

Crimmigration

The immigration consequences of a criminal plea in the Trump era



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Disclaimer

- The information contained here is for educational purposes only as a service to the public, and is not legal advice or a substitute for legal counsel.
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Abril Valdes Siewert



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Russell Abrutyn founded Abrutyn Law, located in Berkley, Michigan. Russell has received multiple awards from AILA for litigation, mentoring, and volunteer work. He has many favorable published decisions from the Sixth Circuit. He chairs AILA's Amicus Committee and serves on its Membership Message Center Moderator Committees. Russell is the Treasurer for AILA's Michigan Chapter.

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What we're going to cover

1. Immigration: The Basics
2. What you need to comply with *Padilla*
3. Categories of Crimes
4. Michigan Specific Crimes

Immigration: The Basics

Common Immigration Statuses



- **U.S. Citizen** (Birth, Naturalized, Derived)
- **Lawful Permanent Resident (LPR)** and Conditional Lawful Permanent Resident (CLPR)
- **Asylee, Refugee**
- **Non-Immigrant** (students, tourists, temporary workers, diplomats, etc.)
- **Humanitarian** - Deferred Action (e.g. DACA), Parole, Temporary Protected Status (TPS)
- **None** (e.g. undocumented, overstays, people ordered removed)

Criminal Convictions

Defined in 8 U.S.C. § 1101(a)(48) (A) and INA 101(a)(48)(A)

- A conviction is any adjudication or admission of guilt with some form of punishment / restrains on liberty.
 - **No contest / nolo contendere plea** —→ **Conviction**
 - **Deferrals (e.g., 7411, 769.4a)** —→ **Conviction**
 - **HYTA** —→ **Conviction**
 - **Expungement** —→ **Conviction**
 - **Drug Court** —→ **Conviction**
 - **Pleas taken under advisement** —→ **Conviction**

Sentence

- Sentence is any period of confinement ordered by court, regardless if suspended, deferred, held in abeyance - INA 101(a)(48)(B)
 - Does not include probation - however, violating probation and sentenced afterward is a sentence.
- Depending on statute, either the sentence actually imposed OR the possible term of imprisonment (or both) could matter.

Juvenile Convictions

- Juvenile convictions may not be convictions for immigration purposes, unless it's an adult charge or conviction *Matter of Devison Charles*, 22 I&N Dec 1362 (BIA 2000)
- But see *Uritzky v Gonzales*, 399 F3d 728 (2005) for a specific refusal to extend *Devison* to offenses entered under Michigan's HYTA (CSC case).

Inadmissibility vs Removability

- ***Inadmissibility***

8 USC § 1182 and INA 212(a)

The ability for a re-enter the U.S. after departure or apply for admission from within the U.S. (such as application to adjust to LPR status)

- ***Removability***

8 USC § 1227 and INA 237(a)

Includes immigration or criminal issues arising after admission to the U.S. Can result in removal from the U.S. and loss of immigration status.

- See also: Removal proceedings (INA §239)

Pardons

- Full and unconditional gubernatorial or presidential pardon
- Only waives certain removal grounds:
 - single/multiple CIMT, aggravated felony, certain federal high speed flight convictions
- Doesn't waive inadmissibility grounds or other removal grounds (like firearms, drug crimes, domestic violence, etc.)

Beware of *Pickering*!

- *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003): A conviction vacated to avoid deportation remains conviction for immigration purposes. Must be vacated because of defect in underlying proceeding, such as ineffective assistance of counsel based on failure to advise on the immigration consequences of a plea.

UPDATE 10/29/19: A sentence modification or clarification must now also comply with the Matter of Pickering standards. Matter of Thomas-Thompson, 27 I&N Dec. 674 (A.G. 2019). This is a departure from prior practice and may apply retroactively.

What you need to
comply with *Padilla*

What is an attorney's duty under *Padilla v. Kentucky*, 559 U.S. 356 (2010)

- Advise on how to avoid being deportable
- Advise on how to avoid immigration bars to relief from removal
- Advise regarding ability to travel (in
- admissibility)
- Advise regarding naturalization (if possible)
- Advocate for avoidance of negative outcomes

***Padilla* - Not Just for Defense Counsel**

Deportation is an “integral part” the penalty imposed on a noncitizen.

“[I]nformed consideration of possible deportation can only benefit both state and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.”

How detailed must my advice be?

Best practice:

- Use penalty and benefit arguments during plea negotiations and at sentencing
- Counsel must give specific advice as to what immigration consequences will result from guilty plea
- Ethical obligation as a negotiator for your client to have an informed decision of his/her plea

Ethical considerations

Michigan Rules of Professional Conduct. Preamble:

- As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.
- As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.

Michigan Rules of Professional Conduct. Rule 1.1

- A lawyer shall provide competent representation to a client.

Ethical consideration cont.

A lawyer shall not:

- (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;
- (b) handle a legal matter without preparation adequate in the circumstances...

Ethical consideration cont.

Rule 1.4. Communication

- Comment: The client should have **sufficient information to participate intelligently in decisions** concerning the objectives of the representation and the means by which they are to be pursued to the extent the client is willing and able to do so. (Removal consequences may be more important to the client than criminal consequences)



What if my client is undocumented?

- “EWI” (Enter Without Inspection / undocumented)
- Inadmissibility (not deportability) is always the issue
- Why should you worry about them?
 - Being undocumented is a civil matter not criminal
 - They may be able to enter WITH inspection at some point and you want to preserve that right (admissibility)
 - They may be eligible for some form of relief from deportation and you want to preserve their ability to apply (inadmissibility, deportability, GMC)

What if my client has DACA?

One cannot have a “conviction” for:

- A “significant misdemeanor”
- 3 misdemeanors
- A felony



Ex: OWI is a “significant misdemeanor” therefore not eligible to renew DACA

Ineffective Assistance of Counsel Claims

The Court in *Padilla* applied the standards set forth in *Strickland v. Washington* 466 U.S. 668 (1984), whether counsel's representation **"fell below an objective standard of reasonableness"** and whether **"there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different"** and rejected the view that only "affirmative misadvice" regarding immigration status could be the basis of an ineffective assistance claim.

What Defense Attorneys Need to Know about Motions to Reopen

- Claims of ineffective assistance of counsel are the basis for most motions to set aside a plea or conviction and may be followed with a complaint to the Attorney Grievance Commission
- Criminal defense attorneys can protect themselves and their clients from these claims by properly advising their client on specific immigration consequences not blanket deportation consequences

Categories of Crimes

Crime of Moral Turpitude (CIMT)

INA 212(a)(2)(A)(i)

An extensive and complicated body of case law has developed as to whether a particular offense is one of moral turpitude. One common definition is **“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.”**

It has also been articulated as **“reprehensible conduct and some degree of scienter, whether specific intent, deliberateness, willfulness, or recklessness.”**

Crime of Moral Turpitude (CIMT)

A conviction OR an admission suffices

Can include, among many other things:

- Theft/retail fraud
- Aggravated assault, assault with weapon, assault against spouse/family member (but probably not simple assault).
- Fraud/deceit
- Sex offenses

Crime of Moral Turpitude (CIMT)

Immigration Consequences:

- Single CIMT within five years of admission punishable by 1 year or more = removability
- Single CIMT = inadmissibility unless punishable by 1 year or less and resulted in jail sentence of 6 months or less (petty offense exception)
- Multiple CIMTs = removability and inadmissibility
- Potential mandatory detention
- Ineligibility for relief from removal or certain benefits
- Delays eligibility for naturalization

Aggravated felonies

- **Doesn't have to be aggravated or a felony**
- Crimes of violence/theft offenses with 1 year or more imprisonment
- Drug trafficking
- Fraud/deceit with loss to victim of at least \$10,000
- Sexual abuse of a minor
- Many others - see 8 USC 1101(a)(43)

Aggravated felonies

- **Doesn't have to be aggravated or a felony to be considered an aggravated felony under immigration law**
- Crimes of violence/theft offenses with 1 year or more imprisonment
- Drug trafficking
- Fraud/deceit with loss to victim of at least \$10,000
- Sexual abuse of a minor
- Many others - see 8 USC 1101(a)(43)



Aggravated felonies

Serious immigration consequences:

- Mandatory detention
- Ineligibility for most forms of relief from removal (e.g., Asylum, cancellation of removal)
- Permanent ineligibility for waiver of inadmissibility
- Ineligibility for naturalization
- Ineligible for Voluntary Departure
- Imprisoned up to 20 years for unlawful reentry

Crime of Violence

- COV + 1 year sentence imposed = aggravated felony
- COV is defined in 18 USC 16
 - 16(a): has as an element the use, attempted use, or threatened use of physical force against the person or property of another
 - 16(b): Unconstitutionally vague - *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016)
- **Generally does not include simple assault**
- Assault w/ dangerous weapon = COV

- *Note:* felony firearm can be COV if underlying crime is a COV.

Crime of Violence Cont

- COV committed against “protected person”
 - Domestic Violence
 - Stalking
 - Child Abuse
- 18 USC 16 committed against current/former spouse, co-parent, “individual similarly protected from domestic or family violence laws of any jurisdiction in US”

These can be deportable offenses!

Other Common Criminal Removal Grounds

- *Drug crimes*
 - “Reason to believe” a drug trafficker = permanent inadmissibility
 - Any drug crime = permanent inadmissibility
 - Only crime that can be waived is single conviction for personal possession of less than 30 grams of marijuana
 - Any drug crime = removability
 - Except single conviction for personal possession of less than 30 grams of marijuana (but don’t travel!)
 - Medical marijuana and marijuana-activities lawful under state law can carry serious immigration consequences, including denial of naturalization and denial of admission

Other Common Criminal Removal Grounds

- Firearms - removability only (not inadmissibility). Even misdemeanor firearm offenses
- Domestic violence - “crime of violence” committed against protected person
- Stalking, violation of protection order (even civil violation), crime of child abuse
- Failure to register as sex offender
- False claim to citizenship
- “Terrorist”

Health related grounds of Inadmissibility related to crimes

- Physical or mental disorders posing threats to property, safety and welfare of client or others (alcohol related offenses: OWI etc.)
- “Drug abusers or addict” (controlled substance offences)
- Alcohol-related driving offenses: generally not a criminal removal/inadmissibility ground, **but likely to lead to prudential revocation of visa.**

UPDATE 10/29/19: Evidence of two or more convictions for driving under the influence during the relevant good moral character period establishes a presumption that a noncitizen lacks good moral character, and also presumptively establishes that the noncitizen’s application for discretionary relief should be denied. Matter of Castillo-Perez, 27 I&N Dec. 664 (A.G. 2019). Although this presumption can be rebutted, noncitizens can expect a difficult time in doing so.

Michigan Specific Crimes

Delivery w/ Intent to Distribute vs. Possession

Delivery

- Analyses
- Consequences
- Plea negotiations
- Inadmissibility/Removability

Possession

- *Inadmissibility*
- *Sometimes removability*
- *Often ineligible for relief*

Marijuana

- Single conviction for simple possession of less than 30 grams makes noncitizen inadmissible if seeking to reenter the U.S. or apply for LPR status. Will not make an LPR deportable if never leaves the U.S.
- Includes expunged/dismissed convictions
- Manufacture/delivery/PWID under 333.7401(d)(iii) has been held to not be a drug trafficking aggravated felony because it includes social sharing for no remuneration. Convictions under (i) or (ii) could be because the minimum quantity element is 5kg or more.
 - Could still trigger inadmissibility for “reason to believe” a drug trafficker

Marijuana cont.

- Lawful use of marijuana, including with medical marijuana card
 - Ineligible for naturalization because lack of good moral character, since still a federal crime
 - Potential inadmissibility if admits to the essential elements of a drug crime



Disorderly Person

MCL 750.167

- Often regarded as a safe harbor for immigration purposes
- Be wary of subsections (b) and (i) (prostitution)
- For inadmissibility purposes, application for LPR status, or discretionary benefits, some ability to look behind the curtain

Home Invasion

- Home invasion can be aggravated felony under crime of violence, burglary, theft provisions if sentence of 1 year.
- Can be CIMT.

Tips for plea negotiations:

- **Trespass** has been found, in unpublished BIA decisions, not to carry removal consequences.
- Also, **entering without breaking** has been found in unpublished decision to not be a CIMT.

Retail Fraud

- Is a CIMT. If results in sentence of 1 year, is an aggravated felony.
- Multiple RF convictions=deportable and inadmissible
- Single RF1 or RF2=deportable offense if committed w/in 5 years of admission
- Single RF3=not deportable or inadmissible
- Single RF2=not inadmissible if sentence less than 6 months.

Tips for plea negotiations:

- Disorderly person may be a safe harbor for immigration purposes.

Domestic Violence

- MCL 750.81(2), (4), (5) are unlikely CIMT's and Aggravated Felonies
- Remember a plea under 769.4a IS A CONVICTION for immigration purposes
- *Does a DV conviction make someone removable or inadmissible?*

Checklist

- What is your client's Immigration status?
- Inadmissibility consequences
- Deportability consequences
- Is the crime considered an aggravated felony?
- Will the crime result in mandatory detention by ICE?
- Good moral character bars?
- Is this offense considered a "crime of violence"?

Resources

- See updated Michigan Specific Crimmigration Chart and Resource Guide that will part of the materials provided
- SBM's Immigration Law Section - section will go live 10/1/19 and we can help you find an immigration attorney in your area!
- AILA Michigan (American Immigration Lawyers Association) - <https://www.ailalawyer.com/>. Also, feel free to reach out to us directly.



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