Criminal Law for Immigration Litigators

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Outline

I. Introduction & Overview - NT

II. *Padilla* IAC: Deficient Performance - MD

III. *Padilla* IAC: Prejudice - MG

IV. Vehicles and Barriers to Relief - AN

V. How Immigration Lawyers Can Help - AN

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Overview

- Criminal and immigration lawyers must work together to ensure:
  1) Criminal history doesn't cause an immigration disaster; and
  2) Immigration status doesn't cause a criminal disaster. See Tooby's Guide to Criminal Immigration Law – free PDF at NortonTooby.com

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Padilla

- *Padilla* concentrates only on protecting D against immigration consequences of plea, but don't forget about *criminal* disasters!
- Criminal and immigration counsel must work together in back-and-forth problem-solving conversations about criminal and immigration detention, immigration consequences, and especially safe pleas.

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Identifying Goal

- Investigate combined criminal and immigration history
- Prepare chronology
- Analyze immigration situation
- Identify exact change(s) in criminal history necessary to solve immigration problem

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Keys to PCR Success

1) Post-conviction *vehicle* that fits
2) *Ground* of invalidity that fits the vehicle
3) Good *substitute disposition*
4) Sufficient *equities* to motivate court and prosecution to help

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Necessity of a Vehicle

- It's not enough to have a meritorious claim of legal invalidity (like a *Padilla* claim). You also need a suitable procedural vehicle by which to raise the claim or the case will get *tossed out of court*.
- Just because you have a good *Padilla* claim, does that automatically give you a vehicle by which to raise it? NO!

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Legal Invalidity

- Convictions vacated *solely* to avoid deportation still exist. *Matter of Pickering*, 23 I&N. Dec. 621 (BIA 2003), rev'd on other grounds; *Pickering v. Gonzales*, 454 F.3d 525 (6th Cir. 2006).
- Convictions vacated at least in part as invalid at the time of the original conviction are eliminated.

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Safe Havens

- Two types of safe havens are necessary:
  1) A safe disposition that was available under the law at the time of the plea that original counsel should have tried to get;
  2) A safe disposition that will be sufficient *right now* to solve the immigration problem, even if this is different than (1) above.

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Equities

- Even if we can vacate the conviction over gov't objection, only very rarely can we obtain a Safe Haven without the cooperation of the prosecution.
- Favorable equities: to motivate the prosecution and the court to help us avoid the immigration disaster.

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General IAC Test

In *Strickland v. Washington,* 466 U.S. 668 (1984), the Supreme Court created a two-prong test to determine whether a person could vacate a conviction for ineffective assistance of counsel:

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IAC Test II

1) *Deficient Performance*: The quality of the attorney's representation fell below professional norms;
2) *Prejudice*: The defendant suffered prejudice as a result of the deficient performance. *Strickland,* 466 U.S at 687.

Both prongs are required to win reversal.

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Padilla's Holding

Padilla pled guilty to marijuana trafficking in Kentucky after counsel told him he did not have to worry about deportation since he had lived in the U.S. for so many years. This was incorrect: the controlled substance conviction made him deportable under INA 237(a)(2)(B)(i).

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Padilla's Holding II

The Kentucky Supreme Court held deportation is a collateral consequence outside the scope of the Sixth Amendment, so defense counsel's misadvice could never violate the constitutional right to effective assistance of counsel.

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Padilla's Holding III

The Supreme Court disagreed: "Accurate legal advice for noncitizens accused of crimes has never been more important." *Padilla* at 1480. Immigration consequences are intertwined with criminal punishment and both are "penalties" about which defense counsel must advise the defendant at plea.

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Padilla's Holding IV

- Affirmative misadvice = IAC
- Failure to advise = IAC
- No holding on prejudice, since the Kentucky court had held that misadvice on collateral immigration consequences could *never* be IAC.

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Padilla's Holding V

1) The Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a plea.
2) Absent such advice, a noncitizen may raise a claim of IAC.

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Deficient Performance

Albert Pujols 2012 Statistics after 35 games:

AB	H	HR	RBI	R	AVG.
142	28	1	12	10	.197
11 Year Career Averages:					
601	196	42	125	121	.328

- **Salary**
  10 years $240 million

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What is Deficient under *Padilla*?

***Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)**

- Not informing defendants before they plead guilty to specified crimes whether the plea carries a risk of deportation
- Giving no advice on the relevant subject of immigration consequences
- Giving inaccurate advice regarding immigration consequences

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Deficient Performance under *Strickland*

- *Strickland v. Washington*, 466 U.S. 668 (1984)
- A counsel's performance is deficient if it falls below an objective standard of reasonableness.
- The defendant must establish both constitutionally deficient performance and actual prejudice as a result of counsel's deficient performance

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Deficient Performance

- Error(s) must be so serious that counsel did not function as the counsel guaranteed by the 6th Amendment

In the future, please say "I object" rather than "that's total bullshit."

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Deficient Performance

- Judicial Scrutiny is highly deferential toward finding counsel's performance was reasonable and adequate

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How Can I Perform Better?

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Just Do What You Are Supposed To

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What Am I Supposed To Do?

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Know and Protect the Client's Issue(s)

- No papers? Keep client out of custody to avoid ICE
- Plans to leave the country—Avoid inadmissibility
- Maintain eligibility for permanent residence
- LPR already? Avoid deportation
- Seeking U.S. citizenship? Avoid aggravated felonies

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Understand the Professional Responsibility

- ABA Standards for Criminal Justice, Pleas of Guilty
- Standard 14-3.2(f):
  - *To the extent possible, defense counsel should determine and advise the defendant sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.*

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ABA Standard 14-3.2(f)

- Be active, not passive, in discovering potential collateral consequences
- Advise defendants of all possible effects of a conviction (both direct and indirect)
- Interview the client well to determine and attempt to protect issues important to him or her

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Other Areas of Guidance

- State rules of professional conduct
- Developing case law
- Prevailing practices
- National Legal Aid and Defender Association Performance Guidelines

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Padilla Basics

- Counsel must investigate citizenship status
- Understand your client's immigration situation or talk to someone who can help you (admissible/deportable?)
- Counsel must inform the client whether his plea carries a risk of deportation (or inadmissibility)
- Counsel cannot guess wrong (or misadvise) and must accurately advise about immigration consequences

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Know the Game and the Chips Involved

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Attempt to Use Whatever Chips Exist

- Bigger fines for lesser crimes
- Offering more jail time on helpful alternative
- Waiving custody credits to avoid 1 year sentences
- Offering immigration-friendly alternatives
- Extending sentencing dates to pay down losses
- Requesting helpful statutory pleadings
- Offer to do more alternative sentencing than requested, if a plea can be avoided
- ETC.

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Be Creative

- Counsel must make affirmative ATTEMPTS to protect immigration status:
  - Avoid aggravated felonies at sentencing: (e.g. 365-364, waive credits, stack counts)
  - Offer to plea to a more serious offense that is immigration friendly (See Norton's Safe Havens)
  - Offer to do more time on immigration friendly alternative
  - Pay down losses to victims that impact status before sentencing (continue sentencing, if possible)

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Creative Alternatives

- Offer more time on a single CIMT (up to 180 days) as opposed to getting less time and pleading to two CIMTs
- If the United States Attorney or District Attorney will not help: Be prepared to go to trial if necessary! (But see *Missouri v. Frye*)
- Annotate the file. Make a record of your efforts.

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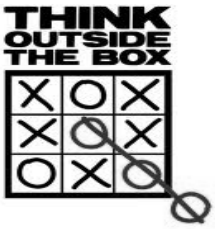
Avoiding Deficient Performance Requires Knowledge and Creativity



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Prejudice the Rock in Your Hard Place

- *Strickland vs. Washington*, 466 U.S. 668 (1984) is the starting point
  - Reasonable probability of prejudice
  - The test is objective not subjective
  - Reasonable probability that the results would have been different
  - Objective standard of reasonableness under prevailing professional norms

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The Case of the Overwhelming Guilt

- The only consequence of Bell's inaccurate advice…is she got a shorter prison term than otherwise… She would have been just as removable *Pilla v U.S.* 668 F. 3d 373 (6th Cir. 2012)
- The PSR indicated a likelihood he would be deported if convicted, Correa-Gutierrez confirmed he read it and discussed with counsel. *Correa-Gutierrez v. U.S.* 445 Fed. Appx. 722, 723 (8th Cir. Neb 2012)

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Plea bargains Are a Critical Part of the Criminal Process

- 97 percent of federal convictions and 94 percent of state convictions are the result of plea bargains *Missouri v. Frye* (2011)
- Plea bargains are so central that counsel must meet the responsibility to render adequate advice.

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Plea Bargains Are the Children of Uncertainty

- A defendant who accepts a plea bargain on counsel's advice does not necessarily suffer prejudice when his counsel fails to seek suppression of evidence
  Premo v. Moore 562 U.S. __ (2011)
- Many defendant's reasonably enter plea bargains even though there is s significant probability much more than a reasonable doubt that they would be acquitted if they proceeded to trial *Id.*

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But a Good Bargain Can Often Be a Better Bargain

- Effective counsel must take the immigration consequences into consideration of the bargain *Commonwealth v. Clarke* 460 Mass. 30 (2011)
- The decision to reject plea bargain would be reasonable
- A reasonable probability of a different plea bargain
- Special circumstances placing particular emphasis on immigration consequences.

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Special Circumstances

- Special circumstances are relevant to prejudice *Commonwealth v. Martinez* 81 Mass App Ct 595 (2012)
- Your invitation to argue the human aspects of your client's situation.
- Make sure you add all the horrors of where he is going

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Procedural Vehicle

Finding The Vehicle That Fits

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Procedural Vehicle

For Federal Offenses:

- Habeas Corpus 28 USC §2255
- Writ of Coram Nobis

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Procedural Vehicle

For State Offenses:

- Each state will have its own procedures
- Examples:
  - Habeas Corpus
  - Coram Nobis
  - Motion to Withdraw Plea
  - Motion to Vacate
  - Expungement

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Barriers to Relief

- Date Claim Arose
- Retroactive Application of *Padilla*
- Statute of Limitations
- Custody Requirement
- Time-Barred Claims

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Date Claim Arose

- Padilla entered his plea in 2001; therefore *Padilla's* holding reflects at least 2001 standard of competence. *Padilla* established that the norm went back "at least the past 15 years." *Padilla*,130 S.Ct. at 1485.
- Deportation became virtually mandatory by IIRAIRA's effective date, Sept. 24, 1996. *Comm v. Clarke*, 460 Mass. 30, 31 (2011).
- Argue the standard existed even earlier.

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Retroactivity

- *Padilla* is not a new rule; it is an application of *Strickland* (1984) to a new context.
- In *Williams v. Taylor*, 529 U. S. 362, 390-91 (2000), the Supreme Court held that applying *Strickland* to particular scenarios does not establish a "new rule" of constitutional law.

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Retroactivity

- Latest On Circuit Splits:
  - NOT RETROACTIVE: 5th, 7th AND 10th Circuits (and 12 District Courts)
  - RETROACTIVE: 3rd Circuit (and 10 District Courts)
  - NOT DECIDED: Everywhere else!

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Retroactivity

- Supreme Court Grants Cert:
  - *Chaidez v. United States, No. 11-820 (U.S.)* will review the Seventh Circuit's decision holding that *Padilla* is not retroactive.
  - *Lafler v. Cooper, No. 10-209 (2011)* provides additional support for the view that *Padilla* applies retroactively: no "floodgates" problem.

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Statute of Limitations

- Federal 2255 habeas has one-year SOL which bars habeas relief of *Padilla* claims unless a rare exception applies. See 28 USC §2254.
- *Lee v. Lampert*, 653 F.3d 929 (9th Cir. 2011)(while believable proof of actual innocence excuses the statute of limitations governing 28 USC §1141 petitions, a greater showing of sufficient evidence of actual innocence is required to allow review of his constitutional claims on the merits).

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Custody Requirements

- *Padilla* says nothing about custody
- Federal habeas, and some state habeas statutes, require "custody" as a prerequisite to habeas corpus.
- This means the defendant must still be incarcerated or released on probation or parole in order to use the vehicle.
- Alternative: Writ of coram nobis (or other state vehicle not requiring custody)

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Custody Requirements

- Under federal law, immigration custody does not suffice. *Resendez v. Kovensky*, 416 F.3d 952 (9th Cir. 2005), *cert. denied,* 546 U.S. 1043, 126 S.Ct. 757, 163 L.Ed.2d 589 (2005); *Contreras v. Schiltgen*, 122 F.3d 30, 32 (9th Cir.1997).
- States with real custody requirements may follow suit.

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How Immigration Counsel Can Help

Appear in criminal court to try for post-conviction relief

OR

Close cooperation with experienced defense counsel

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Opportunities for Immigration Attorneys

THEY NEED US AS MUCH AS WE NEED THEM!!!

- Consultation with criminal defense counsel
- Consultation with client/family
- Post-conviction/post-dismissal representation
  - Cancellation of removal or other relief
  - Motion to Reopen
  - N-600 Certificate of Citizenship
- Presentation to local bar association

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Questions & Answers

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