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**Errors in OIL's 2010 post-*Padilla* Reference Guide:
"Immigration Consequences of Criminal Convictions: *Padilla v. Kentucky*"¹.**

In September 2010, the Office of Immigration Litigation of the U.S. Department of Justice released a reference guide in light of the U.S. Supreme Court's 2010 decision in *Padilla v. Kentucky*. The reference guide, "Immigration Consequences of criminal Convictions: *Padilla v. Kentucky*," stated an intent to assist parties including defense attorneys, judges, and prosecutors, in "understanding the immigration consequences of an alien's guilty plea in a particular case." After closely reviewing the guide, I've identified two significant errors that I would like to bring to light precisely because such parties may rely on OIL's guide in executing and influencing criminal justice outcomes. I also include three points or observations that may be of additional interest. The reference guide does contain concise explanations of removal procedures and a helpful history of significant legislation in the area of criminal immigration consequences and deportation over the last two decades.

Errors:

1. On page 11 of the reference guide, under "Crimes Involving Moral Turpitude" the petty offense exception found in 8 U.S.C. § 1182(a)(2)(A)(ii)(II) is misstated. The exception applies to offenses for which the maximum possible term of imprisonment does not exceed one year. OIL misstates this as "for which the maximum possible term of imprisonment was less than one year." This is significant because under California law, for example, a misdemeanor where the actual sentence didn't exceed 6 months may qualify under the exception because the possible term of imprisonment for a California Misdemeanor does not exceed one year. OIL's error, if relied upon, would mistakenly signal to parties that a California misdemeanor conviction cannot be crafted in such a way as to fall within the petty offense exception and thereby avoid or mitigate certain immigration consequences.
2. Also on page 11 of the guide, under "Controlled Substance Offenses," OIL erroneously states that 8 U.S.C. § 1182(a)(2)(A)(i)(II) contains a marijuana exception. There is no marijuana exception under the criminal grounds of inadmissibility. Such an exception exists instead under the criminal grounds of deportability found in 8 U.S.C. § 1227(a)(2)(B)(i).

Additional Points for Consideration:

3. On page 9 of the reference guide, OIL provides a possible list of offenses that could be deemed to constitute Crimes Involving Moral Turpitude (CIMTs). Parties should be particularly careful in relying on such a list since the CIMT definition is unclear. One Circuit Court has referred to the

¹ Available at: http://www.justice.gov/civil/oil/Padilla_Monograph.htm

question of what constitutes a CIMT as “a nebulous question.”² The agency and federal court interpretations of what constitutes a CIMT are constantly changing. As an example, OIL includes “Driving under the influence without a license” in its list of offenses that could be CIMTs. In the 9th Circuit, driving under the influence with knowledge that the driver is prohibited from driving with a suspended or otherwise restricted license is a CIMT.³ The elements of a crime involving moral turpitude must be found in the statute of conviction. Two statutes cannot be stacked in order to create a new offense that would be considered a CIMT. For example a CA simple DUI, Vehicle Code § 23152 cannot be found in combination with a Driving w/o License, Vehicle Code § 14601 to constitute a CIMT since separately, neither of the offenses requires an individual to drive drunk with knowledge of a suspended or revoked license.

4. OIL uses California's burglary statute, Cal. Penal Code § 459, as an example of a statute that is “missing” the element of an unlawful or unprivileged entry required under *Taylor's* generic definition of burglary. In the 9th Circuit, when a statute is missing an element of the generic offense altogether, it categorically cannot fall within that generic definition since a jury would never be required to find all of the elements of the generic crime.⁴ OIL offers a useful analysis of the Categorical and Modified Categorical Approaches outlined by the U.S. Supreme Court in *Taylor* (1990) and *Shepard* (2005).
5. OIL completely ignores the Attorney General's highly criticized decision in *Matter of Silva-Trevino*⁵ that suggests that the immigration court can go beyond the record of conviction in determining when a conviction constitutes a CIMT. *Silva-Trevino* has been explicitly rejected by the 3rd and 8th Circuits.⁶ OIL was wise not to give weight to the AG's clear departure from years of established Supreme Court, Circuit Court, and BIA precedent in their reference guide.

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² *Ocegueda-Nunez v. Holder*, 594 F.3d 1124, 1127 (9th Cir. 2010).

³ *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc).

⁴ *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1073 (9th Cir. 2007) (en banc).

⁵ *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

⁶ *Jean-Louis v. Attorney General*, 582 F.3d 462 (3rd Cir. 2009) and *Guardado-Garcia v. Holder*, 615 F.3d 900 (8th Cir. 2010).