

**FULFILLING YOUR
SIXTH AMENDMENT DUTY
UNDER
*CRIMINAL LAW AND
IMMIGRATION IMPACT***

Marvin G. Lizama, Esq.
Lizama Law, P.L.L.C.
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PADILLA v. KENTUCKY

- ◆ On March 31, 2010, the U.S. Supreme Court issued its landmark decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), establishing that criminal defense attorneys have an obligation, as part of the Sixth Amendment guarantee of effective assistance of counsel, to advise noncitizen clients about the immigration consequences of the criminal charges against them.

PADILLA v. KENTUCKY

◆ **Held:**

◆ *Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient.*

PADILLA v. KENTUCKY

◆ **Facts:**

- ◆ Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug distribution charges in Kentucky. In post conviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, *but also told him not to worry about deportation since he had lived in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice.*
- ◆ The Kentucky Supreme Court denied Padilla post conviction relief on the ground that the Sixth Amendment's effective assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a "collateral" consequence of a conviction.

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◆ Points of law:

- ◆ *Strickland v. Washington*, 466 U. S. 668, applies to Padilla's claim. Before deciding whether to plead guilty, a defendant is entitled to "the effective assistance of competent counsel." *McMann v. Richardson*, 397 U. S. 759, 771.
- ◆ The Supreme Court of Kentucky rejected Padilla's ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally "reasonable professional assistance" required under *Strickland*, 466 U. S., at 689.

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- ◆ Points of law:

- ◆ Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely **difficult to classify as either a direct or a collateral consequence**. The collateral versus direct distinction is thus **ill-suited** to evaluating a Strickland claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Strickland applies to Padilla's claim.

RETROACTIVITY

- ◆ Retroactivity.
 - ◆ Tenth Circuit: United States v. Chang Hong, _____, an Appeal from the United States District Court for the Western District of Oklahoma.
 - ◆ Question Posted: Is a collateral challenge to a conviction under Padilla a new rule of constitutional law that is retroactively applied?
 - ◆ Held: Padilla is a new rule of constitutional law, but it does not apply retroactively to cases on collateral review.

RETROACTIVITY

- ◆ Retroactivity.

- ◆ In Chaidez v. United States, 568 U.S. 342 (2013), our Supreme Court held that Padilla may NOT be applied retroactively.

CHAIDEZ

- ◆ **Facts of the case:**
- ◆ Roselva Chaidez came to the United States from Mexico in 1971; she became a lawful permanent resident in 1977. In 2003, she was indicted in the U.S. District Court for the Northern District of Illinois on three counts of mail fraud in connection with an insurance scheme. On the advice of her attorney, Chaidez pleaded guilty and received a sentence of four years of probation. The U.S. government initiated removal proceedings in 2009 under a federal law that allows deportation of any alien who commits an aggravated felony. Chaidez's attorney never told her that pleading guilty could lead to her deportation.

PADILLA v. KENTUCKY

- ◆ **Points of law:**

- ◆ Changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, **deportation is an integral part**—indeed, sometimes the most important part—**of the penalty** that may be imposed on noncitizen defendants who plead guilty to specified crimes.

Falling Below the Strickland Standard

- ◆ Under *Strickland*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." 466 U. S., at 688. Then we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694.
- ◆ The first, *constitutional deficiency is necessarily linked to the legal community's practice and expectations*. *Id.*, at 688. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at 688.

Falling Below the Strickland Standard

- ◆ The weight of *prevailing professional norms* supports the view that counsel must advise her client regarding the deportation risk. *National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation* § 6.2 (1995); *G. Herman, Plea Bargaining* § 3.03, pp. 20–21 (1997); *Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 *Cornell L. Rev.* 697, 713–718 (2002); *A. Campbell, Law of Sentencing* § 13:23, pp. 555, 560 (3d ed. 2004); *Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards for Indigent Defense Systems, Standards for Attorney Performance*, pp. D10, H8–H9, J8 (2000) (providing survey of guidelines across multiple jurisdictions); *ABA Standards for Criminal Justice, Prosecution Function and Defense Function* 4–5.1(a), p. 197 (3d ed. 1993); *ABA Standards for Criminal Justice, Pleas of Guilty* 14–3.2(f), p. 116 (3d ed. 1999).

Falling Below the Strickland Standard

- ◆ The U.S. Supreme Court has recognized the importance to the client of “[p]reserving the . . . right to remain in the United States” and “preserving the possibility of” discretionary relief from deportation. *INS v. St. Cyr*, 533 U.S. 289, 323.

Falling Below the Strickland Standard

- ◆ “[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—*universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients*” Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors as *Amici Curiae* 12–14 (footnotes omitted) (citing, *inter alia*, National Legal Aid and Defender Assn., Guidelines, *supra*, § § 6.2–6.4 (1997); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 *The Champion* 61 (Jan./Feb. 2007); N. Tooby, Criminal Defense of Immigrants § 1.3 (3d ed. 2003); 2 Criminal Practice Manual § § 45:3, 45:15 (2009)).

Falling Below the Strickland Standard

- ◆ We too have previously recognized that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *St. Cyr*, 533 U. S., at 323 (quoting 3 Criminal Defense Techniques § § 60A.01, 60A.02[2] (1999)).

Criminal Prosecutions

- ◆ The U.S. Supreme Court has held that aliens are entitled to the same criminal procedural rights as citizens before criminal punishment can be imposed on them. *Wong Wing v. United States*, 163 U.S. 228 (1896).
- ◆ Lower courts have said, however, that Congress can distinguish between citizens and aliens, making some substantive criminal statutes only applicable against aliens.
- ◆ Deportation is the court ordered removal of a person from the United States for a variety of reasons.

Criminal Prosecutions

- ◆ The U.S. Supreme Court considers removals a civil, not criminal, process. *Fong Yue Ting v. United States*, 149 U.S. 698 (1893).
- ◆ The U.S. Supreme Court has, for over a century, recognized that aliens in the United States, whether in the United States lawfully or not, are entitled to due process in removal proceedings. *Reno v. Flores*, 507 U.S. 292 (1993).
- ◆ These fields of the law intersect in two distinct places. 1) the INA criminalizes some immigration violations; and 2) there are adverse immigration consequences as a result of a criminal record including making a person inadmissible, deportable, and ineligible for U.S. Citizenship.

Definition of Conviction for Immigration Purposes

- ◆ The Congress defines a conviction, with respect to an alien, as “a formal judgment of guilt of an alien entered by a court or, if adjudication of guilt has been withheld, where:
 - ◆ a judge or a jury has found the alien guilty or the alien has entered a plea of guilty or *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.

Sentence for Immigration Purposes

- ◆ A deferred sentence is the same as a guilty plea for immigration purposes.
- ◆ A juvenile court disposition is not a conviction for immigration purposes. *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000); *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981).
- ◆ A disposition under a pre-plea diversion statute is not a conviction. *Matter of Grullon*, 20 I&N Dec. 12 (BIA 1989).
- ◆ A conviction that a trial or appeals court vacates because it was legally defective is not a conviction for immigration purposes. *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000).
- ◆ A conviction that a trial court vacates for *equitable reasons* remains a conviction for immigration purposes. *Beltran-Leon v. INS*, 134 F.3d 1379 (9th Cir. 1998).

Deportable Offenses

◆ *Controlled Substance Offenses*

- ◆ A noncitizen convicted of an offense relating to a controlled substance is deportable and subject to removal from the United States. 8 U.S.C. § 1227(a)(2)(B), INA § 237(a)(2)(B).
- ◆ conviction for a conspiracy or an attempt to possess, distribute, or manufacture a controlled substance is a deportable offense. 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i).

Deportable Offenses

◆ *Controlled Substance Offenses*

- ◆ In the Ninth Circuit, a conviction for solicitation to possess a controlled substance is not a deportable offense under the controlled substance ground of deportability. *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (drawing negative implication from the statutory language that includes attempts or conspiracies).
- ◆ Any record of conviction that does not identify the drug cannot support an order of deportability. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).
- ◆ A conviction for a single offense for simple possession of 30 grams or less of marijuana is not a deportable offense. 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i).

Deportable Offenses

◆ *Aggravated Felonies*

- ◆ Conviction of an aggravated felony is a ground of deportability. 8 U.S.C. § 1227(a)(2)(A)(iii), INA § 237(a)(2)(A).
- ◆ Rape, murder, sexual abuse of a minor, drug trafficking, firearms trafficking, a federal conviction of being in possession of a firearm in the commission of a felony, money laundering, fraud, tax evasion, smuggling, and all crimes of violence where a defendant receives a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(F), INA § 101(a)(43)(F). A crime of violence includes an offense that has the use of force as an element of the offense.

Deportable Offenses

- ◆ *Aggravated Felonies*

- ◆ A conviction for a crime of violence is an aggravated felony if the defendant receives a sentence of a year or more. 8 U.S.C. § 1101(a)(43)(F), INA § 101(a)(43)(F). A crime of violence includes an offense that has the use of force as an element of the offense. 18 U.S.C. § 16(a). The crime of violence definition also includes any felony that by its nature presents a substantial risk that force will be used against a person or property in the commission of the offense. 18 U.S.C. § 16(b).

Deportable Offenses

◆ *Aggravated Felonies*

- ◆ The BIA held that this definition includes involuntary manslaughter. *Matter of Alcantar*, 20 I&N Dec. 801 (BIA 1994). See also *Matter of Martin* 23 I&N 491 (BIA 2002) (treating Connecticut assault statute as aggravated felony conviction).
- ◆ It does not, however, apply to offenses where there is **no connection between the use of force and the commission of the crime**. *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999). The Seventh Circuit has held that felony driving under the influence is not an aggravated felony because there is no intent to use force and force is not an element of the offense. *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001). In *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999), the Seventh Circuit held that statutory rape was not necessarily a crime of violence.

Deportable Offenses

◆ *Domestic Violence*

- ◆ A person is deportable for a conviction for a domestic violence offense if on or after September 30, 1996, he or she is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.
- ◆ The statute defines domestic violence as a crime of violence (as defined in section 16 of title 18)" directed against a current or former spouse, co-parent of a child, co-habitator, or other person similarly situated under domestic violence laws.

Deportable Offenses

◆ *Domestic Violence*

- ◆ A crime of violence under 18 U.S.C. § 16 includes an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another or a felony that by its nature involves significant risk of use of such force. Thus, simple assault may come within this ground of deportability under this section if the victim was, for example, a former cohabiting girlfriend.
- ◆ The ground of deportability also applies when a noncitizen is enjoined by a protective order and is found by a criminal or civil court to have violated the portion of the order that protects against credible threats of violence, repeated harassment, or bodily injury.

Deportable Offenses

- ◆ *Crimes Involving Moral Turpitude*

- ◆ Crimes involving moral turpitude although there is no statutory definition of the phrase. A non-citizen is deportable for a crime of moral turpitude if he/she is convicted of a crime involving moral turpitude, committed within 5 years of admission, and for which he/she could have received a sentence of 1 year or more.
- ◆ A conviction for an assault offense where injury to a spouse or child is an element of the offense involves moral turpitude. *INS v. Grageda*, 12 F.3d 919 (9th Cir. 1993).

Deportable Offenses

◆ *Crimes Involving Moral Turpitude*

- ◆ A conviction for an offense in which fraud is an essential element of the crime always involves moral turpitude. *Jordan v. DeGeorge*, 341 U.S. 223 (1951).
- ◆ A conviction for driving under the influence (DUI) is not a crime involving moral turpitude. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999).
- ◆ Nevertheless, the BIA has held that a noncitizen's conviction for driving under the influence involved moral turpitude when an element of the offense was that the defendant knew or should have known that the authorities had revoked his license. *Matter of Lopez-Meza*, 22 I&N Dec. 1188 (BIA 1999).

Deportable Offenses

◆ *Firearms and Explosive Devices*

- ◆ A noncitizen faces removal from the United States if he or she has a single conviction for purchasing, selling, using, owning, or possessing a firearm in violation of law. INA § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).
- ◆ If the statutory definition of the offense does not involve a weapon, then a conviction is not a firearm offense even if the record of conviction shows that the defendant actually used a firearm. *Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992). If a statute punishes use of a weapon, including a firearm, then it is a “divisible offense.” A noncitizen convicted under a divisible statute is not deportable for a firearm offense unless the record of conviction establishes that the offense committed involved firearms. *See, e.g., Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996). A police report is not part of the record of conviction. *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996).