

A Non-Lawyer's Guide to the Supreme Court's Decision in *Padilla v. Kentucky*



The Florence Immigrant & Refugee Rights Project is a nonprofit legal services organization that works with adults and children in immigration custody in Arizona. The staff of the Florence Project prepared and updated this guide for immigrant detainees who represent themselves in their removal proceedings. We do not charge for our services. To see our guides, go to: www.firrp.org.

This guide is not intended to provide legal advice. It is not a substitute for legal counsel.

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Important Words to Know

Immigration law has a lot of technical words. Here is a list of some words you will see in this guide and a short explanation of what they mean.

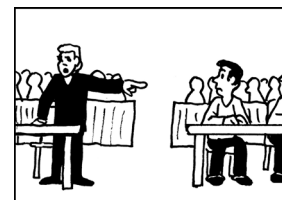
- **Deportation:** ICE has put you in deportation proceedings, which are also called removal proceedings. If the judge orders you deported or “removed” from the United States, officials will send you back to the country where you are a citizen. You will not be able to legally return to the U.S. for at least 10 years.



- **Florence Project:** A group of lawyers and legal assistants who provide free legal help to people who do not have lawyers. The Florence Project wrote this guide to help you understand your case.



- **Government Attorney:** The lawyer who represents ICE when you go to your court hearings. This lawyer sits at the table next to you and talks to the judge. Government attorneys should see that justice is done. Usually, they ask the judge to order to deport you.



- **Immigration and Customs Enforcement (ICE):** The agency that has put you in deportation proceedings and detained you. ICE is part of the Department of Homeland Security, or DHS.



- **Immigration Judge (judge):** The person who will decide your case. Judges hold hearings in the courtroom and wear black robes. They should look at the facts of your case and apply the law fairly. Judges do not work for ICE.



Who Should Read this Guide?

If you have been convicted of a crime and you want to learn how to have that conviction set aside, this guide from the Florence Project will help you understand what you can do.

How Does the *Padilla v. Kentucky* Case Affect You?

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 case affects how criminal defense attorneys must advise people about their immigration issues. While a few people have many misconceptions about this case, you may be able to use that decision to withdraw your plea and vacate your criminal conviction.

In this guide you will find answers to some common questions about the case.

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.



- **When the immigration consequences of a plea are “truly clear,” the defense lawyer must tell defendants of the specific consequences of accepting the plea.**
- **When the immigration consequences are less clear, the lawyer must at least advise defendants that they risk being deported.**

If a lawyer gives you wrong advice or does not mention immigration consequences at all, that lawyer **violates your right to have competent legal representation.**

Can You Vacate Your Criminal Conviction Under *Padilla*?

To *vacate a conviction* means to set aside the verdict.

If you want to vacate your conviction, you must show that:

- **Your lawyer gave you incorrect advice about the immigration consequences of your plea or else did not discuss immigration consequences at all.**
- **The outcome of your criminal case would have been different if your lawyer had not 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 You Vacate Your Conviction?

Vacating a conviction is difficult.

The courts usually do not like to disturb a case that has already been decided. Sometimes, lawyers do not like to admit that they did something “wrong,” so they may not want to help you. Or sometimes lawyers may have actually given defendants correct advice about the immigration consequences, but the defendants were confused or do not 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. Doing this may be expensive and difficult. To make sure that this “post-conviction relief” will actually help your case, before you spend much money you should talk to an immigration attorney.

- **If you do not have money to hire a private attorney**, try to contact the lawyer who originally represented you to see if she is willing to help 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 to give you a lawyer to vacate your conviction.
- **If all else fails, you can try to vacate your conviction by yourself**. Although this is a very difficult and complex process, 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 a form on how to vacate your conviction under Padilla. You can also ask the court to appoint a lawyer to help.

Can’t You Just Get Your Conviction Expunged or Set Aside?

In most cases, no.

Some states may give you a way to erase a conviction from your record if you take classes, pay fines, complete probation, or otherwise “earn” it. In most situations, having a conviction taken off your record for this reason does NOT help your immigration case.

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,
- The conviction occurred before July 14, 2011, and
- Your immigration case is in the Ninth Circuit (The Ninth Circuit includes California, Arizona, Nevada, Idaho, Montana, Oregon, Washington, Alaska, and Hawaii).

If you vacate your conviction under Padilla, it is on constitutional grounds and is not an expungement or set aside.

Does It Matter If Your Conviction Was Before or After the Supreme Court Decided the *Padilla* Case?

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. So, whether you can vacate your conviction may depend on when it occurred and if the court in your particular area has said that *Padilla* should apply “retroactively,” or 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.

But, many states, including Arizona, have already decided that *Padilla* only applies to convictions after March 31, 2010.

Will the Judge Wait to Deport You While You Try to Vacate Your Case?

Probably not.

You can present the judge with evidence that you are trying to vacate your conviction. You can ask for one or more continuances, but most judges are not willing to do this.

But 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 if you can still be deported.



What Are the Risks of Vacating Your Conviction?

If the criminal court grants your request to vacate your conviction, your criminal case is not necessarily over. The state prosecutor can still bring the same charges against you. But this time, you may be able to tell your lawyer that you want to go to trial or that you want to negotiate a plea that would not have the same immigration consequences.

But, 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 does not guarantee that you will be able to stay in the U.S.

What Happens in Your Case If You Can Successfully Vacate Your Conviction?

If you currently have legal permission to be in the United States and you successfully vacate your conviction under *Padilla*, you can ask the immigration judge to *terminate* your removal proceedings.

When a case is *terminated*, the government no longer actively tries to deport you. You will be released from detention and can go back to your normal life.

But, even if you vacate your conviction, in some situations the government can continue to try to deport you. For instance, if you have two domestic violence convictions and only one is vacated, the government can still use the other to say that you can be deported.

If you do not have current legal permission to be in the U.S., getting your conviction vacated does not mean your case is over. The government can still deport you simply because you do not have legal permission to be in the country.

But vacating your conviction may still be beneficial if it allows you to apply for a pardon or to continue to fight your case.