of an offense rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

# Mitigation Strategies

- In addition to seeking to negotiate non-removable plea/sentence, strategies may include:
  - Avoiding sentencing trigger (e.g. 364 days, 179 days)
  - Pre-plea diversion
  - Control allocation of potentially removable offense:
  - Avoid admissions of any conduct beyond bare elements of offense (esp. for potential CIMTs)
  - Sanitize record
  - Loss amount strategies

# Mitigation Strategies (cont)

- Negotiate prosecutor's sponsorship of S or U visa for cooperators/cross-complainants
- Avoid ICE contact via jail or probation
- File appeal
- Seek post-conviction relief
- Avoid sex offender registry

# ICE Contact with Clients( ICE LOOK AT THESE)

- Arrest to arraignment
- Criminal custody facilities
- Green card renewal
- Other applications: Adjustment of Status, citizenship
- Return from travel abroad
- Sex offenders

# Detainers

- Detainer- request by ICE to be held for pick up
- Plead to deportable offense after jail time accrued, not before
- Detainer does not prevent release from DOC custody, but client will be held for pickup by ICE
- 48 hour rule( excluding Holidays and weekends)
- Client has right to refuse ICE interview in DOC custody (DO NOT TALK TO ICE)
- Never lie to ICE about citizenship

# ICE: SECURE COMMUNITIES

- Ice has an agreement with the Montana Department of Justice
- By 2013 ICE plans to mandate that all local law enforcement agencies enroll in secure communities.
- The system take the finger print from the arresting agency and send it to the FBI and ICE. ICE will then issue a detainer to the arresting officer
- Lewistown, Missoula and Yellowstone

# RESOURCES:

## Consultation

- Collect data on intake form (included)
- Have complaint & rap sheet available
- Contact [Knandlal@mt.gov](mailto:Knandlal@mt.gov)
- Contact CQuinn@mt.gov

# RESOURCES:

## Web

- Immigrant Defense Project
  - [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)
- Defending Immigrants Partnership
  - [www.defendingimmigrants.org](http://www.defendingimmigrants.org)
- National Immigration Project, NLG
  - [www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org)

# RESOURCES:

## Print

- M. Vargas, “Tips on How to Work With an Immigration Lawyer to Best protect Your Noncitizen Defendant Client” (handout materials)
- N. Tooby, Tooby’s Guide to Criminal Immigration Law (2008)  
free download @ [www.criminalandimmigrationlaw.com](http://www.criminalandimmigrationlaw.com)
- N. Tooby, Criminal Defense of Immigrants (4th ed.)
- N. Tooby, Safe Havens (2005)



# HYPOTHETICAL

PLEASE REFER TO THE ATTACHED  
HYPOTHETICAL



# QUESTIONS