After Padilla: A Recognition that Removal is Too Harsh a Penalty and the Limitations of Strickland as the Remedy

Steve Krejci

Introduction

Crimmigration, which studies the nexus of immigration and criminal law, is a relatively new concept in the legal arena.¹ The notion that criminal conduct can affect the status of a noncitizen is nothing new to immigration law. And criminal convictions as grounds for inadmissibility and removal are as old as the Immigration and Nationality Act (INA).² Despite the use of criminal convictions in other jurisdictions as grounds for removal and exclusion, immigration law, until recently, has remained squarely in the realm of civil law. Therefore, the necessity for criminal defense attorneys to concern themselves with immigration law is something new entirely.³ This distinction has persisted throughout the American legal system notwithstanding the harsh consequences that follow from removal.⁴ While it is easy to be unsympathetic to a drug trafficking noncitizen being deported, sympathy is not so easily denied to others.

Take for example Marco Gonzalez, who hugged his American born children goodbye a few days after Christmas.⁵ He had lived in the United States for twenty years whilst his asylum case was pending in immigration court.⁶ Working as a pool builder, he bought and fixed up a house, raised five children, and paid his taxes.⁷ But fifteen years ago he wrote a bad check. For that, he lives away from his family, exiled in Guatemala.⁸

David Balderrama faced deportation for drunk driving convictions.⁹ Viewed in isolation, David's case is a relatively palatable deportation for many because drunk driving is a rampant problem.¹⁰ However, David had already paid his fines and gone through court ordered rehabilitation programs.¹¹ Deportation threatens his diabetes stricken wife, who may periodically need to be driven to the hospital.¹² It separates him from his seven American born children and his twenty-two grandchildren.¹³

A noncitizen can be deported for allegedly participating in a drunken brawl—despite being unarmed. Many Americans would never expect to be exiled over such a minor crime.¹⁴ Removal of a manic depressive schizophrenic, a noncitizen who survived the Cambodian killing fields, and a mother

³ Padilla, 559 U.S. at 374.
⁴ “Removal” is the current term of art for deportation under the INA. These terms will be used interchangeably in this paper.
⁶ Id.
⁷ Id.
⁸ Id.
¹⁰ Id.
¹¹ Id.
¹² Id.
¹³ Id.
¹⁴ Id. at 139. This particular case involves a situation where Mr. Delgado pled guilty on advice of counsel who contemplated only the prison sentence, not the deportation consequences. Such a case is at the heart of this paper.
who was forced to leave her 9 year old daughter with social services lest she run the of risk female genital mutilation; show the “civil” penalty of deportation as more criminal in effect than most penal sentences.\textsuperscript{15}

Another noncitizen in danger of removal, the famous Canadian born pop star, Justin Beiber has had his brushes with the law recently.\textsuperscript{16} After admitting to smoking marijuana, taking prescription painkillers, drinking, driving under the influence, and drag racing, Beiber was arrested in Miami.\textsuperscript{17} Is Beiber going to be deported? Not likely. He is here as a non-immigrant on an O-visa\textsuperscript{18} because he is a performer that makes money.\textsuperscript{19} This status earns him the possibility of discretionary relief not available for the cases mentioned above.\textsuperscript{20} Ironically, if charges are brought, an incident in which he and some friends threw eggs at a neighbor's house is more likely to jeopardize his legal status than any of his other criminal conduct.\textsuperscript{21}

Beiber's story underscores the reality that removal sometimes produces inequitable results. However, even if prosecutorial discretion is not extended to more ordinary noncitizens, there should at least be recognition of undesirable effects of removal.

The goal of this paper is to highlight the problem Florida faces in the wake of Padilla, Chaidez, and Hernandez; the recognition that deportation is not so simply civil in nature and that Strickland is ill suited as the main collateral attack to noncitizens entering uninformed pleas. Part I of this paper will examine two criminal grounds for removal: crimes involving moral turpitude and aggravated felonies. Part II of this paper will discuss the impact of the Padilla decision and its retroactivity. Part III of this paper will lay bare the recognition of the harsh results of removal and the inability of many noncitizens to remedy their situation.

I. Crimes Involving Moral Turpitude and Aggravated Felonies.

Crimes involving moral turpitude (“CIMT”) are in part responsible for deportations resulting from otherwise relatively minor crimes. This basis for removal is defined as a crime, which is punishable by a sentence of a year or more.\textsuperscript{22} If there is only one conviction for a CIMT, then this crime must have been committed within 5 years of entry.\textsuperscript{23} For multiple convictions, there is no such time bar.\textsuperscript{24} Notably, the INA does not define a CIMT. The term moral turpitude is an age-old term of art that is notoriously lacking in precision.\textsuperscript{25} When faced with a definitional crisis, we turn to the authority of a dictionary for the most commonly cited definition: \textsuperscript{26} “\textit{A}n act of baseness, vileness, or
depravity in the private and social duties which one person owes to another, or to society in general, contrary to the accepted and customary rule of right and duty between people.”

In finding whether a crime is a CIMT, courts apply the modified categorical approach. First, the court looks to the actual text of the penal statute to determine if all the elements of the specific offense involve moral turpitude. If the court concludes that only some of the elements of the penal statute involve moral turpitude, then specific court documents in the record are examined. Courts do not review beyond the documents in the record of the conviction. Certain crimes, like manslaughter, attempted arson, burglary, and most sex offenses are CIMT’s. However, CIMT’s also encompass more minor crimes, such as trademark counterfeiting, passing bad checks, adultery, and the sale of margarine labeled as butter.

Aggravated felonies overlap with CIMT’s, but are generally more serious. These removal grounds encompass crimes of violence, drug crimes, racketeering, and fraud. Since the gravity of the crime is higher, removals for aggravated felonies do not usually appear as harsh. However, when aggravated felonies do create harsh results, it is often because such a crime can disrupt a lawful permanent resident’s (LPR’s) lifetime in the United States. Unlike CIMT’s, aggravated felonies are defined by statute and have no time limitation whatsoever. Therefore, an LPR of 70 years in the United States could be deported for a drug possession offense, even if there is no life to return to in their country of origin.

Convictions for the purpose of removal are treated differently under the INA since pleas of nolo contendere and guilty pleas to lesser charges do not restrict immigration authorities from considering the underlying criminal conduct. Under the INA, a formal adjudication of guilt certainly counts as a conviction. However, if adjudication is withheld, a mere plea of nolo contendere or an admission of facts capable of proving the crime, can have the same effect as a guilty plea. When adjudication is withheld, a conviction must also encompass some sort of punishment, but does not necessarily require prison or probation.

---

27 BLACK'S LAW DICTIONARY 1101 (9th ed. 2009).
28 Yeremin v. Holder, 738 F.3d 708, 715 (6th Cir. 2013).
29 Id.
30 Id.
41 Id. at § 1101(a)(43)(B).
42 Id. at § 1101(a)(43)(J).
43 Id. at § 1101(a)(43)(M).
45 Id.
46 See id.
47 § 1101(a)(48)(A).
48 Id.
49 Id. at (i).
50 Id. at (ii).
Until Padilla was decided in 2010, immigration jurisprudence considered removal as squarely a civil matter. More specifically, the Strickland remedy was unavailable to LPRs because any immigration outcome was considered a collateral consequence to the criminal proceedings.

The Court in Padilla recognized the severity of removal and so held that a Strickland claim may lie for an LPR if counsel failed to advise a criminally accused noncitizen of potential immigration consequences. Padilla was a lawful permanent resident for 40 years, during which time he served in the U.S. Armed Forces in Vietnam. The Commonwealth of Kentucky convicted him of transportation of marijuana after he entered a guilty plea. Padilla was not concerned with the criminal punishment that would follow from pleading guilty, but rather the consequence that his plea and conviction would have on his immigration status. When he expressed this concern to his attorney, Padilla was advised, “he did not have to worry about immigration status since he had been in the country so long.”

Padilla was placed in deportation proceedings. In an effort to avoid deportation, he claimed ineffective assistance of counsel under Strickland. Even though the Court did not rule on the merits of his Strickland claim, the court acknowledged a chink in the armor protecting removal proceedings from criminal constitutional protections.

Once the shock wore off, the next question was whether the Padilla holding was retroactive. The Chaidez Court faced facts similar to Padilla; an LPR who lived in the United States for 20 years until she was convicted of mail fraud, for which she was sentenced to four years of probation. This crime fit the definition of an aggravated felony under the INA and therefore Chaidez was removable. Her conviction was in 2004 and removal proceedings were initiated in 2009 after she initiated the process to become a citizen. Since she did not realize that her conviction would trigger her removal she sought to set aside her conviction. While her action was pending, Padilla was decided. The Court held Chaidez could not benefit from the Padilla decision because it did not announce a new rule under Teague. Therefore, after Chaidez, Strickland attacks are only permitted after 2010.

While the retroactivity is at least settled for federal purposes, the Teague analysis is useful here since it demonstrates the magnitude of the Padilla holding. Under Teague, a criminal defendant cannot take

---

51 Padilla, 559 U.S. at 366.
54 Strickland allows for a criminal convict to attack his or her conviction through ineffective assistance of counsel. This right derives from a 6th amendment right to counsel. Strickland, 466 U.S. at 687. Hence, it does not apply in civil matters. See Harisiades, 342 U.S. at 594-95.
55 See Padilla, 559 U.S. at 366 (2010).
56 Id. at 359.
57 Id.
58 See id.
59 Id. (internal quotations omitted).
60 Id.
61 Id. at 373-74.
63 She probably would not have been removable for commission of a CIMT because this is only one conviction and she had been in the United States longer than 5 years. See 8 U.S.C § 1227(a)(2)(A)(i) (2012); Chaidez, 133 S. Ct at 1106.
64 Chaidez, 133 S. Ct. at 1106.
65 Id.
66 Id. at 1107.
67 See id.
advantage of a rule retroactively if it is new and not a modified application of an existing rule. Whether a rule is “new” under *Teague* is not a straightforward determination, but the notion that removal at least receives a nod from the Sixth Amendment is something new in 200 years of American immigration jurisprudence. While the dissent in *Chaidez* would extend the protection of *Strickland* to criminal defendant noncitizens retroactively, doing so would minimize the impact that *Padilla* has by framing the new rule as another application of *Strickland*, not something entirely new. In characterizing *Padilla* this way, it may allow a few LPR's to collaterally attack a conviction, but removal is also less clearly seen as a type of punishment.

Prior to *Chaidez*, Florida was forced to consider the retroactivity of *Padilla*. *Chaidez* essentially agreed with *Strickland*, holding that claims asserting *Padilla* cannot be applied retroactively, but both *Chaidez* and *Hernandez* underscore the 6th Amendment flavor of crimmigration. *Hernandez*’s story is familiar. Nicaraguan in origin, he came to the United States with his mother when he was a year old. After which, he became an LPR residing in Florida. When he was 19, he was caught selling LSD and consequently arrested, convicted, and sentenced to a year of probation. After this slip up, Hernandez went on to get a bachelor's degree and work as a network administrator, none of which could save him from removal.

After *Padilla*, Hernandez tried to attack his conviction with *Strickland*, but under *Witt*, retroactivity was unavailable. Under *Witt*, a rule is not retroactive unless it “(a) emanates from [the Florida Supreme Court] or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance.” This last element is often the sticking point and is found when: 1) the state's power to punish is curtailed or there is a 2) watershed change in the law. Interestingly, the first is not analyzed in any depth in *Hernandez*. One reason this factor is unavailable is because the State of Florida is not empowered to remove noncitizens. So even if removal was a form of punishment, it is not one meted out by Florida and hence not relevant to Florida's power to punish. However, as the dissent in *Chaidez* points out, the *Padilla* court was somewhat hesitant in unequivocally stating that the removal process is completely free from the criminal process. While this first factor is unavailable, its unavailability underscores the way in which federalism frustrates immigration law's policy of keeping families together by shifting the responsibility for removal. The federal government is responsible for the civil remedy of removal and unwilling to open the floodgates

---

69 *Chaidez*, 133 S. Ct. at 1110.
70 *Id.* at 1117 (Sotomayor, J., dissenting).
71 See *id.*
72 See *id.* at 1110; *Hernandez* v. *State*, 124 So. 3d 757, 764 (Fla. 2012).
73 *Hernandez*, 124 So. 3d at 759.
74 *Id.*
75 *Id.*
76 Hernandez's crime of selling LSD was classified as both an aggravated felony and controlled substance conviction. *Id.* at 760.
77 *Witt* is the seminal case in Florida to be applied to the question of whether a criminal rule is retroactive. *Id.* at 763; *Witt* v. *State*, 387 So. 2d 922, 931 (Fla. 1980).
78 *Witt*, 387 So. 2d at 931. The first two of these elements are clearly present in *Hernandez*. See *Hernandez*, 124 So. 3d at 764.
79 *Witt*, 387 So. 2d at 927.
80 *Hernandez*, 124 So. 3d at 763.
81 See *id.*; *Witt*, 387 So. 2d at 927.
83 See *Padilla*, 559 U.S. at 365; Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 559 (2013); KANSTROOM, supra note 9, at 140.
through disruption of countless state convictions. However, the state is merely enforcing criminal laws, not necessarily contemplating the immigration consequences of LPR’s. Moreover, removal was not considered punishment, a concept that a court would have no reason to doubt, until Padilla.

The benchmark for watershed changes in law given in Witt is Gideon v. Wainwright, which certainly sets a high bar. In determining whether the change in law is of sufficient magnitude, the court must examine the purpose of the new rule, reliance on the old rule, and the judicial efficiency implications of retroactivity. Analysis of the first factor characterizes Padilla as targeted at ensuring accurate legal advice for criminally accused noncitizens. This characterization starts the analysis off on the wrong foot by focusing the purpose of Padilla on the lawyer and not the client. While Padilla will undoubtedly generate more accurate advice for noncitizen criminal defendants, the explicit purpose of Padilla is simply its holding: to allow for post-conviction Strickland claims when a noncitizen is not advised of immigration status implications. Framed this way, the first factor is inescapably in favor of retroactivity.

The second factor is against retroactive application since no Florida court required attorneys to advise their clients of immigration consequences flowing from criminal accusations. Ironically, the very reason Padilla is arguably a watershed moment in the development of the law is one of the reasons why it should not be applied retroactively in Florida. It is unfair to call a lawyer's services defective when they could not have known better, but it is no fairer to punish noncitizens for the limitations of Strickland. While this irony may unfairly limit Padilla, it also highlights the limitations of Strickland as the vehicle for attacking convictions resulting from uninformed plea bargaining: defense attorneys would have to be admonished for deficient performance in order for a noncitizen to prevail on this claim.

Judicial efficiency counsels against retroactive application of Padilla since it would disrupt finality of judgments. However, this factor is inherently limited in any retroactive application of the law since final judgments will always be disrupted when retroactivity is permitted. Therefore, reliance on this factor should be minimal.

III. The Problem of Padilla.

The result then is that many noncitizens are left without a meaningful avenue to challenge an uninformed plea if made before 2010 because Strickland is the vehicle Padilla has made available to noncitizens. Strickland is not available retroactively at the federal level because, paradoxically, it is not completely a new rule, yet it is novel enough to avoid retroactivity under Teague. Particularly in

---

84 See Chaidez, 133 S. Ct. at 1110.
85 See id.; Hernandez, 125 So. 3d at 763.
86 Witt, 387 So. 2d at 927.
87 Hernandez, 124 So. 3d at 764.
88 Id.
89 But see id.
91 See id. But see Hernandez, 124 So. 3d at 764.
92 Hernandez, 124 So. 3d at 764.
93 See Strickland, 466 U.S. at 687.
94 See Hernandez, 124 So. 3d at 765.
95 See Witt, 387 So. 2d at 929.
96 But see Hernandez, 124 So. 3d at 765.
97 Padilla, 559 U.S. at 374.
98 See Chaidez, 133 S. Ct. at 1107.
Florida, *Padilla* is unavailable to noncitizens convicted prior to 2010 because of Florida's reliance on a lack of duty to advise noncitizen clients of immigration consequences, even though this makes the *Padilla* decision all the more ground breaking. 99 *Padilla* then has left criminally accused noncitizens with difficult options. The overly harsh nature of removal for relatively minor crimes is recognized, but at the same time, the vehicle available to curtail this harshness is largely unusable. Even if *Padilla* were available, the two-pronged test under *Strickland* is notoriously hard to meet, even if the circumstances warrant some type of relief from removal. 100

99 See *Hernandez*, 124 So. 3d at 765.
100 See *Padilla*, 559 U.S. at 372.