Outside Counsel

Font Size:

Providing Immigration Advice To Criminal Defendants After 'Padilla'

Michael J. Wildes

New York Law Journal | July 02, 2010

Michael J. Wildes

In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the U.S. Supreme Court held that criminal defense attorneys have a Sixth Amendment obligation to inform their non-citizen clients of the potential consequences of pleading guilty to offenses that might make them deportable. Petitioner Jose Padilla, a lawful permanent resident of the United States for 40 years, sought to reopen his criminal case because his criminal defense attorney told him he did not have to worry about his immigration status because of his long duration as a permanent resident in the United States. In fact, Mr. Padilla's drug conviction made him deportable as both a controlled substance offender and as an aggravated felon drug trafficker. See 8 USC §1227(a)(2)(B)(i) and 8 USC §1101(a)(43)(B). The Court held that:

> Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses… 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…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.

While the advice Mr. Padilla received from his attorney was incorrect, the majority left the issue of when deportation consequences are "truly clear" for the lower courts to determine in future cases. This may leave many criminal practitioners confused about the depth of immigration advice they are required to give. As the *Padilla* majority acknowledged, determining whether or not a conviction will adversely affect a client's immigration status is often far more complex than it was in Mr. Padilla's case. A generalized understanding of how criminal convictions are classified under immigration law may shed light on the *Padilla* court's expectations.

Deportable Offenses

Aggravated Felonies. There are three types of criminal conviction which can render a noncitizen alien deportable: aggravated felonies, crimes involving moral turpitude, and other types of offenses specifically enumerated in INA §237. Whether or not a conviction qualifies as an aggravated felony can

typically be determined by comparing numerical criteria found in INA 101(a)(43) with facts in the criminal defendant's record of conviction. For example, a fraud crime is considered an aggravated felony when the loss (or intended loss) of the victim exceeds $10,000; a theft crime is considered an aggravated felony when the imposed jail sentence exceeds one year. Whether or not a crime is considered a felony or a misdemeanor by the criminal statute of the state where the conviction occurred has no bearing on whether or not this crime is considered an aggravated felony for immigration purposes.

Because any alien who commits an aggravated felony is deportable pursuant to INA §237(a)(2)(A)(iii), and all of the information required to determine whether or not a crime is an aggravated felony can usually be found in the criminal record of conviction, criminal practitioners will likely be expected to inform clients that a plea to a conviction that is considered an aggravated felony will make them deportable.

Crimes Involving Moral Turpitude. Unlike aggravated felonies, which are defined by statute, determining whether or not a particular conviction is considered a "crime involving moral turpitude" (CIMT) typically requires consulting immigration case law. The term "crime involving moral turpitude" refers generally to conduct which is "inherently base, vile, or depraved, and contrary to the accepted rules of morality…" [*Matter of Franklin* 20 I&N Dec. 867, 868 (BIA 1994)].

To further complicate matters, when determining whether or not a crime is considered a CIMT, only the nature of the statute violated and not the particular circumstances of the person's particular case may be considered by the courts.[1] [*Matter of Short*, 20 I&N Dec. 579 (BIA 1989)] Because CIMT determinations cannot be made using a federal immigration statute alone, aliens who commit CIMTs that are not aggravated felonies likely will not be considered "clearly deportable" within the context of *Padilla.*

The *Padilla* court emphasized that Mr. Padilla's attorney's performance fell below professional standards of competence because he failed to analyze his client's conviction using the statute, not because he failed to study all applicable case law. Attorneys whose clients commit crimes that are not considered aggravated felonies and are not listed among the other statutory grounds for deportation might only be required to inform their client that their charges "may carry a risk of adverse immigration consequences." Aliens who commit CIMTs for which a sentence of one year or longer may be imposed are deportable [INA §237(a)(2)(A)(i)(II)]. Aliens with multiple CIMT convictions are also deportable [INA §237(a)(2)(A)(ii)].

Statutorily Enumerated Deportable Offenses. There are several categories of crimes enumerated in INA §237 that are deportable offenses regardless of whether or not they are considered aggravated felonies or CIMTs. These include controlled substances offenses (other than a single conviction for possession of under 30 grams of marijuana for one's own use) [INA 237(a)(2)(B)(i)], crimes of domestic violence, stalking, or child abuse [INA §237(a)(2)(E)(i)], and certain firearms offenses [INA §237(a)(2)(C)]. Because these offenses are specifically enumerated by statute, noncitizen aliens pleading guilty to any of them should be warned that their plea will make them deportable.

The 'Strickland' Test

The court held that the standards governing reopening due to ineffective assistance of counsel established in *Strickland v. Washington*, 466 U.S. 668, apply to Mr. Padilla's claim. *Strickland* establishes a two prong test: reopening requires the petitioner to show both that his counsel's conduct fell "below an objective standard of reasonableness" and to show that "but for counsel's unprofessional errors, the result of the proceedings would have been different," *Strickland*, supra. Consequently, clients seeking to reopen their criminal cases need not only demonstrate that they were not told that their conviction would make them deportable, but they must also demonstrate that the outcome of their proceedings would have been different had their criminal defense attorney performed his or her duties competently.

Relief From Removal

Though a non-citizen's conviction may make him deportable, it does not necessarily follow that the alien will ultimately be removed from the United States. The INA allows for various types of relief from removal for aliens in immigration court proceedings. The availability of certain applicable waivers typically depends on the seriousness of the alien's conviction, the alien's family ties to the United States,

and the possibility that the alien will suffer persecution or torture if he or she is removed to his or her home country.

While *Padilla* does not require criminal defense attorneys to advise their non-citizen clients of the relief that may be available to them in immigration court, a consultation with an experienced immigration attorney may help clients determine whether or not there would be relief available to them in immigration court if they plead guilty to a criminal offense.

There is virtually no relief available to aliens with aggravated felony convictions or drug convictions other than a single conviction for possession of less than thirty grams of marijuana. Consequently, a consultation with a skilled immigration attorney may help determine whether or not it would be in the accused's best interest to accept a plea agreement.

Michael J. Wildes *is a managing partner of Wildes & Weinberg and a former prosecutor with the U.S. Attorney's Office in Brooklyn.*

Endnotes:

1. In the event that an alien violates a divisible statute which criminalizes some conduct which involves moral turpitude and some that does not, the alien's record of conviction may be examined to determine which portion of the statute the alien was convicted of violating. *Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999).