Representing Non-Citizens After *Padilla*

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I. *PADILLA v. KENTUCKY*, 130 S.CT. 1473 (2010)

A. The Case

Jose Padilla, a native of Honduras, lawful permanent resident of the United States for more than 40 years, and Vietnam veteran, was facing deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in Kentucky. Mr. Padilla filed a habeas petition claiming that he received ineffective assistance of counsel.

His IAC petition had two parts: (1) He claimed that his attorney ***affirmatively misadvised*** him of the immigration consequences of his conviction, *i.e.,* his lawyer said he "did not have to worry about immigration status since he had been in the country so long," when in fact he plead to a deportable offence; and (2) He claimed that his counsel ***failed to advise*** him that he was pleading to a deportable offense.

The Supreme Court of Kentucky denied his petition holding that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction. The Supreme Court of the United States reversed that decision and remanded the case to the lower court for further proceedings.

Justice Stevens, writing for the majority, held that **constitutionally competent counsel *must* advise his/her client of the potential for deportation when the immigration consequences are clear. Counsel cannot remain silent, and cannot merely refer a defendant to seek advice from an immigration attorney; rather, when the immigration consequences are clear, counsel must advise his client of those consequences**. The Court held that in both parts of Mr. Padilla's claim, (1) affirmative misadvice and (2) failure to advise, counsel performed deficiently. Thus, not only is it ineffective assistance for counsel to *misadvise* of the immigration consequences; but further, counsel cannot choose *not* to advise on the immigration consequences at all.

B. The Rationale

Justice Stevens' opinion clearly acknowledges the plight of immigrants that are facing criminal prosecution. He recognizes that undocumented criminal defendants may be the most vulnerable of all defendants. He recites the evolution of immigration laws and the increased ease by which individuals are subject to removal based on the most minor of offenses. He also appreciates that for many immigrants the right to remain in the United States may be more important than any potential jail sentence. He believes that immigrants must be able to turn to the

only lawyer they are entitled to – his/her criminal defense attorney; otherwise, this vulnerable population will have no one.

> 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. In order to ultimately conclude whether the immigration consequences for a defendant are "clear" or "unclear," counsel must first do a thorough job researching the defendant's specific immigration situation and then researching the potential immigration consequences of the charges and any potential pleas – this may require obtaining consultation from an immigration law specialist. Even with expert consultation, there will still be numerous situations in which the immigration 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 <u>not</u> 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 <u>is truly clear</u>, as it was in this case, the duty to give correct advice is equally clear.***
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> *Padilla*, 130 S.Ct. at 1483 (footnote omitted) (emphasis added)

C. <u>How Clear is Clear?</u>

The holding of *Padilla* seems simple: if the immigration consequences are clear, counsel must advise the client as to those consequences; if the consequences are unclear then counsel need only say that the client "may" have a risk of deportation. Inevitably, that raises the elephant in the room, **when is immigration law ever clear?** Indeed, some immigration practitioners say that Mr. Padilla's case itself was not clear because he may have been eligible for certain types of relief from deportation given his service in the Vietnam War, long standing ties to the U.S., and potential extreme hardship to a U.S. Citizen family member. Yet, the Supreme Court held that his was one of the clear cases. So what are some of the other pitfalls where it may not be clear?

Justice Alito's concurrence provides the most thorough recitation of all of the potential difficulties the *Padilla* holding presents for cash-strapped, dim-witted, criminal defense attorneys. He recognizes that whether a conviction for a particular offense will make a defendant removable is often quite complex. Determining whether a conviction is an "aggravated felony" or "crime of moral turpitude" often requires a dizzying and counter-intuitive analysis under the categorical/modified categorical approach. Misdemeanor convictions can sometimes be considered "aggravated felonies." "Expungements" in certain jurisdictions may not qualify as true expungements in immigration court.

The lesson of ***Padilla*** is that criminal defense lawyers need to become more versed in immigration law than we thought necessary. It is not enough to refer your client to an immigration attorney; you must understand the basics and be able to advise your client. For those of you that practice in state court, the California Quick Reference Chart and Notes, produced by Katherine Brady of ILRC is a great resource as a starting point for meeting your *Padilla* obligations. Below are some very general basics to assist you with issue-spotting and understanding the breadth of concerns for immigrants facing criminal charges – nothing discussed herein will serve as a stand-alone source for meeting your *Padilla* obligations – a thorough and individualized analysis of a particular defendant's immigration situation is needed to give competent defense advice.

II. KNOW YOUR CLIENT

You cannot even begin to fulfill your obligations under *Padilla* if you do not have a thorough understanding of your client's immigration status. You cannot assume that your client is here legally, nor can you assume that he is here illegally. There are several basic facts that you need to know about your client. Attached you will find a checklist that will guide you through many of the important facts relevant to immigration law.

III. KNOW THE STATUTE OF CONVICTION & CLIENT'S CRIMINAL HISTORY

In *Padilla*, Justice Stevens is persuaded as to the simplicity of advising Mr. Padilla about his immigration consequences because he asserts that Mr. Padilla's attorney easily could have determined that his conviction for transportation of marijuana in violation of Kentucky state law was an aggravated felony. Early recognition of your client's immigration status and criminal history will help you in understanding how the pending and potential criminal charges can affect their immigration rights.

A. What is an Aggravated Felony?

Aggravated felonies are defined in 8 U.S.C. § 1101(a)(43). The law on whether something constitutes an aggravated felony is changing daily; therefore, nothing replaces thorough and timely research. A conviction for an aggravated felony will almost always result in a defendant being rendered deportable from the United States and bars eligibility from almost all forms of relief or waivers that could stop the deportation. There are a few limited remedies available for someone convicted of an aggravated felony, but determining eligibility is very complex. Avoiding a conviction for an aggravated felony is generally a first priority in many cases.

8 U.S.C. § 1101(a)(43) provides as follows:

(43) The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment is at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for

commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter [FN5]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been

altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

B. Crimes Involving Moral Turpitude

A crime involving moral turpitude has been defined as a reprehensible act with a *mens rea* of at least recklessness. *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008). The law regarding crimes involving moral turpitude for immigration purposes can be complex and requires particularly close attention, given the broad range of crimes that may qualify.

DEPORTABILITY: Under 8 U.S.C. § 1227(a)(2)(A)(i), an alien can be removed after any conviction for a crime involving moral turpitude committed within 5 years after the date of admission (within 10 years if the alien received LPR status as a result of adjusting from non-immigrant to LPR) *and* the crime is one for which a sentence of a year or longer *may be* imposed.

Under 8 U.S.C. § 1227(a)(2)(A)(ii), an alien may be removed if, at any time after admission, is convicted of two crimes of moral turpitude not arising from one common scheme, regardless of whether the convictions came from a single trial.

INADMISSIBILITY: Under 8 U.S.C. § 1182(a)(2)(A), a non-citizen who is convicted of one crime involving moral turpitude is inadmissible. There is a **petty offense exception** to inadmissibility for aliens who have only ever committed one crime of moral turpitude where the maximum potential sentence for said crime was one year or less, and where the actual "sentence imposed" was less than six months.

IMPORTANT NOTE: *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008) drastically changed the landscape for evaluating crimes of moral turpitude in immigration court. Under *Silva-Trevino*, immigration judges may choose to engage in a fact-based inquiry into the facts underlying a specific conviction, rather than being limited to applying the categorical/modified categorical approach to the record of conviction.

C. Crimes Relating to a Controlled Substance

In addition to the aggravated felony grounds for drug trafficking described in 8 U.S.C. §1101(a)(43)(B), one can also be found to be deportable AND inadmissible for any crime "relating to" a controlled substance (or attempt or conspiracy to commit such an offense). 8 U.S.C. § 1227(a)(2)(B)(i); 8 U.S.C. §1182(a)(2)(A)(i)(II). **HOWEVER**, if a non-citizen has no prior controlled substance convictions, a first conviction for simple possession of a controlled substance that has been eliminated under rehabilitative provisions such as Prop 36, DEJ, or expungement under California Penal Code § 1203.4 is also eliminated for immigration purposes. *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).[1] To further complicate matters, a noncitizen who has been a drug addict or abuser since admission to the United States is deportable under 8 U.S.C. 1227(a)(2)(B)(ii), regardless of whether there is a conviction. It is therefore important to avoid having evidence or admissions of drug addiction or chronic abuse in the record of conviction. Furthermore, a noncitizen is inadmissible if immigration authorities have "reason to believe" that he or she has ever been or has ever assisted a drug trafficker. 8 U.S.C. § 1182(a)(2)(C).

D. Firearms/Explosives

A non-citizen who is "convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing or carrying or of attempting or conspiring to [commit these acts] in violation of any law, any weapon, part or accessory which is a firearm or destructive device…" is deportable 8 U.S.C. §1227(a)(C).

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[1] The *Lujan-Armendariz* benefit has been limited by several decisions that make it inapplicable to certain cases. Where there were probation violations prior to the rehabilitative relief being granted, the conviction is not eliminated for immigration purposes. *Estrada v. Holder*, 560 F.3d 1039 (9th Cir. 2009). If, before the current conviction, the defendant had previously had pre-plea diversion, the conviction does not qualify for the *Lujan-Armendariz* benefit. *Melendez-Gonzalez*, 503 F.3d 1019, 1026-27 (9th Cir. 2007). There may be other exceptions and nothing can replace individualized analysis in each particular case.

E. Domestic Violence/Child Abuse

A noncitizen is deportable under 8 U.S.C. 1227(a)(2)(E) if he or she is convicted of a "crime of domestic violence," a crime of child abuse, neglect or abandonment, or if he or she is convicted of stalking.

F. Prostitution and Commercialized Vice

A non-citizen is inadmissible if he or she "engages in" a pattern and practice of prostitution. 8 U.S.C. § 1182(a)(2)(D). Furthermore, a non-citizen is deportable for running a non-U.S.C. prostitution business. 8 U.S.C. §1227(a)(2).

G. Two or More Convictions with Aggregate Sentence of 5 years

A noncitizen is inadmissible under 8 U.S.C. 1182(a)(2) if he or she is convicted of two or more convictions of any type for which the aggregate sentence is 5 years or more.

IV. RELIEF FROM DEPORTATION

While the avenues for relief from removal are quickly fading, there are still a few opportunities available to certain immigrants. A defense attorney should not only aim to advise their clients regarding immigration consequences, but should work to attempt to avoid or mitigate those consequences. Although it is not always possible to obtain a resolution that will have no negative immigration consequences, it is often possible to tailor a resolution that may allow your client to have a chance to apply for relief from deportation or waivers to the grounds of inadmissibility. Again, individualized analysis is necessary to determine what avenues for relief may be available in each particular case. A few of the most common types of relief are listed below, but this list is by no means exhaustive and does not replace the need for individualized analysis in each particular case.

A. Cancellation of Removal

Cancellation of removal is just what it sounds like: the alien is found to be removable, and he has a right to ask that he be permitted not to be removed. A conviction for an aggravated felony disqualifies an alien for cancellation of removal.

Under 8 U.S.C. § 1229b, an individual who is a lawful permanent resident of the U.S. (a green card holder), may receive cancellation of removal if the alien:

1. Has been an alien lawfully admitted for permanent residence for not less than five years;
2. Has resided in the United States continuously for 7 years after having been admitted in any status; and
3. Has not been convicted of an aggravated felony.

Under 8 U.S.C. § 1229b(b), an individual with *no status* (non-LPR/green card holder), may receive cancellation of removal and adjust status to a lawful permanent resident if the alien:

1. Has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
2. Has been a person of good moral character during such period;
3. Has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
4. Establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

B. Withholding of Removal & Asylum/Convention Against Torture

ASYLUM: An alien can be granted asylum if the Attorney General determines that the alien was a "refugee." *See* 8 U.S.C. § 1158(a). A refuge is defined as a person who was "unable or unwilling to return to" his or her home country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1101(a)(42)(A). An applicant may apply for asylum if she is "physically present in the United States" or at the border. 8 U.S.C.§ 1158(a)(1). "The applicant may qualify as a refugee either because he or she has suffered past persecution or because he or she has a well-founded fear of future persecution." 8 C.F.R. § 1208.13(b).

WITHOLDING OF REMOVAL: In order to qualify for withholding of removal an applicant must show that her "life or freedom would be threatened" if she is returned to her homeland, on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 1208.16(b). The agent of persecution must be "the government or . . . persons or organizations which the government is unable or unwilling to control." *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, 788 (9th Cir. 2004) (internal quotation marks omitted).

"To qualify for withholding of removal, an alien must demonstrate that it is more likely than not that he would be subject to persecution on one of the specified grounds." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (internal quotation marks omitted); see also *INS v. Stevic*, 467 U.S. 407, 430 (1984); *Hanna v. Keisler*, 506 F.3d 933, 940 (9th Cir. 2007); Zehatye v. Gonzales, 453 F.3d 1182, 1190 (9th Cir. 2006); 8 C.F.R. § 1208.16(b)(2). "This clear probability standard for withholding of removal is more stringent than the well-founded fear standard governing asylum." *Al-Harbi*, 242 F.3d at 888-89 (internal quotation marks and citation omitted).

An applicant who fails to satisfy the lower standard of proof for asylum necessarily fails to satisfy the more stringent standard for withholding of removal. *See Farah v. Ashcroft*, 348 F.3d 1153, 1156 (9th Cir. 2003). However, if asylum is denied in the exercise of discretion, the applicant remains eligible for withholding. *See Huang v. INS*, 436 F.3d 89, 95 (9th Cir. 2006).

"Unlike asylum, withholding of removal is not discretionary. The Attorney General is not permitted to deport an alien to a country where his life or freedom would be threatened on account of one of the [] protected grounds . . . ." *Al-Harbi v. INS*, 242 F.3d 882, 888 (9th Cir. 2001) (fear of execution based on U.S. evacuation from Iraq) (internal quotation marks and citation omitted).

Under asylum, an applicant granted relief may apply for permanent residence after one year. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 429 n.6 (1987). Under withholding, the successful applicant is only given a right not to be removed to the country of persecution. *See INS v. Aguirre-Aguirre*, 526 U.S. 415, 419-20 (1999). Withholding does not confer protection from removal to any other country. *El Himri v. Ashcroft*, 378 F.3d 932, 937-38 (9th Cir. 2004); *Huang v. Ashcroft*, 390 F.3d 1118, 1121 n.2 (9th Cir. 2004).

CONVENTION AGAINST TORTURE: There are two forms of protection under the Convention Against Torture: (1) withholding of removal under 8 C.F.R. § 1208.16(c) for aliens who are not barred from eligibility under FARRA for having been convicted of a "particularly serious crime" or of an aggravated felony for which the term of imprisonment is at least five years, and (2) deferral of removal under 8 C.F.R. § 1208.17(a) for aliens entitled to protection but subject to mandatory denial of withholding. *See Hosseini v. Gonzales*, 471 F.3d 953, 958-59 (9th Cir. 2006); see also *Lemus-Galvan v. Mukasey*, 518 F.3d 1081, 1083 (9th Cir. 2008); *Huang v. Ashcroft*, 390 F.3d 1118, 1121 (9th Cir. 2005).

"Torture is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." *Kamalthas v. INS*, 251 F.3d 1279, 1282 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(1) (2000)); see also *Sinha v. Holder*, 564 F.3d 1015, 1026 (9th Cir. 2009); *Villegas v. Mukasey*, 523 F.3d 984, 989 (9th Cir. 2008) (explaining that "petitioner must show that severe pain or suffering was specifically intended – that is, that the actor intend[ed] the actual consequences of his conduct . . ."). "Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman or degrading treatment or punishment that do not amount to torture." *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001) (quoting 8 C.F.R. § 208.18(a)(2)), amended by 355 F.3d 1140 (9th Cir. 2004) (order).

"The United States included a reservation when it ratified the Convention, narrowing the definition of torture with respect to "mental pain or suffering." The reservation states that "mental pain or suffering refers to the prolonged mental harm caused by or resulting from (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality." *Nuru v. Gonzales*, 404 F.3d 1207, 1217 n.5 (9th Cir. 2005).

In order to be eligible for withholding of removal under the Convention Against Torture, the applicant has the burden of establishing that if removed to the

proposed country of removal "he is more likely than not to suffer intentionally-inflicted cruel and inhuman treatment that either (1) is not lawfully sanctioned by that country or (2) is lawfully sanctioned by that country, but defeats the object and purpose of CAT." *Nuru v. Gonzales*, 404 F.3d 1207, 1221 (9th Cir. 2005) (*citing Wang v. Ashcroft*, 320 F.3d 130, 134 (2d Cir. 2003) (emphasis in original); *see also Wakkary v. Holder*, 558 F.3d 1049, 1067-68 (9th Cir. 2009); 8 C.F.R. § 1208.16(c)(2). This standard requires that an applicant demonstrate "only a chance greater than fifty percent that he will be tortured" if removed. *Hamoui v. Ashcroft*, 389 F.3d 821, 827 (9th Cir. 2004); *see also Wakkary*, 558 F.3d at 1068.