“CrImmigration Law” and Its Relation to America’s Hispanic Population

Daniel N. Ramirez & Peter G. Dawson

Abstract

“A simple way to take measure of a country is to look at how many want in... And how many want out.” — Tony Blair

For generations Hispanics from throughout Latin America have sought out the American Dream by immigrating to the United States. Hispanic holders of immigrant visas, non-immigrant visas, lawful permanent resident status, or undocumented status face potentially devastating immigration consequences resulting from convictions for common criminal offenses. This essay provides a brief overview of the niche area of law referred to as “CrImmigration” in Section I & II. Section III analyzes the Supreme Court’s landmark decision in Padilla v. Kentucky and the duties owed by criminal defense attorneys to their non-citizen clients with regard to guilty pleas. Section IV provides a prospective look to what the future holds in the field of CrImmigration in light of the prospects for comprehensive immigration reform.

Daniel N. Ramirez is a named partner at Monty & Ramirez LLP and Board Certified in Labor and

Peter G. Dawson is an associate attorney at Monty & Ramirez LLP. He received his B.B.A. from Belmont University and his J.D. from The University of Memphis Cecil C. Humphreys School of Law. The authors wish to thank Nancy Molina and Steven Herrera for their valuable contributions to the editing process.
I. INTRODUCTION

Criminal defense and immigration law have a distinct symbiotic relationship. Removal proceedings often follow an arrest for alleged criminal conduct by a foreign national. The disposition of the criminal matter may directly impact the available defenses to removal in Immigration Court. America’s Hispanic population is all too aware of the interrelationship between local, state, or federal criminal matters and the often-resulting immigration ramifications. This awareness has led to societal attitudes that tend to avoid law enforcement authorities, even to the Hispanic population’s detriment. Congress has taken some steps to alter these attitudes by creating the U-Visa with the passage of the Victims of Trafficking and Violence Protection Act in October of 2000.

The U-Visa provides for a non-immigrant visa to victims of certain crimes who have assisted law enforcement authorities in the investigation or prosecution of the

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1 “Removal” proceedings were called “Deportation” proceedings prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept 20, 1996). All references to Immigration proceedings in this essay will be identified as “Removal” proceedings regardless of whether the specific instance took place before the enactment of IIRIRA.


6 Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(15)(U)(iii) (2014) (identifies the applicable crimes to the U visa. “[T]he criminal activity referred to in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign
criminal activity.\textsuperscript{7} The U-Visa has helped thousands of foreign nationals overcome their aversion to police and empowered them to contact authorities when they have fallen victim to certain crimes.

Despite the progress made through the U-Visa, the fact remains that foreign national members of the U.S. Hispanic population face far more severe consequences in relation to common criminal matters than their U.S. citizen counterparts. For example, a U.S. citizen found guilty of a misdemeanor domestic assault charge could face less than a year of incarceration or even a suspended sentence with probation, whereas a foreign national convicted of the same crime could face removal proceedings and the same conviction could be classified as a crime involving moral turpitude, which constitutes a deportable offense. It is vitally important for foreign nationals in criminal proceedings to have an attorney who is knowledgeable of both criminal defense and immigration law. Herein lies the niche area of law known as “CrImmigration”.

II. THE INTERSECTION OF CRIMINAL DEFENSE AND IMMIGRATION LAW

The term of art CrImmigration is commonly used to describe immigration consequences that foreign nationals may face as a result of certain criminal convictions in state and/or federal court proceedings.\textsuperscript{8} The determination of whether or not a foreign national was “convicted” of a crime is often a disputed matter in removal proceedings. Properly determining whether a disposition resulted in a conviction is a widely labor contracting (as defined in section 1351 of title 18) or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes…”)
\textsuperscript{7} Id.
overlooked and costly mistake that many criminal defense attorneys make when representing foreign nationals in state or federal courts. The Immigration and Nationality Act (“INA”) has a specific definition of the term “conviction” that governs in all removal proceedings. INA § 101(a)(48)(A) defines the term conviction as,

[A] formal judgment of guilt entered by a court or, if adjudication of guilt was withheld, where-

(i) a judge or 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

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.\(^9\)

INA § 101(a)(48)(B) goes further to explain,

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.\(^10\)

The mistake that criminal defense attorneys often make involves suspended sentences and probation. The defense lawyer negotiates an agreement with the prosecutor where, in return for a guilty plea, the judge will convict the defendant of the crime charged or lesser offense, suspend the sentence to time served or no time at all, and provide for some probationary period. The defendant walks out of the courthouse a free person. The problem in this scenario is that the defendant has been convicted for immigration purposes as defined in INA § 101(a)(48) and, depending on the convicted offense, the individual may have no available relief in removal proceedings.\(^11\)

\(^9\) The Immigration Consequences of Deferred Adjudication Programs in New York City: A Report of the Association of the Bar of the City of New York, NEW YORK CITY BAR COMMITTEE ON CRIMINAL JUSTICE OPERATIONS (2007), http://www.nycbar.org/pdf/report/Immigration.pdf (stating that “[s]ometimes, defense attorneys are just as surprised as their clients to learn that their clients have become deportable”).
\(^11\) Id.

For an overview of “Deportation Invoking” criminal offenses, see Mario K. Castillo, Immigration Consequences: A Primer for Texas Criminal Defense Attorneys in Light of Padilla v. Kentucky, 63 BAY. L.
An ancillary, but equally unforgiving, mistake that criminal defense attorneys make is assuming that, because a particular charge is eligible to be expunged by state or federal expungement statute, that the conviction is no longer treated as a conviction in immigration court once the conviction has been expunged. An expungement of a conviction is defined as “[t]he removal of a conviction (esp. for a first offense) from a person’s criminal record.”\(^\text{13}^\) The purpose of expungement statutes is:

- to facilitate a convicted person’s reentry into society. Specifically, statutes have had one or more of the following purposes: to eliminate discrimination against convicts who have fulfilled their sentence terms and have been deemed rehabilitated, to reduce the potential for continuing public sanction, and to reward rehabilitated convicts. Within its plain meaning, expungement might be expected to help accomplish these ends by sealing or physically destroying an offender’s record and thereby shielding it from public scrutiny.\(^\text{14}^\)

The general adopted rule by the Board of Immigration Appeals (“BIA”), as well as most circuit courts of appeals, is that expunged or vacated convictions—for reasons other than “a defect in the underlying criminal proceedings”—remain a conviction for immigration purposes.\(^\text{15}^\)

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to … have the assistance of counsel for his defense.”\(^\text{16}^\) Furthermore, the assistance of counsel must be effective.\(^\text{17}^\) Inadequate legal assistance violates a defendant’s right to the effective assistance of counsel guaranteed by the Sixth

\(^{13}\) BLA\'CK\’S LAW DICTIONARY 621 (8th ed. 2004).


\(^{15}\) In re Christopher Pickerling, 23 I&N Dec. 621, 624 (B.I.A. 2003).

\(^{16}\) U.S. CONST. amend. VI.

Amendment. However, for years, a criminal defense attorney’s failure to warn a client of the adverse immigration consequences did not constitute a violation of the Sixth Amendment’s guarantee of effective assistance of counsel because it was considered a collateral consequence of a conviction.

In 1970, the Supreme Court articulated what later became known as the “Collateral Consequences” doctrine in Brady v. United States. The Brady Court, in evaluating the voluntariness of guilty pleas, held that absent threats, misrepresentations, or improper promises, a guilty plea must stand if the defendant knew about the direct consequences of the conviction. The usage of the term “direct consequence” created an inclusio unius est exclusio alterius interpretation by lower courts.

Case law emerged holding that “collateral” consequences or “indirect consequences” were not germane to a voluntariness determination of a guilty plea. “For a guilty plea to be constitutionally valid, a defendant must be made aware of all the direct, but not the collateral, consequences of his plea.” Immigration consequences of a guilty plea were widely regarded as collateral. The distinction between direct and collateral consequences took hold, and courts adopted various tests to determine whether

21 Id.
22 Latin phrase meaning “the inclusion of one is the exclusion of another.”
24 H.D. Warren, Annotation, Court’s Duty to Advise or Admonish Accused as to Consequences of Plea of Guilty, or to Determine That He is Advised Thereof, 97 A.L.R. FED. 549 (1964); Meyer v. Branker, 506 F.3d 358 (4th Cir. 2007); Virsnieks v. Smith, 521 F.3d 707 (7th Cir. 2008).
a consequence was direct, requiring proper warnings by defense counsel, or collateral, requiring no such advice. The Supreme Court decided to resolve the issue in *Padilla v. Kentucky*.27

III. **Padilla v. Kentucky and Its Impact on “Criminal Immigration”**

Jose Padilla was a lawful permanent resident from Honduras who had lived in the “United States for over 40 years.”28 He pled guilty and was convicted of transporting marijuana, which is a deportable offense pursuant to immigration law.29 Padilla appealed the conviction alleging his defense counsel failed to advise him of the immigration consequences prior to entering the guilty plea and, additionally, that his counsel misadvised by stating that Padilla “did not have to worry about immigration status since he had been in the country so long.”30 The Supreme Court of Kentucky denied Padilla’s post-conviction claim because the immigration consequences of the conviction were collateral.31 The U.S. Supreme Court accepted the case “to decide whether, as a matter of federal law, Padilla’s counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country.”32

The Court first noted that, with the expansion of federal immigration law over the past 90 years, “removal is now virtually inevitable for a vast number of non-citizens

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26 For an overview of the various tests to determine whether a consequence was defined as “direct” or “collateral,” see generally, Margaret C. Love, Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation, 30 ST. LOUIS U. PUB. L. REV. 87, 97-101 (2011) (outlining the development of case law regarding the duties owed by defense attorneys with regard to the collateral consequences and the Sixth Amendment following *Brady v. United States*).
28 *Id.* at 359.
29 *Id.*; see 8 U.S.C. § 1227(a)(2)(B)(i) (“Conviction. Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.”)
31 *Id.* at 485.
32 *Padilla*, 559 U.S. at 360.
convicted of crimes.” Because deportation is so closely connected to the criminal process, the Court held that the distinction between direct or collateral consequences is “ill suited” to determine whether the Sixth Amendment right to effective counsel applies to advice on immigration consequences of a guilty plea. Therefore, the Court applied the *Strickland v. Washington* test to determine whether Padilla was denied his Sixth Amendment right to effective assistance of counsel. Ultimately, the Court held that defense counsel must advise non-citizen clients of the risk of deportation prior to entering a guilty plea.

The significance of the *Padilla* holding cannot be overstated. Now a criminal defense attorney’s failure to warn non-citizen clients of the potential immigration consequences of a conviction before entering a guilty plea is a violation of the Sixth Amendment’s guarantee of the right to effective assistance of counsel. The scope or extent of the advice rendered in order to pass constitutional muster is beyond the scope of this essay. The fact remains that now defense attorneys cannot be silent on the issue. They have an affirmative duty to non-citizen clients.

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33 *Id.* at 356.
34 *Id.* at 366.
37 *Padilla*, 559 U.S. at 356.
38 See *TEX. CRIM. PROC. CODE ANN.* § 26.13 (WEST) (“Prior to accepting a plea of guilty or a plea of nolo contendere, the court shall admonish the defendant of … (4) the fact that if the defendant is not a citizen of the United States of America, a plea of guilty or nolo contendere for the offense charged may result in deportation, the exclusion from admission to this country, or the denial of naturalization under federal law.”)
IV. IMMIGRATION REFORM AND CRIMMIGRATION

On June 27, 2013, the United States Senate passed the Border Security, Economic Opportunity, and Immigration Modernization Act. The 1,197-page bill represents the most substantial reform in U.S. immigration law since 1986. The bill provides an avenue for the estimated eleven million “undocumented immigrants to apply for Registered Provisional Immigrant (RPI) status if they have been in the U.S. since December 31, 2011, have not been convicted of a felony or three or more misdemeanors, pay their assessed taxes, pass background checks, and pay application fees and a $1,000 penalty (which may be paid in installments), among other requirements.”

Although the Senate bill is likely to undergo significant alterations, either in the House of Representatives or in conference, the grounds of ineligibility for individuals seeking RPI status in S.744; should be known by all criminal defense attorneys who represent non-citizen clients. Applicants will be ineligible for RPI status if they have been convicted of a crime as classified by the convicting jurisdiction, an aggravated felony as defined by INA § 101(a)(43), three or more misdemeanors, any foreign offense other than a “purely political offense, which, if committed in the United States, would render the alien inadmissible under section 212(a), and, lastly, unlawful voting.”

The newly formed INA § 245B(b)(3)(C) in S.744 clarifies a vitally important issue from criminal defense attorneys. It states that “[f]or purposes of this paragraph, the

41 S. 744.
42 Id.
43 Id.
44 Id.
45 Id.
term ‘conviction’ does not include a judgment that has been expunged, set aside, or the equivalent. This sub-section would allow non-citizens, otherwise eligible for RPI status, to accept guilty pleas under state of federal expungement statutes without the conviction remaining for immigration purposes, so long as the conviction gets expunged. Even though S.744 has not been enacted into law, it illustrates the criminal background thresholds foreign nationals will have to meet under most immigration reform schemes.

For now, defense attorneys are warned that the Senate bill has not been enacted into law. The law has not changed with regard to expunged convictions. In light of Padilla, however, criminal defense attorneys should stay up to date with the latest immigration reform developments.

V. CONCLUSION

The prospect of real comprehensive immigration reform is long overdue. Regardless of what legislation eventually passes, there will always be an intersection between immigration and criminal law. Many Hispanic immigrants in the United States stand to benefit from immigration reform. On the same token, many Hispanic immigrants in the United States have much to lose if arrested and/or convicted of a crime.

The beginning of this essay includes a quote from former British Prime Minister Tony Blair stating that “[a] simple way to take measure of a country is to look at how many want in... And how many want out.” While I absolutely agree with Prime Minister Blair’s remarks, I would add one more comment: the measure of a country is to look at how many people want in, how many want out, and how many are turned away. Criminal defense attorneys with a solid knowledge and awareness of the immigration

46 Id.
consequences of criminal convictions can ensure that deserving foreign nationals are not
turned away from the American Dream.