



Takura Nyamfukudza

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## *Padilla v Kentucky* and criminal defense attorneys' responsibilities

by Takura Nyamfukudza

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The United States Supreme Court has clarified that it is the responsibility of criminal defense attorneys to advise their clients of the immigration consequences of convictions. Because this continues to be an area of confusion, here is a brief overview of attorney responsibilities

A deportation “may result also in the loss of both property and life; or of all that makes life worth living.” *Ng Fung Ho v White*, 259 US 276, 284; 42 S Ct 492; 66 L Ed 938 (1922). The sentiment underlying that observation has evolved into precedent that imposes affirmative duties on criminal defense attorneys articulated in *Padilla v Kentucky*, 599 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010).

In *Padilla*, the Supreme Court held that the Sixth Amendment requires counsel to provide a noncitizen client accurate advice about the immigration and deportation consequences of a plea. Absent such advice, the client may raise a claim of ineffective assistance of counsel. Long gone are the days when criminal defense attorneys could remain oblivious of immigration law reforms; remaining mum can yield the same adverse results as misadvice on counsel’s part. This piece will provide an overview of the *Padilla* decision, comment on relevant areas, and provide some tips for practitioners.

### Attorney responsibilities

**Duty to inquire.** Long before *Padilla*, courts recognized that “criminal defense attorneys are obligated to determine the immigration status of their clients.” *State v Paredes*, 136 NM 533, 539 (2004). Such holdings are relevant today because one cannot comply with the rule enunciated in *Padilla* without knowledge of whether a client is a lawful permanent resident, refugee, asylee, temporary visitor, or even an undocumented person. Therefore, the ideal time to determine every client’s immigration status is during the initial interview. See [NLDA Guideline 2.2\(b\)\(2\)\(A\)](#). Additional inquiry might be called for and depends on a host of factors including, but not limited to, the client’s immigration status, the nature of the alleged offense, and the sentence meted out.

**Duty to investigate and advise.** In *Padilla*, the court acknowledged that immigration law can be complex and is a legal specialty of its own. Therefore, the extent of counsel’s investigation and duty to advise a client is determined by the certainty of the immigration consequences of the plea. If deportation consequences are unclear, counsel has a limited duty. The court announced that a criminal defense attorney is merely charged with informing the client that pending charges may carry a risk of adverse immigration consequences.

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If the law is succinct and straightforward, and the deportation consequence is truly clear, the duty to give correct advice is equally clear.

**Counsel may not remain silent.** The court summarily rejected the notion that counsel is able to satisfy the requirement to provide objectively reasonable advice by maintaining silence with regard to unfamiliar immigration law matters that will not be decided in a criminal case. Two reasons were given. First, such a rule would encourage silence on matters of paramount importance, even when answers are readily available. Second, it would deny a class of clients poorly equipped to represent themselves the most basic advice on deportation even when it is readily available. Thus, ignorance of immigration law is no longer an option for criminal defense attorneys.

Each immigration classification under the Immigration and Nationality Act (INA) lists unique consequences for certain felonies and misdemeanors. A synopsis of those consequences follows.

### Immigration consequences of criminal conviction

Under the INA, a conviction is defined as a formal judgment of guilt, or if a judgment is withheld, where there is some type of plea or admission of facts warranting guilt and the imposition of a penalty. 8 USC 1101(a)(48). Holmes Youthful Training Act, MCL 762.11, and rehabilitative drug dispositions under MCL 333.7411 are two common adjudications that are considered to be convictions for immigration purposes. Consequently, either can be used as grounds for deportation.

Section 1227 of the INA provides an exhaustive listing of the classes of aliens that must be removed from the United States upon order of the attorney general.

**General crimes.** Any alien convicted of an offense involving high speed flight or failure to register as a sex offender is deportable. Other classes include crimes premised on controlled substances, certain firearm offenses, domestic violence, stalking, and child abuse.

**Moral turpitude.** Deportation may follow conviction of two or more crimes involving moral turpitude committed within five years of admission. The INA does not define crimes involving moral turpitude. However, courts have defined them as acts of “baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.” *Sosa-Martinez v US Attorney General*, 420 F3d 1338, 1342 (11th Cir 2005). “Murder, rape, robbery, kidnapping, voluntary manslaughter, some involuntary manslaughter offenses, aggravated assaults,” and even theft offenses have been readily categorized as involving moral turpitude. *Matter of Lopez-Meza*, 22 I&N Dec 1188 (BIA 199). Perhaps the most important consideration here is the duration of the possible sentence. Deportation is presumptively mandatory if a sentence of one year or longer may be imposed.

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**Aggravated felony.** An alien who is convicted of an aggravated felony is deportable, irrespective of how long she or he has been in the United States. In *Padilla*, the defendant had been a lawful permanent resident of the United States for over 40 years before pleading guilty to drug distribution charges. Notably, it was counsel's false and misleading advice that led to his possibly being able to withdraw his plea – not the defendant's 40 years in the country.

Some offenses will result in a bar to re-entry if that person leaves the United States. As explained below, this is true whether the offense is committed before departure from the United States or upon arrival abroad. Under section 1182(a)(2)(a), criminal history as a grounds for exclusion applies to aliens who

- are convicted of, or admit to having committed, acts comprising essential elements of a crime involving moral turpitude;
- have been convicted of or admit to having committed a federal, state, or foreign law violation related to a controlled substance;
- traffic illicit drugs, aid or abet the same, or are the family member of a person who has realized pecuniary benefits from trafficking illicit drugs;
- have been convicted of two or more offenses – excluding purely political offenses – for which the aggregate sentence imposed was at least five years;
- engage in prostitution or another form of commercial vice; or
- commit a serious crime, then assert immunity.

A lawful permanent resident may be denied citizenship if the person fails to establish good moral character. 8 USC 1101(f). Among other offenses, no person can establish good moral character if he has been

- a habitual drunk;
- a prostitute or engaged in other commercial vice;
- convicted of two or more gambling offenses;
- incarcerated for more than six months;
- convicted of two or more offenses in which the aggregate sentences to confinement were more than five years;
- convicted of an aggravated felony, 8 USC 1101(a)(43);
- involved in genocide;
- given benefits under the INA based on false testimony;
- involved in smuggling;
- a polygamist; or
- convicted of a crime involving moral turpitude.

## Exceptions

Fortunately, there are chinks in the armor of the proverbial juggernaut called the INA. For example, the Act provides a waiver of deportation or removal for a victim of domestic violence or stalking who acts in self-defense, and does not cause serious bodily injury when committing an act of violence. 8 USC 1227(a)(7). Also, cancellation of removal and waivers of inadmissibility

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are available for permanent residents and non-permanent residents respectively.

### Practice tips for criminal defense attorneys

**Pretrial plea bargaining.** The court declared that prosecutors and defense attorneys are most likely to reach agreements that better satisfy the interests of the state and noncitizen defendants by engaging in collaborative plea-bargaining that addresses deportation consequences. So, criminal defense attorneys should not lead a solo charge. Indeed, the court envisioned both parties bargaining creatively to craft a conviction and sentence that reduces the likelihood of deportation.

**Put it on the record.** Like fastening a seatbelt, it takes very little time to advise a client of his “*Padilla* rights” on the record, but failing to do so can have disastrous effects. The Honorable Donald L. Allen, Jr. and the Honorable Thomas P. Boyd, 55<sup>th</sup> District Court Judges, are two judges who ensure that every single person who offers a plea is advised of their “*Padilla* rights” on the record. Currently, Michigan law does not require the advice to be imparted on the record, but it is prudent for defense attorneys to make sure that all defendants are entering a knowing plea.

Counsel should be certain that *specific* advice related to the defendant’s offense is relayed on the record. To provide general *Padilla* advice on the record, counsel should explain the following points to a client: 1) A guilty plea can render a non-citizen removable or result in a bar to re-entry upon return from another country. 2) A guilty plea could mean that some countries will not allow a *citizen* of the United States to visit. This is especially critical for defendants who have been convicted of operating while intoxicated or operating while impaired and travel to Canada.

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### Padilla’s Progeny

*Chaivez v United States*, 133 S Ct 1103; 185 L Ed 149 (2013)

This case is significant because in it, the court held that its decision in *Padilla*, requiring defense attorneys to inform criminal defendants of the deportation risks of guilty pleas, does not apply retroactively to cases already final on direct view. Hence, March 31, 2010 is the critical date when *Padilla* was decided.

Criminal and immigration law are no longer mutually exclusive. *Padilla* is an essential tool for a criminal defense attorney navigating the thicket of rules embodied by the INA. The important point to remember is to ask clients about their immigration status, investigate the possible ramifications of any convictions, and then advise the client accordingly. Immigration reform shows no sign of slowing, so embrace the change and look for more to come.

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