Broadening Our Interpretation of *Padilla* Will Promote More **Immigration-Neutral Plea Agreements**

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IN the aftermath of the 9/11 bombings, the Department of Homeland Security (DHS) started aggressive deportation of individuals who did not have lawful status in the United States. The increase in deportation of noncitizens was intended to protect national security. DHS believes its most important mission is to remove aliens quickly with criminal convictions.

While DHS zealously expels noncitizens so that Americans may have an immediate sense of security, immigration attorneys believe that federal initiatives to secure our porous borders are slowly tearing apart our society. For example, U.S. born children are increasingly finding themselves separated from an undocumented parent that has been deported because of a conviction for a nonviolent offense such as DUI or theft.

There was a glimmer of hope for immigration attorneys in 2010 when the U.S. Supreme Court decision in *Padilla v. Kentucky*[1] obligated criminal defense attorneys to advise noncitizens about the risk of deportation before a guilty plea. The immigration law community immediately interpreted the holding in *Padilla* as a reminder that criminal defense attorneys must advise clients of the potential for deportation.

This viewpoint advanced the position that the *Padilla* decision's singular goal was to promote the effective assistance of counsel by criminal defense attorneys representing noncitizens in criminal courts. Unfortunately, this narrow interpretation of *Padilla* did not significantly improve the excessive penalty of deportation for noncitizens convicted of nonviolent crimes in state court.[2]

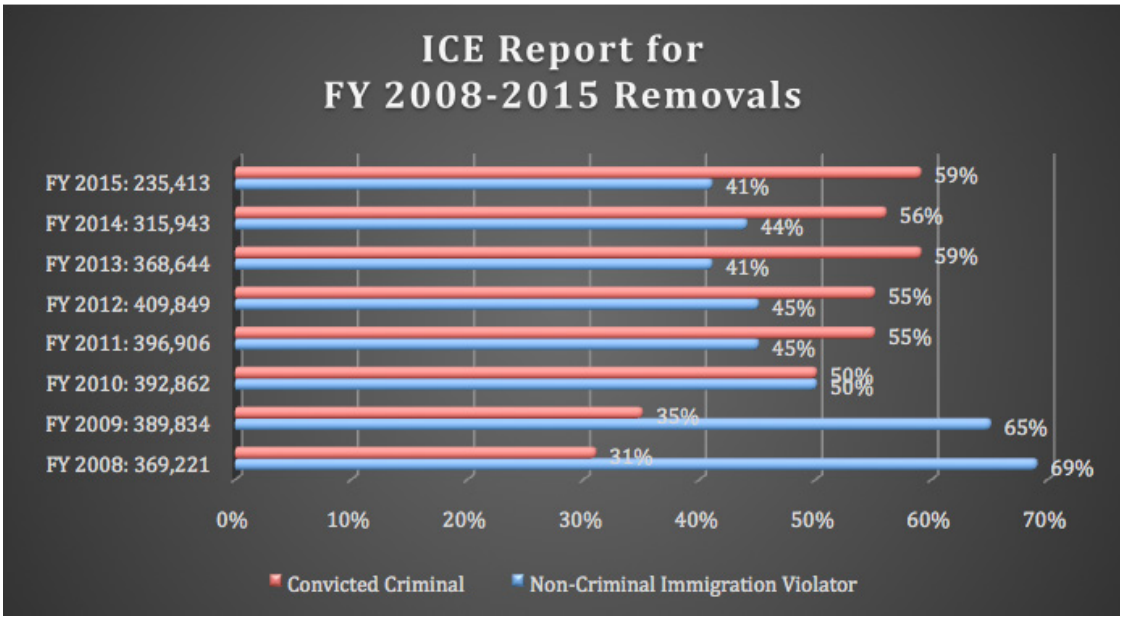
Looking ahead, there must be meaningful institutional change in both the defense as well as the prosecution of noncitizens to promote outcomes proportionate to the charged offenses. The legal community must adopt a more practical interpretation of *Padilla* that includes the duty of prosecutors to pursue immigration-neutral plea agreements in the interest of justice.

The Devil is in the Details

In 2015, U.S. Immigration Customs and Enforcement (ICE) reported removing 139,368 criminals. This represented 59% of total ICE removals. Whereas, in 2008, only 31% of total ICE removals were convicted criminals.[3]

At first glance, these statistics suggest that ICE is successfully performing the task of deporting dangerous foreign nationals unlawfully present in the United States. However, the data presented by ICE does not distinguish between violent crimes and nonviolent crimes such as driving offenses and theft.

Instead, ICE removals are generally categorized by the following three different levels of enforcement priorities as established by the DHS Secretary Jeh Charles Johnson in his November 20,



2014 Memorandum, Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants:

- Priority 1 covers threats to national security, border security and public safety. This category combines terrorists with aliens convicted of an "aggravated felony" as defined by the Immigration and Nationality Act (INA).
- Priority 2 consists of "misdemeanants" and new immigration violators.
- Priority 3 is refers to other immigration violations.[5]

Before examining the statistics regarding removals of noncitizens within each level of enforcement priority as reported by ICE, it is important for defense attorneys to understand the meaning of the terms misdemeanant, significant misdemeanor and aggravated felony for immigration purposes.

A misdemeanant refers to an alien convicted of three or more misdemeanor offenses each punishable for less than one year or to an alien convicted of one significant misdemeanor. An example of a significant misdemeanor is a conviction to driving under the influence of alcohol as a first offense. Another example of a significant misdemeanor is any offense for which the individual was sentenced to time in custody of 90 days or more (the sentence must involve time to be served in custody, and does not include a suspended sentence).

A more complex analysis is required to determine whether state offense is an "aggravated felony" as defined by Section 101(a)(43) of the Immigration and Nationality Act (INA). The definition of "aggravated felony" under the INA covers more than thirty types of offenses, including simple battery, theft, and failing to appear in court. For example, Section 101(a)(43)(G) of the INA provides that an aggravated felony includes a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year.

A sentence of time-served to 23 months for a conviction to Retail Theft as a Misdemeanor of the First Degree under the Pennsylvania Crimes Code triggers an aggravated felony categorization pursuant to Section 101(a)(43)(G) of INA. In *Bovkun v. Ashcroft*, the Third Circuit held that under Pennsylvania's sentencing scheme of requiring a minimum term of incarceration and a maximum term of incarceration, it is the number representing the maximum term of incarceration that determines if the sentence is a year or more for purposes of an aggravated felony determination under Section 101(a)(43)(G) of INA.[6]

As a result, a conviction to Retail Theft as a Felony of the Third Degree is not an aggravated felony under the INA when the sentence is to three years of probation. The reason is that the maximum term of incarceration is the determinative factor in identifying whether a theft offense is an aggravated felony as defined by the INA. The grading of a theft offense under the Pennsylvania Crime Code is not considered

in the aggravated felony determination.

Keeping in mind that a misdemeanant can be an individual convicted of any one of several nonviolent crimes graded as a misdemeanor in state court and that there are numerous offenses defined as an aggravated felony under the INA, the statistics released by ICE do not necessarily support the position that ICE is successfully removing dangerous noncitizens.

For example, the statistics released by ICE do not reveal what percentage of the convicted criminals within Priority 1 are nonviolent offenders charged with an aggravated felony under the INA. The statistics also do not show what percentage of convicted criminals in Priority 2 are nonviolent offenders with convictions for crimes such as driving offenses or theft.

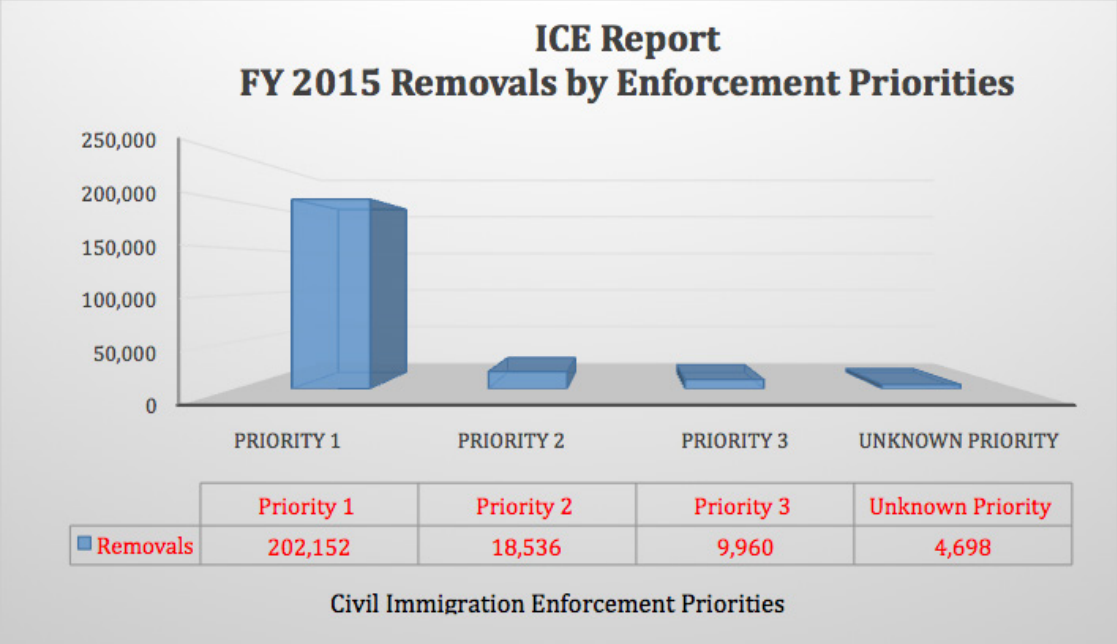
The data published by ICE should also be weighed against the data that demonstrates the negative societal impact of indiscriminate and aggressive deportation policies. For instance, in 2013, ICE deported approximately 72,000 parents of US-citizen children.[8] The Urban Institute and Migration Police Institute compiled research and prepared a joint report in 2015 informing that it is possible that more than half a million children experienced parental deportation in recent years. There were 180,000 children affected by parental deportation annually in 2011 and 2012 alone, and 140,000 in 2013.[9] A report by the Applied Research Center (ARC) in 2011 estimated that there are at least 5,100 children currently living in foster care across the country whose parents have either been detained or deported.[10] ARC's 2011 report also states that in counties where local police have agreements with ICE, children in foster care were about 29 percent more likely to have a detained or deported parent than in other counties.[11]

As a consequence of being left behind in either a foster or single parent home, the children of a deported parent are more likely to have an increased reliance on federal public benefits. The resources of each individual state are also unnecessarily drained when families are forced into economic distress after an income-earning parent is deported. This common and unjust outcome resulting from a nonviolent criminal conviction by a U.S. born child's parent should be the narrative that introduces the more broad interpretation of the *Padilla* decision that demands institutional changes from prosecutors.

Padilla for Prosecutors

"The prosecutor has more control over life, liberty, and reputation than any other person in America." – Robert H. Jackson, United States Attorney General, April 1, 1940[12]

Legal scholars have acknowledged the practical importance of the role of the prosecutor in the plea bargaining process that was discussed in the *Padilla* decision. In her 2012 Georgetown Law Journal article, Heidi Altman presents a compelling argument in support of the position that the



American Prosecutor's role in the post-*Padilla* era is to promote creative plea bargaining programs for noncitizens when appropriate and in the interest of justice.[13] Ms. Altman cites to the portion of the *Padilla* decision where, according to her, Justice Stevens makes a "ground breaking invitation to the defense and prosecution bars" as follows:

> [I]nformed consideration of possible deportation can only benefit both the 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. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.[14]

Justice Stevens advises that "informed consideration of possible deportation consequences" and "creative plea bargaining" should involve BOTH defense counsel and the prosecutor. The role of the prosecutor in the creative plea bargaining process, envisioned by Justice Stevens, is an active one that deserves the full attention of the legal community equal to the efforts employed to encourage criminal defense attorneys to provide effective assistance of counsel to noncitizens in criminal cases.

Prosecutors have an interest in pursuing just outcomes for criminal cases and in maintaining safe communities. The National District Attorney's Association identifies three broad prosecutorial goals: 1) to promote the fair, impartial, and expeditious pursuit of justice; 2) to ensure safer communities; and 3) to promote integrity in the prosecution profession and coordination in the criminal justice system.[15]

Imagine what the post-*Padilla* era could have been like if the legal community's efforts included more than advancing the single purpose of reminding defense attorneys to advise clients of the potential for deportation? The legal community could have also educated the community at large and prosecutors about the resource drain on society created when families are separated by the deportation of an undocumented parent charged with a crime like a DUI or a theft.

Acknowledging the negative impact of separating families in their community after a noncitizen parent is charged with a nonviolent offense, District Attorneys should reconsider policies that preclude ARD dispositions in DUI cases for a defendant without legal status in the United States or a Pennsylvania issued driver's license. More significantly, the Pennsylvania District Attorney's Association should encourage each District Attorney in the Commonwealth to train their staff on deportation issues and alternative plea agreements that would eliminate the likelihood of deportation for a noncitizen convicted of a nonviolent offense.

To actually achieve the just outcomes originally envisioned by immigration advocates in 2010, criminal defense attorneys must cure the

legal community's myopic interpretation of the *Padilla* decision by referencing the language in the Court's opinion that places a burden on prosecutors to pursue immigration-neutral plea agreements when appropriate and in the best interest of the state.

Notes

1. 130 S.Ct. 1473 (2010).
2. The Pennsylvania Superior Court has held that *Padilla* requires counsel to inform a defendant as to a risk of deportation, but not as to its certainty. *Commonwealth v. Escobar*, 70 A.3d 838, 841 (Pa. Super. 2013). S*ee also Commonwealth v. McDermitt*, 66 A.3d 810, 814 (Pa. Super. 2013) (holding that plea counsel's advice that defendant's guilty plea would render him "deportable" was not ineffective).
3. Department of Homeland Security, US Immigration and Customs Enforcement, *ICE Enforcement and Removal Operations Report FY 2015* (Dec. 22, 2015), Accessed June 21, 2016, https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf
4. *Id*.
5. *Id*.
6. 283 F.3d 166 (3rd Cir. 2002).
7. *Id*.
8. Department of Homeland Security, U.S. Immigration and Customs Enforcement, *Deportation of Aliens Claiming U.S.-Born Children*, First Semi-Annual, Calendar Year 2013: Report to Congress. (Apr. 28, 2014), http://big.assets.huffingtonpost.com/2013report1.pdf.
9. Urban Institute and Migration Policy Institute, *Implications of Immigration Enforcement Activities for the Well Being of Children in Immigrant Families* (Sep. 2015), https://www.urban.org/sites/default/files/alfresco/publication-exhibits/2000405/2000405-Implications-of-Immigration-Enforcement-Activities-for-the-Well-Being-of-Children-in-Immigrant-Families.pdf.
10. Wessler, S., *Shattered Families: The Perilous Intersection of Immigration Enforcement and the Child Welfare System*. New York: The Applied Research Center (Nov. 2011), http://www.arc.org/shatteredfamilies.
11. *Id*.
12. Robert J. Jackson, United States Attorney General, Address at the Second Annual Conference of United States Attorney: The Federal Prosecutor (April 1, 1940) (transcript available at https://www.roberthjackson.org/wpcontent/uploads/2015/01/The_Federal_Prosecutor.pdf)
13. Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizens*, Vol. 101: Issue 1 Geo. L.J. (Nov. 2012).
14. *Id*. at 22. *citing Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).
15. *Id*. at 32-33. *citing* American Prosecutors Research Institute, *Prosecution in the 21st Century: Goals, Objectives, and Performance Measures, Special Topic Series (Feb. 2004)* available at http://www.ndaa.org/pdf/prosecution_21st_century.pdf.

About the Author

Wana Saadzoi *is the President and Founder of The Law Offices of Wana Saadzoi. Her practice includes criminal defense, immigration, and crimmigration. She is a former assistant district attorney at Delaware County District Attorney's Office, assistant public defender at Delaware County Public Defender's Office, and law clerk to Judge George Pagano at the Delaware County Court of Common Pleas. Wana graduated from Villanova University School of Law and Dickinson College.*