

The *Padilla* Rule

"[C]ounsel must inform her client whether his plea carries a risk of deportation."

Padilla v. Kentucky, 559 U.S. ___, * 17, No. 08-651 (2010).



Complying with *Padilla*

1. You must know some immigration law;
2. Consult with an immigration lawyer;
3. Check statute, case law, and secondary sources; and
4. Document your studies in your file.



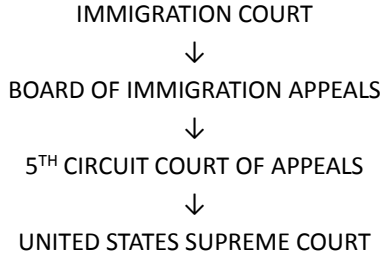
STATUTES, CASE LAW, and SECONDARY SOURCES

Important immigration statutes:

- 8 U.S.C. Sect. 1227(a)(2) (grounds of removal from the United States);
- 8 U.S.C. 1101 Sect. (a)(43) (definition of aggravated felony);
- 8 U.S.C. Sect. 1182(a)(2) grounds of inadmissibility into the United States;
- 8 U.S.C. Sect. 1231(a)(5) (Reinstatement statute);
- 8 U.S.C. Sect. 1228(b)(1) (Administrative Removal).



Case Law



Case Law, cont'd.

- Board of Immigration Appeals, EOIR *Virtual Library*
- <http://www.justice.gov/eoir/vll/libindex.html>
- See the Board Precedents and Related Court Decisions Chart
- Sign up to receive email notifications when new Board decisions are entered



Secondary Sources

- Kurzban's
- National Immigration Project
- Norton Tooby
- Join AILA (American Immigration Lawyers Association)
- Join SABA Immigration.



Padilla's TWO CATEGORIES

1. If "the terms of the relevant immigration statute are succinct, clear and explicit," then you must advise your client regarding the removal consequences.
2. If not "succinct and straightforward," then your duty is to advise that it might carry adverse immigration consequences.



Padilla's implied presumption

The immigration law is "succinct, clear, and explicit" . . . until you research it and find otherwise!

YOU HAVE A DUTY TO INVESTIGATE AND ADVISE ABOUT IMMIGRATION CONSEQUENCES



WHAT DO YOU NEED TO KNOW?

1. Will the plea result in your client being placed in a removal proceeding?
2. If yes, will the plea disqualify your client from seeking any form of discretionary relief in the removal proceeding?



Will the conviction result in a removal proceeding?

- If unlawfully present, they are going to be placed in a removal proceeding. See if your plea will affect their eligibility for relief.
- If lawfully present, they may or may not be placed in a removal proceeding, depending on the conviction.



Lawful Permanent Residents and Removal

- **You must determine whether plea will result in a removal proceeding.**
- Grounds of removal are located at 8 U.S.C. Sect. 1227(a)(2).



Most common criminal grounds of removal relating to Lawful Permanent Residents

1. Aggravated felonies
2. Crimes involving moral turpitude
3. Smuggling offenses
4. Offenses relating to controlled substances
5. Certain Firearm offenses
6. Crimes involving domestic violence



Aggravated Felonies

- "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. Sect. 1227(a)(2)(A)(iii)
- Relief extremely limited
- Does not need to be a "felony" conviction in order to be an "aggravated felony" for immigration purposes



What is an Aggravated Felony?

- See handout for statutory definition
- Check Board of Immigration Appeals Precedent
- Check 5th Circuit Court of Appeals Precedent
- Deferred Adjudication may for certain types of crimes avoid the finding of an aggravated felony



What is a Crime Involving Moral Turpitude (CIMT)?

- Fraud
- Most sex crimes
- Theft offenses
- Base, vile, or morally depraved conduct



Case law provides some clarity to the definition of a CIMT

- Board of Immigration Appeals decisions;
- 5th Circuit Court of Appeals precedent decisions.



Crimes relating to controlled substance violations

- Will almost always result in a removal proceeding
- Only exception is for a single offense of possession of less than 30 grams of marijuana for one’s own personal use
- **Ground referenced in *Padilla*!**
- Supreme Court says it’s succinct and straightforward.



Relief in removal proceedings before an IJ

Padilla **requires** you to advise how a plea will affect your client’s eligibility for discretionary relief.

“[W]e have recognized that ‘preserving the possibility of’ discretionary relief from deportation . . . would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.”

Padilla, 559 U.S. ____, *17 (quoting *INS v. St. Cyr*, 533 U.S. 239, 323 (2001)).



Relief in removal proceedings cont'd

- 1. Cancellation of Removal;
- 2. Adjustment of Status; and
- 3. Asylum and related forms of relief
- * IJ nearly always has discretion to grant or deny.
- ** There are other forms of relief; however, these are the most common forms when dealing with immigrants with criminal convictions.



LPRs and traveling abroad after a conviction.

- Different rules apply for those LPRs who are physically present in the United States and those who are applying to re-enter after a trip outside of the country.
- See 8 U.S.C. Sect. 1182.



LPRs and traveling abroad after a conviction.

Hypo 1:

Suppose an LPR is convicted of a single offense of possession of marijuana of less than 30 grams.

- Not subject to removal so long as they stay in the country.
- When they return to the US after a trip abroad, they will be placed in a removal proceeding as an inadmissible immigrant.



LPRs and traveling abroad after a conviction.

Hypo 2:

Client has been an LPR for over 20 years. He is charged with a theft offense. Theft offenses require a one year term of imprisonment in order to be considered an aggravated felony. You obtain him a 364 day sentence of imprisonment.

-- What happens when Client returns the United States after a trip abroad?



Horizontal lines for handwritten notes.

LPRs and traveling abroad after a conviction.

Answer:

Client will be placed in a removal proceeding.

What if you obtained him a deferred adjudication?



Horizontal lines for handwritten notes.

LPRs and traveling abroad after a conviction.

Answer:

No difference. He's still subject to a removal proceeding.



Horizontal lines for handwritten notes.

CONSULTING WITH AN IMMIGRATION LAWYER

- Consider contacting board certified immigration lawyers.
- Make sure that the immigration lawyer routinely practices in immigration courts.



WHAT TO EXPECT FROM AN IMMIGRATION LAWYER

1. Will the plea result in a removal proceeding?
2. Will the plea disqualify your client from applying for relief in the removal proceeding?
3. Will the plea result in your client being placed into immigration custody?
4. Will the plea affect your client's ability to travel?
5. Will the plea affect your client's eligibility to naturalize?



WHAT TO EXPECT FROM AN IMMIGRATION LAWYER

- Assistance in finding plea alternatives.
- Be prepared with answers to the questions on the questionnaire.
- **Make them put their answers in writing.**



Administrative Removal under 8 U.S.C. Section 1228(b)(1)

- Applies to those here unlawfully and who were convicted of an aggravated felony.
- No right to see an IJ.
- No right to seek discretionary relief.
- Depending on the offense, it may or may not be succinct and clear that an administrative proceeding will occur.
- **Know the definition of aggravated felony!**



Reinstatement of Removal

- Applies to those who entered the United States illegally after a prior deportation.
- No right to see an IJ.
- Relief extremely limited.
- **It is succinct and clear when this will apply.**
- **Know your client's immigration history!**



Mandatory Immigration Detention and Naturalization

- May not be covered by *Padilla*;
- Criminal conviction may result in mandatory detention throughout the duration of a removal proceeding;
- Might result in disqualifying them from naturalization.



“The importance of accurate legal advice for noncitizens accused of crimes has never been more important.”

Lance Curtright
Board Certified in Immigration and Nationality Law by the Texas Board of Legal Specialization
DeMott, McChesney, Curtright & Amendiaz, LLP
800 Dolores, Suite 100
San Antonio, Texas 78207
210-354-1844

