

# **The Intersection of Immigration Law with CA State Law**

**January 16, 2015**

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# Agenda

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- Overview of Immigration Consequences of Criminal Convictions.
- Post-Conviction Relief in State Court for Noncitizens and *Padilla*.
- Juvenile Delinquency Proceedings and Special Immigrant Juvenile Status.



# Immigration Consequences of Criminal Convictions: An Overview

# When are Immigration Consequences of Criminal Convictions Important?

- Applying for Status
- Applying for Naturalization
- Traveling Outside of the U.S.
- Renewing green card
- Determining Bond Eligibility
- Identifying Relief from Removal
- In considering a criminal plea bargain
- Determining need for Post Conviction Relief

# Analysis Usually Comes in at 2 points:

## □ **Before Plea/Conviction**

### □ Advising Criminal Defense Counsel:

- Immigration Consequences of Pleading as Charged
- Alternate Pleas/Dispositions that May Avoid or Mitigate Immigration Consequences

## □ **Post Plea/Conviction**

- Person not yet in Removal Proceedings & wants to determine eligibility for an immigration benefit.
- Person is already in Removal Proceedings & wants to explore relief from removal.

# Immigration Detention

- Civil Detention
- Not legally classified as “punishment”
- No fixed “sentence” so detention can feel indefinite
- Held in federal detention center or at one of approximately 300 jails or private prisons.
- Some convictions (including minor, nonviolent, misdemeanor convictions) trigger **Mandatory Detention** (detention w/o the possibility of bail).

# ICE HOLD or DETAINER

- Issued pursuant to 8 C.F.R. 287.7(d) – Temporary detention at Department of Homeland Security Request. Criminal justice agency “shall” maintain the custody of an alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays.
- Trust Act – CA Legislation effective Jan. 1, 2014 – prohibits sheriff’s from honoring ICE holds in certain instances.
- **As of May 21, Alameda County is no longer honoring any ICE holds!**

# What Happens at a Removal Proceeding?

## □ **Question of Removability:**

1. Is individual subject to U.S. Immigration Laws?
2. Is individual in violation of U.S. Immigration Laws and thereby removable?

## □ **Question of Relief:**

1. If removable, is individual eligible for any relief against removal?
2. If eligible, whether relief should be granted?  
Does the case merit a grant of relief or favorable exercise of discretion?



# Absence of Due Process

- No right to appointed counsel if indigent.
- No speedy trial rights
- No statute of limitations
- No right to bail
- No right to formal discovery
- No 8<sup>th</sup> Amendment Protection

# Criminal Grounds of Removability

- **INA 212(a)(2)**
  - If client is seeking entry or admission to the United States, may be charged with Grounds of **Inadmissibility**.
  
- **INA 237(a)(2)**
  - If client has been lawfully admitted to the U.S. (LPR, Visa, etc.), may be charged with Grounds of **Deportability**.

# Non-Citizens Include:

- Green Card (Lawful Permanent Resident)
- Non-Immigrant Visas, including:
  - ▣ Tourist Visa (B-1) or Student Visa (F-1)
  - ▣ Special Immigrant Juvenile Status (SIJS)
  - ▣ S (informants), U (victims), T (human trafficking) Visas
- Undocumented
  - ▣ Entered without inspection
  - ▣ Legally admitted then status expired
- Granted Asylum or Refugee Status
- Temporary Protected Status (select countries)

# Immigration Consequences Analysis

Requires Three Parts to Be Complete:

- (1) Analysis of whether a criminal statute falls within the definition of one of the removal offenses described in the immigration statute.
- (2) Analysis based on Defendant's prior criminal history.
- (3) Analysis based on Defendant's prior immigration history.

# Wrong Question To Be Asking



**WHETHER A PARTICULAR CONVICTION WILL  
CAUSE DEPORTATION**

# Right Questions To Be Asking

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**WHETHER A PARTICULAR INDIVIDUAL WILL BE REMOVABLE BASED ON A SPECIFIC CONVICTION.**

**WHAT ARE ALTERNATIVE DISPOSITIONS THAT WILL MITIGATE OR AVOID IMMIGRATION CONSEQUENCES.**


# Aggravated Felonies

- Defined in 8 USC 1101(a)(43)
- Differs from state definition of “felony” or “aggravated.”
- Aggravated Felony for immigration purposes
  - Doesn’t have to be “aggravated”
  - **Doesn’t have to be “felony”**
- Aggravated Felonies carry the most severe immigration consequences. Cause ineligibility for most forms of relief and can permanently bar return to the U.S.

# Selected Aggravated Felony Provisions

- Murder, rape, sexual abuse of a minor (regardless of sentence)
- Drug trafficking (regardless of sentence)
- Crimes of violence with 1 year or more sentence imposed
- Theft, possession of stolen property, burglary with 1 year or more sentence imposed
- Crimes of fraud or deceit where loss to the victim exceeded \$10,000 (regardless of sentence)
- Forgery with 1 year or more sentence imposed
- Illicit trafficking in firearms (regardless of sentence)



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- Immigration law contains many criminal law terms that are not clearly defined by the immigration statute (Immigration & Nationality Act).
  - Look to case law for definitions of criminal law terms such as “burglary” or “theft” or “crime of violence.”

# “Conviction” for Immigration Purposes

## Statutory Definition INA 101(a)(48)(A):

- Formal judgment of guilt by court

OR

- Where adjudication of guilt withheld (deferred adjudication): where guilty by trial or plea (guilty plea or no contest plea) or admitted sufficient facts to warrant finding of guilt **AND** judge has ordered some punishment, penalty, or restraint.

# DEOJ under California Law

- Defendant enters a plea, completes program, plea is dismissed → No conviction under criminal law.
- Under immigration law, the operation of a plea (whether no contest or guilty) + an ordered condition to be completed = “conviction for immigration purposes”.
- So DEOJ = conviction for immigration purposes, even if plea is dismissed!  
8 U.S.C. 1101(a)(48)(A).

# Diversion?

- Post-plea diversion = conviction for immigration purposes.
- Pre-plea diversion **not** conviction for immigration purposes.

# “Sentence” for Immigration Purposes

## **“Term of Imprisonment” OR “Sentence” MEANS...**

- Period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that sentence.*
- Does not include probation (unless confinement sentenced as part of probation conditions or as result of probation violation).
- 8 U.S.C. 1101(a)(48)(B)

# HYPO

- Defendant is convicted of theft and sentenced to 3 years state prison, 2.5 years to be suspended and only 6 months to be served. The sentence for criminal law purposes (unless the Defendant messes up) is 6 months. But the sentence for immigration purposes is 3 years.

# Review

- D convicted of CPC 245(a)(1) and sentenced to 3 years probation, 364 days of which to be served in a county jail as a term of probation.
- Sentence for immigration purposes? 364 days.
- Same Defendant later violates probation and is sentenced to 60 days jail on the probation violation.
- Sentence on the 245(a)(1) for immigration purposes? 1 yr and 59 days.

*The following are NOT convictions under immigration law:*

- Juvenile *delinquency* dispositions
- Vacated convictions if vacated for legal cause (on the basis of a procedural or substantive defect).





# Expungements Can't Fix It

- California Expungement (1203.4) does not eliminate immigration consequences of a conviction.
- Two exceptions in Ninth Circuit Only:
  - First-time, possession or use of a controlled substance conviction entered before July 14, 2011 that has been expunged. See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9<sup>th</sup> Cir. 2011)
  - To re-qualify someone for Deferred Action for Childhood Arrivals.



Post Conviction Relief in State  
Court For NonCitizens & *Padilla*.

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- A non-citizen may want to challenge a previous conviction that ultimately subjects them to a serious immigration consequence.
  - Many non-citizens were not advised of immigration consequences at the time that they decided to accept criminal pleas.

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- Many do not learn of the devastating immigration consequences of such pleas until many years (decades) later since DHS can charge a noncitizen as removable at *any* time.
  - The challenge is finding a legal vehicle with which to get back into state court in order to challenge the prior conviction.

# *Padilla v. Kentucky*

130 S. CT. 1473 (2010)

# *Padilla v. Kentucky* (2010)

## Supreme Court held:

- Sixth Amendment requires defense counsel to provide **affirmative, competent** advice to a non-citizen defendant regarding the immigration consequences of a guilty plea. Non-Advice (silence) is insufficient and therefore ineffective.
- Absent such advice, a non-citizen may raise a claim of ineffective assistance of counsel.

# *Padilla v. Kentucky* (2010)

The Court observed:

- Increasing harshness of immigration laws over past 90 years.
- “Accurate legal advice for non-citizens accused of crimes has never been more important.”
- Deportation is a “particularly severe penalty” that is “intimately related” to the criminal process.

## *Padilla v. Kentucky*: Key Point

“Informed consideration” of possible deportation can only **benefit** both the State and the noncitizen during plea bargaining. State and defense may be able to reach agreements that **better satisfy the interests of both parties.**



## *Padilla v. Kentucky: Key Point*

Supreme Court recognized that there may be instances where defense counsel should “plea bargain creatively with the prosecutor in order to **craft** a conviction and sentence that reduce the likelihood of deportation...”

# Under *Padilla*, Defense Counsel Must:

- **Inquire** as to where each defendant was born and whether or not s/he is a U.S. Citizen.
- **Investigate** the immigration consequences of the disposition that Defendant is facing.
- **Advise** the Defendant about the immigration consequences of a particular conviction.
- **Defend** the Defendant by advocating for alternative pleas or modified sentences that may mitigate or avoid immigration consequences.

# A Judicial Advisement Does Not Cure Ineffective Assistance of Counsel

- Even *pre-Padilla* Judges were required to provide a general immigration advisement to defendants in criminal proceedings. See Cal. Penal Code 1016.5(a).
- *Padilla* applies to defense counsel and not Judges for the precise reason that the type of advisement required by a Judge is different than advice provided to a defendant by his or her advocate.
- A Judge's advisement should not preclude a future IAC claim based on the failure of defense counsel to provide competent immigration advice.

# Padilla Is Not Retroactive.

- The U.S. Supreme Court held in *Chaidez v. United States* that *Padilla* is a “new rule” that does not apply retroactively to any conviction that was final before *Padilla*.
- *Padilla* applies to convictions that were not final as of March 31, 2010. Others may still have a claim – See Practice Advisory:  
[http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/Chaidez%20practice%20advisory%203-1-2013..pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Chaidez%20practice%20advisory%203-1-2013..pdf)

# HABEAS JURISDICTION

- In California, the court loses jurisdiction over an Ineffective Assistance of Counsel claim brought through a Habeas petition once the individual is out of custody and off probation or parole for the conviction being collaterally attacked.
- Immigration custody did not count as “custody.”
- See *People v. Kim* (2009) 45 Cal.4th 1078 and *People v. Villa* (2009) 45 Cal.4th 1063.



# Juvenile Delinquency Proceedings and Special Immigrant Juvenile Status.

# Special Immigrant Juvenile Status

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## PURPOSE:

To help children under 21 who cannot reunify with one or both parents based on abuse, neglect, abandonment, or similar basis to get lawful status in the United States.

# SIJS Statutory Authority

- INA 101(a)(27)(J)

Special Immigrant Juvenile Status may be conferred upon one who “has been declared **dependent on a juvenile court located in the United States** or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States...”



# Other SIJS requirements

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- Child must be under 21 at time of filing
- Not married

# SIJS Regulatory Authority

- 8 C.F.R. 204.11
- **The regulations are outdated!!** They were last updated in 1993.
- DHS submitted a proposed rule on September 6, 2011 that would reflect the legislative changes made by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). Rule still pending. *See* 76 FR 54978.

# Juvenile Court Must Find:

- (1) That the child has been declared dependent on a juvenile court;
- (2) That reunification with 1 or both of the child's immigrant parent's is not viable due to abuse, abandonment, neglect, or a similar basis under state law;
- (3) That it would not be in the child's best interest to be returned to the child's or parent's previous country of nationality or country of last habitual residence;

# SIJS: Two-Step Process

- 1) Obtain State Court Order with specific findings for SIJS eligibility (can be dependency, delinquency, probate, or family court)
- 2) File Applications with CIS (Affirmative) or if child is in removal proceedings with the Immigration Court (Defensive) to obtain SIJS and permanent residency status.

# Path to Legalization

- Getting a predicate order in state court doesn't mean the child will be granted SIJS status by the Department of Homeland Security/Citizenship and Immigration Services. It means a child can *apply* for SIJS status and work authorization.
- If a child is granted SIJS status, s/he is then eligible to *apply* for a green card.
- Once the child has had a green card for five years, s/he can *apply* for naturalization.

# Examples of Abuse, Neglect or Abandonment (not exhaustive)

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- Abuse: Physical, emotionally, verbal by parents or caretaker.
- Neglect: Not providing for basic needs, forced to work full-time and not attend school.
- Abandonment: Parent left child.
- Other similar basis in state law: Parents are deceased or incapacitated.

# JV-224 Form

- California Judicial Council Form JV-224
- Should be provided to the Judge with a request for findings pursuant to the Special Immigrant Juvenile Status federal statute found at INA 101(a)(27)(J).
- Judge must include a specific basis for his or her findings.
- Form clarifies that the child can be dependent on the court in either delinquency or dependency proceedings.

# Federal Regulations

- A child remains eligible for SIJS if s/he has been declared dependent upon a juvenile court and “**continues to be dependent** upon the juvenile court...such declaration, dependency, or eligibility not having been vacated, terminated, or otherwise ended...” 8 C.F.R. 204.11(c)(5).



# Juvenile Court Jurisdiction

- Delinquency (WIC 602) or Dependency (WIC 300).
- Child must remain in the juvenile court's jurisdiction until SIJS is granted.
- May take several months for an SIJS application (and accompanying green card application) to be completed, filed, and adjudicated by DHS. Keeping a juvenile on probation who is otherwise eligible for termination can be challenging.

# The “1 or Both” Drama

- Some district attorney offices and juvenile court judges argue that the federal statute requires a child to show that reunification with *both* parents is not viable due to abuse, abandonment, neglect, or similar basis under state law.

# What Does the Statute Say?

- The juvenile court must find that “reunification with **1 or both** of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under state law.”

# What Does DHS Say?

- DHS has published a fact sheet recognizing that a child can be residing with his or her non-abusive parent and still be eligible for SIJS. As such a child does not have to show abuse, abandonment, or neglect by **both** parents to be SIJS eligible.

# *Erick M.* (Nebraska Supreme Court)

- *In re Interest of Erick M.*, 284 Neb. 340 (2012)
- Nebraska Supreme Court decision.
- Minor was living with his mother and arguing that he could not reunify with his father. The request for SIJS findings was denied on that basis.
- *Erick M.* decision is erroneous because it goes beyond the plain language of the statute.

# *Erick M.* (Nebraska Supreme Court)

- The court in *Erick M* concluded that “[t]he crux of the appeal is the meaning of the phrase ‘1 or both’ parents under [subparagraph (J)]. We conclude that Congress wanted to give state courts and federal authorities flexibility to consider a juvenile’s family circumstances in determining whether reunification with the juvenile’s parent or parents is feasible.”

# State Appellate Decisions Addressing SIJS

- *Leslie H. v. Superior Court* (2014) 224 Cal. App.4th 340 (2014).
- *In re Minor Children of J.E.* (2013) 432 N.J. Super. 361
- *Eddie E. v. Superior Court* (2013) 223 Cal. App.4<sup>th</sup> 622
  
- No California Court of Appeal decision directly addressing the one parent v. both parents issue.

# State Appellate Decisions Addressing SIJS

- In **three** cases pending before the CA Court of Appeal (Divisions 1, 3, and 5), the Attorney General has filed briefs stating that it **agrees** that a juvenile residing with a non-abusive parent who has shown that s/he has been abused, abandoned, or neglected by the other parent (just one) is eligible for SIJS.
- Main determinative factor for the AG was that DHS itself had published materials recognizing eligibility for children who show A/A/N by just one parent.





# Questions?

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