

Impact of Immigration on Families: Intersection of Immigration and Criminal Law

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Introductions

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Learning Objectives

By the end of this training you will be better able to:

- Identify ways in which immigration consequences arise from criminal activity and convictions
- Identify the impact of juvenile adjudications on children's immigration relief options and status
- Understand how criminal activity and convictions may lead to the breakup of immigrant families
- Explore options for judges to respond to requests to reopen and dismiss prior convictions under state law
- Engage with ethical issues that arise at the intersection of immigration and criminal law

Criminal Activity and Immigration

Criminal activity may:

- Result in removal from the United States
- Delay or completely bar legal immigration
- Delay or completely bar naturalization
- Bar discretionary relief from removal from the U.S.
- In some instances, limit the ability of U.S. citizens to sponsor family members
- Mandate detention

Criminal Activity and Immigration

The impact depends on a great number of factors, so it is rarely accurate to say that a particular activity or conviction will always have a specified effect

- Different people doing the same criminal activity in the same jurisdiction might face drastically different immigration consequences
- The same person doing the exact same thing in different jurisdictions might face in very different immigration consequences

Factors that affect interaction include:

- Immigration status when act committed
- Timing of crime in relation to entries, admissions, and accrued physical presence in the United States
- Sentences and amounts of loss
- Prior criminal records

Factors that affect interaction include:

- Design of diversion programs, practice for accepting pleas
- Status of relatives in the United States
- Wording and scope of criminal statutes
- Eligibility for various relief and associated waivers
- Age sometimes makes a huge difference
- Country of origin may make a difference

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

- “We have long recognized that deportation is a particularly severe ‘penalty,’ but it is not, in a strict sense, a criminal sanction.”
- “Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it ‘most difficult’ to divorce the penalty from the conviction in the deportation context.”

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

- “Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to Padilla's claim.”

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

- “The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”

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

- “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 (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 is truly clear, as it was in this case, the duty to give correct advice is equally clear.”

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

- The U.S. Supreme Court has held that *Padilla* is not retroactive. *Chaidez v United States*, 133 S Ct 1103 (2013)
- Some states have granted more protections pursuant to state constitutions, statutes, and case law.

Classes of Crimes

Immigration law cannot specifically reference the shifting multitude of criminal statutes in every jurisdiction by name or citation, so it uses classes of offenses, such as:

Crimes involving moral turpitude

Aggravated felonies

Particularly serious crimes

Offenses relating to a controlled substance

Crimes of violence

Crimes of domestic violence

Firearm offenses

Crimes Involving Moral Turpitude

- Conduct that is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.”
- Two essential elements: reprehensible conduct and a culpable mental state.

Matter of Silva-Trevino, 26 I. & N. Dec. 826 (B.I.A. 2016)

Crimes Involving Moral Turpitude

A person is guilty of theft of services when ...
[w]ith intent to obtain ..., subway, ... services
without payment of the lawful charge
therefor,... he obtains or attempts to obtain
such service or avoids or attempts to avoid
payment therefor by force, intimidation,
stealth, deception or mechanical tampering,
or by unjustifiable failure or refusal to pay;

New York Penal Law 165.15(03):

Convictions for Immigration Purposes

A conviction requires:

- (1) judgment of guilt and
- (2) Some form of punishment, penalty, or restraint on liberty

Judgments of guilt include pleas of guilt or *nolo contendere* (including Alford pleas) and even admissions of “facts sufficient to warrant a finding of guilt.”

Immigration considers actual sentences of imprisonment, regardless of time suspended.

INA § 101[a][48][B]

Convictions include

- Judgments withheld or deferred until probation completed.
- Convictions that are expunged, dismissed, canceled, vacated, discharged, sealed, or otherwise removed pursuant to post-conviction rehabilitative procedures or to avoid immigration hardships
 - Small exception for Federal First Offender Act (Lujan-Armendarez v. INA (9th Cir. 2000))

Convictions Do NOT Include

- Juvenile delinquency adjudications (though these may still be relevant to conduct-based grounds)
- Pretrial diversion schemes (when probation or other punishment given at the beginning of trial without a guilty plea).

Convictions Do NOT Include

- Informal deferred plea: bargain with prosecutor to continue plea hearing, during which time defendant completes probation-like requirements; then asks for charges to be dropped or amended.
- Convictions on appeal
- Judgments vacated on the merits based on procedural or constitutional defect.
- Some foreign convictions for conduct that is not criminal in the U.S.

Categorical Approach

Does a conviction under a particular statute “categorically” mean that the perpetrator has committed a particular class of crime for immigration purposes

The focus is on the language and elements of the statute, not the facts underlying the case

Categorical Approach

- Does all conduct that is punishable by the statute (**even the most minimally-criminal conduct**) fall within the federal immigration definition?
- Would the activity that may trigger the federal definition **realistically be prosecuted**?

Categorical Approach – Step One

- “The court asks ‘whether the state law is a categorical match with’ the generic federal offense.” *Gutiierrez v. Sessions*, __ F.3d __ (6th Cir. April 16, 2018) (quoting *Marinelarena v. Sessions*, 869 F.3d 780, 785 (9th Cir. 2017))
- Only a statute whose “elements are the same as, or narrower than, those of the generic offense” categorically matches the generic offense. *Descamps v. United States*, 570 U.S. 254, 257 (2013).

Realistic Probability Test

- “[U]nless circuit court law dictates otherwise, we apply the realistic probability test. This requires us to focus on the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction, rather than on the facts underlying the respondent’s particular violation of that statute.”

Matter of Silva-Trevino, 26 I. & N. Dec. 826 (B.I.A. 2016)

Categorical Approach – Step Two

“Where the statute of conviction includes some crimes that involve moral turpitude and some that do not, adjudicators must determine if the statute is divisible and thus susceptible to a modified categorical analysis.”

Matter of Silva-Trevino, 26 I. & N. Dec. 826 (B.I.A. 2016)

Divisible Statutes

A “divisible” statute “list[s] elements in the alternative, and thereby define[s] multiple crimes.”

Mathis v. United States, 136 S. Ct. 2243, 2249 (2016)

Divisible Statutes

A criminal statute is divisible if:

- (1) it lists multiple discrete offenses as enumerated alternatives; or
- (2) defines a single offense by reference to disjunctive sets of elements

Indivisible and Overbroad Statutes

If a statute criminalizes some conduct that is not a categorical match, a finding that a statute is “indivisible” ends the inquiry because “an indivisible, overbroad statute can *never* serve as a predicate offense.”

Medina-Lara v. Holder, 771 F.3d 1106, 1112 (9th Cir. 2014) (citing *Descamps*, 570 U.S. at 265).

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Categorical Approach – Step Three

- Statutes that are divisible receive “modified categorical” analysis.

Descamps v. United States, 570 U.S. 254, 257 (2013).

- The modified categorical approach allows the court to review “a limited class of documents to determine” not the *facts* of the underlying criminal conduct but rather “which of a statute’s alternative *elements* formed the basis of the . . . conviction,” *Id.* at 262 (emphases added).

Scope of Modified Categorical

The “court may use these additional materials ‘only to determine *which* crime within a statute the defendant committed, not *how* he committed that crime.’”

United States v. Soto-Sanchez, 623 F.3d 317, 320-21 (6th Cir. 2010) (quoting *United States v. Woods*, 576 F.3d 400, 405 (7th Cir. 2009))

Modified Categorical Approach Documents

- Judgment of conviction
- Charging document
- Written plea agreement
- Plea colloquy
- Other “comparable judicial record.”

Shepard v. United States, 544 U.S. 13, 26 (2005).

- The list is limited to preventing “relitigation of past convictions . . . long after the fact.”

Moncrieffe v. Holder, 569 U.S. 184, 200-01 (2013)

Questions

Technical Assistance and Materials

- Power Point presentations and materials for this conference at www.niwap.org/go/JTN1
- Judicial Training Manual at www.niwap.org/go/sji
 - NIWAP Technical Assistance:
 - Call (202) 274-4457
 - E-mail info@niwap.org
- Web Library: www.niwaplibrary.wcl.american.edu