

Criminal Law Section I

Immigration Update: Criminal Law

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1 OVERVIEW OF CRIMMIGRATION

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2 Removal Proceedings

- ▶ How do people come into ICE custody?
- ▶ Bond
- ▶ Removal proceedings
- ▶ Relief
- ▶ Due Process

3 Morales-Diaz v. State 15-0862

- ▶ We conclude Morales Diaz's attorney failed in his duty to advise his client of the direct and severe immigration consequences of pleading guilty to the crime of aggravated misdemeanor forgery, leading Morales Diaz to plead guilty and subject himself to automatic and permanent removal.
- ▶ Undocumented immigrant, forgery offense, two year suspended sentence. What's the problem?
- ▶

4 Morales-Diaz cont'd

- ▶ In many ways, this is not earth-shattering. Padilla v. Kentucky (2010), US S Ct held Defense counsel has to inform imm. defendants of clear consequences of plea
- ▶ IA Court: Counsel after Padilla is held to the same standard counsel was before Padilla: to provide objectively reasonable assistance as measured by prevailing professional norms.
- ▶
- ▶

5 ABA Standards adopted in Morales-Diaz

- ▶ A) Determine client's status, but don't shout it from the rooftops (if shouting could result in bad consequences)
 - ▶ My Freebie: First question: Where were you born?
- ▶ B) If not US Citizen, determine the consequences, seek funding, seek consultation with expert if needed
- ▶ C) Discuss the following with client: removal, exclusion, bars to relief from removal, immigration detention, denial of citizenship, and adverse consequences to the client's immediate family, then advise the client of all such potential consequences and determine with the client the best course of action for the client's interests
- ▶ D) If going to be deported, advise re: coming back illegally

6 Morales-Diaz follow-up

- ▶ Is it retroactive?
- ▶ Ramirez v. State, 919 N.W.2d 766 (Iowa Ct. App. 2018)

- ▶ However, the State maintains that the *Padilla* controls what advice was reasonable at the time Ramirez entered his plea. We disagree. *Diaz* is not a change in law but rather an application of the existing law found in *Padilla*. See *Diaz*, 896 N.W.2d at 730 (stating the court must answer the “vexing question [of] the extent to which counsel must advise the specific consequences beyond deportation” in order “to complete the analysis in *Padilla* and address the State’s argument that [defendant’s] counsel was not required to advise him on anything other than the risk of deportation,” and recognizing how other courts have “read” *Padilla*).

7 Pending charges

- ▶ In Re: Guerra, 24 I&N Dec. 37, 41 (BIA 2006).
 - ▶ “Criminal complaint” was specific and detailed.
 - ▶ Described source of information that Resp was involved in selling drugs. Includes locations, alleged accomplices

8 FINALITY OF CONVICTION

- ▶ Matter of Acosta, 27 I. & N. Dec. 420, 1–420 (BIA 2018)
- ▶ (1) A conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review on the merits of the conviction has been exhausted or waived.
- ▶ (2) Once the Department of Homeland Security has established that a respondent has a criminal conviction at the trial level and that the time for filing a direct appeal has passed, a presumption arises that the conviction is final for immigration purposes, which the respondent can rebut with evidence that an appeal has been filed within the prescribed deadline, including any extensions or permissive filings granted by the appellate court, and that the appeal relates to the issue of guilt or innocence or concerns a substantive defect in the criminal proceedings.

▶

9 Finality cont’d

- ▶ Appeals, including direct appeals, and collateral attacks that do not relate to the underlying merits of a conviction will not be given effect to eliminate the finality of the conviction.
- ▶ Motion to Reconsider sentence:
 - ▶ In Re Cota-Vargas, 23 I. & N. Dec. 849, 849 (BIA 2005)
 - A trial court’s decision to modify or reduce an alien’s criminal sentence nunc pro tunc is entitled to full faith and credit by the Immigration Judges and the Board of Immigration Appeals, and such a modified or reduced sentence is recognized as valid for purposes of the immigration law without regard to the trial court’s reasons for effecting the modification or reduction. *Matter of Song*, 23 I&N Dec. 173 (BIA 2001), clarified; *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003), distinguished.

10 Federal Crim. Issues

- ▶ Pre-trial release: government failed to show that there was serious risk that defendant would flee on his own volition, as would permit it to seek his pretrial detention under the Bail Reform Act. United States v. Villatoro-Ventura, 330 F. Supp. 3d 1118 (N.D. Iowa 2018)
- ▶
- ▶ Speedy Trial Act violations

- ▶ Bail Reform Act violations

11 **Strategies for Federal Immigration crimes**

- ▶ Trial
- ▶ Appeal
- ▶ Time-served?
- ▶ BOP transfer?