

PRO SE GUIDE TO *PADILLA V. KENTUCKY*

Overview

On March 31, 2010, the U.S. Supreme Court issued a decision in a case called *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010) that affects how people must be advised about immigration issues by their criminal defense attorneys. While there are many misconceptions about *Padilla*, in some cases it may be possible to use this case to withdraw your plea and vacate your criminal conviction. Here are the answers to some common questions about *Padilla*:

What did the Supreme Court say in *Padilla*?

In *Padilla*, the Supreme Court ruled that criminal defense attorneys have a constitutional duty to tell criminal defendants about the immigration consequences of a guilty plea. The court said that when the immigration consequences of a plea are “truly clear,” the defense lawyer must tell the



defendant of the specific consequences of accepting the plea. When the immigration consequences are less clear, the defense lawyer must at least advise the defendant that there is a risk of deportation. If a lawyer gives you wrong advice, or if he doesn't mention immigration consequences at all, this violates your right to have competent legal representation.

Can I vacate my criminal conviction under *Padilla*?

In order to vacate your conviction, you have to show two things. First, you have to show that your lawyer gave you incorrect advice about the immigration consequences of your plea or else didn't discuss immigration consequences at all. Second, you have to show that the outcome of your criminal case would have been different if your lawyer hadn't given you wrong advice or no advice. For instance, you must show that you would have gone to trial if you knew that accepting the plea would result in your deportation.

How can I vacate my conviction?

This is the most difficult part of the process since courts usually do not like to disturb a case that has already been decided. Furthermore, some lawyers do not like to admit that they did something “wrong” and so may not want to help you. On the other hand, sometimes lawyers actually gave the defendant correct advice on immigration consequences but the defendant was confused and/or doesn’t remember.

The easiest way to vacate a conviction is to hire a private attorney to file a motion or a petition to overturn your conviction. This may be expensive and hard to do so it is a good idea to talk to an immigration attorney before you spend a lot of money to make sure that this “post-conviction relief” will actually help your immigration case.

If you don’t have money to hire a private attorney, you can try to contact the lawyer who originally represented you to see if she is willing to assist you. If you had a public defender, you can contact the public defender’s office or ask a family member to go to the office and see if they are willing to help you or give you a lawyer to vacate your conviction.



If all else fails, you can try to vacate your conviction by yourself. This is a very difficult and complex process, but some people have been able to successfully vacate their convictions without a lawyer’s help. Write a letter to the court where you were convicted and ask for instructions and/or a form on how to vacate your conviction under *Padilla*. You can also ask the court to appoint you a lawyer to assist you in this process.

Can’t I just get my conviction expunged or set aside?

In most cases, no. Some states provide a way to erase a conviction from your record by taking classes, paying fines, completing probation, or otherwise “earning” it. In most situations, having a conviction taken off your record for

this reason does NOT help your immigration case.¹ If you vacate your conviction under *Padilla*, this is on constitutional grounds and is not an expungement or set aside.

Does it matter if my conviction was before or after the Supreme Court decided *Padilla*?

Yes. While some courts have said that criminal lawyers *always* had the duty to advise about immigration consequences, other courts have said that *Padilla* is a new rule that does not apply to convictions that occurred before March 31, 2010. Therefore, your ability to vacate your conviction may depend on when it occurred and whether the court in your particular area has said that *Padilla* should apply “retroactively,” or applied to cases that happened before the Supreme Court decided *Padilla*.

In *Chaidez v. United States*, the Supreme Court ruled that its decision in *Padilla* would not apply retroactively to criminal cases that had reached a final decision before the 2010 decision in *Padilla*. Some attorneys around the country are trying to argue that *Chaidez* is limited to federal crimes and that *Padilla* should apply retroactively to state convictions. However, many states, including Arizona, have already decided that *Padilla* only applies to convictions after March 31, 2010.

Will the immigration judge wait to deport me while I’m trying to vacate my case?



Probably not. You can present the judge with evidence that you are trying to vacate your conviction and ask for one or more continuances, but most judges are not willing to do this. However, if the judge orders you deported and your conviction is vacated while your case is on appeal at the Board of Immigration Appeals or the circuit court, you can ask the appeals court to send your case back to the immigration judge to see whether you can still be deported.

¹ The only time that an expungement or set aside may erase immigration consequences is if you have a single conviction for simple possession of a drug that occurred before July 14, 2011. Furthermore, this only applies in the Ninth Circuit (which includes California, Arizona, Nevada, Idaho, Montana, Oregon, Washington, Alaska, and Hawaii).

What are the risks of vacating my conviction?

If the criminal court grants your request to vacate your conviction, it does not mean that your criminal case is necessarily over. The state prosecutor can still bring the exact same charges against you, but this time you may be able to tell your lawyer you want to go to trial or that you want to negotiate a plea that would not have the same immigration consequences. However, it is possible that you could end up with more jail time or a more serious offense than you had the first time. While vacating your conviction is the first step in trying to erase negative immigration consequences, it is not a guarantee that you will be able to stay in the U.S.

What happens in my immigration case if I can successfully vacate my conviction?

If you can successfully vacate your conviction under *Padilla*, you can ask the immigration judge to “terminate” your removal proceedings. This means the government is no longer actively trying to deport you and you will be released from detention and can go back to your normal life.

However, even if you vacate your conviction, there are some situations in which the government can continue to try to deport you. For instance, if you have two domestic violence convictions and one is vacated, the government can still use the other to say you can be deported. Also, if you have a conviction vacated but you don't have current legal permission to be in the U.S., the government can still deport you. However, vacating your conviction may still be beneficial if it allows you to apply for a pardon or continue to fight your case.

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