

Crime and Punishment in American Immigration

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In 1882, the same year that Robert Ford killed the famous outlaw Jesse James, the U.S. Congress passed a new Immigration Act that imposed a 50 cent tax upon immigrants to fund the cost of regulating immigration and gave federal authorities the power to deny entry to "convicts...lunatics and persons likely to become public charges."

On March 31, 2010, the United States Supreme Court issued its decision in the case of *Padilla v. Kentucky*, 559 U.S. ____ (2010), 130 S. Ct. 1473. Mr. Padilla, a lawful permanent resident of the United States for more than 40 years, had served in Vietnam with honor. However, he was charged with transporting marijuana in Kentucky. He claimed that his lawyer had told him that "he did not have to worry about immigration status since he had been in the country so long." 253 S.W. 3d 482, 483 (Ky. 2008.) Padilla claimed that he would not have pleaded guilty to the charges if he knew that such plea would make him removable (deportable).

The Court held that under the Sixth Amendment's effective-assistance-of-counsel guarantee, lawyers must provide affirmative, competent advice to noncitizen clients regarding the potential immigration consequences of a guilty plea. If a lawyer does not render accurate advice, noncitizens may be entitled to relief if they can show that the ineffective assistance of counsel was prejudicial.

The *Padilla v. Kentucky* decision is noteworthy in several respects. First, it makes it clear that the Sixth Amendment requires lawyers to advise their clients to render affirmative, correct advice as to the potential immigration consequences of a guilty plea. Second, the court noted that:

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by JUSTICE ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

There are indeed an endless number of traps under the U.S. Immigration and Nationality Act (INA), and these have multiplied rapidly over the decades. So what should a lawyer who is contacted by the accused do?

Taking the following steps may reduce the risk of a call from a client who loved the great plea deal that you negotiated for him, only to be calling you now in a panic from a U.S. Immigration and Customs Enforcement (ICE) detention facility:

I. Identify Noncitizen Clients. A criminal defense lawyer's intake questionnaire should ask the client whether they are a U.S. citizen or, if not, to identify the immigration status that they hold such as lawful permanent resident, work or student visa holder, asylee, or other status. Examine their documents to verify the correctness of such claim. As in the case of Mr. Padilla, even long-time permanent residents can find themselves subject to removal. Even if a conviction does not make a permanent resident removable, it may impact their ability to qualify for naturalization. Those in a nonimmigrant (temporary) status may find themselves in even a more precarious situation regarding their immigration status in the wake of a conviction.

II. Disclose the Possible Consequences in Writing to the Client. When you encounter a noncitizen client, you should, either in the representation agreement itself, or in a subsequent, traceable communication to the client, explain that a conviction, including a plea, can jeopardize their immigration status and/or result in removal, and that the law is subject to change and there is no guarantee that they can avoid such consequence.

III. Beware the Many Tentacles of a "Conviction." The definition of "conviction" under the INA is shockingly broad. It includes not only a formal adjudication of guilty by a judge or jury but also situations where an adjudication of guilt has been withheld but the noncitizen has entered a plea of guilty or no contest or has admitted sufficient facts to warrant a finding of guilt and the judge has ordered some form of punishment, penalty or restraint to be imposed. Hence, a defense lawyer must obtain and evaluate all court records, police statements and tapes to discover any admissions and determine whether an arrangement such as a court-ordered treatment or domestic violence counseling may trigger this definition. Some noncitizens have been shocked when ICE issues a Notice to Appear for removal proceedings when they were advised by the court that there was no conviction but the court record contains the defendant's acknowledgement of having committed the elements of an offense and the judge imposed a fine or attendance in a program.

IV. Align Yourself With the Necessary Expertise to Evaluate All Alternatives. The defense lawyer must decipher, or partner with an immigration lawyer to understand, how the charges align with the immigration law. Historically, lawyers primarily needed to be worried about whether the offense was a "crime involving moral turpitude" (CIMT) and, if so, whether the CIMT fit within a petty offense exception. Over the years, the INA added more classes of crimes which could trigger either removal or ineligibility for visas. Most notable was the birth of "aggravated felonies" and the expansion of this roster of crimes over the past quarter century. This long list of offenses which trigger grounds of removal includes not only major crimes such as murder and rape, but also lesser crimes of violence, theft and fraud for which the maximum sentence that *could be* imposed can be a year or more. This has resulted the removal of noncitizens for misdemeanor shoplifting offenses where it was a first offense, the defendant did not serve a day in jail and paid a small fine because the state law says that the defendant could have been sentenced to a year or more in jail. In all cases, the lawyer must map out all of the possible outcomes of the charge and evaluate possible alternative pleas to determine if the prosecutor might be willing to agree to an outcome that will fall short of a CIMT, aggravated felony, or other crime bearing immigration consequences.

V. Understand that Noncitizens May Not Be Insulated from Ex-Post Facto Applications of the Law. While this topic is worthy of an article in its own right, the U.S. immigration authorities have been known to attack the immigration status and consider or bring removal proceedings against noncitizens, including permanent residents, years after a court disposition of a charge. Congress has steadily increased the number of offenses that can give rise to removal. Further, the U.S. immigration agencies, including U.S. Citizenship and Immigration Services (CIS) which adjudicates applications seeking immigration benefits such as permanent residence and naturalization, and U.S. Customs and Border Protection ("CBP"), which inspects

those entering our country, have vastly improved data sharing and mining. This has resulted in conviction records becoming available online that formerly were not available to the "front line" officers that encounter noncitizens at immigration inspection points including at the airports and during immigration interviews regarding the adjudication of applications. Many permanent residents and nonimmigrant visa holders continue to unexpectedly find themselves in exclusion or removal proceedings due to old convictions or pleas.

VI. Explain the Consequences of Failing to Disclose an Arrest or Conviction When Required, Regardless of Sealed Records or Expungement. Some noncitizens incorrectly assume that if their lawyer gains a pardon, expungement, or a sealing of the records, they are not required to disclose the arrest or conviction to anyone, including U.S. authorities. Many noncitizens will encounter a variety of questions on various immigration-related petition and application forms about prior arrests or convictions. The wording of the questions on such forms are often inconsistent and lack any explanation about what the questions really require. Failing to disclose required information about an arrest or conviction can result in the U.S. government charging the noncitizen with a material misrepresentation (i.e., immigration fraud) which may make the noncitizen removable, and ineligible for immigration benefits, even if the underlying conviction does not make him or her ineligible. Noncitizens need proactive advice about how to handle such situations and what documents, such as original arrest and disposition records, and an explanatory memo of law, explaining their continuing eligibility for readmission, to have in hand to present, if necessary.

Conclusion

The maze of immigration law contains hidden minefields even for the experienced practitioner. In the post 9/11 and recessionary environment, unlike in good times, legal immigrants and nonimmigrants are feeling less than welcome. American lawmakers tend to lose sight of the fact that Americans living in foreign countries face the same issues, and would find this treatment to be draconian if imposed by a foreign government such as China.

Lawyers representing noncitizens must maintain the vigilant mindset of Jean Valjean in Victor Hugo's classic novel, *Les Misérables*. Valjean sought to keep one step ahead of the unrelenting pursuit of the moralistic Inspector Javert, who was bent on imposing additional punishment on Valjean, a man of honorable character, beyond the 19 years he had already served for the crime of stealing a loaf of bread to feed his impoverished family.

When one hears such real-life stories as long-time residents deported for a youthful one-time shoplifting of a small item or a shove back against an abusive husband resulting in a domestic violence "conviction," Hugo's words ring true:

If there were not a greater abuse on the part of the law, in the penalty, than there had been, on the part of the guilty, in the crime. If there were not too much weight on one side of the scales -- on the side of the expiation. If the excess of the penalty were not the eradication of the crime; and if the result were not a reversal of the situation, replacing the wrong of the delinquent with the wrong of the repression, to make a victim of the guilty, and a creditor of the debtor, and actually to put the right on the side of the one who had violated it.

It is the noble objective of the counselor of law to do his or her utmost to prevent such injustices in the application of the immigration law to our noncitizen clients.