

Padilla and Beyond

*Featuring materials and an instructional video from
The Criminal Justice Section Symposium
at the Newseum in Washington D.C.*



*An ABA Criminal Justice Section
Publication*



*A project funded by the Open Society Institute
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The videos and the accompanying materials were developed by the Criminal Justice Section with the objective of sharing information about the implications of the recent Supreme Court Decision, *Padilla V. Kentucky*, and providing a useful video to be utilized with additional materials to improve communications and compliance with *Padilla* in the Criminal Justice System

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Padilla and Beyond

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Padilla and Beyond
The Criminal Justice Section Symposium
Related Materials and Accompanying Disc

The American Bar Association Criminal Justice Section *Padilla Task Force* presents *Padilla and Beyond*, the Criminal Justice Section Symposium Materials.

Materials include articles and reference tools for judicial, prosecutorial, and defense agencies as well as for the general public. The accompanying discs are a product of the American Bar Association Criminal Justice Section production at the Newseum in Washington D.C. in front of a live-studio audience.

The first disc is a “How-to Guide” providing practical advice for complying with *Padilla v. Kentucky*, 130 S. Ct. 4473 (2010). The first disc introduces *Padilla v. Kentucky*, providing the Supreme Court case’s general facts and holding. It also provides an overview of applicable immigration law as it relates to *Padilla* and elaborates on the implications of a new standard of care stemming from the case. Watch as *Scott Burns*, *McGregor Smyth*, *Benita Jain*, *Gwendolyn Washington*, and *Judge Darrin Gayles* provide specific instructions to prosecutors, defenders and judges on how to comply with *Padilla v. Kentucky*.

The second disc presents a thoughtful panel discussing *Padilla v. Kentucky*, moderated by *Stephen Saltzburg*. This panel, comprised of key stakeholders in the criminal justice system, discusses pressing issues relating to *Padilla*, most specifically touching upon the constitutional implications of *Padilla v. Kentucky*, and the practical and systemic implications of the Supreme Court case. Participants on this panel include: *Bruce Green*, *Scott Burns*, *Gabriel “Jack” Chin*, *Margaret Love*, *Gwendolyn Washington*, *Benita Jain*, and *Judge Paul Friedman*.

Supplementary resources are available online. We hope these resources will improve the effectiveness of communication between justice agencies and the people they serve, and build confidence in the integrity and reliability of the criminal justice system.

Additional materials can be found at:

<http://new.abanet.org/sections/criminaljustice/CR109200/Lists/Announcements/DispForm.aspx?ID=1>

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Special Thanks To:

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National Association of Criminal Defense Lawyers
National District Attorneys Association
Immigrant Defense Project
The Bronx Defenders

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Our Presenters and Panelists:

Scott Burns was selected by the NDAA Board of Directors on March 21, 2009, to serve as executive director of the association. Scott Burns was nominated twice by President George W. Bush and unanimously confirmed both times by the United States Senate. Scott Burns served from 2002 to 2009 as the deputy director, White House Office of National Drug Control Policy. Prior to that, Scott Burns served as deputy director for State, Local and Tribal Affairs following Senate confirmation in April 2002.

In 2003, Scott Burns was appointed by the White House to serve as the United States' representative to the World Anti-Doping Agency (WADA), an international organization charged with eliminating doping and drug use in sport. Scott Burns was subsequently chosen to represent the 40-nation Americas region on WADA's Executive Committee and further honored by his selection to chair the 180-nations' Ministers of Sport conference in Athens, Greece.

Prior to his confirmation, Scott Burns served for 16 years as the elected county attorney and chief prosecutor in Iron County, Utah. He also routinely provided pro bono legal service to the indigent. As an adjunct professor, Scott Burns taught constitutional law, search and seizure, race relations, and the civil liability of peace officers.

Scott Burns attended college in Cedar City, Utah where he was inducted into the Southern Utah University Sports Hall of Fame (football), and law school in San Diego, California.

Richard Cassidy has practiced law since 1980. He is a founding member of *Hoff Curtis*, a Burlington, Vermont law firm. He served for 14 years as member of the Vermont Board of Bar Examiners, including 11 years as its Chair. Since 1999, he has served in the American Bar Association (ABA) House of Delegates and also served a term on the ABA Board of Governors. He chairs the ABA's Standing Committee on the Delivery of Legal Services.

Richard Cassidy is admitted to the bar in the states of New York and Vermont and to practice before the United States District Court for Districts of Vermont and the Northern District of New York, the United States Court of Appeals for the Second Circuit, as well as the United States Supreme Court. Richard was first appointed as a Vermont member of the Uniform Law Commission by Governor Howard Dean in 1994, and has served as member since that time. He is currently the Commission's Secretary.

Richard Cassidy chaired the Uniform Law Commission's Study Committee on the Collateral Consequences of Conviction. From 2005 through 2009, he chaired the Commission's Drafting Committee on the Uniform Collateral Consequences of Conviction Act, which was adopted by the Commission at its Annual Meeting in July of 2009. The UCCCA was endorsed by the American Bar Association at its meeting in

February of 2010. In June, he testified on the “Collateral Consequences of Criminal Convictions: Barriers to Reentry for the Formerly Incarcerated” before the United States House of Representatives Committee on Judiciary Subcommittee on Crime, Terrorism, and Homeland Security. He maintains a blog, *OnLawyering.com* providing news and commentary on the law and culture of the practice of law.

Gabriel “Jack” Chin teaches and writes about Immigration Law, Criminal Procedure, and Race and Law at the University of Arizona where he is the Chester H. Smith Professor of Law and Director of the Program in Criminal Law and Policy. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), decided this March, the Justices cited his article, co-authored with former student Richard Holmes, *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, five times in opinions agreeing that the Sixth Amendment required defense lawyers to advise clients about the possibility of deportation. He was also co-author of the ABA’s *amicus* brief in *Padilla*, and Reporter for the ABA Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, and the Uniform Law Commission’s Uniform Collateral Consequences of Conviction Act.

His widely cited scholarship has appeared in the *UCLA*, *Cornell*, *Iowa*, *Illinois* and *North Carolina* law reviews, the *Georgetown Law Journal*, and the *Harvard Civil Rights-Civil Liberties Law Review* among others. A graduate of Wesleyan and the Michigan and Yale law schools, he practiced with Skadden, Arps, Slate, Meagher & Flom and The Legal Aid Society of New York and clerked for U.S. District Judge Richard P. Matsch in Denver before entering teaching. His teaching includes prosecuting white collar crimes with students as an Arizona Special Assistant Attorney General.

April Frazier is the Community Reentry Coordinator for the Public Defender Service (“PDS”) for the District of Columbia. In her role, she assists persons returning home to the D.C. community with legal and administrative issues arising from their criminal records. Prior to joining PDS, she served as Deputy Director of the Legal Action Center's National H.I.R.E. (Helping Individuals with criminal records Reenter through Employment) Network, a project aimed at increasing the number and quality of job opportunities available to people with criminal records by changing public policies, employment practices and public opinion. Prior to assuming this position, April Frazier served as the Project Coordinator of the ABA Commission on Effective Criminal Sanctions in Washington, D.C., where she worked with the legal community, policy makers, employers and local advocates on policy reforms concerning alternative sentencing, post-conviction relief mechanisms and collateral consequences. She also served as a judicial law clerk to Administrative Law Judge Pamela Wood at the U.S. Department of Labor in Washington, D.C.

April Frazier is a graduate of Howard University School of Law. While at Howard Law, she served as a student attorney in the Criminal Justice Clinic, and represented clients

facing misdemeanor and felony charges at D.C. Superior Court. She received a bachelor of arts in English and Philosophy from Tennessee State University.

Honorable Paul L. Friedman is a judge on the United States District Court for the District of Columbia. Before taking the oath of office on August 1, 1994, he was a partner in the firm of White & Case and the managing partner of its Washington, D.C. office. Judge Paul Friedman was law clerk to Judge Roger Robb on the U.S. Court of Appeals for the D.C. Circuit and to Judge Aubrey E. Robinson, Jr., on the U.S. District Court. He was an Assistant U.S. Attorney for the District of Columbia, an Assistant to the Solicitor General of the United States, and Associate Independent Counsel for the Iran/Contra Investigation. Judge Paul Friedman is a Past President of the District of Columbia Bar. He is a member of the American Law Institute, its Council, and the Executive Committee of the Council; he chairs the ALI's Program Committee and is an advisor to its Model Penal Code Sentencing Project. Judge Paul Friedman has served on the Advisory Committee of Federal Criminal Rules of the U.S. Judicial Conference and the American Bar Association Special Commission on Multidisciplinary Practice, and has chaired the Rules Committee of the U.S. District Court for the District of Columbia. He is a member of the American Academy of Appellate Lawyers and a Fellow of the American College of Trial Lawyers.

Honorable Darrin P. Gayles was appointed to the County Court for the 11th Judicial Circuit Court of Florida by former Florida Governor Jeb Bush in April of 2004. Since his appointment, Judge Darrin Gayles has been assigned to the criminal and civil divisions of the County Court, where he has presided over thousands of cases. He is currently the presiding judge for the Miami Beach Branch Court.

A graduate of Howard University and The George Washington University Law School, Judge Darrin Gayles began his legal career in 1993 as an Assistant State Attorney in the Miami-Dade County State Attorney's Office. There, he quickly developed a reputation as a tough, yet fair, prosecutor and received many commendations from judges, fellow attorneys and crime victims. Immediately prior to his appointment to the County Court, Judge Darrin Gayles served as an Assistant United States Attorney for the Southern District of Florida, where he represented the people of the United States in hundreds of high-level, complex, criminal investigations and prosecutions.

Success South Florida Magazine recognized Judge Darrin Gayles as one of South Florida's most influential black professionals under the age of 40. Judge Darrin Gayles is a Trustee of the historic Greater Bethel AME Church in Miami, a past president of the Howard University Alumni Association of South Florida, and a member of the George Washington University Law Alumni Board of Directors. He is also a member of the Judicial Council of the National Bar Association and several civic and charitable organizations, including 100 Black Men of South Florida and 5000 Role Models of Excellence. Judge Gayles has mentored several local law students and received the 2007 "Mentor of the Year" award from the St. Thomas University Black Law Students Association. He has also been recognized by Big Brothers/Big Sisters of Greater Miami

for his dedicated service. Judge Darrin Gayles recently received awards for outstanding public service from the National Black Justice Coalition and the 2008 “Making an Impact Award” from the George Washington University Black Alumni Association.

Bruce A. Green is the Chair of the ABA Criminal Justice Section. He is the Louis Stein Professor at Fordham Law School, where he teaches and writes primarily in the areas of legal ethics and criminal law and directs the Louis Stein Center for Law and Ethics. Prior to joining the Fordham faculty in 1987, he was a federal prosecutor in the Southern District of New York and a judicial law clerk to Justice Thurgood Marshall and Circuit Judge James L. Oakes. While at Fordham, he served part-time as Associate Counsel in the office of the Iran/Contra prosecutor.

Jack Calvin Hanna is the current director of the Criminal Justice Section of the American Bar Association where he has helped augment lawyer membership from 6,700 lawyers to 11,000 lawyers and law student membership from 2,000 to 10,000 law student members. He has led the Section to diversify its funding base by pursuing grants and law firm and corporate sponsorships. He obtained his B. A. in English and his J. D. from the University of South Carolina. After obtaining his J.D. he worked for the South Carolina Department of Education where he produced close to 70 educational television programs about law. He established and ran the South Carolina Bar Pro Bono Program in 1986 quickly recruiting close to 56% of the Bar members for the program. He also ran the SC Bar Law Education in the Schools programs (18 projects) before moving to Washington, D.C. in 1992. In D.C., Jack Hanna became Executive Vice President of the Phi Alpha Delta International Law Fraternity Public Service Center. He is the former Director of the American Bar Association Section of Dispute Resolution where he helped establish one of the largest dispute resolution conferences in the world and helped grow the section membership dramatically.

Dr. Timothy Hedeem is a researcher, trainer, and professor of conflict management at Kennesaw State University. He serves on the editorial boards of *Conflict Resolution Quarterly* and *Family Court Review*. He is a senior consultant to the Consortium for Appropriate Dispute Resolution in Special Education, a past board chair of the National Association for Community Mediation, and a visiting faculty member at Hamline University School of Law. He serves as Research Director of the National Study of Collateral Consequences, a National Institute of Justice project administered by the ABA Criminal Justice Section, and as Liaison to the Associates Committee of the ABA Section of Dispute Resolution.

Benita Jain is Co-Director of the Immigrant Defense Project, based in New York City. IDP protects the rights of immigrants facing criminal and deportation charges by training and advising the criminal defense and immigration bars and judges on the immigration consequences of criminal dispositions; assisting public defender offices in setting up office-wide immigration advising programs; supporting community-based education; and leading and supporting impact litigation and advocacy on these issues. IDP is also a founding member of the Defending Immigrants Partnership, a national collaboration that aims to improve public defense for immigrants by provides cutting edge trainings and

resources for defenders and the immigrant experts who advise them. Benita Jain is a national expert on the intersection of the immigration and criminal justice systems. She has written several *pro se* guides for immigrants fighting deportation and is an original designer and co-author of the "Deportation 101" curriculum, which has trained more than 1000 people around the country. She is a graduate of NYU School of Law and joined IDP on a Soros Justice Fellowship in 2003.

Margaret Colgate Love practices law in Washington, D.C., specializing in executive clemency and restoration of rights, and sentencing and corrections policy. She has written and lectured widely on executive clemency and the collateral consequences of a criminal conviction, including "Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide" (W.S. Hein 2006)(revision underway). Margaret Love chaired the drafting committee for the ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, and served as ABA liaison to the Uniform Law Commission Collateral Consequences project. From 2005 to 2009 she directed the work of the ABA Commission on Effective Criminal Sanctions, which produced a comprehensive catalogue of federal collateral consequences (<http://www.abanet.org/cecs/internalexile.pdf>). She participated in drafting the ABA amicus brief in *Padilla v. Kentucky* and has co-authored two articles about the Court's decision with Professor Gabriel "Jack" Chin.

Kate Richtman received her Juris Doctor from William Mitchell College of Law in St. Paul, Minnesota, in 1985. She worked as a judicial clerk for a trial judge in Minnesota's First Judicial District until 1987, when she was appointed an Assistant Scott County Attorney. Kate Richtman joined the Ramsey County Attorney's Office in 1992 and was named head of the Juvenile Prosecution Section in April 1995. In addition to her management responsibilities, she maintains a caseload, prosecuting serious juvenile offenses and appeals. She also regularly provides training to prosecutors, law enforcement officers, school officials, probation officers and others on various topics relating to juvenile justice.

In July 2007, Kate Richtman was named co-chair of the Juvenile Justice Section of the American Bar Association and continues to serve in this capacity, working on juvenile justice policy at the national level. Also in 2007, she was appointed by the Governor to Minnesota's Juvenile Justice Advisory Committee (JJAC) and remains an active member of the Committee. She served as co-chair of the Minnesota County Attorneys Association Juvenile Law Section from 1998 to 2009 and continues to serve as a member of the Section. Kate Richtman takes an active role in drafting legislation to address various juvenile delinquency issues and is frequently asked to review legislation and testify at legislative hearings regarding juvenile justice issues. Kate Richtman currently serves on the state's Human Trafficking Taskforce, served on the Minnesota Supreme Court's Juvenile Delinquency Rules Committee from 2002 to 2007, and previously served on the Minnesota Supreme Court Juvenile Justice Services Task Force.

In 2004, Kate Richtman received the Minnesota State Bar Association's Public Attorney Award of Excellence in recognition of her commitment to public service and the practice of law.

J. McGregor Smyth, Jr. established the Civil Action Practice at The Bronx Defenders a decade ago, pioneering the full integration of civil representation with criminal and family defense practice. Through his leadership, his staff has grown from one to more than twenty lawyers and advocates. They have provided comprehensive civil legal representation to thousands of clients on every type of legal problem, including immigration, housing, employment, public benefits, and civil rights. As class counsel, McGregor Smyth also represents two certified classes in federal court of over 22,000 people falsely arrested by the NYPD. By working on interdisciplinary teams of criminal lawyers, civil law specialists, social workers, investigators and administrative support staff, this model of holistic defense capitalizes on opportunities for early and effective intervention and results in improved outcomes in criminal cases and better life outcomes for clients.

McGregor Smyth also established and directs Reentry Net (www.reentry.net/ny) - the first support network and information clearinghouse on reentry and the full range of collateral consequences of criminal proceedings. Reentry Net improves advocacy and service-delivery by training advocates on best practices for solving everyday reentry problems, disseminating the most useful resources and practical tools to thousands of advocates each year. More than 20,000 individual materials – model briefing papers, training resources, tip sheets, sample letters, etc. – are downloaded each month from the website's libraries.

A recognized national expert on the enmeshed penalties, or "collateral consequences," resulting from a criminal arrest and/or conviction, McGregor Smyth consults on program design and conducts extensive trainings nationwide for judges, defense attorneys, legal services lawyers, and other advocates on these penalties, legal barriers to reentry, and holistic defense. He is the published author of "From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings," "Bridging the Gap: A Practical Guide to Civil-Defender Collaborations," "Holistic is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments as an Advocacy Strategy," and "Cross-Sector Collaboration in Reentry: Building an Infrastructure for Change." McGregor Smyth serves on the ABA *Padilla* Task Force, the Advisory Board of the ABA Adult Collateral Consequences Project, the Commissioners' Guide Team of the New York City Discharge Planning Collaboration, and the New York State Bar Association's Special Committee on Collateral Consequences of Conviction.

McGregor Smyth graduated from Yale Law School and clerked for Chief Judge Charles P. Sifton, U.S. District Court, E.D.N.Y. He is a recipient of the 2010 Kutak-Dodds Prize from the National Legal Aid & Defender Association, Yale Law School's Arthur Liman Public Interest Law Fellowship, and the Skadden Fellowship.

Gwendolyn McDowell Washington received her JD in 1998 from the George Washington University Law School. She served as judicial law clerk to the Honorable Anita Josey-Herring, Associate Judge in the Superior Court of the District of Columbia. In 1999, she joined the Public Defender Service for the District of Columbia (“PDS”) as a staff attorney. Gwendolyn Washington served as a trial attorney, representing clients in serious misdemeanor and major felony cases pending before the Superior Court of the District of Columbia and before the United States Parole Commission. For the past six years, she has served in PDS’s Civil Legal Services Division with a directive to provide indigent clients with general civil legal services ancillary to the clients’ criminal matters. In her civil practice, Gwendolyn Washington specializes in immigrant defense issues, asset forfeiture, and landlord and tenant cases. As a civil attorney, Gwendolyn Washington represents clients before the Superior Court of the District of Columbia, District of Columbia Housing Authority and the District of Columbia Office of Fair Hearings. In that capacity, she provides trainings to the local defense bar and the bench in asset forfeiture and landlord and tenant areas of law.

Throughout her tenure at the DC Public Defender Service, Gwendolyn Washington has developed an expertise in the area of immigrant defense. She provides immigrant defense consultations to the criminal defense bar, the immigration bar and the bench in that capacity. In addition to her consultations, she organizes and conducts immigrant defense trainings for PDS attorneys, the District of Columbia criminal defense bar, and for non-profit immigration service providers, both locally and nationally. To supplement her immigrant defense trainings, Gwendolyn Washington has developed training materials, such as the PDS Immigrant Defense Quick Reference Guide and immigrant defense practice guides, that have been re distributed widely to the defense bar and the public. Of all her roles and accomplishments, Gwendolyn Washington is most proud of her role as a wife and as a mother of two small children.

Stephen Saltzburg joined the GW Law faculty in 1990. Before that, he had taught at the University Of Virginia School Of Law since 1972, and was named the first incumbent of the Class of 1962 Endowed Chair there. In 1996, he founded and began directing the master’s program in Litigation and Dispute Resolution at GW.

Stephen Saltzburg served as reporter for and then as a member of the advisory committee on the Federal Rules of Criminal Procedure and as a member of the advisory committee on the Federal Rules of Evidence. He was the reporter for the Civil Justice Reform Act Committee for the District of Columbia District Court before he assumed the chair of that committee. He has served as a special master in two class action cases in the District of Columbia District Court, and continues to serve as a mediator for the U.S. Court of Appeals for the District of Columbia.

He also has mediated a wide variety of disputes involving public agencies as well as private litigants; has served as a sole arbitrator, panel chair, and panel member in domestic arbitrations; and has served as an arbitrator for the International Chamber of Commerce. Professor Stephen Saltzburg’s public service includes as associate independent counsel in the Iran-Contra investigation; as deputy assistant attorney general

in the Criminal Division of the U.S. Department of Justice, as the Attorney General's ex-officio representative on the U.S. Sentencing Commission; and as director of the Tax Refund Fraud Task Force, appointed by the Secretary of the Treasury. He currently serves as a council member in the ABA Litigation Section, and is a member of the ABA House of Delegates from the Criminal Justice Section. He was appointed to the ABA Task Force on Terrorism and the Law and to the Task Force on Gatekeeper Regulation and the Professional in 2001 and to the ABA President's Advisory Group on Citizen Detention and Enemy Combatant Issues in 2002.

In 2001 he was appointed by Chief Judge Edward R. Becker of the U.S. Court of Appeals for the Third Circuit as co-chair of the Task Force on the Selection of Lead Counsel in Class Actions, which published its final report in 2002. Stephen Saltzburg is the author of numerous books and articles on evidence, procedure, and litigation.

The “Major Upheaval” of *Padilla v. Kentucky*

Extending the Right to Counsel to the Collateral Consequences of Conviction

By Margaret Love and Gabriel J. Chin

In *Padilla v. Kentucky*, 559 U.S. ____ (March 31, 2010), the U.S. Supreme Court broke new ground in holding that a criminal defense lawyer had failed to provide his noncitizen client competent representation as required by the Sixth Amendment when he did not warn him that he was almost certain to be deported if he pled guilty. It is the first time that the Court has applied the 1984 *Strickland v. Washington* standard to a lawyer's failure to advise the client about a "collateral" consequence of conviction—something other than imprisonment, fine, probation, and the like, that the court imposes at sentencing.

While *Padilla's* implications for cases involving deportation are clear, it may also require lawyers to consider many other legal implications of a plea.

Justice Stevens began his opinion for the five-justice majority by explaining that José Padilla was a native of Honduras who had been a lawful permanent resident of the United States for more than 40 years, and who had served with honor as a member of the U.S. armed forces during the Vietnam War. Padilla faced deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky. His state felony drug-trafficking crime was clearly a deportable offense. The problem was that Padilla claimed his lawyer had advised him to plead guilty after reassuring him that he "did not have to worry about immigration status since he had been in the country for so long." Two years after entering his plea and receiving an agreed five-year prison sentence, Padilla lodged a state postconviction petition, claiming that he would have refused the plea and insisted on going to trial if he had been correctly advised about its consequences for his immigration status. As relief, he sought vacatur of the conviction and withdrawal of his plea. The

Supreme Court of Kentucky refused his request, holding that the Sixth Amendment's guarantee of effective assistance of counsel affords no protection against a lawyer's erroneous advice about a "collateral" consequence of conviction, which it defined as one that is not within the sentencing authority of the trial court.

Seven justices of the U.S. Supreme Court ruled that his lawyer's incompetent advice violated Padilla's right to counsel. While two concurring justices thought the case should have turned on the fact that the advice was incorrect, all seven agreed that lawyers for noncitizen defendants who are considering a guilty plea have an affirmative obligation at least to warn their clients that they may be deported as a result. Even the two dissenters expressed sympathy with Padilla's situation, suggesting that he might have secured their vote if he had based his claim on the due process clause rather than the Sixth Amendment.

The *Padilla* decision clearly governs cases where a noncitizen is threatened with deportation on the basis of conviction. But if that were all, it would not "mark a major upheaval in Sixth Amendment law," as the concurring justices warned. While *Padilla's* effects will be felt most immediately in the tens of thousands of criminal cases involving noncitizen defendants, defense lawyers must now concern themselves more generally with the broader legal effects of a criminal conviction on their clients. The systemic impact of this new obligation cannot be underestimated. *Padilla* may turn out to be the most important right to counsel case since *Gideon*, and the "*Padilla* advisory" may become as familiar a fixture of a criminal case as the *Miranda* warning.

Decoding the *Padilla* Decision

Padilla's five-justice majority traced the historical relationship between alienage and criminal prosecution, concluding that recent changes in immigration laws "have dramatically raised the stakes of a noncitizen's criminal conviction." It went on to observe that "[b]ecause the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important." Likening deportation to banishment or exile, the majority held that deportation is "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." Citing the ABA Criminal Justice Standards as well as various other performance guidelines promulgated by public defender and other professional organizations, the Court found that prevailing professional norms of effective representation require counsel in every case to advise a noncitizen client "regarding the risk of deportation." Competent

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representation in Padilla's case required more than simply a warning about risk, however, because "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequences for Padilla's conviction. . . . This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect."

In this case, because the indirect consequences of a guilty plea were both critically important to the client and "truly clear," Padilla's lawyer had an affirmative "duty to give correct advice." As evidence of the "critical" importance of advice about deportation in the plea context, the Court noted that more than half the states—including Kentucky itself—already require the trial court to alert defendants to possible immigration consequences. Accordingly, the lawyer's failure to give Padilla correct advice fell below an objective standard of reasonableness in violation of Strickland's first ("competence") prong.

The Court could have decided the case in Padilla's favor on the narrower ground that he had been given incorrect advice, as urged by the solicitor general, a rule that it conceded "has support among the lower courts." That path would, however, "invite two absurd results." First, finding constitutional incompetence in misadvice alone would "give counsel an incentive to remain silent on matters of great importance, even when answers are readily available." Second, silence "would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available." The Court emphasized that "[i]t is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel,'" citing *McMann v. Richardson*, 397 U. S. 759, 771 (1970). The Court gave a practice-oriented demonstration of how "informed consideration" of immigration consequences in the plea bargaining process "can only benefit both the State and noncitizen defendants":

By bringing deportation consequences into [the plea-bargaining] 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 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.

Justice Alito, joined by Chief Justice Roberts, concurred with the majority's conclusion that Padilla had received constitutionally incompetent representation. However, he thought the specific defect in Padilla's lawyer's performance was in "unreasonably providing incorrect advice" about the likelihood of his client's deportation, not in failing to provide him accurate advice in the first instance (an issue that the case arguably did not present). At the same time, Justice Alito also held that it is part of a lawyer's constitutional duty in representing a noncitizen to "advise the defendant that a criminal conviction may have adverse immigration consequences." Though he later criticized the majority for its "dramatic departure" from the "long-standing and unanimous" opinion of the lower federal courts that a lawyer need only avoid giving misadvice, he himself appears to have joined in this dramatic departure by declaring that a lawyer may not stand mute when a noncitizen client is considering a plea: In light of "the extraordinary importance that the risk of removal might have in the client's determination whether to enter a guilty plea . . . , silence alone is not enough to satisfy counsel's duty to assist the client." Again, the lawyer must "put[] the client on notice of the danger of removal" so as to "significantly reduce the chance that the client would plead guilty under a mistaken premise."

Once the lawyer has advised about the "general risk" of deportation, however, Justice Alito would impose no other duty than to advise the client to "consult an immigration attorney." The source of Justice Alito's reluctance to impose a duty of explanation on defense counsel (the only way in which his opinion differs from the majority) lies in the arcane and uncertain intricacies of immigration law, which he illustrated in sometimes amusing detail from *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers* by Robert McWhirter. Because of the complexity and ambiguity of immigration law, "it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms."

As a theoretical matter, Justice Alito's formulation of the applicable Sixth Amendment "competence" standard is a little hard to distinguish from Justice Stevens's for the Court. Both reject the rule proposed by the solicitor

general that noncitizen defendants should prevail on an ineffective assistance claim only if they were misadvised, but not if they received no advice at all. Both agree that lawyers cannot be silent where their clients are in jeopardy of deportation. If Justice Alito's reluctance to go as far as the majority is only because of the uncertainties of immigration law, there may be little or no difference between them in a situation where the law is not "truly clear."

In light of Justice Alito's detailed justification for a "misadvice" rule, however, and his partial concession to its doctrinal inconsistency in embracing a duty to warn, it is tempting to speculate that he had at one point been assigned by the chief justice to write for the Court. The fact that Justice Scalia directs most of his criticism to the concurrence reinforces the impression that it began as a plurality opinion. What may have persuaded at least two justices to join Justice Stevens's opinion is the likely real-world effect of limiting defense counsel's obligation to a bare warning: Indigent defendants represented by appointed counsel or public defenders cannot hire specialized immigration counsel, so that a warning would likely have almost the same result as silence in most common plea bargaining scenarios involving noncitizens. Accordingly, encouraging defenders to fob off their own advice-giving duties on other lawyers would result in clients being essentially uncounseled on an issue of momentous importance, and without an effective advocate at the bargaining table. Thus the majority opinion responds to the practical needs of noncitizens caught up in the criminal justice system, in insisting that criminal defense lawyers familiarize themselves with issues that have historically been "intimately related to the criminal process" and an "integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."

It is remarkable that even the two dissenting justices thought the law should provide relief to someone in Padilla's situation. Justice Scalia, writing for himself and Justice Thomas, began his opinion by stating that "[i]n the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction." He was unwilling to extend the constitutional right to counsel beyond advice directly related to defense against prosecution of the charged offense, however, on the theory that "[s]tatutory provisions can remedy these concerns in a more targeted fashion, and without producing permanent, and legislatively irreparable overkill."

Somewhat inconsistently, however, Justice Scalia suggested that Padilla might have been on surer constitutional ground if he had based his claim on the due process clause, arguing that his plea was not knowing and voluntary. This, too, if adopted, would go far beyond almost all prior case law, which takes the position that

a defendant need only be made aware of the "direct" and not the "collateral" consequences of a guilty plea in order for that plea to be considered "knowing." And if Justices Scalia and Thomas are correct in their suggestion, then a new duty would fall not only on counsel (under the Sixth Amendment holding) but also on every court accepting a guilty plea to conduct the colloquy so as to ascertain the defendant's knowledge of the most important collateral consequences.

The Court remanded Padilla's case to the Kentucky courts for an assessment of whether, with correct advice, he would have been "rational" in insisting on going to trial on the charges he was facing, or might have sought and been able to negotiate a different plea. If he is thus unable to establish prejudice, *Strickland's* second prong, Padilla's plea will stand, along with its adverse implications for his immigration status. If he can establish prejudice and his plea is vacated, immigration authorities will have no further basis on which to remove him. (See *Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (conviction vacated for failure to advise about immigration consequences of a guilty plea is no longer a valid conviction for immigration purposes); *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000) ("We will . . . accord full faith and credit to this state court judgment [vacating a conviction under New York state law]").) While Kentucky authorities might seek to retry him, that would seem anomalous since he has already fully served his sentence.

Lawyering Implications of the Padilla Decision *Consideration of Deportation in Criminal Cases*

Retroactivity. The Court signaled that its holding will have some retroactive effect as an application of *Strickland*, as opposed to a "new rule" of constitutional law. (See *Padilla*, Slip op. n.12, suggesting that the decision follows directly from *Hill v. Lockhart*, 474 U.S. 52, 59-60 (1985) (explaining how *Strickland* applies to guilty pleas). See also *Williams v. Taylor*, 529 U.S. 362 (2000) (applying *Strickland* to particular scenarios does not establish a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989).) Evidently recognizing this, the Court predicted that its decision would not unsettle many convictions already obtained: "For at least the past 15 years, professional norms have required defense counsel to provide advice on the deportation consequences of a client's plea." It noted that in any event its decision in *Hill* had produced no flood of vacated pleas: "[T]o obtain relief on this type of claim a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances," citing *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486 (2000). Moreover, as the Court wisely observed with respect to all pleas, withdrawing or overturning a plea means a client loses the benefit of

the plea and may face trial, which could lead to a more severe result: “The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle.”

The ability of noncitizens to challenge ineffectively counseled state court pleas in state court, as *Padilla* attempted to do, turns on the present availability of a state court procedural vehicle, both in terms of timeliness and in terms of possible procedural default rules. Their ability to proceed through federal habeas corpus under 28 U.S.C. § 2254 depends first on exhaustion of state remedies, which vary widely nationwide. Thus, relief for many *Padilla* violations may turn on the vagaries of state postconviction law, at least initially. Moreover, a *Padilla* challenger faces the same one-year AEDPA statute of limitations as any other petitioner. (See 28 U.S.C. § 2244(d).) Realistically, few will navigate this procedural minefield successfully. (*Padilla* himself would have been out of time to file for federal habeas corpus relief, had the Supreme Court not granted certiorari on appeal from denial of his state postconviction petition, because he had waited more than a year before filing his state-court petition that tolled the federal statute.)

As for federal convictions, a motion under 28 U.S.C. § 2255 would be available for one year after the conviction became final. (In the typical case where no appeal was taken after sentencing, this means one year after the time to appeal expired.) After that time has run out, however, the federally convicted noncitizen (unlike the noncitizen convicted in state court) may still have a coram nobis remedy under 28 U.S.C. § 1651, the all-writs act. In this connection, it is worth reviewing a little-noticed, recent Supreme Court case, *United States v. Denedo*, 129 S. Ct. § 2213 (2009). In *Denedo*, a Nigerian national serving in the U.S. Navy had pleaded guilty in military court to an offense after his attorney, like *Padilla*’s, assured him he would not be deported. Six years later, following his discharge from the service, he was put in deportation proceedings. Justice Kennedy writing for five justices said that the plea could be challenged in an Article I military court under section 1651. (See generally *Defending Immigrants Partnership*, REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS: A NATIONAL GUIDE, Chapter 5, available at <http://defendingimmigrants.org/>.)

Advice and Advocacy Going Forward. Most jurisdictions already require judicial advice about the possibility of deportation at the time of a plea. After *Padilla*, this advice is mandated by the Sixth Amendment as a part of every criminal case. Prosecutors and judges who want their pleas to hold up will almost certainly require confirmation, as part of a plea colloquy or plea agreements, that the defense attorney’s *Padilla* advisory has taken place. That the

Padilla holding rested squarely on the Sixth Amendment, however, makes clear that counsel’s new duty extends to every criminal case—not just the 95 percent that result in guilty pleas, but also those that go to trial. A defendant can be adversely affected by ignorance or misunderstanding about immigration consequences as much in a case that goes to trial as one that ends in a guilty plea. Just as one better-informed defendant might choose to go to trial rather than plead, so another might choose to negotiate a plea rather than stand trial.

The Court’s opinion, though, did not merely require advice about immigration consequences. In addition, it suggested that a defendant’s immigration status can be an important bargaining chip for the defense in plea negotiations, as earlier described. The amicus brief filed by the ABA in the case describes how immigration status is taken into account in a number of prejudgment contexts, including prosecutorial charging, bail, and sentencing decisions. (See Brief for the American Bar Association as amicus curiae, *Padilla v. Kentucky*, U.S. Supreme Court, No. 08-651, available at http://www.abanet.org/publicated/preview/briefs/pdfs/07-08/08-651_Petitioner-AmCuABA.pdf.) There is also evidence that prosecutors take the possibility of deportation and other collateral consequences into account in plea negotiations. (See Robert M.A. Johnson, *NDAA President’s Letter: Collateral Consequences*, THE PROSECUTOR, May/June 2001, available at www.ndaa.org/publications/ndaa/toc_may_june_2001.html (“Judges often consider the collateral consequences of a conviction, and prosecutors also must consider them if we are to see that justice is done.”); 8 U.S.C. § 1228(c)(5) (stipulation to deportability as part of plea bargain); *State v. Rodriguez*, 45 P.3d 541, 547 (Wash. 2002) (witness pleaded guilty because prosecutor agreed to recommend deportation instead of jail sentence); *People v. Bautista*, 8 Cal. Rptr. 3d 862, 870 & n.8 (Ct. App. 2004) (“in ineffective assistance of counsel claim, court considered expert’s declaration that techniques used to defend against adverse immigration consequences include pleading to different but related offense, ‘pleading up’ to a nonaggravated felony even if the penalty is stiffer, and obtaining disposition of 364 days instead of 365 days.”).) Accordingly, *Padilla* gives formal recognition to the principle that counsel must consider immigration status not just so the client understands the situation, but also to change or improve the plea.

The decision is also likely to encourage closer working relationships between the criminal defense and immigration bars, and a better understanding by defense lawyers of what is concededly a complex and uncertain area of the law. Hopefully, it may also lead to clarification and simplification of that body of law, and greater fairness in its administration. The legal inconsistencies and uncertainties revealed in

the passages from *The Criminal Lawyer's Guide to Immigration Law* quoted by Justice Alito would be hilarious if the subject matter were not so deadly serious. The recent changes in immigration law described by the Court's opinion have all been geared toward eliminating all possibility of discretionary leniency for noncitizens unfortunate enough to be caught at the intersection of the criminal and immigration systems. It is possible that the *Padilla* decision will eventually produce a climate in which some of those changes can be reconsidered.

Sex Offender Registration and Other Collateral Consequences

The biggest question mark about *Padilla*, and its greatest potential for systemic impact beyond the immigration context, lies in its extension to indirect legal effects of a plea other than deportation. The opinion does not explicitly require notice of other "collateral" consequences of conviction, such as sex offender registration and residency requirements, loss of licenses, firearm possession bans, ineligibility for public housing or other benefits, or the right to adopt or maintain other family relationships. Yet, from their perspective, clients have an interest in learning of severe and certain legal consequences of the plea in nonimmigration areas. In carrying out plea negotiations, avoiding a lifetime registration requirement or loss of a professional license may be just as important a goal as avoiding deportation, and those collateral consequences may be just as useful as bargaining chips. In addition, a client informed about one category of consequences, those having to do with immigration status, may assume that those are the only important consequences, so that partial advice may be misleading. For all of these reasons, as a matter of competent lawyering, the client should know all significant and certain legal effects of the plea, and the means of avoiding them through the structure of the plea should be explored. Any concessions warranted because of severe collateral effects should be requested from prosecutors and sentencing courts.

This seems to be the import of *Padilla*. And Justice Stevens' opinion specifically left open the possibility that its holding might extend to other indirect consequences of a plea, noting that the Court has "never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance' required under *Strickland*." At the same time, "whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation." That supposed "uniqueness" appears to derive principally from deportation's "intimate relationship" to the criminal process: "Our law has enmeshed criminal convictions and the penalty of

deportation for nearly a century." And again, a few lines later, "because of its close connection to the criminal process [deportation is] uniquely difficult to classify as either a direct or a collateral consequence." The opinion also mentions that deportation is "a particularly severe 'penalty'" and ("importantly") "nearly an automatic result" as considerations making it "most difficult" to divorce the penalty from the conviction." The opinion works hard to conclude that "[t]he collateral versus direct distinction is . . . ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation."

Both the concurring and dissenting justices thought the Court had left that door open a good deal more than a crack. Justice Alito was not persuaded that deportation is all that "unique," noting that conviction may carry other immigration consequences like excludability, about which a defendant might care just as much as initial removal. He listed other collateral consequences such as civil commitment, loss of public benefits, and discharge from the armed forces, which might be considered just as "serious" for those affected by them. Justice Scalia, too, thought the obligation placed on defense counsel by the Court had "no logical stopping-point." He even suggested (presumably mischievously) that "[i]t is difficult to believe that the warning requirement would not be extended . . . to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act. . . . We can expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar's devising of ever-expanding categories of plea-invalidating misadvice and failures to warn—not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given."

Despite the Court's efforts at containment, it seems likely that Justice Scalia's prediction is closer to the mark, and that efforts will be made to expand the category of indirect consequences requiring a "*Padilla* advisory" (though it seems preposterous to suggest that any court would preclude a recidivist enhancement because the defendant had not been warned about this possibility in an earlier plea bargain). In recent years legislatures have enacted many statutory penalties that are "collateral" to the criminal case in the sense that they are not within the authority of the sentencing court. Many of these penalties are as severe as and even more certain than deportation, and arguably just as "closely connected" to the criminal process, even if they cannot claim the same historical pedigree. Sex offender registration and residency requirements come to mind. Moreover, to the extent such penalties are easier for a defense lawyer to ascertain, Justice Alito's objection to finding a duty of advisement would not pertain.

On balance, while there is room to argue that *Padilla* is a case about immigration and deportation, ultimately it is likely to have a broader application. In this regard it is significant that in New Mexico, one of the few states where effective assistance has extended to advice about the immigration consequences of a guilty plea, see *State v. Paredes*, 136 N.M. 533 (2004), defendants charged with sex offenses have been held constitutionally entitled to notice of residency and notification requirements and other related collateral consequences. (See *State v. Edwards*, 141 N.M. 491, 499 (2007) (“In light of the harsh and virtually certain consequences under SORNA that flow from a plea of guilty or no contest to a sex offense, we follow *Paredes* and conclude that defense counsel has an affirmative duty to advise a defendant charged with a sex offense that a plea of guilty or no contest will almost certainly subject the defendant to the registration requirements of SORNA.”).) Significantly, the *Edwards* court noted that “the task of figuring out whether a defendant’s plea will expose him or her to SORNA’s registration requirements is far less complicated [than determining deportability].” (*Id.*)

A Framework for Dealing with Collateral Consequences

The *Padilla* decision will greatly expand the responsibilities of defense lawyers in counseling and advocating for their clients, and give impetus to a trend toward “a more holistic and comprehensive model of representation.” (See Robin Steinberg, *Supreme Court Ruling Speaks of a New Kind of Criminal Defense*, HUFFINGTON POST, April 5, 2010, at http://www.huffingtonpost.com/robin-steinberg/supreme-court-ruling-spea_b_522044.html.) And as collateral consequences become the business of defenders, they also necessarily become the business of other actors in the process by which collateral consequences are imposed, such as prosecutors and sentencing courts, and of the legislatures that enact them in the first place. This in turn suggests the desirability of developing a more comprehensive framework for dealing with collateral consequences as part of the criminal justice process. The 2003 ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons anticipated this need in urging jurisdictions to collect and codify collateral sanctions, to provide for their consideration in the plea bargaining and sentencing process, and to allow for their modification and removal. The ABA, under a grant from the National Institute of Justice, is in the first year of a three-year study intended to collect and categorize the collateral consequences imposed by state and federal law.

More recently, the 2009 Uniform Collateral Consequences of Conviction Act, <http://www.law.upenn.edu/>

[bll/archives/ulc/ucsada/2009_final.htm](http://www.law.upenn.edu/bll/archives/ulc/ucsada/2009_final.htm), offers jurisdictions a way to impose some discipline on the process by which collateral consequences are enacted and imposed. The UCCCA would make it considerably easier for defense attorneys, courts, and government officials (including prosecutors) to incorporate consideration of collateral consequences into the criminal case by providing for their compilation and publication. With advance knowledge of the collateral consequences likely to attach to certain convictions, prosecutors can shape their charges and defenders can prepare to bargain. The UCCCA also requires that defendants be notified early in a criminal case that collateral consequences may attach to conviction. (The UCCCA will likely be reassessed to determine whether it should be amended to specifically comply with *Padilla*’s new requirements.) The notice contemplated by the UCCCA will initiate a conversation about the issues between defendants and their lawyers, and provide lawyers with the information needed to advise and advocate for defendants, with prosecutors and with the courts. Even if every collateral consequence would not satisfy the high bar established for a constitutionally required “*Padilla* advisory,” the procedure specified in the UCCCA will resolve uncertainty about which collateral consequences apply to particular convictions and which do not, and help to forestall the “years of elaboration” in the courts that Justice Scalia predicted. The UCCCA contains other provisions to help participants in the criminal justice system deal with the collateral consequences of conviction, including those imposed by other jurisdictions, and establishes a two-step process by which convicted persons can obtain relief.

Conclusion

The *Padilla* decision promises to transform the landscape of criminal representation in this country by requiring consideration of collateral consequences at the front end of a criminal case. In that regard, it is surely a “major upheaval” in Sixth Amendment jurisprudence with broad systemic ramifications. The decision adds to the burdens of defense counsel at a time when defender budgets are already strained. It throws a monkey wrench into the plea bargaining process at a time when law enforcement depends upon efficient operation of assembly-line justice. And it places new obligations on courts when accepting pleas lest they see them undone because a defendant did not understand what was at stake.

At the same time, the *Padilla* decision gives defenders new tools with which to advocate for their clients, and introduces greater transparency and fairness into the plea process. If there is uncertainty about which collateral consequences may qualify for a *Padilla* advisory, all actors in the system—including prosecutors and judges

as well as defenders—will have an incentive to familiarize themselves with the array of laws and rules affecting people with a criminal record. This in time may lead to the development of more flexible relief mechanisms, such as those proposed by the Uniform Collateral Consequences of Convic-

tion Act, thereby mitigating the very factors (severity and certainty) that required the assistance of counsel in the first place. If it is true that a shock is sometimes beneficial to the system, *Paddilla v. Kentucky* may be exactly what the doctor ordered. ■

FROM ARREST to REINTEGRATION

A Model for Mitigating Collateral Consequences of Criminal Proceedings

BY J. MCGREGOR SMYTH, JR.

"There is no justification for the legal system to operate in ignorance of the effects of its actions."

(ABA CRIMINAL JUSTICE STANDARDS
COMM'N, REPORT TO THE ABA HOUSE OF
DELEGATES ON PROPOSED STANDARDS ON
COLLATERAL SANCTIONS AND DISCRETIONARY
DISQUALIFICATION OF CONVICTED PERSONS
at R-6 (3d ed. 2003).)

Collateral sanctions. Invisible punishments. Internal exile. From the moment of arrest, people are in danger of losing jobs, housing, basic public benefits, and even the right to live in this country. For many, these hardships are far more severe than the criminal charges confronting them. In New York, a plea to disorderly conduct makes a person ineligible for New York City public housing for three years, and two convictions for turnstile jumping can result in the deportation of a lawful permanent resident. Intended to improve "public safety," these punishments ultimately trap individuals in the revolving door of incarceration and poverty. By blocking the path to stable employment and housing, these barriers actually contribute to recidivism and undermine the struggle for self-sufficiency. The impact hits much deeper than individual defendants—entire families

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suffer the consequences.

This article outlines a methodology for identifying, evaluating, and mitigating this collateral damage of criminal proceedings. The breadth of these collateral consequences is daunting, both to the people affected and criminal and civil justice practitioners who are faced with learning them. They are often hidden from view, scattered across federal, state, and local statutes, regulations, and administrative policies and practices. Established research and daily experience offer another way of looking at these consequences: They are a critical piece of the reentry/recidivism puzzle—and they are a way of identifying a population most in need of help.

Nature and Scope of Collateral Damage

The collateral consequences of criminal proceedings inflict damage on a breadth and scale too shocking for most lawyers and policy makers to accept. The FBI estimates that well over 14 million people were arrested nationwide in 2007. (*See Crime in the United States 2007* (FBI, Sept. 2008), available at <http://www.fbi.gov/ucr/cius2007/>.) According to Bureau of Justice Statistics, more than 650,000 people are released from prisons every year, more than 12 million pass through U.S. jails, and more than 7.3 million people were on probation, in jail or prison, or on parole at year-end 2007. (*See generally* <http://www.ojp.usdoj.gov/bjs/welcome.html> for a breakdown of statistics under "Corrections" tab.) The end result is that nearly 81 million people in the United States, or nearly one in four adults, had a criminal record as of December 31, 2006, reports the U.S. Department of Justice. (*Survey of State Criminal History Information Systems*, 2006.)

The disparate impact of the criminal justice system on communities of poverty and of color is well documented and undeniable. More than 80 percent of those charged with crimes are too poor to afford an attorney. (BJS.) African Americans and Latinos face significantly greater likelihood of being arrested, convicted, and incarcerated than whites. (See, e.g., Fran Fajana, *The Intersection of Race, Poverty, and Crime*, 41 CLEARINGHOUSE REV. 120 (July-Aug. 2007); Bruce Western, PUNISHMENT AND INEQUALITY IN AMERICA (Russell Sage Foundation 2006).) The direct effects on families illustrate a staggering multiplier effect: one in four black children born in 1990 had a parent imprisoned by age 14; only one in 25 white children were similarly situated. (See Christopher Wilde- man, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage*, DEMOGRAPHY (Vol. 46, No. 2, May 2009) at 265-80.) By age 14, more than half of African-American children born in 1990 to high school dropouts had a father imprisoned. (*Id.*)

Common Ground for a Solution

The scale of this vicious cycle of poverty, crime, collateral consequences, and recidivism has the potential to cut through traditional criminal justice battle lines and point to policies that are smarter on crime and public safety—and to policies that are more equitable to people charged with crimes, their families, and their communities. Indeed, the Bush administration recognized that public safety required attention to this problem. In his 2004 State of the Union Address, George W. Bush introduced a new reentry initiative for people leaving prison, stating: “This year, some 600,000 inmates will be released from prison back into society. We know from long experience that if they can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison.”

Law enforcement leaders have also recognized the self-defeating and unfair nature of collateral consequences. In 2001, the president of the National District Attorneys Association (NDAA) told prosecutors that they “must comprehend this full range of consequences that flow from a crucial conviction” and asked: “[h]ow can we ignore a consequence of our prosecution that we know will surely be imposed by the operation of law? These collateral consequences are simply a new form of mandated sentences.” (Robert M.A. Johnson, *Message from the President, Collateral Consequences*, THE PROSECUTOR (May/June 2001).) The NDAA officially acknowledged the prosecutor’s role in reentry in 2005:

[People] reenter our communities in need of housing, medical and mental health treatment, employment, counseling and a variety of other services.

Communities are often overwhelmed by these increased demands and, due to budget constraints, unable to provide minimum services to [people with criminal records]. As a result, the safety of our communities and citizens is jeopardized when releasees, who are unable to acquire employment, housing and needed services, revert to a life of crime.

(NDAA, Policy Positions on Prisoner Reentry Issues at 2 (adopted July 17, 2005), available at http://www.ndaa.org/pdf/policy_position_prisoner_reentry_july_17_05.pdf.)

Unfortunately, this recognition of the link between reentry, collateral consequences, and recidivism too frequently fails to influence daily decisions by prosecutors, policy makers, judges, defenders, and government agencies.

Underlying Themes

A number of important patterns emerge from any serious inquiry into collateral consequences. These themes should guide your strategy from intake and client interviews through briefing and trial advocacy. (J. McGregor Smyth, *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records* (The Bronx Defenders 2000, April 2009 ed.)

“Collateral” consequences are not actually collateral. Courts have segregated these sanctions from “direct” consequences as a way to remove them from the constitutional protections in criminal law. (See, e.g., Gabriel J. Chin and Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002).) While often hidden from practitioners, these consequences inflict predictable and measurable damage to clients and their families after a criminal charge.

These sanctions are not limited to felony convictions. Although felony charges draw the most intense individual focus within the criminal justice system, many of the most draconian civil punishments result from misdemeanor and petty offense cases. For example, two convictions for turnstile jumping make a “green card” holder (a lawful permanent resident) deportable. (INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii).) Simple possession of a marijuana cigarette (a noncriminal offense in New York) cuts off federal student loans for a year. (20 U.S.C. § 1091(r)(1).) To put this in context, in 2008 in New York State, more than 87 percent of adult convictions were for misdemeanors or petty offenses. (N.Y. Division of Criminal Justice Services (DCJS), *Dispositions of Adult Arrests by County and Region* (6/18/2009).) Nationwide, only 4.2 percent of the 14 million annual adult arrests

charged violent crimes. (See *Crime in the United States 2007* (FBI, Sept. 2008).)

The punishments are not even limited to convictions. Among the most damaging types of records are not convictions at all—they are arrest records where the person charged has received a favorable disposition such as a dismissal or acquittal. Tragic consequences can result from an arrest or charge alone. For example, an arrest by itself often triggers termination proceedings in publicly subsidized housing, without regard to the eventual criminal disposition. (See, e.g., 24 C.F.R. § 966.4(l)(5)(iii)(A) (stating that in conventional public housing, a Public Housing Authority may terminate assistance “regardless of whether the covered person has been arrested or convicted for such activity and without satisfying the standard of proof used for a criminal conviction”); 24 C.F.R. § 982.553(c) (analogous provision for Section 8 voucher).) Do not mistake this for a trivial phenomenon—in New York, for example, more than one in three people who are arrested are never convicted of any crime or offense, but they still suffer drastic consequences. That translates to more than 200,000 nonconviction dispositions per year in New York alone.

A perfect storm hits. In the past decade, this landscape has changed drastically for the worse. The steady accumulation of collateral sanctions has combined with the exponential increase in the availability of criminal history information to create a “perfect storm.” This storm overwhelmingly affects communities of poverty and of color.

Defining the problem, of course, is the first step to crafting solutions. Collateral consequences actually outline the structure that traps many low-income clients in recurring encounters with the criminal justice system. Many stakeholders, from prosecutors to Justice Kennedy, from the ABA to the Council of State Governments, have recognized that the cycle of crime is perpetuated in significant part by the collateral damage inflicted by the criminal justice system. Experience on the ground from around the country now demonstrates that timely and targeted services can help stabilize a family during the crisis of a criminal case and address many of the underlying social problems (such as addiction and homelessness) that contribute to the cycle of poverty and crime. By mitigating the collateral damage of criminal proceedings (such as eviction or job loss), these services can address the root problems that lead to crime and help individuals reenter society as productive citizens. (See McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. Tol. L. Rev. 479 (2005).)

Never Accept a Rap Sheet at Face Value

Criminal background checks have become routine for employment, housing, and public benefits applicants. A 2005 survey of human resource professionals by the Society for Human Resource Management found that 96 percent of businesses perform a background check on all job applicants. Over 100 employment licenses in New York State require criminal history review. Research in Ohio found nearly 300 statutory or administrative employment barriers. (See Kimberly R. Mossoney & Cara A. Roecker, *Ohio Collateral Consequences Project*, 36 U. Tol. L. Rev. 611, 615 (2005).) Every public housing, Section 8, and public assistance applicant undergoes a mandatory criminal history screening. Private landlords increasingly do the same. The resulting barriers can often prevent people from securing jobs, finding stable housing, and reuniting with their families. The problems arising from increased availability of criminal history data are only compounded by serious questions about reliability.

The Birth and Immortality of a Criminal Record

Criminal records are easy to create and nearly impossible to destroy. Every step in the criminal justice process—from arrest to prosecutor review, state and federal criminal history inquiry, arraignment, disposition, sentencing, and incarceration—creates a new record at multiple agencies. The FBI maintains its own criminal history files for federal proceedings and “serious and/or significant” state proceedings. (28 U.S.C. § 534; 28 C.F.R. §§ 20.30–20.38.) Each state has its own official criminal history repository. (See Bureau of Justice Statistics, U.S. Dep’t of Justice, *Compendium of State Security and Privacy Legislation: Overview 2002* (2003).) Most courts and law enforcement agencies compile their own independent versions. In New York State alone, dozens of agencies maintain their own computerized records of arrests and prosecutions, including the Division of Criminal Justice Services, Office of Court Administration, New York State Police, and local law enforcement.

Technology now provides unparalleled access to this ever-increasing range of criminal history data. Nearly all state criminal history repositories, courts, and law enforcement agencies sell their data (or provide it for free online). Hundreds of private, commercial background screening businesses access these data sources and create their own repositories. (SEARCH, The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (December 2005).) A recent report found that “several companies compile and manage criminal history databases with well in excess of 100 million criminal history records.” (*Id.*) A tremendous market for these services drives its expansion.

Ubiquitous and Inaccurate Is a Dangerous Combination

Background checks are routine, but they often return inaccurate information. A recent report conducted for the National Association of Professional Background Screeners found a litany of serious problems with FBI reports, including failure to report dispositions of arrests, lack of timeliness in reporting dispositions, and ineffective linking of the proper individual and case. Perhaps the most damning finding was that of 174 million arrests on file, only 45 percent have dispositions. (Craig N. Winston, *The National Crime Information Center: A Review and Evaluation* (August 3, 2005).) Significant problems with the background check industry include criminal identity theft leading to improperly attributed convictions, false positives, and mismatches based on nonbiometric background checks, and negligence by commercial vendors. (Sharon Dietrich, *Expanded Use of Criminal Records and Its Impact on Reentry*, presented to the American Bar Association Commission on Effective

out the error patterns present in their own jurisdiction. Defender-based rap sheet initiatives, in particular, are critical tools to improve rap sheet accuracy and thereby reduce widespread barriers to employment and housing. Because defenders receive copies of each client's official criminal history, in-house rap sheet services are efficient and effective. In addition, the scale of the problem and the depth of impact on communities of poverty argue for making rap sheet review a standard service at civil legal aid organizations. Excellent programs implementing both models exist in New York (The Bronx Defenders, Legal Action Center, Community Service Society), Pennsylvania (Community Legal Services of Philadelphia), Michigan (Legal Aid of Western Michigan), Massachusetts, Illinois (Sargent Shriver National Center on Poverty Law), California (East Bay Community Law Center, San Francisco Public Defender), and many other states. (See Sharon Dietrich, *When "Your Permanent Record" Is a Permanent Barrier: Helping Legal Aid Clients Reduce the Stigma of Criminal Records*, 41 CLEARINGHOUSE REV. 139 (July-August 2007).

Problems arising from the greater availability of criminal history data are only compounded by serious questions about reliability.

Criminal Sanctions (March 3, 2006).)

In 2007, the Bronx Defenders partnered with a major New York law firm in a pilot project to review and correct rap sheets. After extensive training, a pro bono attorney and paralegal reviewed a random sample of 266 official state rap sheets from recent Bronx arrests. Their paper review focused on three significant potential errors, each of which is likely to lead to the denial of housing, employment, and public benefits applications: (1) missing disposition information, (2) cases incorrectly left unsealed, and (3) unrecorded vacatur of warrants. The results revealed one of the most significant gaps in services in New York. Fully 62 percent of the random sample of official state rap sheets contained at least one significant error; 32 percent had multiple errors. The number of errors ranged from one to nine, with a median of two.

Criminal history errors can cause adverse consequences both during a criminal case and postconviction. While a criminal case is pending, a rap sheet error can significantly impact bail, plea, and sentencing decisions. Knowing the serious incidence of inaccuracy outlined above and the serious consequences, prosecutors, defenders, and judges have a duty to find and root

Collateral Consequences Begin at Arrest, and so Must Services

Individuals and families begin to suffer collateral consequences from the moment of arrest—missed days of work, the loss of a job or home after the reporting of an arrest to a licensing agency or public housing authority, the removal of one's children. These early and long-lasting punishments create significant barriers to successful reentry from the criminal justice system, be it prison, jail, or short-term detention. Recognizing this landscape, we must redefine "reentry" as a process that begins at arrest and continues through community reintegration. This shift in the paradigm of reentry and collateral consequences highlights the substantial role that all stakeholders can play and expands the focus beyond incarceration, so that it encompasses the consequences of criminalization individuals face from the moment they come in contact with the criminal justice system. (Smyth, *supra*, 36 U. Tol. L. Rev. at 501.)

The Bronx Defenders' experience in providing integrated criminal and civil legal services for the past nine years proves that knowledge of these collateral conse-

quences is a critical direct advocacy tool in criminal cases. (*See id.*) Proper consideration of collateral sanctions results in more productive criminal dispositions; more equitable discovery; and direct benefits to people charged with crimes and their families.

As a starting point, examine your state's criminal code for the legal leverage to include collateral consequences in the calculus of a criminal case. For example, in New York in 2006, the legislature amended Penal Law § 1.05(6) to add a new goal, "the promotion of [the convicted person's] successful and productive reentry and reintegration into society," to the four traditional sentencing goals of deterrence, rehabilitation, retribution, and incapacitation. (2006 N.Y. Laws 98.) For a national model, the aspirational ABA *Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons* require sentencing courts to consider collateral sanctions in determining the overall sentence. (Standard 19-2.4(a) (3d ed. 2004) [hereinafter ABA Standards].) In the context of far-reaching and se-

More Productive Criminal Dispositions

The vast majority of people cycling through the criminal justice system are released without a term of incarceration—but the mark of a criminal record remains. For this group, a brief interaction with a defense attorney, the prosecutor, and the court system can lead to life-long consequences. In this process, courts, prosecutors, and defenders have significant potential for positive impact, but also for great harm. With tremendous authority over bail decisions, the ability to influence plea negotiations, and at least some discretion over sentencing, criminal court judges have many tools to craft outcomes that promote successful reentry. Many prosecutors question the relevance of collateral consequences to their criminal justice calculus and may fear appearing weak on crime. In a world of mandatory minimums and determinate sentences, however, prosecutors hold a tremendous amount of power. In decisions to charge, demand bail, offer plea deals, and agree to diversion programs, pros-

Examine a state's criminal code for legal leverage to include collateral consequences in the calculus of a criminal case.

vere hidden sanctions, the ABA wanted the court to ensure that the "totality of the penalty is not unduly severe and that it does not give rise to undue disparity." (ABA, *Criminal Justice Standards Comm'n, Report to the ABA House of Delegates on Proposed Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons* at R-11 n.21 (3d ed. 2003).) The ABA has also recommended that all criminal justice professionals who exercise discretion in the justice system should participate in training that will give them greater understanding of what elements, including reentry issues, should be considered in the exercise of their discretion. (ABA Commission on Effective Criminal Sanctions, *Second Chances in the Criminal Justice System: Alternatives to Incarceration and Reentry Strategies* (ABA 2007).)

Similarly, in July 2009 the Uniform Law Commission (formerly the National Conference of Commissioners on Uniform State Laws) approved the Uniform Collateral Consequences of Conviction Act and recommended enactment by each state. The Act requires collection of all collateral consequences in a single document or code provision; proper notice to all defendants; and reasonable processes for obtaining relief from the consequences. (For additional information, *see* www.nccusl.org.)

ecutors have the discretion to choose more productive reentry outcomes—or not. These stakeholders, however, generally lack the training and resources to be smart on crime.

Experience has taught that defenders can be successful at leveraging creative and more productive (and often more favorable) bail, plea, and sentencing results—or even outright dismissals—when they are able to educate prosecutors and judges on specific and severe consequences for clients and their families. The first step? The defender must prove that these consequences are real. Many prosecutors, judges, and even defenders simply do not believe that so many irrational and draconian punishments exist. I spent many years at the beginning of my work in the Bronx printing out various statutes, regulations, and policy statements as evidence. Proof of the likelihood of the specific collateral consequence leads logically to the next step: convincing the prosecutor and judge that they should include it in their decision making. A serious collateral sanction undermines many of the goals of the criminal justice system and destroys any notion of sentencing equity. Intelligent justice stakeholders will recognize that ignoring collateral consequences leads only to a self-defeating cycle of recidivism, and

that the loss often falls most heavily on innocent family members.

In our experience, prosecutors and judges respond best to consequences that affect their basic sense of fairness—consequences that are absurd, disproportionate, or affect innocent family members. Although a discussion of the substantive areas of collateral consequences is beyond the scope of this article (and could be the subject of its own book), the following four areas of impact should guide strategy and intake interviews. (For concrete examples of these advocacy strategies in action, see Smyth, 36 U. Tol. L. Rev. at 495-96.)

Immigration

The 1996 overhaul of federal immigration law created a Byzantine, rigid, and stunningly harsh legal framework for noncitizens accused of crimes. Long-term residents can be stripped of their green card and deported for a single minor conviction that carries no jail time, without regard to their family ties in the United States or their lack of support in their countries of origin. Once a non-citizen has been convicted, his or her fate is often sealed and nothing can be done to stop deportation. (See, e.g., Alina Das, *Avoiding Unintended Consequences in Civil Advocacy for Criminal Charged Immigrants*, 41 CLEARINGHOUSE REV. 228 (July-Aug. 2007).)

The immigration laws, however, are so complex and counterintuitive that with early collaboration between an immigration lawyer, the criminal defense lawyer, and the client, defenders can often negotiate dispositions that will protect their clients from deportation and keep their families intact. Last year, the integrated immigration services of the Civil Action Practice at The Bronx Defenders resulted in safe or mitigated plea dispositions for our clients in 88 percent of the plea consultations.

For extensive practical resources for advocates in this area, contact the Immigrant Defense Project (www.immigrantdefenseproject.org); the Defending Immigrants Partnership (<http://defendingimmigrants.org/>); the Immigration Advocates Network (www.immigrationadvocates.org); and Reentry Net (www.reentry.net/ny).

Housing

The loss of a family's home as a result of an arrest or incarceration is a tragically common event. Any involvement in the criminal justice system creates a substantial risk of homelessness. Loss of existing, stable housing in this context damages entire families and results in high shelter expenses and increased risk of recidivism. (See Stephen Metraux, Caterina G. Roman, and Richard S. Cho, "Incarceration and Homelessness," in *Toward Understanding Homelessness: The 2007 National Symposium on Homelessness Research*, #9 (2007).) Once

evicted, people with criminal histories have an increasingly difficult time finding new, stable housing. Criminal records restrict future opportunities to qualify for federally subsidized housing, such as public housing or Section 8. (See, e.g., 42 U.S.C. § 13661.) The resultant lack of housing stability contributes substantially to the cycle of poverty and crime.

When a client can demonstrate that a particular plea offer or sentence will result in a specific loss of public housing or Section 8, or the probable denial of a pending application, better outcomes can result. (For extensive practical strategies for defending from eviction or termination a current public housing resident or Section 8 recipient who is charged with or convicted of a crime, see Lawrence R. McDonough and Mac McCreight, *Wait a Minute: Slowing Down Criminal-Activity Eviction Cases to Find the Truth*, 41 CLEARINGHOUSE REV. 55 (May-June 2007). For an excellent manual regarding eligibility and the application process for federal assisted housing for individuals with criminal histories, see National Housing Law Project, *An Affordable Home on Re-entry: Federally Assisted Housing and Previously Incarcerated Individuals* (2009). Both are available at www.reentry.net/ny along with dozens of briefs, training manuals, and other advocacy materials.)

Employment

Similarly, an arrest or conviction frequently results in the loss of a current job or the denial of future job applications. Many public employers and licensing agencies receive automatic notification of new arrests, and clients frequently find themselves terminated or suspended from employment regardless of the final outcome of the criminal case. As noted above, the vast majority of employers now perform criminal background checks on all new applicants.

Studies have shown that recidivism is directly linked to lack of economic opportunity. (See, e.g., Christy A. Visher, Laura Winterfield, and Mark B. Coggeshall, *Ex-offender employment programs and recidivism: A meta-analysis*, J. EXPERIMENTAL CRIMINOLOGY (Sept. 2005) 1:295-316.) The imminent or probable loss of a job or employment license (or a specific employment opportunity), particularly for a breadwinner, can provide powerful leverage for a more productive plea or sentence in a criminal case.

In 2008, Community Legal Services of Philadelphia (CLS) (www.clsphila.org), a pioneer in employment advocacy for people with criminal records, received funding from the Open Society Institute to spearhead the Litigation-Based Project on Criminal Records and Employment with the goal of creating legal precedents and raising public consciousness nationally of the legal violations

that lead to people with criminal records being unable to access employment. Over the three years of the project, CLS will bring impact litigation with private cocounsel on employment issues related to criminal records. CLS will also provide leadership and backup support for legal advocates around the country who are working on these same issues and seeking to expand their knowledge, experience, and success with regard to litigation. They will create a document bank, create a network of potential expert witnesses, advocate with the EEOC, and collaborate with other advocates through telephone conferences and technical assistance. Advocates can also obtain helpful materials from the National Employment Law Project (www.nelp.org); the National HIRE Network (www.hirenetwork.org); and Reentry Net (www.reentry.net).

Student Loans

Federal law suspends eligibility for any grant, loan, or work assistance for students convicted of any offense under any federal or state law involving the possession or sale of a controlled substance for conduct occurring while receiving student aid. (See 20 U.S.C. § 1091(r)(1).) Ineligibility periods range from one year after a first conviction for simple possession to indefinite for a second conviction for sale. Under section 1091(r)(2), a student may regain eligibility before the above period expires if the student satisfactorily completes a drug rehabilitation program that meets certain criteria.

Even with the waiver opportunity, a qualifying conviction inevitably leads to a substantial delay or denial of educational opportunity. Because post-secondary education is one of the most cost-effective and successful inoculations against recidivism, the loss of a specific educational opportunity for a client can radically shift outcomes in criminal cases if used during plea and sentencing.

More Equitable Discovery

Subsidized housing, family issues, public employment or licenses—these are all situations where the client is likely to have an ancillary civil or administrative proceeding pending at the same time as the criminal case. Defense attorneys legitimately can use these civil proceedings for additional discovery not available in the criminal case. Eviction cases, employment licensing proceedings, DMV hearings, school suspension hearings, and more are all venues where an administrative or lower court judge, or an attorney, is likely to have subpoena power.

Client Priorities—Too Late Comes Too Soon

The collateral damage of being arrested often falls most heavily on family members and children. This harsh reality, when known during the pendency of the criminal

case, influences the decision making of people charged with crimes. What's more important to the client: Avoiding jail or prison? Preserving custody of their children? Avoiding deportation or eviction? The answer differs for each client and family. The only way to know the right answer is to ask, and listen. Often our job as advocates involves taking clients "out of the moment" to consider the downstream consequences or externalities of their decisions in light of their larger goals and priorities. In criminal cases, battered by high caseloads and docket demands, we have to resist the pressures to focus only on the liberty interest. Particularly with misdemeanor charges (the vast majority of criminal cases), many clients would rationally choose even a short term of incarceration to avoid these harsh "collateral" consequences. Help people caught in the system think about these long-term hidden effects of pleas before taking them. Too late comes too soon—the fact of a conviction, by itself, forecloses many opportunities to mitigate or avoid these drastic consequences.

Early, Effective Interventions with Integrated Civil Legal Services

Legal aid programs and other civil legal providers serve the very same population that the criminal justice system targets. The individuals and families caught in the criminal, child welfare, and civil justice systems come from the same communities of poverty and of color. Given the increasingly pervasive impact of the criminal justice system on these communities, every organization with a mission of combating poverty or racism should provide client services to fight the collateral consequences. (See Smyth, *Cross-Sector Collaboration in Reentry: Building an Infrastructure for Change*, 41 CLEARINGHOUSE REV. 245 (July-Aug. 2007).) The experience of legal services offices from around the country demonstrates the success of these services.

Co-locating civil legal services with public defense offers an innovative and proven model of service delivery to reach this at-risk population, which historically has been unable to access legal services. Since they meet individuals when their lives and communities are in crisis, defenders have a unique opportunity for early intervention. These interventions are cost-effective—they reduce the counterproductive collateral consequences and can increase access to treatment and other alternatives that are cheaper in the long term than serial incarceration.

Integrated civil and criminal legal services from the time of arrest effect critical change in at least two dimensions. First, these services can avoid or mitigate collateral consequences by working with both the criminal and civil systems for mutually productive outcomes. Second, proper services can stabilize a client or family by ad-

addressing the more traditional legal problems arising out of poverty—such as nonpayment of rent—that become overwhelming in light of the crisis of the criminal case.

Experience has shown that families caught in the disruption of pending criminal cases or incarceration are less likely to seek other needed legal services at a separate office. They often let the first and second notices from their landlord or welfare agency go unaddressed. For those who do navigate the labyrinth of traditional legal services intake, the delay before retaining counsel necessitates greater crisis intervention (and more work) by the providers. These problems quickly become emergencies, which are more difficult, more time-consuming, and more expensive, to resolve.

Defenders, however, are often the first to hear about these problems because of their established relationship with these families. Partnering with a defender office for civil legal services creates a unique opportunity for early intervention. This model leverages existing services for the greatest effectiveness. Advocates can often resolve a potential housing problem, such as a public assistance error that suspends rent payments, with a letter or phone call. Proper planning and client services can prevent some litigation, such as eviction proceedings, altogether. When litigation becomes necessary, advocates have immediate access to clients' existing case files and the benefit of an established relationship with client families.

Countless Bronx Defenders clients demonstrate the power of this model. Omar was a disabled, 30-year public housing resident with many health problems who had let a friend stay with him. The friend refused to move out and began to terrorize Omar, who went to his Public Housing Authority (PHA) and the police for help and advice on how to get the new roommate out. When the police came to the apartment and found the roommate's drugs, Omar was arrested. The PHA filed an administrative proceeding to evict him because of the arrest. Working closely with his defense attorneys, his civil attorneys gained early notice of the eviction, preserved Omar's right to stay in his home, and entered a probationary stipulation requiring the exclusion of the unauthorized roommate, who had already disappeared.

The most effective partnership model involves integrated criminal and civil staff in the same office. Limitations in funding and organizational design can make the execution of this model difficult. Advocates must find ways to structure collaborations that bridge the critical gap in services between traditional criminal and civil legal organizations. Bridging this gap ensures that both defenders and civil legal aid advocates can capitalize on the full range of intervention points, from arrest to postconviction. (For practical advice on structuring civil-defender collaborations, see

McGregor Smyth, *Bridging the Gap: A Practical Guide to Civil-Defender Collaboration*, 37 CLEARINGHOUSE REV. 56 (May-June 2003) and Cynthia Works, *Reentry—the Tie That Binds Civil Legal Aid Attorneys and Public Defenders*, 37 CLEARINGHOUSE REV. 328 (Sept.-Oct. 2003). For a collection of similar articles on program design, visit the Reentry Net National Research & Policy Library at www.reentry.net/library/folder.88048-Holistic_Defender_Civil_Legal_Services.) Integrating civil and criminal legal services, either in the same office or through partnerships, turns the pitched battle to alleviate collateral consequences into a more effective and efficient effort to avoid them altogether.

Outlining a Consolidated Advocacy Strategy

This section details a methodology for identifying, evaluating, and mitigating the collateral damage of criminal proceedings. This problem-solving model requires client-centered practice and a creative willingness to bridge traditional divides in civil legal work. The complexity of these problems that occupy both the criminal and civil legal worlds daunts even well-meaning advocates. In discussing the application of the model, I will highlight dozens of practical resources already available to support advocates in this work. In the process, the model itself points to the need for an infrastructure that supports advocates and promotes collaboration. (See Smyth, *supra*, *Cross-Sector Collaboration in Reentry*, 41 CLEARINGHOUSE REV. 245, for a discussion of an existing infrastructure solution supporting New York advocates.)

A CONSOLIDATED ADVOCACY STRATEGY

- Identify the legal provision or policy that creates the barrier for the client.
- Examine the criminal record and the process by which it was obtained and used.
- Consider challenges related to legal hierarchy.
- Consider state or federal constitutional challenges.
- Determine whether a state or local law protects people with criminal records.
- Challenge broad exclusionary policies as discriminatory based on race.
- Demand a reasonable accommodation if the criminal activity arose from a disability.
- Pursue restoration of rights process or certificate of rehabilitation, if available.
- Put them to their proof.
- Develop a compelling narrative.

Identifying a Barrier Provision or Policy

To assist a client fighting a collateral sanction, you must first identify the source of the barrier. It sounds simple and obvious, but this step holds surprising challenges—experts have labeled collateral consequences “invisible punishments” for a reason. Determine the statutory, regulatory, and/or policy basis for the adverse decision. Outline the hierarchy of legal provisions. Detail the procedures for decision making and appeal, including provisions that guide or limit discretion. Be certain to identify other controlling legal instruments such as employment contracts, leases, or collective bargaining agreements that set forth rights and responsibilities of all relevant parties.

Some barriers arise automatically from an arrest or conviction (the ABA and ULC call these “collateral sanctions”); other disabilities authorize, but do not require, a court, agency, or other decision maker to impose them (“discretionary disqualifications”). Common examples of the latter are licenses or other opportunities that require “good moral character,” where criminal records predictably result in denial or termination. A distinction without a difference to the families actually affected, these legal classifications will prove useful in guiding your legal strategy. For example, categorical bars more frequently contain constitutional or regulatory infirmities, while deficient procedural due process often marks discretionary disqualifications (see below).

Make sure to determine whether a waiver process exists that can overcome the adverse action upon some showing by your client. Many policies require automatic denials or terminations because of criminal records and give little to no notice of the existing waiver practices. These waiver or appeal policies are fairly common. For example, the federal Transportation Worker Identification Credential (TWIC) provides for a waiver process that takes into account evidence of rehabilitation, as well as an appeal process that allows workers to challenge inaccuracies in their background check that led to initial disqualification. (See 49 C.F.R. §§ 1515 *et seq.* and NELP’s TWIC manual at www.nelp.org.) Individuals who are (1) fleeing to avoid felony prosecution, or custody, or confinement after a felony conviction, or (2) violating a condition of probation or parole, as found by a judicial or administrative determination, may not receive an array of federally funded benefits, including TANF-funded benefits, SSI, SSDI, public and federally assisted housing, or food stamps. (See, e.g., 42 U.S.C. §§ 608(a)(9)(A) and 1382(e)(4).) For good cause shown, however, the Social Security Administration can reinstate benefits retroactively if a court of competent jurisdiction has found the individual not guilty of the criminal offense, dismissed the charges relating to the criminal offense,

vacated the warrant for arrest of the individual for the criminal offense, or took any similar exonerating action. (42 U.S.C. § 1382(e)(4)(B); POMS SI 530.015.)

Follow similar steps with private actors, making every attempt to get policies and procedures in writing. Unions can be powerful and useful allies for employment issues. Identify cross-cutting concerns of the government or private actors, such as negligent hiring liability, (see, e.g., *State-by-State Survey—Employer Legal Liability for Hiring Individuals with Criminal Records* (Commissioned by Goodwill Industries, 2007) at www.reentry.net), as they can help guide your advocacy strategy (see below).

Even with government sunshine laws, finding many policies and even regulations can be challenging. Be aggressive in using your state’s freedom of information law, where applicable. Be equally as aggressive at sharing the records that you receive with your legal community. (Reentry Net will post any materials that you submit so that they remain freely and publicly available.) Take advantage of local expertise in civil legal services offices or bar associations. Practice area experts can often point you directly to hard-to-find resources, such as the Section 8 administrative plans posted deep in the HUD Web site that detail each public housing authority’s policy on applicants with criminal histories.

Many jurisdictions have already worked to compile listings or write manuals detailing collateral consequences. Arizona, Maryland, Michigan, Minnesota, New York, Ohio, Washington, and the District of Columbia all have excellent guides. Many other resources detail consequences in particular areas. (See, e.g., Sharon Dietrich and Maurice Emsellem, *Legal Outline of Authorities & Decisions Related to Criminal Records and Employment* (2006); McDonough & McCreight, *supra*; NHLP, *supra*.) A 2009 study by the ABA Commission on Effective Criminal Sanctions and the Public Defender Service for the District of Columbia describes the collateral consequences of a felony conviction arising under federal statutes and regulations. (*Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations* (January 2009).) All of these resources are posted on Reentry Net (www.reentry.net), in particular in “Find Out About Collateral Consequences of Criminal Charges, Proceedings, and Convictions in Your State: Collateral Sanctions Around the United States.” Finally, the National Institute of Justice will fund a comprehensive survey of collateral consequences in every U.S. jurisdiction in the next year. (See Court Security Improvement Act of 2007, Pub. L. No. 110-177, § 510 (2008).)

Examine the criminal record and the process by which it was obtained and used. As discussed in detail above, even official criminal history records routinely contain errors. The private sector practice of buying and compiling these

records in bulk only exacerbates the problem. Worse, the vast majority of background checks go through a private sector proxy rather than an official repository. To be effective, you have to see what records the employer, landlord, or other party used to make its decision. Review the records immediately for errors. With surprising regularity, a legal, factual, or interpretive correction will solve the problem because of an error in the rap sheet or an error in reading it. Determine whether any of the records qualify for expungement or sealing under state law. For example, Maria was rejected for a job because of arrest charges from 1989 that appeared on her rap sheet without a disposition. She knew that she had never been convicted of any offense. Our staff investigated, discovering that the district attorney had declined to prosecute within hours of the arrest. We obtained documentation and had all records of the arrest correctly sealed. With

include a requirement that, prior to taking adverse action based in part on a consumer background report, an employer provide the applicant with a copy of the report. (See 15 U.S.C. § 1681b(b)(3)(a)(i) and (ii).) Section 1681e(b) requires CRAs to implement “reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” FCRA establishes liability for both negligent and willful noncompliance (including statutory damages) and provides for attorney fees. (*Id.* at § 1681n, 1681o; *Dalton v. Capital Associated Industries*, 257 F.3d 409 (4th Cir. 2001).)

Note that state versions of FCRA can provide more protection. In New York, for example, no CRA may report any conviction for noncriminal offenses. (N.Y. Gen. Bus. L. § 380-j(a)(1).) Although frequently ignored by national CRAs doing business in New York, this provi-

Many clients would rationally choose a term of incarceration to avoid harsh collateral consequences.

this proof in hand, Maria got the job.

Federal and state law provide both substantive and procedural rights relating to criminal histories. The Criminal Justice Information Systems Regulations, 28 C.F.R. Part 20, set national standards in this area. Their stated purpose is to ensure that criminal history record information “is collected, stored, and disseminated in a manner to ensure the accuracy, completeness, currency, integrity, and security of such information and to protect individual privacy.” (28 C.F.R. § 20.1.) Each state has passed its own statutes and regulations to implement the federal standards. Use these legal provisions to challenge the use of criminal history information from official government sources.

The use of criminal history information from private sources (any background checking company), triggers the protections of the Fair Credit Reporting Act (FCRA). (See 15 U.S.C. §§ 1681 *et seq.*) FCRA governs the reporting and use of credit and public record information by consumer reporting agencies (CRAs). Substantive provisions include prohibiting CRAs from reporting arrests or other adverse information (other than convictions of crimes) that are more than seven years old, unless the report is in connection with an employment position that pays an annual salary of \$75,000 or more. (See 15 U.S.C. §§ 1681c(a)(2), (a)(5), and (b)(3).) Procedural provisions

should have significant impact—in 2008, more than 42 percent (145,278) of all convictions in New York were for noncriminal offenses. (DCJS, *Dispositions of Adult Arrests by County and Region* (6/18/2009).)

Consider challenges related to legal hierarchy. After charting the hierarchy of legal provisions, examine them for procedural or substantive problems related to that hierarchy. Determine whether the relevant state or local provision conflicts with federal law (preemption). Similarly, consider whether the local law or policy violates state law or policy. Compare the policy or regulation to the enabling statute to determine whether it is entitled to *Chevron* deference or is *ultra vires*. (See, *e.g.*, *Chevron USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).) For example, numerous Florida appellate courts have found that in the absence of legislative authority, state agencies may not require that a person with a felony conviction obtain the restoration of his or her civil rights to obtain an occupational license. (*Yeoman v. Construction Industry Licensing Board, State of Florida Department of Business and Professional Regulation*, 919 So. 2d 542, 31 Fla. L. Weekly D48 (Fla. 1st DCA Dec. 22, 2005); *Vetter v. Department of Business and Professional Regulation, Electrical Contractors Licensing Board*, 920 So. 2d 44, 30 Fla. L. Weekly D2807 (Fla. 2d DCA Dec. 14, 2005); *Daniel Scherer v. Depart-*

ment of Business and Professional, 919 So. 2d 662, 31 Fla. L. Weekly D320 (Fla. 5th DCA Jan. 27, 2006.) Examine whether the promulgation of the regulation or policy complied with the state or federal Administrative Procedure Act. (See, e.g., 5 U.S.C. §§ 500 *et seq.*)

Consider state or federal constitutional challenges.

Although constitutional law does not categorize people with criminal records as a protected class for equal protection analysis, constitutional challenges to the imposition of collateral consequences have met with surprising success. Courts have used rational basis review to invalidate laws that categorically bar large groups of people with criminal records, but courts have generally upheld laws where the relationship between the offense and the opportunity is more carefully tailored. (Miriam J. Aukerman, *The Somewhat Suspect Class: Towards a Constitutional Framework for Evaluating Occupational Restrictions Affecting People with Criminal Records*, 7 J.L. Soc’y 18 (2005) (collecting cases and evaluating constitutional challenges).) As a general rule, look for broad or automatic barriers that do not distinguish relevant and irrelevant offenses and do not provide for individualized review. (See, e.g., *Schwartz v. Board of Bar Examiners of New Mexico*, 353 U.S. 232 (1957); *Lewis v. Alabama Dep’t of Public Safety*, 831 F. Supp. 824, 826-27 (D. Ala. 1993).)

Because many collateral consequences occur through administrative agency action, consider carefully whether the procedures for challenging an adverse action provide due process. The Legal Aid Society of New York City, for example, has successfully battled the city for decades over its unconstitutional procedures surrounding the seizure and attempted civil forfeiture of vehicles incident to an arrest. The financial consequences of losing the car often paled in comparison to the lost wages and lost jobs resulting from the lack of transportation. Through this litigation, the Second Circuit Court of Appeals has repeatedly set due process standards that protect people charged with crimes from the loss of their property. (See, e.g., *Krimstock v. Kelly*, 306 F.3d 40 (2d Cir. 2002) (holding that due process requires a prompt hearing before a neutral fact finder to test the probable validity of the deprivation *pendente lite*, including the probable cause for the initial warrantless seizure and the necessity and legitimacy of continued impoundment).)

Many state constitutions provide more protection, either procedural or substantive, than the U.S. Constitution. Advocates around the country have used state constitutional provisions to strike down laws limiting opportunities for people with criminal records. In Pennsylvania, for example, the Older Adults Protective Services Act (OAPSA), created a lifetime bar preventing most people with criminal records from working in nursing

homes, home health care agencies, and other long-term care facilities. The law summarily unemployed many people who had worked safely in long-term care facilities for decades. With private cocounsel, Community Legal Services of Philadelphia successfully challenged OAPSA under the state constitution. The court found that the lifetime ban violated Article I, Section 1, of the Pennsylvania Constitution because no “real and substantial” relationship existed between a lifetime prohibition from employment in elder care and a legitimate governmental purpose. (*Nixon v. Commonwealth of PA*, 839 A.2d 277, 289 (Pa. 2003).) In Massachusetts, the court in *Cronin v. O’Leary*, 13 Mass. L. Rep. 405 (Mass. Super. Ct. 2001), struck down a lifetime ban on employment with the state department of human services as a violation of procedural due process under Article 12 of the Massachusetts Declaration of Rights.

Determine whether a state or local law protects people with criminal records. While no federal civil rights statute explicitly protects people with criminal records, many state and local laws take a more progressive view. At least five states—Hawaii, Kansas, New York, Pennsylvania, and Wisconsin—prohibit private employers from having complete bars against hiring persons with a conviction record. (See Dietrich and Emsellem, *supra*, *Legal Outline of Authorities* at 6-7 (collecting statutes).) The New York State Human Rights Law, for example, forbids public and private employers and occupational licensing agencies from denying any individual a job or license (or otherwise discriminating against that person) because of arrests that did not result in a conviction, confidential youthful offender adjudications, and sealed convictions for noncriminal offenses. (See N.Y. Exec. L. § 296(16).) Employers and licensing agencies may not have a policy of denying every person with a criminal history—they must consider each applicant individually. (N.Y. Corr. L. Article 23-A.) Employers and licensing agencies may not deny any person a job or license because of past conviction(s) unless (a) the conviction(s) are “directly related” to the job in question, or (b) hiring or licensing that person would create an “unreasonable risk” to the safety of people or property. (N.Y. Corr. L. § 752.) Section 753 lists factors that must be considered in determining whether a conviction meets the above criteria.

Do not overlook local laws—the New York City Human Rights Law mirrors the state law but covers more private actors and provides for attorney fees. (See, e.g., NYC Admin. Code § 8-107.) Several other urban areas across the United States (including Boston, Chicago, Minneapolis, San Francisco, St. Paul, and the counties of Alameda and Multnomah) have recently implemented policies that limit discrimination in city and county jobs

against people with criminal records. (See www.nelp.org/site/issues/category/city_and_county_hiring_reforms.) For more information on state and local laws, see the Legal Action Center's Advocacy Toolkit Package Twelve, "Enforce Anti-Discrimination Laws" available at www.lac.org/toolkits/titlevii/title_vii.htm.

Challenge broad exclusionary policies as discriminatory based on race. The disparate racial impact of arrests and convictions is well documented. Employment, housing, and other policies or practices that impose broad exclusions on the basis of arrests or convictions, in turn, have disparate racial impact. Consider using existing federal, state, and local civil rights statutes to challenge these practices.

For example, the EEOC has determined that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records, absent business necessity, has an adverse impact on African Americans and Latinos in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. An employ-

disability under federal and state law. In these situations, demand that covered entities provide a reasonable accommodation for the disability by creating exceptions to their criminal record exclusion or termination policies. (See, e.g., 29 U.S.C. § 705(20)(C)(ii) (defining people recovered and recovering from substance abuse as disabled).) Note that a demand for reasonable accommodation shifts the burden to the covered entity to demonstrate that no accommodation will eliminate or acceptably minimize a direct and serious risk to the safety of others posed by the behavior of the person with a disability. (See *Roe v. City of Boulder*, 909 F. Supp. 814, 823-24 (D. Col. 1995); *Roe v. Sugar River Mills Assoc.*, 820 F. Supp. 636, 640 (D.N.H. 1993).)

Advocates in New York have used the disability provisions of the FHA to protect people with criminal records. When the Rochester Housing Authority refused to modify its criminal history bar for an applicant with a past substance abuse problem, the Monroe County Legal Assistance Center (MCLAC) and Empire Justice Center sued for disability discrimination and failure to provide

Advocates around the country have used provisions within state constitutions to strike down laws limiting opportunities for people with criminal records.

er can show business necessity when the applicant is engaged in conduct that is particularly egregious or related to the position in question. (See, e.g., EEOC COMPLIANCE MANUAL, Vol. II, § 15(IV)(B)(2) and Appendices 604-A ("Conviction Records") and 604-B ("Conviction Records—Statistics").) As described above, Community Legal Services in Philadelphia runs a national resource center supporting this type of litigation.

Similarly, a landlord's policy or practice of excluding persons with conviction records has a disparate impact on African Americans and Latinos. (See 42 U.S.C. § 3604(f); N.Y. Exec. L. §§ 290 *et seq.*; N.Y. Civ. Rights L. §§ 18-a to 19-b.) For a practical description of using federal and state fair housing laws to challenge such a policy, see the Legal Action Center's Advocacy Toolkit Package Five: "Making a Claim of Racial Discrimination Under the Federal Fair Housing Act" at www.lac.org/toolkits/housing/package5.htm.

Demand a reasonable accommodation if the criminal activity arose from a disability. Criminal activity often arises from mental illness and substance abuse. In many circumstances, these conditions meet the definition of

reasonable accommodation. A separate case brought by MCLAC won a consent decree that orders the Rochester Housing Authority to implement policies that reflect the legal status of recovered substance abusers as persons with disabilities, and enjoining the authority from discriminating against them (pursuant to the Fair Housing Act, 42 U.S.C. § 3604(f)).

Pursue restoration of rights process or certificate of rehabilitation, if available. Many jurisdictions have mechanisms to restore certain rights to people with conviction histories. While often limited in scope, these devices can be critical tools in avoiding or mitigating collateral consequences. Even where they do not actually lift a barrier, do not discount the rhetorical leverage of any official imprimatur in proving rehabilitation when advocating in a discretionary process. Margaret Colgate Love, former director of the ABA Commission on Effective Criminal Sanctions and U.S. pardon attorney, has compiled a state-by-state reference guide describing laws and practices relating to restoration of rights and obtaining relief from the collateral disabilities and penalties that accompany a criminal conviction. (*Relief from the Collateral*

Consequences of a Criminal Conviction: A State-by-State Resource Guide (2005), available at www.sentencingproject.com.) The ABA and Uniform Law Commissioners have recommended that all jurisdictions enact procedures for comprehensive restorations of rights.

New York, for example, has two critical tools—certificates of relief from disabilities (CRDs) and certificates of good conduct (CGCs)—that lift automatic barriers to housing and employment. These certificates promote rehabilitation by removing statutory collateral bars imposed because of convictions and providing a rebuttable “presumption of rehabilitation” for employment applications. (N.Y. Corr. L. §§ 701-703; 703-a and 703-b.) They are, however, vastly underutilized, and few advocates or people with criminal records even know to apply. According to DCJS, between 1972 and 2003, fewer than 100,000 CRDs were issued. On average, that is fewer than 3,200 a year. To provide some context, in 2004 in New York City alone there were more than 44,000 guilty pleas to the petty offense of disorderly conduct.

Put them to their proof. Sometimes your client must

process. Explore potential constitutional evidentiary arguments, such as the exclusionary rule, where there is a government decision maker. (*See, e.g., Matter of Tejada v. Christian*, 422 N.Y.S.2d 957, 71 A.D.2d 527 (N.Y. App. Div., 1st Dep’t 1979).)

Develop a compelling narrative. Never define a person by his or her worst act, or allow it to happen to your client. Develop a narrative of your client as a member of a family and a community who has the fundamental fitness to perform in the opportunity. Work with your client to identify the goals that motivated his or her desire for the denied opportunity (and drove them to seek legal services).

Use the factors that define your decision maker’s discretion to frame your advocacy. In general, the following factors (compiled from the EEOC, N.Y. Corr. L. 753, and case law) can guide your advocacy because they resonate with decision makers: (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of the sentence; (3) the nature of the opportunity held or sought; (4) the bearing, if any,

The informality of many administrative forums result in routine due process violations.

pursue affirmative relief, and other times he or she has the defensive posture. Examine the governing law and procedure and know the elements of all relevant claims and defenses. (*See, e.g., McDonough & McCreight, supra*, at 58-67.) If the barrier requires proof that a specific crime was committed, undermine the elements of the crime. Use this tactic where the client has a conviction for a lesser or different offense than the trigger or for the significant number of criminal cases that terminate in noncriminal (e.g., petty offenses) or nonconviction dispositions. Pay close attention to the rights, responsibilities, and procedures detailed in binding legal instruments such as employment contracts, leases, and collective bargaining agreements.

Decision makers in this area are unaccustomed to challenges by represented parties, and the informality of many administrative forums result in routine due process violations. Many agencies fail to follow their own procedures for proper notice or access to evidence. (*See, e.g., 42 U.S.C. § 1437d(k), (l)(7); 24 C.F.R. § 966.4(l)(3).*) Be on the watch for rank hearsay (such as unsubstantiated and unauthenticated charging instruments from criminal court) and challenge them as violations of basic due

the criminal offense(s) will have on the person’s fitness or ability relevant to the opportunity (e.g., to perform the job, to be a good tenant); (5) the age of the person at the time of occurrence of the criminal offense(s); (6) any information produced by the person, or produced on his or her behalf, in regard to rehabilitation and good conduct. This framework can prove particularly useful when battling a decision based on a highly discretionary “good moral character” standard.

The narrative should contain many elements of a redemption story: a descent (from a good life or hard life); a fall (the conviction(s)); experiences that triggered a turning point; remorse for past actions; the long road towards restoration (where collateral consequences are roadblocks to success). Use established mitigation techniques from sentencing advocacy to describe the descent and fall. A credible delineation of and explanation for the turning point can be critical to distance your client from the offense and assure the decision maker that the future risk is low. Turning points are inherently personal yet familiar—treatment, a horrible jail or prison experience, loss of reputation with friends and family, religion, family intervention, becoming a parent, get-

ting married. We have also found in our direct client work that decision makers often overvalue a showing of remorse.

Be particularly assertive and creative in collecting evidence of rehabilitation. Get documentation of employment history, job training, educational certificates, and relevant courses of treatment or counseling. Particularly when defending a client from the loss of a current benefit (such as public housing), encourage him or her at your first meeting to begin a relevant treatment, counseling, or training program—the sooner the better. Collect letters of support from neighbors, clergy, family members, volunteer opportunities, probation or parole officers, and colleagues. (See, e.g., Legal Action Center, *How to Gather Evidence of Rehabilitation*.)

Through it all, be cognizant of the demons that you battle: outsized stigmas against people with criminal records and inflated fears of lawsuits if the decision makers associate with people with criminal records. Use your narrative to humanize, with the hope of deflating the stigma. Structure your evidence with an eye towards creating a future shield from liability (e.g., negligent hiring) for the decision maker. Undermine the fear of future risk or harm with the person's rehabilitation story. Include, if possible and relevant, the important context of the most recent research on desistance, which demonstrates conclusively

that as time increases from the commission of a crime, the less likely it is that the individual will reoffend. (See, e.g., Megan Kurlychek, Robert Brame, and Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Short-Term Predictions of Criminal Involvement*, (March 2006).)

Conclusion

For decades, collateral consequences accumulated quickly and quietly in scattered areas of the law. The relative difficulty of obtaining criminal histories further hid the impending storm from view. Exacerbating existing pressures of poverty, these consequences drove communities deeper into a cycle of crime and virtually ensured that they could never break free. Collateral consequences degrade the institutions that implement them and undermine the fabric of whole communities. The storm has hit, but we have been too slow to adjust our practice to weather it. With consistent national attention to collateral consequences and the ready availability of practical strategies to address them, no reasonable excuse remains for the continuation of the traditional myopic approach that balkanizes criminal and civil practice. We have a responsibility to deliver services that reflect reality—to educate ourselves and the people affected, to bridge the criminal-civil divide, and to incorporate an awareness of collateral consequences in our daily work. ■

**DEFENDER TOOLKIT:
USING KNOWLEDGE OF “ENMESHED PENALTIES” (OR COLLATERAL CONSEQUENCES)
TO GET BETTER RESULTS IN THE CRIMINAL CASE***

The U.S. Supreme Court Requires It

In March 2010, the U.S. Supreme Court in *Padilla v. Kentucky*, 599 U.S. ___ (2010), ruled that defense counsel **must give affirmative, competent advice** to clients of the risk of **all penalties “enmeshed” with the criminal charges** or potential pleas.

- The Court held that for evaluating the effective assistance of counsel, the Sixth Amendment does not distinguish between the “direct” and “collateral” consequences of pleas – the relevant inquiry is the extent to which the penalty is *enmeshed* with the criminal process or charges.
- The ruling concerned deportation specifically, but other major penalties “intimately related” to criminal charges include *public housing eligibility, employment, sex offense registration, voting, and student loans*.
- The Court explicitly encouraged creative pleas to avoid these enmeshed penalties.

*Use Padilla to improve your advocacy skills,
from bail arguments to plea negotiations to sentencing.*

From the moment of arrest, people are in danger of losing hard-earned jobs, stable housing, basic public benefits, and even their right to live in this country. The steady increase in the scope and severity of the penalties that result from arrests has combined with the nearly universal availability of criminal history data to alter drastically the impact of criminal charges on clients – and the practice for lawyers.

As the Supreme Court recognized in *Padilla*, these “collateral consequences” have become an integral and are sometimes the most important part of the penalty of a criminal case. For many clients, their children, and their families, these consequences are much more severe than any criminal sentence. Because these enmeshed penalties have dramatically raised the stakes of a criminal case, defenders, prosecutors, and judges must incorporate them into their daily practice.

The Supreme Court has now endorsed, and in many ways required, a *client-centered, holistic defense practice*. Proper investment in this practice and its strategies will return measurable results.

◆ **The Bronx Defenders’ experience proves that defense counsel can use knowledge of these penalties, or collateral consequences, as a direct advocacy tool to win better dispositions in the criminal case and improved life outcomes for clients.**

A clearinghouse of materials on reentry and the consequences of criminal proceedings.

www.reentry.net/ny

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I. IMPROVED CRIMINAL DISPOSITIONS

- Experience has taught that defenders can obtain more favorable bail, plea, and sentencing results – and even outright dismissals – when they are able to educate prosecutors and judges on the draconian consequences for the clients and their families.
- When raising these consequences with prosecutors and judges, keep in mind that they typically respond best to consequences that offend their basic sense of fairness – those that are absurd, disproportionate, or affect innocent family members.
- Focus on *predictable* penalties for *specific* clients and challenge prosecutors and judges to justify those consequences when they have the power to change them with alternative dispositions. If you know that bail will result in the loss of a stable job for a breadwinner, or that a particular plea or sentence will lead to the loss of permanent, affordable housing or the right to live in this country with your client’s citizen children, ask whether prosecutors and judges are really serving public safety – or achieving just outcomes – by insisting on that disposition. Ask them to consider the unquestioned research which has shown that access to stable housing and employment proves critical to reducing recidivism.
- Remind prosecutors and judges that the U.S. Supreme Court has explicitly encouraged creative dispositions, endorsing “informed consideration” of these enmeshed penalties by the defense, prosecution, and courts during plea bargaining. *Padilla v. Kentucky*, 599 U.S. at ___, 130 S. Ct at 1486.
- Assure prosecutors and judges that proper consideration of these penalties for individual clients does not create any special treatment for certain classes of defendants. Rather, it embraces the Supreme Court’s recognition that some people charged with the same crimes suffer far greater penalties in predictable (but often hidden) ways. A fair and just process entails a proper and complete consideration of all penalties that cannot be divorced from a particular conviction.

We have found these four categories of penalties most likely to alter dispositions:

- (1) **Immigration**
 - Deportability, inadmissibility, or ineligibility for a waiver as the result of a plea
- (2) **Housing**
 - Loss of public housing or Section 8 as the result of a plea
- (3) **Employment & Military Service**
 - Loss of a job or employment license, particularly for a breadwinner
- (4) **Student Loans**
 - Loss of a federal student loan eligibility and educational opportunity

Other serious penalties “intimately related” to criminal charges include sex offense registration and its attendant consequences, loss of voting rights, ineligibility for government benefits, and prohibition on firearms possession.

Improved Dispositions - Using Collateral Consequences in Practice

- Juan R. was charged with a drug crime, and the prosecutor refused any plea below a misdemeanor. Juan, however, was disabled and lived in public housing, and a misdemeanor would result in his eviction. The defense attorney used this knowledge to convince the prosecutor to offer a non-criminal disposition, and Juan kept his home.
 - Joanne F. had worked hard to get a steady job as a security guard. In a domestic incident with her boyfriend, she was charged with Assault and Harassment. The initial plea offer would have resulted in the loss of her security guard license and her job. The defense attorney used this knowledge to convince the DA to offer an adjournment in contemplation of dismissal. Joanne kept her job.
 - Max S. was 18 years old and charged with possession of a marijuana cigarette. The prosecutor would only offer a plea to a marijuana violation, defined by New York law as a non-criminal offense. Max, however, was enrolled in college and was receiving student loans. Under draconian federal law, even a non-criminal plea to a drug offense would render Max ineligible for student loans and thus unable to attend college. Using her knowledge of this sanction, the defense attorney persuaded the DA to offer an adjournment in contemplation of dismissal (a deferred prosecution without a guilty plea). Max remains in college pursuing his degree.
- Defense counsel, however, bears the burden for good reason. Sometimes the appropriate client-centered strategy involves *avoiding* a discussion of certain penalties with prosecutors and judges, when raising these issues would actually increase the risk of those enmeshed penalties. Give clear, specific, individualized advice to the client of these risks and make strategy decisions consistent with the client’s priorities.

II. RISK MANAGEMENT

- Knowledge of enmeshed penalties, or “collateral” consequences, is a key risk management tool for defenders. Clients facing criminal charges will often have to face ancillary civil or administrative proceedings in housing court, in family court, or with employment licenses.
- Clients will often testify or give written statements as part of these ancillary proceedings (they are penalized for invoking their right to remain silent) about the underlying facts, with or without their defense attorney.
- Defense attorneys have to be familiar with the collateral consequences so that they can anticipate these proceedings and properly advise clients of the impact of those proceedings on their criminal case.

III. DISCOVERY

- Proper risk management has another significant benefit: as a result of being prepared for these ancillary proceedings, defense attorneys can use them for additional discovery not available in the criminal case.
- Eviction cases, employment licensing proceedings, DMV hearings, school suspension hearings – these are all venues where important witness might testify and where an administrative or lower court judge (or even an attorney) is likely to have subpoena power allowing you to obtain documents otherwise unavailable to you.

IV. CLIENT BENEFITS

- Learning the penalties enmeshed with your client’s criminal case and advising your clients of those consequences helps you build better relationships with your clients.
- It also empowers clients to choose outcomes based their *own* priorities. The collateral damage of being arrested often falls most heavily on family members. When given the option, your clients will often choose the outcome that minimizes the impact on their families.
- Help your client think about these long-term hidden effects of a plea before he accepts it. Give clear, specific, individualized advice about these penalties. Under *Padilla*, silence (the failure to advise a client of these risks) is *per se* ineffective assistance of counsel.

Attorneys who ignore these enmeshed penalties are not only not doing their job, they are *actively doing harm*. These penalties can be disproportionate to the offense and counterproductive, forming substantial barriers to successful reentry. Proper advocacy within the criminal case can mitigate or avoid them entirely and win better case outcomes. By redefining “reentry” as a process that begins at arrest and continues through community reintegration, we highlight the substantial role that criminal defense attorneys can play. Quite simply, incorporating knowledge of the broad range of enmeshed penalties into your daily defense work will make you a better lawyer.

GENERAL PRACTICE TIPS

- **Always advise your clients to attend a relevant treatment program - immediately. Such “evidence of rehabilitation” will prove invaluable for obtaining or keeping a job, housing, or immigration status.**
- **Always apply for a certificate of rehabilitation or restoration of rights procedure, if available in your jurisdiction.**
- **Talk to your clients. There is a good chance that they are making statements on the record about relevant facts in ancillary civil proceedings.**
- **Broaden your strategy: Consider using these ancillary civil proceedings as a way of getting discovery for the criminal case.**

ADVOCATE RESOURCES

- ❖ **ABA Adult Collateral Consequences Survey** (every jurisdiction, forthcoming)
- ❖ **The Center for Holistic Defense at The Bronx Defenders** (www.holisticdefense.org): practical resources and technical assistance to support client-centered, interdisciplinary advocacy.
- ❖ **Reentry Net (www.reentry.net) & Reentry Net/NY (www.reentry.net/ny)** - comprehensive information clearinghouse on reentry and enmeshed penalties
- ❖ **Survey of Federal Enmeshed Penalties: *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations*** (The ABA Commission on Effective Criminal Sanctions and the Public Defender Service for the District of Columbia, January 2009) (www.reentry.net/search/item.232200)
- ❖ For an extensive **New York practice guide**, see *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records* (The Bronx Defenders, February 2010) (www.reentry.net/ny/library/attachment.172234)

* Adapted from McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney's Guide to Using Invisible Punishments As An Advocacy Strategy*, 36 U. TOL. L. REV. 479 (2005) (www.reentry.net/link.cfm?5373).

Immigration Consequences of Crimes Summary Checklist *

CRIMINAL INADMISSIBILITY GROUNDS – Will or may prevent a noncitizen from being able to obtain lawful status in the U.S. May also prevent a noncitizen who already has lawful status from being able to return to the U.S. from a trip abroad in the future.	CRIMINAL DEPORTATION GROUNDS – Will or may result in deportation of a noncitizen who already has lawful status, such as a lawful permanent resident (LPR) green card holder.	CRIMINAL BARS ON OBTAINING U.S. CITIZENSHIP – Will prevent an LPR from being able to obtain U.S. citizenship.
Conviction or admitted commission of a Controlled Substance Offense , or DHS reason to believe that the individual is a drug trafficker	Conviction of a Controlled Substance Offense EXCEPT a single offense of simple possession of 30g or less of marijuana	Conviction or admission of the following crimes bars the finding of good moral character required for citizenship for up to 5 years: ➤ Controlled Substance Offense (unless single offense of simple possession of 30g or less of marijuana) ➤ Crime Involving Moral Turpitude (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months) ➤ 2 or more offenses of any type + aggregate prison sentence of 5 years ➤ 2 gambling offenses ➤ Confinement to a jail for an aggregate period of 180 days
Conviction or admitted commission of a Crime Involving Moral Turpitude (CIMT) , which category includes a broad range of crimes, including: ♦ Crimes with an <i>intent to steal or defraud</i> as an element (e.g., theft, forgery) ♦ Crimes in which <i>bodily harm</i> is caused or threatened by an intentional act, or <i>serious bodily harm</i> is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes) ♦ Most sex offenses <i>Petty Offense Exception</i> – for one CIMT if the client has no other CIMT + the offense is not punishable >1 year + does not involve a prison sentence > 6 mos.	Conviction of a Crime Involving Moral Turpitude (CIMT) [see Criminal Inadmissibility Gds] ➤ One CIMT committed within 5 years of admission into the US and for which a prison sentence of 1 year or longer may be imposed ➤ Two CIMTs committed at any time “not arising out of a single scheme”	
	Conviction of a Firearm or Destructive Device Offense	
	Conviction of a Crime of Domestic Violence, Crime Against Children, Stalking, or Violation of Protection Order (criminal or civil)	
Prostitution and Commercialized Vice	Conviction of an Aggravated Felony ➤ <i>Consequences</i> , in addition to deportability: ♦ Ineligibility for most waivers of removal ♦ Permanent inadmissibility after removal ♦ Enhanced prison sentence for illegal reentry ➤ <i>Crimes included</i> , probably even if not a felony: ♦ Murder ♦ Rape ♦ Sexual Abuse of a Minor ♦ Drug Trafficking (including most sale or intent to sell offenses, but also including possession of any amount of flunitrazepam and possibly certain second or subsequent possession offenses where the criminal court makes a finding of recidivism) ♦ Firearm Trafficking ♦ Crime of Violence + at least 1 year prison sentence ** ♦ Theft or Burglary + at least 1 year prison sentence ** ♦ Fraud or tax evasion + loss to victim(s) >10,000 ♦ Prostitution business offenses ♦ Commercial bribery, counterfeiting, or forgery + at least 1 year prison sentence ** ♦ Obstruction of justice or perjury + at least 1 year prison sentence ** ♦ Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ♦ Other offenses listed at 8 USC 1101(a)(43) ♦ Attempt or conspiracy to commit any of the above	Conviction of an Aggravated Felony on or after Nov. 29, 1990 (and conviction of murder at any time) <i>permanently</i> bars the finding of moral character required for citizenship “CONVICTION” as defined for immigration purposes A formal judgment of guilt of the noncitizen entered by a court, OR , if adjudication of guilt has been withheld, where: (i) A judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or <i>nolo contendere</i> or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen’s liberty to be imposed THUS: ➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated) ➤ A deferred adjudication without a guilty plea IS NOT a conviction ➤ NOTE: A youthful offender adjudication IS NOT a conviction if analogous to a federal juvenile delinquency adjudication
Conviction of two or more offenses of any type + aggregate prison sentence of 5 yrs.		
CRIMINAL BARS ON 212(h) WAIVER OF CRIMINAL INADMISSIBILITY based on extreme hardship to USC or LPR spouse, parent, son or daughter ➤ Conviction or admitted commission of a Controlled Substance Offense other than a single offense of simple possession of 30 g or less of marijuana ➤ Conviction or admitted commission of a violent or dangerous crime will presumptively bar 212(h) relief ➤ In the case of an LPR, conviction of an Aggravated Felony [see Criminal Deportation Gds], or any Criminal Inadmissibility if removal proceedings initiated before 7 yrs of lawful residence in U.S.		
CRIMINAL BARS ON ASYLUM based on well-founded fear of persecution in country of removal OR WITHHOLDING OF REMOVAL based on threat to life or freedom in country of removal		
Conviction of a “Particularly Serious Crime” (PSC) , including the following: ➤ Aggravated Felony [see Criminal Deportation Gds] ♦ All aggravated felonies will bar asylum ♦ Aggravated felonies with aggregate 5 years sentence of imprisonment will bar withholding ♦ Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding of removal ➤ Violent or dangerous crime will presumptively bar asylum ➤ Other PSCs – no statutory definition; see case law		
CRIMINAL BARS ON 209(c) WAIVER OF CRIMINAL INADMISSIBILITY based on humanitarian purposes, family unity, or public interest (only for persons who have asylum or refugee status) ➤ DHS reason to believe that the individual is a drug trafficker ➤ Conviction or commission of a violent or dangerous crime will presumptively bar 209(c) relief	CRIMINAL BARS ON LPR CANCELLATION OF REMOVAL based on LPR status of 5 yrs or more and continuous residence in U.S. for 7 yrs after admission (only for persons who have LPR status) ➤ Conviction of an Aggravated Felony ➤ Offense triggering removability referred to in Criminal Inadmissibility Grounds if committed before 7 yrs of continuous residence in U.S.	

*For more comprehensive legal resources, visit IDP at www.immigrantdefenseproject.org or call 212-725-6422 for individual case support.

** The “at least 1 year” prison sentence requirement includes a suspended prison sentence of 1 year or more.

Immigrant Defense Project

Suggested Approaches for Representing a Noncitizen in a Criminal Case*

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Immigrant Defendants in New York* (4th ed., 2006).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- ◆ Drug offense (§5.4)
- ◆ Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- ◆ Property offense, including theft, burglary or fraud offense (§5.6)
- ◆ Firearm offense (§5.7)

1. If your client is a **LAWFUL PERMANENT RESIDENT**:

- First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)
- Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).
- If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

2. If your client is a **REFUGEE** or **PERSON GRANTED ASYLUM**:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for the so-called 209(c) waiver of inadmissibility for refugees and asylees (§3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

3. If your client is **ANY OTHER NONCITIZEN** who might be eligible now or in the future for LPR status, asylum, or other relief:

IF your client has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and (4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

IF your client has a fear of persecution in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).
- In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

*References above are to sections of our manual, *Representing Immigrant Defendants in New York* (4th ed., 2006).

See reverse ➤



A Defending Immigrants Partnership Practice Advisory*
**DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING
AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY***

April 6, 2010 (revised April 9, 2010)

On March 31, the Supreme Court issued its momentous Sixth Amendment right to counsel decision in *Padilla v. Kentucky*, 599 U.S. ___ (2010). The Court held that, in light of the severity of deportation and the reality that immigration consequences of criminal convictions are inextricably linked to the criminal proceedings, **the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.**

Some Key *Padilla* Take-Away Points for Criminal Defense Lawyers

- **The Court found that deportation is a “particularly severe penalty” that is “intimately related” to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.**
- **Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.** In support of its decision, the Court relied on professional standards that generally require counsel to **determine citizenship/immigration status** of their clients and to **investigate and advise** a noncitizen client about the immigration consequences of alternative dispositions of the criminal case.
- **The Sixth Amendment requires affirmative, competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).** In reaching its holding, the Court expressly rejected limiting immigration-related IAC claims to cases involving misadvice. It thus made clear that a defense lawyer’s silence regarding immigration consequences of a guilty plea constitutes IAC. Even where the deportation consequences of a particular plea are unclear or uncertain, a criminal defense attorney must still advise a noncitizen client regarding the possibility of adverse immigration consequences.
- **The Court endorsed “informed consideration” of deportation consequences by both the defense and the prosecution during plea-bargaining.** The Court specifically highlighted the benefits and appropriateness of the defense and the prosecution factoring immigration consequences into plea negotiations in order to craft a conviction and sentence that reduce the likelihood of deportation while promoting the interests of justice.

What is Covered in this Practice Advisory

This advisory provides initial guidance on the duty of criminal defense counsel representing an immigrant defendant after *Padilla*. The Defending Immigrants Partnership will later provide guidance on issues not covered here, including the ability to attack a *past* conviction based on ineffective assistance under *Padilla*.

- I. **Summary & Key Points of the *Padilla* Decision for Defense Lawyers** (pp. 2-4)
- II. **Brief Review of Select Defense Lawyer Professional Standards Cited by the Court** (pp. 4-6)
 - Duty to inquire about citizenship/immigration status at initial interview stage
 - Duty to investigate and advise about immigration consequences of plea alternatives
 - Duty to investigate and advise about immigration consequences of sentencing alternatives

Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)

Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources)

I. Summary & Key Points of the *Padilla* Decision for Defense Lawyers

A. *Summary*

Background. In *Padilla v. Kentucky*, the petitioner was a lawful permanent resident immigrant who faced deportation after pleading guilty in a Kentucky court to the transportation of a large amount of marijuana in his tractor-trailer. In a post-conviction proceeding, Mr. Padilla claimed that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “did not have to worry about immigration status since he had been in the country so long.” Mr. Padilla stated that he relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory.

The Kentucky Supreme Court’s Ruling. The Kentucky Supreme Court denied Mr. Padilla post-conviction relief based on a holding that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction.¹

The U.S. Supreme Court’s Response. The U.S. Supreme Court disagreed with the Kentucky Supreme Court and agreed with Mr. Padilla that “constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.” *Padilla*, slip op. at 2. The Court observed that “[t]he landscape of federal immigration law has changed dramatically over the last 90 years.” *Id.* at 2. The Court stated:

While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.

Id. at 2 (citations omitted).

Based on these changes, the Court concluded that “accurate legal advice for noncitizens accused of crimes has never been more important” and that “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Id.* at 6.

In Mr. Padilla’s case, the Court found that the removal consequences for his conviction were clear, and that he had sufficiently alleged constitutional deficiency to satisfy the first prong of the *Strickland* test – that his representation had fallen below an “objective standard of reasonableness.”²

The Supreme Court’s Holding in *Padilla*: Sixth Amendment Requires Immigration Advice. The Court held that, for Sixth Amendment purposes, defense counsel must inform a noncitizen client whether his or her plea carries a risk of deportation. The Court stated: “Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.” *Id.* at 17.

B. *Key Points For Defense Lawyers*

1. **The Court found that deportation is a “particularly severe penalty” that is “intimately related” to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.**

With respect to the distinction drawn by the Kentucky Supreme Court between direct and collateral consequences of a criminal conviction, the Court noted that it has never applied such a distinction to define the

scope of the constitutionally “reasonable professional assistance” required under *Strickland v. Washington*, 466 U.S. 668 (1984). *Padilla*, slip op. at 8. It found, however, that it need not decide whether the direct/collateral distinction is appropriate in general because of the unique nature of deportation, which it classified as a “particularly severe penalty” that is “intimately related” to the criminal process. *Id.* The Court stated:

Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. . . . Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. . . . Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence.

Id. (citations omitted).

2. Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.

In assessing whether the counsel’s representation in the *Padilla* case fell below the familiar *Strickland* “objective standard of reasonableness,” the Court relied on prevailing professional norms, which it stated supported the view that defense counsel must advise noncitizen clients regarding the risk of deportation:

We long have recognized that that “[p]revailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable” . . . [T]hese standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law. . . . Authorities of every stripe—including the American Bar Association, criminal defense and public defender organization, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients.

Padilla at 9-10 (citations omitted).

3. The Sixth Amendment requires affirmative and competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).

Finding that the “weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation,” *id.* at 9, the Court concluded that counsel’s misadvice in the *Padilla* case fell below the familiar *Strickland* “objective standard of reasonableness.” The Court further noted that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” *Id.* at 10 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).

The Court, though, did not stop there: it found that the Sixth Amendment requires affirmative advice regarding immigration consequences. It made this clear by rejecting the position of amicus United States that *Strickland* only applies to claims of misadvice, stating that “there is no relevant difference ‘between an act of commission and an act of omission’ in this context.” *Id.* at 13 (citing *Strickland*, 466 U.S. at 690). The Court explained:

A holding limited to affirmative misadvice . . . would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of “the advantages and disadvantages of a plea agreement.” . . . When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.

Id. (citations omitted).

The Court acknowledged that immigration law can be complex, and that there will be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The Court stated that, when the deportation consequences of a particular plea are unclear or uncertain, “a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Id.* at 11-12. But the Court then went on to say that “when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.” *Id.* at 12. Whether or not the consequences are clear or unclear, however, the Court made clear that the governing test is the *Strickland* test of whether counsel’s representation “fell below an objective standard of reasonableness,” and that “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” *Id.* at 9 (quoting *Strickland*, 466 U.S. at 688). Under those norms, “[i]t is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so ‘clearly satisfies the first prong of the *Strickland* analysis.’” *Id.* at 14 (citation omitted).

4. The Court endorsed “informed consideration” of deportation consequences by both the defense and the prosecution during plea-bargaining.

The Court recognized that “informed consideration” of immigration consequences are a legitimate part of the plea-bargaining process, both on the part of the defense and the prosecution. The Court stated:

[I]nformed consideration of possible deportation can only benefit both the State and the 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. . . . 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 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

Id. at 16.

II. Brief Review of Select Defense Lawyer Professional Standards Cited by the Court

In support of its holding that defense counsel’s failure to inform a noncitizen client that his or her plea carries a risk of deportation constitutes ineffective assistance of counsel for Sixth Amendment purposes, the Court cited professional standards that it described as “valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.” *Padilla*, slip op. at 9. The Court cited, among such standards, the National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Representation (1995) (hereinafter, “NLADA Guidelines”), and the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) (hereinafter, “ABA Pleas of Guilty Standards”).

In order to assist defense counsel seeking guidance on how to comply with their legal and ethical duties to noncitizen defendants, this section of the Practice Advisory will highlight some of the NLADA and ABA standards recognized by the Supreme Court as reflecting the prevailing professional norms for defense lawyer representation of noncitizen clients. While these standards provide that competent defense counsel must take immigration consequences into account at all stages of the process, this section will focus in particular on defense lawyer responsibilities at the plea bargaining stage, the stage of representation at issue in the *Padilla* case.

Duty to inquire about citizenship/immigration status at initial interview stage:

Defense lawyer professional standards generally recognize that proper representation begins with a firm understanding of the client's individual situation and overall objectives, including with respect to immigration status. For example, the ABA Pleas of Guilty Standards commentary urges counsel to "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces." *Id.* cmt. at 127. It then notes that "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." *Id.*

In order to comply with a defense lawyer's professional responsibilities, counsel should determine the immigration status of *every* client at the *initial* interview. See NLADA Guideline 2.2(b)(2)(A). Without knowledge that the client is a noncitizen, the lawyer obviously cannot fulfill his or her responsibilities—recognized by the Supreme Court and these professional standards (see "Duty to investigate and advise about immigration consequences of plea alternatives" and "Duty to investigate and advise about immigration consequences of sentencing alternatives" below)—to advise about immigration consequences. Moreover, merely knowing that your client is a noncitizen may not be enough: while the degree of certainty of the advice may vary depending on how settled the consequences are under immigration law, it is often not possible to know whether the consequences will be certain or uncertain without knowing a client's *specific* immigration status. Thus, it is necessary to identify a client's specific status (whether lawful permanent resident, refugee or asylee, temporary visitor, undocumented, etc.) in order to ensure the ability to provide correct advice later about the immigration consequences of a particular plea/sentence. See *State v. Paredes*, 136 N.M. 533, 539 (2004) ("criminal defense attorneys are obligated to determine the immigration status of their clients").

Duty to investigate and advise about immigration consequences of plea alternatives:

At the plea bargaining stage, NLADA Guideline 6.2(a) specifies that as part of an "overall negotiation plan" prior to plea discussions, counsel should make sure the client is fully aware of not only the maximum term of imprisonment but also a number of additional possible consequences of conviction, including "deportation"; Guideline 6.3(a) requires that counsel explain to the client "the full content" of any "agreement," including "the advantages and disadvantages and potential consequences"; and Guideline 6.4(a) requires that prior to entry of the plea, counsel make certain the client "fully and completely" understands "the maximum punishment, sanctions, and other consequences" of the plea. Again, while the advice may vary depending on the certainty of the consequences, investigation based on the client's specific immigration status is necessary in order to be able to provide correct advice about the certainty of the immigration consequences of a plea.

The ABA Standards set forth similar responsibilities. ABA Pleas of Guilty Standard 14-3.2(f) provides: "To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." With respect specifically to immigration consequences, the ABA emphasizes that "counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." *Id.* cmt. at 127. The commentary urges counsel to be "active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." *Id.* cmt. at 126-27.

The fact that many states³ require court advisals regarding potential immigration consequences of a guilty plea does not obviate the need for defense counsel to investigate and advise the defendant. The ABA's commentary to ABA Pleas of Guilty Standard 14-3.2 states that the court's "inquiry is not, of course, any substitute for advice by counsel," because:

The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

Id. See also ABA Pleas of Guilty Standard 14-3.2(f) cmt. at 126 (“[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.”).

Defense counsel should be aware that prosecutors also have a responsibility to consider deportation and other so-called “collateral” consequences in plea negotiations. Prosecutors are not charged merely with the obligation to seek the maximum punishment in all cases, but with the broader obligation to “see that justice is accomplished.” National District Attorneys Association, *National Prosecution Standards* § 1.1 (2d ed. 1991). Prosecutors are thus trained to take these collateral consequences into account during the course of plea bargaining. *E.g.* U.S. Dep’t of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997) (in determining whether to enter into a plea agreement, “the attorney for the government should weigh *all relevant considerations*, including . . . [t]he probable sentence *or other consequences* if the defendant is convicted”) (emphasis added). These prosecutor responsibilities can be cited whenever a prosecutor claims that he or she cannot consider immigration consequences because to do so would give an unfair advantage to noncitizen defendants.

Duty to investigate and advise about immigration consequences of sentencing alternatives:

At the sentencing stage, NLADA Guideline 8.2(b) requires that counsel be “familiar with direct and collateral consequences of the sentence and judgment, including . . . deportation”; and *id.* 8.3(a) requires the client be informed of “the likely and possible consequences of sentencing alternatives.” For example, some immigration consequences are triggered by the length of any prison sentence. In some cases, a variation in prison sentence of one day can make a huge difference in the immigration consequences triggered. See, *e.g.*, 8 U.S.C. 1101(a)(43) (prison sentence of one year for theft offense results in “aggravated felony” mandatory deportation for many noncitizens; 364-day sentence may avoid deportability or preserve relief from deportation).

For resources for defense lawyers on the immigration consequences of criminal cases, see attached Appendices:

Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)

Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources for defense lawyers)

ENDNOTES:

* This advisory was authored by Manuel D. Vargas of the Immigrant Defense Project for the Defending Immigrants Partnership with the input and collaboration of the Immigrant Legal Resource Center, the National Immigration Project of the National Lawyers Guild, and the Washington Defender Association’s Immigration Project.

¹ Over the years, a number of courts have dismissed ineffective assistance of counsel claims based on failure to give advice on immigration consequences under the “collateral consequences” rule. See, *e.g.*, *People v. Ford*, 86 N.Y.2d 397 (1995). Other courts — particularly since the harsh immigration law amendments of 1996 — have rejected this rule. See, *e.g.*, *State v. Nunez-Valdez*, 200 N.J. 129, 138 (2009) (“[T]he traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here.”).

² The Court remanded Mr. Padilla’s case to the Kentucky courts for further proceedings on whether he can satisfy *Strickland*’s second prong—prejudice as a result of his constitutionally deficient counsel.

³ Thirty jurisdictions including the District of Columbia and Puerto Rico have statutes, rules, or standard plea forms that require a defendant to receive notice of potential immigration consequences before the court will accept his guilty plea.

Appendix A

Immigrant Defense Project

Immigration Consequences of Convictions Summary Checklist*

GROUND OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)	GROUND OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)	INELIGIBILITY FOR US CITIZENSHIP
<p>Aggravated Felony Conviction</p> <ul style="list-style-type: none"> ➤ <i>Consequences</i> (in addition to deportability): <ul style="list-style-type: none"> ◆ Ineligibility for most waivers of removal ◆ Ineligibility for voluntary departure ◆ Permanent inadmissibility after removal ◆ Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal ➤ <i>Crimes covered</i> (possibly even if not a felony): <ul style="list-style-type: none"> ◆ Murder ◆ Rape ◆ Sexual Abuse of a Minor ◆ Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam) ◆ Firearm Trafficking ◆ Crime of Violence + 1 year sentence** ◆ Theft or Burglary + 1 year sentence** ◆ Fraud or tax evasion + loss to victim(s) > \$10,000 ◆ Prostitution business offenses ◆ Commercial bribery, counterfeiting, or forgery + 1 year sentence** ◆ Obstruction of justice or perjury + 1 year sentence** ◆ Certain bail-jumping offenses ◆ Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ◆ Attempt or conspiracy to commit any of the above 	<p>Conviction or <i>admitted commission</i> of a Controlled Substance Offense, or DHS has reason to believe individual is a drug trafficker</p> <ul style="list-style-type: none"> ➤ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana) <hr/> <p>Conviction or <i>admitted commission</i> of a Crime Involving Moral Turpitude (CIMT)</p> <ul style="list-style-type: none"> ➤ Crimes in this category cover a broad range of crimes, including: <ul style="list-style-type: none"> ◆ Crimes with an <i>intent to steal or defraud</i> as an element (e.g., theft, forgery) ◆ Crimes in which <i>bodily harm</i> is caused or threatened by an intentional act, or <i>serious bodily harm</i> is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes) ◆ Most sex offenses ➤ <i>Petty Offense Exception</i>—for one CIMT if the client has no other CIMT + the offense is not punishable > 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months 	<p>Conviction or admission of the following crimes bars a finding of good moral character for up to 5 years:</p> <ul style="list-style-type: none"> ➤ Controlled Substance Offense (unless single offense of simple possession of 30g or less of marijuana) ➤ Crime Involving Moral Turpitude (unless single CIMT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months) ➤ 2 or more offenses of any type + aggregate prison sentence of 5 years ➤ 2 gambling offenses ➤ Confinement to a jail for an aggregate period of 180 days
<p>Controlled Substance Conviction</p> <ul style="list-style-type: none"> ➤ EXCEPT a single offense of simple possession of 30g or less of marijuana 	<p>Conviction of 2 or more offenses of any type + aggregate prison sentence of 5 years</p>	<p>Aggravated felony conviction on or after Nov. 29, 1990 (and murder conviction at any time) <i>permanently</i> bars a finding of moral character and thus citizenship eligibility</p>
CONVICTION DEFINED		
<p>Crime Involving Moral Turpitude (CIMT) Conviction</p> <ul style="list-style-type: none"> ➤ For crimes included, see Grounds of Inadmissibility ➤ One CIMT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor) ➤ Two CIMTs committed at any time “not arising out of a single scheme” 	<p>A formal judgment of guilt of the noncitizen entered by a court or, if adjudication of guilt has been withheld, where:</p> <ul style="list-style-type: none"> (i) a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND (ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed. <p>THUS:</p> <ul style="list-style-type: none"> ➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated) ➤ A deferred adjudication disposition without a guilty plea (e.g., NY ACD) is NOT a conviction ➤ A youthful offender adjudication (e.g., NY YO) is NOT a conviction 	
<p>Firearm or Destructive Device Conviction</p>		
<p>Domestic Violence Conviction or other domestic offenses, including:</p> <ul style="list-style-type: none"> ➤ Crime of Domestic Violence ➤ Stalking ➤ Child abuse, neglect or abandonment ➤ Violation of order of protection (criminal or civil) 		
INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL		
<ul style="list-style-type: none"> ➤ Aggravated felony conviction ➤ Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States 		
INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL		
<p>“Particularly serious crimes” make noncitizens ineligible for asylum and withholding. They include:</p> <ul style="list-style-type: none"> ➤ Aggravated felonies <ul style="list-style-type: none"> ◆ All will bar asylum ◆ Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding ◆ Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding ➤ Other serious crimes—no statutory definition (for sample case law determination, see Appendix F) 		

*For the most up-to-date version of this checklist, please visit us at <http://www.immigrantdefenseproject.org>.

**The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.]

Immigrant Defense Project

Suggested Approaches for Representing a Noncitizen in a Criminal Case*

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Noncitizen Criminal Defendants in New York* (4th ed., 2006).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- ◆ Drug offense (§5.4)
- ◆ Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- ◆ Property offense, including theft, burglary or fraud offense (§5.6)
- ◆ Firearm offense (§5.7)

1. If your client is a **LAWFUL PERMANENT RESIDENT**:

- First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)
- Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).
- If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an “aggravated felony.” This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a “particularly serious crime” in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

2. If your client is a **REFUGEE** or **PERSON GRANTED ASYLUM**:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for a special waiver of inadmissibility for refugees and asylees (§3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a “particularly serious crime” in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

3. If your client is **ANY OTHER NONCITIZEN** who might be eligible now or in the future for LPR status, asylum, or other relief:

IF your client has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and (4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

IF your client has a fear of persecution in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy (**TPS**) of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a “particularly serious crime” (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a “particularly serious crime” (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).
- In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

*References above are to sections of our manual.

See reverse ➤

Appendix B – Resources for Criminal Defense Lawyers

This Appendix lists and describes some of the resources available to assist defense lawyers in complying with their ethical duties to investigate and give correct advice on the immigration consequences of criminal convictions. This section will cover the following resources:

1. Protocol “how-to” guide for public defense offices seeking to develop an in-house immigrant service plan;
2. Outside expert training and consultation services available to other defense provider offices and attorneys;
3. National books and practice aids;
4. Federal system, regional, or state-specific resources.

1. Protocol “how-to” guide for public defense offices seeking to develop an in-house immigrant service plan

Many public defender organizations have established immigrant service plans in order to comply with their professional responsibilities towards their non-citizen defendant clients. Some defender offices maintain in-house immigration expertise with attorneys on staff trained as immigration experts. For example, The Legal Aid Society of the City of New York, which oversees public defender services in four of New York City’s five boroughs, has an immigration unit that counsels attorneys in the organization’s criminal division. Other public defender organizations consult with outside experts. For example, several county public defender offices in California contract with the Immigrant Legal Resource Center to provide expert assistance to public defenders in their county offices. Other public defender organizations have found yet other ways to address this need.

For guidance on how a public defender office can get started implementing an immigration service plan, and how an office with limited resources can phase in such a plan under realistic financial constraints, defender offices may refer to *Protocol for the Development of a Public Defender Immigration Service Plan* (May 2009), written by Cardozo Law School Assistant Clinical Law Professor Peter L. Markowitz and published by the Immigrant Defense Project (IDP) and the New York State Defenders Association (NYSDA). (*This is available at <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm>*).

This publication surveys the various approaches that defender organizations have taken, discusses considerations distinguishing those approaches, provides contact information for key people in each organization surveyed to consult with on the different approaches adopted, and includes the following appendices:

- Sample immigration consultation referral form
- Sample pre-plea advisal and advocacy documents
- Sample post-plea advisal and advocacy letters
- Sample criminal-immigration practice updates
- Sample follow-up immigration interview sheet
- Sample new attorney training outline
- Sample language access policy

2. Outside expert training and consultation services available to other defense provider offices and attorneys

For those criminal defense offices and individual practitioners who do not have access to in-house immigration experts, a wide array of organizations and networks has emerged in the past two decades to provide training and immigration assistance to public and private criminal defense attorneys regarding the immigration consequences of criminal convictions.

Some of the principal national immigration organizations with expertise on criminal/immigration issues (see organizations listed below) have worked together along with the National Legal Aid and Defender Association in a collaboration called the **Defending Immigrants Partnership** (www.defendingimmigrants.org), which coordinates on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent non-citizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions.

In addition to its national-level coordination activities, the Partnership offers many other services. For example, the Partnership coordinates and participates in trainings at both the national and the regional levels — including, since 2002, some 220 training sessions for about 10,500 people. In addition, the Partnership provides free resources directly to criminal defense attorneys through its website at www.defendingimmigrants.org. That website contains an extensive resource library of materials, including a free national training manual for the representation of non-citizen criminal defendants, see *Defending Immigrants Partnership, Representing Noncitizen Defendants: A National Guide* (2008), as well as jurisdiction-specific guides for Arizona, California, Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, New Mexico, North Carolina, Oregon, Texas, Vermont, Virginia, and Washington. The website also contains various quick-reference guides, charts, and outlines, national training powerpoint presentations, several taped webcastings, a list of upcoming trainings, and relevant news items and reports. **Website: www.defendingimmigrants.org.**

- DIP partner **Immigrant Defense Project** (IDP) is a New York-based immigrant advocacy organization that provides criminal defense lawyers with training, legal support and guidance on criminal/immigration law issues, including a free nationally-available hotline. IDP also has trained dozens of in-house immigrant defense experts at local defender organizations in New York, New Jersey, Pennsylvania, and other states. In addition, IDP maintains an extensive series of publications aimed at criminal defense practitioners. For example, visitors to the IDP's online resource page can find a free two-page reference guide summarizing criminal offenses with immigration consequences (see Appendix A attached). The IDP website also contains free publications focusing on other aspects of immigration law relevant to criminal defenders, such as aggravated felony and other crime-related immigration relief bars. In addition, IDP publishes a treatise aimed specifically at New York practitioners, *Representing Immigrant Defendants in New York* (4th ed. 2006). **Telephone: 212-725-6422. Website: www.immigrantdefenseproject.org.**
- DIP partner **Immigrant Legal Resource Center** (ILRC) is a San Francisco-based immigrant advocacy organization that provides legal trainings, educational materials, and a nationwide service called "Attorney of the Day" that offers consultations on immigration law to attorneys, non-profit organizations, criminal defenders, and others assisting immigrants, including consultation on the immigration consequences of criminal convictions. ILRC's consultation services are available for a fee (reduced for public defenders), which can be in the form of an hourly rate or via an ongoing contract. ILRC provides in house trainings for California public defender offices, and many offices contract with the ILRC to answer their questions on the immigration consequences of crimes. ILRC also provides immigration technical assistance on California Public Defender Association's statewide listserve, with about 5000 members, and maintains its own list serve of over 50 in-house immigration experts in defender offices throughout California to provide ongoing support, updates, and technical assistance. In addition, ILRC provides support to in-house experts in Arizona, Nevada, and Oregon. ILRC writes criminal immigration related practice advisories and reference guides for defenders which are posted on its website and widely disseminated, and is the author of a widely-used treatise for defense attorneys, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2009). **Telephone: 415-255-9499. Website: www.ilrc.org.**

- DIP partner **National Immigration Project** of the National Lawyers Guild (NIP/NLG) is a national immigrant advocacy membership organization with offices in Boston, Massachusetts that provides many types of assistance to criminal defense practitioners, including direct technical assistance to practitioners who need advice with respect to a particular case. These services are available free of charge and may be used by practitioners anywhere in the nation. NIP/NLG also provide trainings in the form of CLE seminars for defense lawyers, and is also responsible for publishing *Immigration Law and Crimes* (2009), the leading treatise on the relationship between immigration law and the criminal justice system, which is updated twice yearly and is also available on Westlaw. **Telephone: 617-227-9727. Website: www.nationalimmigrationproject.org.**

For other organizations and networks that provide training and consultation services in specific states or regions of the country, see section (4) below entitled “Federal System, Regional, or State-Specific Resources.”

3. National Books and Practice Aids

- ***Immigration Consequences of Convictions Checklist*** (Immigrant Defense Project, 2008), 2-page summary, attached to this practice advisory, that many criminal defenders find useful as an in-court quick reference guide to spot problems requiring further investigation.
- ***Representing Noncitizen Criminal Defendants: A National Guide*** (Defending Immigrants Partnership, 2008), available for free downloading at <http://defendingimmigrationlaw.com>.
- ***Aggravated Felonies: Instant Access to All Cases Defining Aggravated Felonies*** (2006), by Norton Tooby & Joseph J. Rollin, available for order at <http://criminalandimmigrationlaw.com>.
- ***Criminal Defense of Immigrants*** (4th ed., 2007, updated monthly online), by Norton Tooby & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***The Criminal Lawyer’s Guide to Immigration Law: Questions and Answers*** (American Bar Association, 2001), by Robert James McWhirter, available for order at <http://www.abanet.org>.
- ***Immigration Consequences of Criminal Activity*** (4th ed., 2009), by Mary E. Kramer, available for order at <http://www.ailapubs.org>.
- ***Immigration Consequences of Criminal Convictions***, by Tova Indritz and Jorge Baron, in ***Cultural Issues in Criminal Defense*** (Linda Friedman Ramirez ed., 2d ed., 2007), available for order at <http://www.jurispub.com>.
- ***Immigration Law and Crimes*** (2009), by Dan Kesselbrenner and Lory Rosenberg, available for order at: <http://west.thompson.com>.
- ***Practice Advisory: Recent Developments on the Categorical Approach: Tips for Criminal Defense Lawyers*** (2009), by Isaac Wheeler and Heidi Altman, available for free downloading at <http://www.immigrantdefenseproject.org/webPages/practiceTips.htm>.
- ***Safe Havens: How to Identify and Construct Non-Deportable Offenses*** (2005), by Norton Tooby & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***Tips on How to Work With an Immigration Lawyer to Best Protect Your Non-Citizen Defendant Client*** (2004), by Manuel D. Vargas, available for free downloading at <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm>.
- ***Tooby’s Crimes of Moral Turpitude: The Complete Guide*** (2008), by Norton Tooby, Jennifer Foster, & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***Tooby’s Guide to Criminal Immigration Law: How Criminal and Immigration Counsel Can Work Together to Protect Immigration Status in Criminal Cases*** (2008), by Norton Tooby, available for free downloading at <http://www.criminalandimmigrationlaw.com>.

4. Federal system, regional, or state-specific resources

Federal System:

- Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (National Immigration Project, 2010), available at www.defendingimmigrants.org.

Regional resources:

Ninth Circuit Court of Appeals region

- Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

Seventh Circuit Court of Appeals region

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.

State-Specific Resources:

Arizona

- In 2007, the Arizona Defending Immigrants Partnership was launched to provide information and written resources to Arizona criminal defense attorneys on the immigration consequences of criminal convictions. Housed at the Florence Immigrant and Refugee Rights Project (FIRRP) and funded by the Arizona Foundation for Legal Services and Education, the partnership is run by Legal Director Kara Hartzler, who provides support, individual consultations, and training to Arizona criminal defense attorneys and other key court officials in their representation of noncitizens. Telephone: (520) 868-0191.
- Kathy Brady, Kara Hartzler, *et al.*, *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (2009), available at www.ilrc.org and www.defendingimmigrants.org.
- Kara Hartzler, *Immigration Consequences of Your Client's Criminal Case* (2008), Powerpoint presentation available at www.defendingimmigrants.org.
- Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

California

- The ILRC coordinates the California Defending Immigrants Partnership to provide public defenders in California with the critical resources and training they need on the immigration consequences of crimes. In particular, the ILRC provides mentorship of in-house experts in defender offices across the state, coordination and monitoring of a statewide interactive listserv of in-house defender experts, technical assistance on immigration related questions posted on California Public Defender Association's Claranet statewide listserv, ongoing training of county public defender offices, and written resources. The ILRC also provides technical assistance to several county defender offices by contract. A comprehensive list and description of these and other criminal immigration law resources for criminal defenders in California is provided at www.ilrc.org.
- Brady *et al.*, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.
- Katherine Brady, *Quick Reference Chart to Determining Selected Immigration Consequences to Select*

California Offenses (2010), available at www.ilrc.org.

- Katherine Brady, *Effect of Selected Drug Pleas After Lopez v. Gonzales*, a quick reference chart on the immigration consequences of drug pleas for criminal defenders in the Ninth Circuit (2007), available at www.ilrc.org.
- *Immigration Criminal Law Resources for California Criminal Defenders*, available at www.ilrc.org.
- *Tooby's California Post-Conviction Relief for Immigrants* (2009), available for order at <http://www.criminalandimmigrationlaw.com>.
- The Immigrant Rights Clinic at the University of California at Davis Law School provides limited, but free consultation to public defender offices that have limited immigration related resources. Contact Raha Jorjani at rjorjani@ucdavis.edu.
- In Los Angeles, the office of the Los Angeles Public Defender offers free consultation through Deputy Public Defender Graciela Martinez. She also regularly presents trainings on this issue to indigent defenders and works with in-house defender experts in the Southern California region. She can be reached at gmartinez@pubdef.lacounty.gov.

Colorado

- Hans Meyer, *Plea & Sentencing Strategy Sheets for Colorado Felony Offenses & Misdemeanor Offenses* (Colo. State Public Defender 2009). Contact Hans Meyer at hans@coloradoimmigrant.org.

Connecticut

- Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2007), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.
- Elisa L. Villa, *Immigration Issues in State Criminal Court: Effectively Dealing with Judges, Prosecutors, and Others* (Conn. Bar Inst., Inc., 2007).

District of Columbia

- Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Def. Serv., 2008).

Florida

- *Quick Reference Guide to the Basic Immigration Consequences of Select Florida Crimes* (Fla. Imm. Advocacy Ctr. 2003), available at www.defendingimmigrants.org.

Illinois

- The Heartland Alliance's National Immigrant Justice Center (NIJC) offers no-cost trainings and consultation to criminal defense attorneys representing non-citizens, and also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings.
- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Selected Immigration Consequences of Certain Illinois Offenses* (National Immigration Project, 2003), available at www.defendingimmigrants.org.

Indiana

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Immigration Consequences of Criminal Convictions* (Indiana Public Defender Council, 2007), available at <http://www.in.gov/ipdc/general/manuals.html>.

Iowa

- Tom Goodman, *Immigration Consequences of Iowa Criminal Convictions Reference Chart*.

Maryland

- *Abbreviated Chart for Criminal Defense Practitioners of the Immigration Consequences of Criminal Convictions Under Maryland State Law* (Maryland Office of the Public Defender & University of Maryland School of Law Clinical Office, 2008).

Massachusetts

- Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (National Immigration Project, 2006), available at www.defendingimmigrants.org.
- Wendy Wayne, *Five Things You Must Know When Representing Immigrant Clients* (2008).

Michigan

- David Koelsch, *Immigration Consequences of Criminal Convictions (Michigan Offenses)*, U. Det. Mercy School of Law (2008), available at <http://www.michiganlegalaid.org>.

Minnesota

- Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999).

Nevada

- The ILRC and University of Nevada, Las Vegas Thomas & Mack Legal Clinic, William S. Boyd School of Law (UNLV) provide written resources, training, limited consultation, and support of in-house defender experts in Nevada public defense offices.
- The ILRC and UNLV are finalizing in 2010 portions of *Immigration Consequences of Crime: A Guide to Representing Non-Citizen Criminal Defendants in Nevada*, including a practice advisory on the immigration consequences and defense arguments to pleas to Nevada sexual offenses and the immigration consequences of Nevada drug offenses. They will be posted at www.ilrc.org and www.defendingimmigrants.org.

New Jersey

- The IDP, Legal Services of New Jersey, Rutgers Law School-Camden and the Camden Center for Social Justice collaborate with the New Jersey Office of Public Defender to provide written resources, trainings and consultations to New Jersey criminal defense lawyers who represent non-citizens.
- Joanne Gottesman, *Quick Reference Chart for Determining the Immigration Consequences of Selected New Jersey Criminal Offenses* (2008), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

New Mexico

- The New Mexico Criminal Defense Lawyers Association (NMCDLA) assists defenders in that state concerning immigration issues and has presented several continuing legal education programs in various locations of the state on the immigration consequences of criminal convictions and the duty of criminal defense lawyers when the client is not a U.S. citizen. NMCDLA regularly publishes a newsletter in which one ongoing column in each issue is dedicated to immigration consequences.
- Jacqueline Cooper, *Reference Chart for Determining Immigration Consequences of Selected New Mexico Criminal Offenses*, New Mexico Criminal Defense Lawyers Association (July 2005), available at www.defendingimmigrants.org.

New York

- The IDP and the New York State Defenders Association Criminal Defense Immigration Project collaborate with New York City indigent criminal defense service providers and upstate New York public defender offices to provide written resources, trainings and consultations to New York criminal defense lawyers who represent non-citizens. Additional information on IDP's services and written resources is available at www.immigrantdefenseproject.org.
- Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4th ed. 2006), available at www.immigrantdefenseproject.org.
- *Quick Reference Chart for New York Offenses* (Immigrant Defense Project, 2006), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

North Carolina

- Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* (Office of Indigent Defense Services, 2008).

Oregon

- Steve Manning, *Wikipedia Practice Advisories on the Immigration Consequences of Oregon Criminal Offenses* (Oregon Chapter of American Immigration Lawyers Association and Oregon Criminal Defense Lawyers Association, 2009), available at <http://www.aialaoregon.com>.

Pennsylvania

- *A Brief Guide to Representing Noncitizen Criminal Defendants in Pennsylvania*, (Defender Association of Philadelphia, 2010), soon to be available at www.immigrantdefenseproject.org.

Tennessee

- Michael C. Holley, *Guide to the Basic Immigration Consequences of Select Tennessee Offenses* (2008).
- Michael C. Holley, *Immigration Consequences: How to Advise Your Client* (Tennessee Association of Criminal Defense Law).

Texas

- *Immigration Consequences of Selected Texas Offenses: A Quick Reference Chart* (2004-2006), available at www.defendingimmigrants.org.

Vermont

- Rebecca Turner, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Vermont* (2005)
- Rebecca Turner, *Immigration Consequences of Select Vermont Criminal Offenses Reference Chart* (2006), available at www.defendingimmigrants.org.

Virginia

- Mary Holper, *Reference Guide and Chart for Immigration Consequences of Select Virginia Criminal Offenses* (2007), available at www.defendingimmigrants.org.

Washington

- The Washington Defender Organization (WDA) Immigration Project provides written resources and offers case-by-case technical assistance and ongoing training and education to criminal defenders, prosecutors, judges and other entities within the criminal justice system. Go to: www.defensenet.org/immigration-project

- Ann Benson and Jonathan Moore, *Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses* (Washington Defender Association's Immigration Project, 2009), available at www.defendingimmigrants.org and <http://www.defensenet.org/immigration-project/immigration-resources>.
- *Representing Immigrant Defendants: A Quick Reference Guide to Key Concepts and Strategies* (WDA Immigration Project, 2008), available at <http://www.defensenet.org/immigration-project/immigration-resources>.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws (formerly California Criminal Law and Immigration)* (2009), available at www.ilrc.org.

Wisconsin

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- Wisconsin State Public Defender, *Quick Reference Chart – Immigration Consequences of Select Wisconsin Criminal Statutes*.



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A Defending Immigrants Partnership Practice Advisory¹
STEPS TO ADVISING A NONCITIZEN DEFENDANT
UNDER *PADILLA V. KENTUCKY*

April 15, 2010

In *Padilla v. Kentucky*² the Supreme Court held that criminal defense counsel have a Constitutional duty to address the immigration consequences facing a noncitizen defendant. Failure to perform this duty constitutes ineffective assistance of counsel under the Sixth Amendment.³

The requirement to address immigration consequences in a criminal case may seem like an overwhelming task to defenders with little experience in this area. It is a challenging area of law even to experienced defenders. However, it can be done. Many indigent defender offices, from small counties to state-wide organizations, have been competently providing this representation for many years. This is possible partly because there is a large and growing number of resources aimed specifically at assisting criminal defenders in this task. Extensive print resources, trainings, and individual consultation services are available—many of them for free—and more will be made available now that the decision has come out. One compilation of such resources is at www.defendingimmigrants.org. These resources address the questions of how to make the immigration analysis itself, as well as how to structure office systems and forms to more efficiently incorporate this representation.

This Advisory will discuss two points. First, it will discuss the scope of counsel’s duty and the steps required to provide competent criminal defense in terms of immigration consequences. Second it will highlight some resources that are currently available.

A. What Must I Do: The Scope of the Duty under *Padilla v. Kentucky*

Addressing immigration consequences in a criminal case involves similar steps to conducting a “regular” criminal defense. Counsel must *investigate and analyze* the case, *advise* on potential consequences, elicit the *client’s wishes*, and *defend* the case accordingly.⁴

1. **INVESTIGATE THE FACTS.** In each case counsel must investigate the immigration status of the defendant and other relevant facts, including family ties in the U.S.⁵ Relevant facts can be captured

¹ This advisory was authored for the Defending Immigrants Partnership by Katherine Brady and Angie Junck of the Immigrant Legal Resource Center, in collaboration with the Immigrant Defense Project, the National Immigration Project of the National Lawyers Guild, the Washington Defenders Association, and Rebecca Turner.

² *Padilla v. Kentucky*, 599 U.S. ____ (March 31, 2010).

³ *Padilla* slip opinion at * 8-9, 13. See discussion in DIP, “Duty of Criminal Defense Counsel Representing an Immigrant Defendant after *Padilla v. Kentucky*” at www.immigrantdefenseproject.org.

⁴ This section draws from *Padilla* and from the published professional standards of practice that the Court referenced as guides for determining counsel’s duty to advise, including the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) (see *Padilla* slip opinion at * 9).

⁵ American Bar Association Pleas of Guilty Standard 14-3.2(f), commentary at p. 127.

using a questionnaire; samples are posted at www.defendingimmigrants.org. If the defendant is a noncitizen, counsel must obtain his or her entire criminal record, which is required to make an immigration analysis.

2. **ANALYZE THE IMMIGRATION IMPACT OF KEY DEFENSE DECISIONS AND ADVISE THE CLIENT.** Based on this information, counsel should investigate the specific immigration consequences that the plea would impose on the defendant. Counsel must consider both avoiding deportability, and maintaining eligibility for relief from deportation (“removal”).⁶ Failing to provide advice on immigration consequences, i.e. remaining silent on the subject, constitutes ineffective assistance of counsel.⁷ As with other aspects of defense strategy, in some cases counsel will be able to advise that a plea clearly will carry a particular immigration consequence, while in other cases counsel will advise that the plea carries a risk of a particular immigration consequence, but that it is not clear whether the consequence will adhere.

This analysis and advice also must take place before a defendant decides to go to trial, enters a diversion or drug treatment program, handles a charge of violating the terms of probation or of a protection order, admits an addiction, or handles a sentencing or delinquency hearing – all of which can carry adverse immigration consequences. If an incarcerated defendant has an immigration hold or detainer, before obtaining release from criminal custody counsel should inform her/his client that DHS might detain him or her. Because persons often are transferred multiple times and long distances in immigration custody, criminal custody may be preferable.

3. **ASCERTAIN THE CLIENT’S WISHES.** In some cases the defendant may have to choose whether to prioritize getting a good immigration result versus a lesser criminal penalty. Some immigrant defendants care only about getting the smallest jail or prison term. Other immigrant defendants would trade any concern in order to avoid removal so that they can remain with their families. They would be willing to plead to a more serious offense, take additional jail time, or go to trial and risk a higher sentence. A defendant can only make this crucial decision if he or she understands the potential criminal and immigration penalties.
4. **DEFEND THE CASE ACCORDING TO THE CLIENT’S PRIORITIES.** If the client states that immigration consequences are the highest priority, the defense should be conducted with this in mind.⁸ In that case the defense goals may be quite different than they would if just criminal penalties were at stake. For example, certain minor misdemeanors carry terrible immigration penalties and must be avoided, while some properly constructed felony pleas can be relatively safe. In fact, in some cases defendants purposely plead *up* for immigration purposes. In *Padilla* the Court indicated that the *prosecution* also should take immigration consequences into account.⁹

B. Meeting *Padilla*’s Challenge: Resources to Help Defenders Provide Competent Advice

How are criminal defenders, especially indigent defenders with limited budgets and time, going to be able to provide competent representation? This is a larger discussion that will be undertaken across the country in light of *Padilla*. These discussions should take account of existing resources, as well as how to create new resources and partnerships.

⁶ *Padilla* slip opinion at * 10-11.

⁷ *Id.* at * 13.

⁸ *Id.* at * 16.

⁹ “Finally, informed 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.” *Ibid.*

- **Print Resources:** There are extensive print materials written specifically for criminal defense counsel who are representing noncitizens. For example, see state-specific analyses of the immigration consequences of commonly charged offenses, national and state-specific manuals explaining immigration consequences, and other free resources written for criminal defenders, as well as information about obtaining hornbooks on the subject, at www.defendingimmigrants.org. See also Appendix B “Resources for Criminal Defense Lawyers” in Defending Immigrants Partnership, “Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla v. Kentucky” at www.immigrantdefenseproject.org.
- **Training.** Live and online trainings are available, both national and state- or circuit-specific. In addition, free materials to help local experts give trainings, including power points and other materials, can be downloaded at www.defendingimmigrants.org
- **Consultation.** As important as print resources and training is the possibility of obtaining expert consultation on individual cases. Expert consultation can save a lot of time and ensure a level of certainty in the answer. Defender offices obtain expert advice under a range of different methods, so that not every attorney on staff needs to understand the immigration component. Offices may appoint a research attorney to devote part-time to becoming an in-house expert, under mentorship of a more established expert; may take advantage of free expert consultation, or else contract with non-profit or private experts to provide consultation on difficult cases; or may move for court funding for an immigration expert on a particular case. Private offices often require noncitizen clients to pay for immigration consultation as part of the defense work. See discussion of various immigrant service plan models in “Protocol for the Development of a Public Defender Immigrant Service Plan” at www.immigrantdefenseproject.org/webPages/crimJustice.htm. There are also existing and planned list serves so that defenders grappling with these issues may discuss common challenges.



Criminal Justice Section Newsletter

Volume 18, Issue 3 Spring 2010

PRACTICE TIPS

Practice Pointers for the Criminal Defense Attorney in the Aftermath of *Padilla v. Kentucky*

By Sara Elizabeth Dill and Robert J. McWhirter

A deportation may result in “loss of both property and life; or all that makes life worth living.” *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

The United States has an extraordinary number of non-citizens. On occasion, these individuals come into contact with the criminal justice system, often for very minor offenses. However, under current immigration laws, even misdemeanor offenses and some diversionary programs can still subject the individual to deportation. In the recent decision of *Padilla v. Kentucky*, 559 U.S. ____ (March 31, 2010), the United States Supreme Court addressed the question of whether an alien was denied effective assistance of counsel, and thus entitled to reversal of the conviction based on the failure to warn or advise of the immigration consequences of a conviction. The Court, in a 7-2 decision, held that deportation is uniquely severe and that the immigration consequences of criminal convictions are inextricably linked to criminal proceedings. Further, the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a non-citizen defendant regarding the immigration consequences of a guilty plea and, absent this advice, a noncitizen may claim ineffective assistance of counsel.



Sara Elizabeth Dill and Robert J. McWhirter are co-chairs of the ABA Criminal Justice Section’s Immigration Committee.



Although this practice pointer is only able to flag a few issues, it can provide a good starting point for criminal defense attorneys in effectively representing the non-citizen defendant. For a more detailed analysis, see, ROBERT J. McWHIRTER, *A CRIMINAL LAWYER’S GUIDE TO IMMIGRATION LAW: QUESTIONS AND ANSWERS*, 2D ED. *Chapter 4: Immigration Consequences of Criminal Convictions* (2005).

Some key points for defense attorneys to consider post-*Padilla*:

- Deportation is a penalty, not a collateral consequence of the criminal proceeding, thus the direct vs. collateral distinction does not apply
- Professional standards for defense lawyers (such as the ABA standards) provide guiding principles for what constitutes effective assistance of counsel
- The 6th Amendment requires affirmative, competent advice regarding immigration consequences, non-advice/silence is insufficient/ineffective
- The Court endorses “informed consideration” of deportation consequences by both the defense and prosecution in plea-bargaining
- Attorneys need to investigate and advise about immigration consequences of plea alternatives
 - NLADA Guideline 6.2(a) and ABA Pleas of Guilty Standard 14-3.2(f)
 - Counsel should be familiar with basic immigration consequences that flow from different types of pleas to different offenses

Continued on page 6

Inside This Issue:

**How You Can Help with
Collateral Consequences
in Your State (p. 2)**

After Padilla, continued from page 1

- Counsel must investigate, research, and specifically advise
- Attorneys need to investigate and advise about immigration consequences of sentencing alternatives
 - Some immigration consequences are triggered by the length of prison sentence – reducing sentence by one day can make a huge difference (the 365 vs. 364)
 - Diversion Programs and Required “pleas” with subsequent dismissal/vacating plea

At the commencement of work on a criminal case, a lawyer should determine the current immigration status of the client (e.g. no status, pending application, non-immigrant visa, lawful permanent resident, temporary protected status, or U.S. Citizen). This initial inquiry is vital, as it will guide the remainder of the representation. An individual’s status strictly determines what immigration penalties will result from a conviction. Part of this inquiry also involves discussion of the individual’s family in the United States, as the presence of a lawful permanent resident or U.S. Citizen family member may allow an individual to gain lawful status, or make an individual eligible for a waiver, should the criminal case result in a conviction.

The following are questions that a defense attorney should ask the client at the initial interview:

- Where were you born?
- How did you enter the United States (at an airport, border crossing station, or undetected)?
- List all immigration statuses ever held (e.g. student visa, tourist visa, business/employment based visa, refugee, asylee, family-based visa, lawful permanent resident)?
- How and when did you obtain this status?
- Do you have any pending applications for immigration status?
- Are your parents, siblings, or children lawful permanent residents or citizens?
- Have you ever been ordered deported or been subject to immigration court proceedings?
- Have you previously been arrested or charged with a crime?
- Did you plead guilty to a criminal offense prior to 1996? If yes, this may trigger the relief available under *INS v. St. Cyr*.
- If you previously pled guilty to a criminal offense, did your attorney discuss your immigration status and/or any possible immigration consequences with you? If no, then it may be possible to vacate the conviction.

One important thing to keep in mind at the outset is that the definition of “conviction” for immigration purposes is different than what is used in the criminal justice system and for other purposes. *See* 8 U.S.C. § 1101(a)(48). A “conviction” is a formal judgment of guilty of the noncitizen entered by a court, or if adjudication of guilt has been withheld, where a judge or jury has found noncitizen guilty or plea of guilty or nolo contendere entered or admission of sufficient facts to warrant finding of guilt and the judge has ordered some form of punishment, penalty, or restraint on the noncitizen’s liberty. For example, a “withhold of adjudication” or suspended entry of sentence, while not considered a conviction for most purposes, will be considered to be a conviction for immigration. A conviction also includes court-ordered drug treatment, values, anger management or domestic violence counseling alternative to incarceration disposition is a conviction if a guilty plea is taken (even if later vacated). Deferred adjudication dispositions without a guilty plea and youthful offender adjudications are not considered “convictions” for immigration purposes.

Title 8 U.S.C. § 1227 lists the following as grounds for deportation:

- Criminal acts without conviction showing the alien is a certain type of person, such as a drunk, addict, gambler, prostitute, or polygamist;
- A crime of “moral turpitude” (CIMT) misdemeanor if the alien is convicted of two or more crimes not involving a single scheme or a CIMT felony if the alien is convicted within 5 years of admission into the U.S. For a listing of CIMT, *see* NORTON TOOBY, *CRIMINAL DEFENSE OF IMMIGRANTS* VOLUMES I & II (2003) or NATIONAL LAWYER’S GUILD, *IMMIGRATION LAW AND DEFENSE* (3D ED. 1995);
- Weapons convictions, including misdemeanors, under 18 U.S.C. § 922(g)(1); 18 U.S.C. § 922(g)(5); 18 U.S.C. § 922(j) or analogous state provisions (trafficking in weapons is an aggravated felony, which will guarantee deportation, *see* 8 U.S.C. § 1101(a)(43)(C));
- Domestic violence convictions including stalking, child abuse, child neglect, child abandonment, or a violation of a protective order;
- Convictions for alien smuggling, immigration fraud, and alien voting;
- Drug convictions of any type unless the conviction is for simple possession of 30 grams or less of marijuana for personal use; and
- Any “aggravated felony” listed at 8 U.S.C. § 1101(a)(43).

Therefore, because attorneys are now required to give affirmative advice regarding immigration consequences, it is important that they keep on hand some basic resources. Both the ABA amicus brief and the decision in *Padilla* list books, online sources, and even state-specific guides to help determine whether a conviction for a particular offense will lead to deportation. These guides can instantly alert the defense attorney that there may be immigration consequences. At this point, it is the duty of the attorney to investigate further or hire an immigration attorney to evaluate the case and render an opinion. Many immigration attorneys are willing to work on an hourly or fixed fee basis to evaluate a client's immigration status, the nature of the criminal charges, and develop an opinion and strategy as to how to proceed and advise the client as to possible outcomes.

Currently many organizations are developing new resources to further help guide criminal defense attorneys in meeting their obligations under *Padilla*, and protecting the vital right to the effective assistance of counsel. The ABA Criminal Justice Section has posted on its web site a *Padilla* Resource page with links to various documents to assist lawyers in meeting their obligations at <http://new.abanet.org/sections/criminaljustice/CR109200/Pages/default.aspx>.

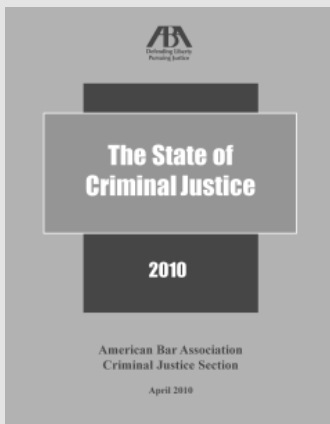
Coming Soon.... New Publication

Careers in Criminal Law

The forthcoming Criminal Justice Section book, *Careers in Criminal Law*, edited by attorney Ellen C. Brotman of Montgomery, McCracken, Walker & Rhoads, LLP, in Philadelphia, will describe the variety of career options available to lawyers and law students interested in in the criminal justice field.

The book will include articles by authors whose careers present an wide and impressive array of choices beyond that of defense and prosecution, including, for example, mitigation expert, victim advocate, and post-imprisonment re-entry specialist. Despite the diversity of career paths these authors have taken, they all have one important thing in common: their passion and commitment to what they do. Expected publication date is June/July 2010. Please check the Section website for availability.

NEW BOOK



The State of Criminal Justice 2010

Edited by Myrna Raeder

Authors from across the criminal justice field provide essays on topics ranging from white collar crime to international law to juvenile justice. This annual publication examines and reports on the major issues, trends and significant changes in the criminal justice system. As one of the cornerstones of the Criminal Justice Section's work, the publication serves as an invaluable resource for policy-makers, academics, and students of the criminal justice system alike.

The 2010 volume contains 19 chapters focusing on specific aspects of the criminal justice field, with new addition of full text and reports of all of the adopted official ABA policies passed in 2009-2010 that address criminal justice issues.

Product Details:

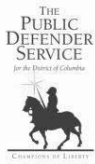
Regular Price: \$29.95

Section Member Price: \$24.95

8 1/2 x 10 - paperback

360 pages

Product Code: 5090126



Gwendolyn Washington, PDS Attorney

CLIENT INTERVIEW SHEET

1. Give Card and Discuss Attorney/Client Privilege.
2. Get Release Form Signed.
3. Explain to Client What Will Happen Today.
4. Inform the Client of What the Client Should Say in Court.

Family Data

Name: _____ Nickname: _____

Age: _____ DOB: _____ SSN: _____

Place of Birth: _____ Nationality: _____

Home Address: _____

Public Housing? _____ Who Else Lives There: _____

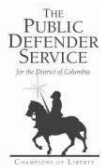
How Long at Current Address: _____ Years in DC: _____

Mailing Address: _____

Home Phone No.: () _____ Cell Phone No. () _____

Other Phone No.: () _____ Other Phone No. () _____

Other Family In Area: _____



Pending Cases

Judge: _____ Charge: _____ When: _____

Judge: _____ Charge: _____ When: _____

Judge: _____ Charge: _____ When: _____

Judge: _____ Charge: _____ When: _____

Judge: _____ Charge: _____ When: _____

Parole: _____

Employment

Employer: _____

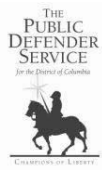
Address: _____

Supervisor: _____

How Long Employed There: _____ Work Phone No.: () _____

Health Issues

Receiving SSI Disability of Health Issues? _____ If so, why and how long?



Today's Arrest

When: _____

Where: _____

Co-Defendants: _____

Searched: _____

Statement(s): _____

Drug Test Results: _____

Immigration Status

Arrival Date in U.S. _____

Current Immigration Status: _____

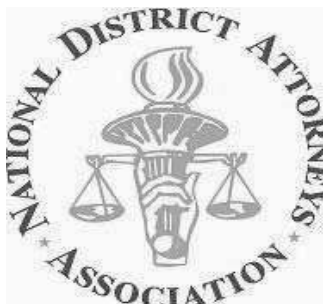
Status of Parents or Spouse: _____

Any family who are U.S. citizens? _____ If so, provide name(s) and
relationship(s) to the client: _____

All Immigration Proceedings (give years for pending and prior): _____

Have you ever been ordered deported (if yes, then provide date(s) and reason for
removal): _____

Alien Registration No. (A Number): A _____ ICE Detainer? _____



Padilla v. Kentucky

Angela A. Downes¹
NDAA Express Article July 2010

Padilla v. Kentucky, Criminal Pleas, Immigration and Deportable Offenses

Sixth Amendment-Right to Effective Assistance of Counsel. Ratified 12/15/1791

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

In Padilla v. Kentucky, the Supreme Court of the United States held that the petitioner's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. The failure of counsel to properly advise the client rose to the level of ineffective assistance of counsel. Immigration consequences of a plea are integral to the criminal penalty.

Petitioner Jose Padilla, a native of Honduras, was a permanent resident of the United States for over 40 years. He faced deportation after pleading guilty to the transportation of a large amount of marijuana in the Commonwealth of Kentucky.² Padilla's crime was

¹ Angela A. Downes is a Senior Attorney with the National Center for the Prosecution of Child Abuse, a program of the NDAA. The National District Attorneys Association is the oldest and largest professional organization representing criminal prosecutors in the world. Its members come from the offices of district attorneys, state's attorneys, attorneys general, and county and city prosecutors with the responsibility of prosecuting criminal violations in every state and territory of the United States. The organization offers technical assistance, training and research to prosecutors and others in the criminal justice field.

² Padilla v. Kentucky, 559 U.S. ____ (2010).

a deportable offense under 8 U.S.C. sec. 1227 (a)(2)(B)(i).³ Padilla claimed that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “did not have to worry about immigration status since he had been in the country so long”.⁴ Padilla relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. Padilla argued that he would have insisted on going to trial had he not received incorrect advice from his attorney.⁵

The Supreme Court of Kentucky held that that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction.⁶ The Kentucky Court reasoned that neither counsel’s failure to advise the petitioner about the possibility of removal, nor counsel’s incorrect advice, could provide a basis for relief.

According to the Sixth Amendment, a defendant is entitled to “effective assistance of competent counsel” before deciding whether to plead guilty to a charge.⁷ The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, i.e. matters not within the sentencing authority of the state trial court.⁸ For the Supreme Court of Kentucky, collateral consequences are outside the scope of representation required by the Sixth Amendment, and therefore the failure of defense counsel to advise the defendant of possible deportation consequences should not be the basis for an ineffective assistance of counsel claim.⁹

The U.S. Supreme Court reversed that decision but did not decide the issue of whether Padilla had been prejudiced and entitled to relief. The Supreme Court determined that it is the duty of defense counsels to provide accurate information to the criminal client who may possible face deportation. The court acknowledged that immigration is a complex body of law. However, because the stakes of deportation are so high for the defendants, the criminal defense lawyer has a duty to give correct advice when the deportation consequence is truly clear.¹⁰ These are cases where the deportation is distinct, clear and explicit. The Court reasoned that in situations in which the deportation consequences of a

³ 8 U.S.C. Sec. 1227 (a)(2)(b)(i). Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.

⁴ Padilla v. Kentucky, 253 S.W. 3d 482, 483 (Ky.2008).

⁵ Id at 484, 485.

⁶ Id. at 485.

⁷ McMann v. Richardson, 397 U.S. 759,771 (1970); Strickland v. Washington, 466 U.S., at 686.

⁸ Padilla v. Kentucky, 253 S.W. 3d, at 483-484 (citing Commonwealth v. Fuartado, 170 S.W.3d 384 (2005))

⁹ Id at 483.

¹⁰ Padilla v. Kentucky, 559 U.S. ____ (2010)

particular plea are uncertain or unclear, the duty of the private practitioner is limited¹¹. When the law is not succinct and straight forward, a criminal defense attorney only has to advise a non citizen that pending criminal charges may carry a risk of adverse immigration consequences.¹²

The Supreme Court held that Padilla's counsel as a matter of federal law had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from the country.¹³ Counsel must inform a client whether his plea carries a risk of deportation; the Court found that Padilla had sufficiently alleged that his counsel was constitutionally deficient.¹⁴

The Court's decision in *Padilla* dramatically raises the stakes of a noncitizens' criminal conviction. The importance of accurate legal advice for noncitizens' accused of crimes has never been more important.¹⁵ According to the Court, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.¹⁶ Deportation is intimately related to the criminal process.¹⁷

The concurring opinion agreed that any competent criminal defense counsel should reasonably advise the client of immigration status for a plea. A non citizen defendant's Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on the subject.¹⁸

The dissenting opinion seeks both a limitation on the constitutional obligation to provide advice and to clarify the consequences of bad advice. Reasoning that the Sixth Amendment has no application because the subject of the petition was the erroneous advice by counsel and not the prosecution for which Padilla was convicted; he was not entitled to ineffective assistance of counsel.¹⁹ The dissent reasons that this issue can be addressed by statute or legislation without expanding the constitutionality of the Sixth Amendment.

¹¹ Id.

¹² Id.

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

¹⁹ Id.

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E-SJI News

July 2010



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NEW JUVENILE & FAMILY BENCH GUIDE AVAILABLE FOR STATE TRIAL COURT JUDGES

As part of its efforts through SJI's Strategic Initiatives Grants (SIG) program, the Center for Public Policy Studies (CPPS) has recently finalized a Juvenile & Family Immigration Bench Guide for state trial court judges. The Juvenile & Family Bench Guide is intended to provide judges with an overview of areas of federal immigration law that might intersect with a juvenile or family case. Like its predecessor, the Bench Guide for State Trial Court Judges on Immigration Issues, the Juvenile & Family Bench Guide is designed to provide judges with a quick summary of key immigration law that they can access electronically from the bench. Judges using the guide should be aware that it is not meant to be an in-depth treatise on immigration law. The Juvenile & Family Bench Guide also contains two types of analyses: 1) topical discussions that examine how immigration law can affect the issues that may arise in a juvenile or family case; and 2) summaries of select areas of federal immigration law regarding legal entry or exposure to removal.

The Juvenile & Family Bench Guide is very user-friendly, and the PDF document is available now on the SJI website. All documents and work conducted by CPPS for this SIG project are available on their website: www.centerforpublicpolicy.org.

IMPLICATIONS OF PADILLA V. KENTUCKY ON THE DUTIES OF STATE COURT CRIMINAL JUDGES

The U.S. Supreme Court's decision in *Padilla v. Kentucky*, announced on March 31, 2010, held that a criminal defendant who was not advised by counsel that a guilty plea might carry a risk of deportation could claim that his representation was constitutionally deficient. The Court determined that the immigration consequences of a guilty plea are an integral part of the punishment that could result from a criminal conviction, and thus are within scope of the 6th Amendment's right to counsel. (continued on page 2)

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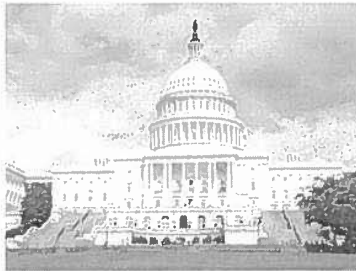
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It is clear that *Padilla* will affect the practice of criminal defense attorneys in cases involving immigrant defendants, particularly since all non-citizens, including lawful permanent residents, face the risk of deportation for a wide range of criminal convictions. However, it is not clear how state criminal court judges will be affected by the decision. Therefore, in their continuing work under a SJI-funded Strategic Initiatives Grant, the Center for Public Policy Studies (CPPS) published an updated summary document that includes: 1) a brief summary of the *Padilla* decision; 2) examples of how some states are requiring judges to investigate whether non-citizen criminal defendants have been advised of the potential immigration consequences of a guilty plea; and 3) what the judge's role will likely be as a direct result of the *Padilla* decision.

The updated summary discusses the potential implications that the Supreme Court's decision has for state criminal court judges in: 1) taking a guilty plea; 2) appointing counsel for indigent defendants; 3) assuring fairness for unrepresented defendants; and 4) becoming familiar with federal immigration law. As the law is just emerging, the purpose of the summary is to raise questions rather than provide definitive answers. The summary does, however, provide information on what some states are doing to address these issues.

This [document](#) is now available on both the SJI website, and the [CPPS website](#) on immigration issues in the state courts.

STATUS OF FY 2011 APPROPRIATIONS



On June 30, 2010, the House Commerce, Justice, Science (CJS) Subcommittee on Appropriations marked up the CJS Bill for FY 2011. The mark included SJI's full request of \$6,273,000; an increase of \$1,142,000 over the FY 2010 enacted budget. The Subcommittee published a [summary table](#) of the Bill, which is available on the House Appropriations [website](#). (continued on page 3)

Implications of *Padilla v. Kentucky* on the Duties of State Court Criminal Judges¹

By Steven Weller and John A. Martin²

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The purpose of this note is to discuss an emerging issue that is increasingly coming to the attention of state criminal court judges across the country. Under Federal immigration law, conviction of a wide range of crimes can put a lawful permanent resident at risk of deportation and affect other important immigration rights. A recent U.S. Supreme Court decision, *Padilla v. Kentucky*, 559 U.S. ____ (2010), has held that failure of a defendant's attorney to advise him about the potential immigration consequences of pleading guilty to a deportable criminal offense constitutes ineffective assistance of counsel. This note discusses the potential implications of that decision for state criminal court judges in: (1) taking a guilty plea; (2) appointing counsel for indigent defendants; (3) assuring fairness for unrepresented defendants; and (4) becoming familiar with Federal immigration law.

As the law is just emerging, the purpose of the note is to raise questions rather than provide definitive answers. In fact there are as yet no definitive answers to most of the questions we raise. We do, however, provide information on what states and judges around the country are considering as they struggle to decide how to address these issues.

Summary of Facts and Decision of *Padilla v. Kentucky*

Jose Padilla was arrested driving a tractor-trailer truck containing over 1,000 pounds of marijuana. He was charged in state court with two drug possession misdemeanors, felony drug trafficking, and a tax related crime. He entered a guilty plea in return for a sentence of five years, as opposed to the ten years he might have received had he been convicted at trial. Padilla was a native of Honduras who had been living in the U.S. as a lawful permanent resident for over 40 years. He had served in the U.S. armed forces honorably in Vietnam. Due to his immigrant status, Padilla asked his counsel before accepting the plea if the conviction carried any adverse immigration consequences and was advised that it did not, given his length of residence in the U.S.

¹ A version of this article has been submitted to *The Judges' Journal*.

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That advice was incorrect, as it is clear under Federal immigration law that the conviction was for a removable offense. Padilla subsequently sought post-conviction relief to have his plea set aside for ineffective representation of counsel.

The U.S. Supreme Court's decision in *Padilla v. Kentucky*, announced on March 31, 2010, held that advice of counsel regarding deportation risks of a criminal conviction falls within the scope of the Sixth Amendment's right to counsel, so that failure to advise a defendant that a guilty plea might carry a risk of deportation deprives the defendant of effective representation under the Sixth Amendment. The Court determined that "deportation is an integral part of the penalty that could be imposed on non-citizen defendants who plead guilty to specified crimes." The Court rejected respondent's argument that deportation is a collateral consequence that does not fall within the defense attorney's scope of representation. Further, the Court held that the defective representation went beyond the affirmative misadvice provided to Padilla and applied to failure to advise as well.

The Court went on to say that to be eligible for relief, the defendant must also show prejudice, that is, show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In the context of a guilty plea, this means that there must be a reasonable probability that the defendant would have entered a different plea had he or she known of the risk of deportation. The Court remanded the case to the Kentucky Supreme Court to make that determination.

It is clear that *Padilla* will affect the practice of criminal defense attorneys in cases involving immigrant defendants, particularly since all non-citizens, including lawful permanent residents, face the risk of deportation for a wide range of criminal convictions. It is not clear from the *Padilla* decision, however, how state criminal court judges will be affected by the decision. The potential impact of *Padilla* on state criminal court judges is the subject of this note.

Duties of the Judge in Accepting a Guilty Plea

The Supreme Court was silent on the issue of whether state criminal court judges have a duty to assure that immigrant defendants have been advised of the immigration consequences of a guilty plea, despite the fact that the issue was raised in the oral argument of the case. Still, a growing number of states now require, either through statute, court rule, or plea acceptance form, that judges investigate whether non-citizen criminal defendants have been advised of the potential immigration consequences of a guilty plea.

The following are examples of the range of requirements that different states have placed on judges with regard to non-citizen criminal defendants, ranging from a simple advisement to a more detailed investigation of the advice that a defendant has received. Note that the examples below provide that judges address all potential immigration consequences of a guilty plea and not just the risk of deportation.

- California Penal Code Ann. § 1016.5 (West 1985) requires a general advisement. This is the most common approach taken by those states that deal with the issue.

The court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

- D. C. Code Ann. §16-713 (1997) adds a provision that the defendant may request additional time to reconsider the plea.

(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime, the court shall administer the following advisement on the record to the defendant: "If you are not a citizen of the United States, you are advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

(b) Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement. If the court fails to advise the defendant as required by subsection (a) and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by subsection (a), the defendant shall be presumed not to have received the required advisement.

- Massachusetts Gen. Laws § 278:29D (1996 Supp.) requires a more specific advisement, including that admission of facts may have immigration consequences, and provides for a remedy if the advisement is not given.

The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States." The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of

the plea to disclose to the court his legal status in the United States.

If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.

- Minnesota Rule Crim. Proc. 15.01 and 15.02 (2010) requires that, before accepting a plea in a felony, gross misdemeanor, or misdemeanor case, the judge must ensure that defense counsel has told the defendant and the defendant understands:

If the defendant is not a citizen of the United States, a guilty plea may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

- Connecticut Gen. Stat. § 54-1j (2001) goes the furthest and puts a burden on the court to determine if the defendant understands the possible immigration consequences of a guilty plea.

(a) The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from readmission to the United States or denial of naturalization, pursuant to the laws of the United States. If the defendant has not discussed these possible consequences with the defendant's attorney, the court shall permit the defendant to do so prior to accepting the defendant's plea.

(b) The defendant shall not be required at the time of the plea to disclose the defendant's legal status in the United States to the court.

(c) If the court fails to address the defendant personally and determine that the defendant fully understands the possible consequences of the defendant's plea, as

required in subsection (a) of this section, and the defendant not later than three years after the acceptance of the plea shows that the defendant's plea and conviction may have one of the enumerated consequences, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.

Other states are struggling with efforts to develop appropriate requirements, either by statute or court rule. For example, one state is considering the following two very different alternatives for a court rule on plea advisements regarding immigration consequences of a guilty plea:

- Alternative A: If the defendant is not a citizen of the United States, ask the defendant's lawyer and the defendant whether they have discussed the possible risk of deportation that may be caused by the conviction. If it appears to the court that no such discussion has occurred, the court may not accept the defendant's plea until the deficiency is corrected.
- Alternative B: Advise the defendant who offers a plea of guilty or nolo contendere that such a plea by a non-citizen may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement.

Note that alternative A requires that the judge inquire whether the defendant is a non-citizen, while alternative B is given to all defendants and thus does not require the judge to inquire about the defendant's immigration status. Also, alternative A requires the judge to explore what the defendant and his or her attorney have discussed, while alternative B does not.

Even without a specific state requirement or court rule that the judge assure that a defendant has been advised of immigration consequences of a guilty plea before accepting the plea, after *Padilla* it is likely that many judges will feel that they have an ethical duty to do so to assure fundamental fairness for immigrant defendants. If a defendant indicates in court that he or she has not been advised of the possible immigration consequences of a guilty plea, the judge may consider refusing to accept the plea until the defendant has been properly advised. Judges may also find that defense attorneys representing immigrants may request time to investigate the potential immigration consequences before advising a client to enter a guilty plea, in order to meet the requirements for effective representation set forth in *Padilla*.

Duties in Appointing Counsel

There may be circumstances where a criminal court judge plays a role in appointing counsel for a defendant. This role may arise in a variety of contexts, including the following:

- The judge may share a responsibility for selecting attorneys to be included in the indigent criminal defense pool;
- The judge may select and appoint private counsel to serve as counsel for indigent criminal defendants, paid by the court; or
- The judge may select and appoint private counsel to represent indigent criminal defendants pro bono in individual cases.

In any of these circumstances, judges in cases involving immigrant defendants may find themselves faced with some of the following questions:

- Should expertise in immigration law be a factor in selecting an attorney to represent an indigent defendant that the judge is aware is an immigrant?
- How can a judge determine an attorney's level of expertise in immigration law?
- Should a judge consider appointing an immigration attorney as co-counsel?

As a corollary to the above, in answering those questions judges must also consider what steps they might or should take to determine if a defendant is an immigrant, if the court does not already have information on the defendant's immigration status.

Duties Regarding Unrepresented Defendants

There may be cases where an immigrant offender charged with a misdemeanor may be unrepresented and not have a right to appointed counsel, but conviction of the misdemeanor may still carry a risk of deportation. For example, certain misdemeanors may qualify as crimes involving moral turpitude, if an individual is convicted of two crimes not arising out of the same circumstances. These are crimes involving fraud or immoral behavior, such as theft, fraud, perjury, and prostitution.

There are no clear answers as to what the judge should do in cases involving unrepresented immigrant defendants, but some possibilities might include the following:

- Appoint counsel in any case involving a crime that may carry a risk of deportation without regard to defendant's immigration status.
- Appoint counsel in any case involving a crime that may carry a risk of deportation where the defendant is an immigrant.
- Appoint counsel in any case regardless of the crime where the defendant is an immigrant and has not been advised of the deportation risks of his case.
- Advise the immigrant defendant that some crimes carry a risk of deportation and allow the defendant an opportunity to seek the advice of counsel.

If the judge chooses to appoint counsel, the considerations discussed in the previous section of this note regarding considerations in appointing counsel come into play.

What Do State Court Judges Need to Know About Immigration Law?

State court judges across the country are divided as to how much they should be aware of or take into account the ways in which the outcome of a criminal case could affect the defendant's immigration status. It is becoming increasingly difficult, however, to take the position that state court judges do not need to know anything about Federal immigration law, as it is clear that state court decisions can have a major impact on an individual's immigration status and, conversely, Federal immigration law can serve to limit or undermine the criminal sanctions imposed on an immigrant defendant.

There is a lengthy list of criminal charges for which conviction carries potential immigration consequences. As noted above, some of those charges may be classified as misdemeanors under state laws and thus on their face may not appear to be important for immigration purposes. For some crimes the immigration consequences depend on the length of the potential sentence or the actual sentence imposed.

Federal immigration law defines what is considered a conviction and a sentence for the purpose of determining immigration rights.

- A conviction encompasses any decision that involves a finding or admission of guilt and the imposition of a punishment, including diversion and deferred adjudication.
- A sentence includes a suspended sentence or a sentence of probation if accompanied by a suspended jail sentence.

Thus for example, a sentence to drug court accompanied by a suspended jail sentence is treated as a conviction of a crime related to controlled substance with a sentence equal to the amount of the suspended sentence.

The *Padilla* case involved a claim concerning the defendant's lack of knowledge of the effect of a criminal conviction on deportation. A criminal conviction, however, can affect a defendant's immigration status in a variety of ways, including:

- Making the defendant removable;
- Making the defendant inadmissible, including preventing the defendant from reentry if the defendant leaves the country;
- Making the defendant ineligible for cancellation of a removal order; and
- Preventing the defendant from attaining citizenship.

It is not practical for state court judges to become experts in all of the details and technical language of Federal immigration law. To assure that state criminal laws and sanctions are applied effectively in cases involving immigrant defendants, however, state criminal court judges may want to know enough about immigration law to be able to: (1) identify criminal cases where a defendant's immigration rights may be affected;

and (2) identify defendants who may need legal advice on how a plea agreement may impact their immigration status.³

Conclusion

We expect the questions raised in this note to be the subject of considerable debate. Some judges with whom we have talked believe that the trial judge should leave the issue of adequacy of representation to the appellate courts and are concerned that going further would be overstepping their role as a judge. Other judges believe that they need to take an active role to assure that immigrant defendants have received competent legal advice regarding the potential immigration consequences of a conviction. Others want to find a middle ground that seeks to make defendants aware of the risks without having to inquire into a defendant's immigration status or the quality of the advice that the defendant received. None of these approaches can be characterized as right or wrong. What is important as the debate unfolds is that policy makers understand how each alternative affects federal regulation of immigration, the effectiveness of state and local justice systems, and fairness to individual defendants and their families.

³ One resource that is presently available is a *Bench Guide for State Trial Court Judges on the Immigration Consequences of State Court Criminal Actions*, prepared by the Center for Public Policy Studies (CPPS) under a grant from the State Justice Institute (SJI). The *Guide* may be downloaded in PDF format either from the SJI website or from the CPPS website <http://www.centerforpublicpolicy.org/>.

PADILLA COMPLIANCE GUIDE FOR JUDGES:
Proper Consideration of “Enmeshed Penalties” (or Collateral
Consequences) in a Criminal Case¹

The U.S. Supreme Court Requires Due Consideration of All Actual Penalties

In March 2010, the U.S. Supreme Court in *Padilla v. Kentucky*, 599 U.S. __ (2010), ruled that defense counsel **must give affirmative, competent advice** to clients of the risk of **all penalties “enmeshed” with the criminal charges** or potential pleas.

- The Court held that for evaluating the effective assistance of counsel, the Sixth Amendment does not distinguish between the “direct” and “collateral” consequences of pleas – the relevant inquiry is the extent to which the penalty is *enmeshed* with the criminal process or charges.
- The Court recognized that preserving rights such as immigration status may be more important to the defendant than any jail sentence. *Padilla*, 130 S.Ct. at 1483.
- The ruling concerned deportation specifically, but other serious penalties enmeshed with criminal charges include *public housing eligibility, employment, sex offense registration, voting, and student loans*. These penalties share with deportation the same unique characteristics outlined by the Supreme Court. Legislatures across the country have “intimately related” these penalties and the availability of these programs or rights to criminal charges and convictions. Legal changes over the last few decades have made termination or rejection from these programs or rights nearly an automatic result for a broad class of people.
- The Court explicitly encouraged creative pleas to avoid these enmeshed penalties.

From the moment of arrest, people are in danger of losing hard-earned jobs, stable housing, basic public benefits, and even their right to live in this country. The steady increase in the scope and severity of the penalties that result from arrests has combined with the nearly universal availability of criminal history data to alter drastically the impact of criminal charges on defendants – and the practice for lawyers and judges.

As the Supreme Court recognized in *Padilla*, these “collateral consequences” have become an integral and are sometimes the most important part of the penalty of a criminal case. For many clients, their children, and their families, these consequences are much more severe than any criminal sentence. Because these enmeshed penalties have dramatically raised the stakes of a criminal case, defenders, prosecutors, and judges must incorporate them into their daily practice.

¹ Thanks to Benita Jain, JoJo Annobil, Peter Markowitz, Anita Marton, Ward Oliver, Laurie Parise, Martha Rayner, Alan Rosenthal, and Manny Vargas for their suggestions in preparing this checklist.

An information clearinghouse of materials on reentry and the consequences of criminal proceedings.
www.reentry.net/ny

GENERAL PRINCIPLES

- *Do not ask* a defendant or defense counsel to disclose his or her citizenship or immigration status either directly or implicitly.
- *At every stage of the proceeding* (and as early as possible), encourage defense counsel to take seriously their responsibility to provide competent advice regarding enmeshed penalties, including immigration consequences.
- Inform defense counsel about *resources available* to assist in this counseling (see below).
- Ensure that the defendant has had *appropriate time to consult* with his or her attorney, and adjourn proceedings when defense attorney or defendant need time to research and discuss these penalties. ♦ Keep in mind that a judicial colloquy on these penalties does not supplant a defense attorney’s duties under *Padilla*. A judicial colloquy also cannot provide the full, individualized advice, based on specific facts, that a defense attorney is obligated to provide, and therefore cannot fully insulate a plea from an ineffective assistance of counsel claim.
- Create an atmosphere that *promotes creative pleas* by encouraging the prosecution to factor any specific enmeshed penalties, such as deportation, into its plea negotiation and sentencing recommendations as these penalties cannot be divorced from the conviction.²
- Request that any *presentence investigation or report* include a discussion of these enmeshed penalties, *except* immigration,³ where in practical effect it is difficult to “divorce the penalty from the conviction.” *Padilla*, 130 S.Ct at 1481. ♦ Without adequate consideration of the full penalties, a court cannot determine a sentence truly consistent with justice or public safety. ♦ These penalties can be disproportionate to the offense and counterproductive, forming substantial barriers to successful reentry and leading to recidivism.

* * *

The Supreme Court has now recognized that people charged with crimes (and their families) suffer significant and predictable penalties enmeshed with their criminal charges, and that all such penalties should be included in the calculus of justice, regardless of their label as “collateral” or “direct.”

Focus on the measured risk of *identifiable* penalties for *specific* defendants. If setting bail will result in the loss of a stable job for a breadwinner, or a particular plea or sentence will lead to the loss of permanent, affordable housing or the right to live in this country with a defendant’s citizen children, ask whether it really serves public safety – or achieves just outcomes – to insist

² The Supreme Court has explicitly encouraged the defense and prosecution to reach creative resolutions during the plea bargaining process, noting that “informed 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.” The Court noted approvingly that counsel could “plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.” *Padilla*, 130 S.Ct. at 1486.

³ Because of potential Fifth Amendment issues, *do not permit* probation to inquire about immigration status. However, if the defendant, upon advice of counsel, offers proof of immigration penalties for the purpose of the presentence report, judges should consider those penalties appropriately.

on that disposition. Consider, for example, the unquestioned research that has shown that access to stable housing and employment proves critical to reducing recidivism.

Proper consideration of these penalties for individual defendants does not create any special treatment for certain classes of defendants. Rather, it embraces the Supreme Court’s recognition that some people charged with the same crimes suffer far greater penalties in predictable (but often hidden) ways. A fair and just process entails a proper and complete consideration of all penalties that cannot be divorced from a particular conviction.

IMMIGRATION

- At arraignment and before entering any guilty plea, **advise all defendants** (since the Court should not inquire about specific citizenship/immigration status) that certain convictions, even of a petty offense or misdemeanor, could result in mandatory deportation or other negative immigration consequences for some non-citizens (including lawful residents).⁴ ♦ Adjourn proceedings to allow defendants to explore immigration consequences. ♦ Allow defendants to withdraw guilty pleas entered without immigration counseling.
- For young defendants:
 - ▶ Consider giving immigrant defendants a **juvenile** disposition that does not constitute a “conviction” for immigration purposes and will generally not make an immigrant deportable.⁵
 - ▶ Consider **transfer to Family Court or other appropriate juvenile court** for underage immigrant defendants. ♦ A juvenile delinquency adjudication will generally not make an immigrant deportable, although it may have other adverse immigration consequences.
- Exercise **judicial flexibility** in sentencing. ♦ For example, several grounds of *mandatory* deportation are triggered by sentences of one year or more. In such situations, consider a sentence of *no more than 364 days*.
- Allow immigrant defendants to enter **drug treatment and domestic violence** programs **without** requiring an “up-front” guilty plea or admission. ♦ Otherwise, such a defendant may be deportable because immigration law does not recognize rehabilitative vacatur.
- Suggest that defense attorneys call the **Immigrant Defense Project hotline** (212.725.6422) for information on the immigration consequences of criminal dispositions.

CRIMINAL RECORDS ACCURACY PROBLEMS

- Criminal history data is increasingly available from a range of sources, and serious questions have arisen about reliability. ♦ While more research is needed, existing studies suggest error rates over 60%.⁶ ♦ Common errors include missing disposition information, unsealed records,

⁴ *Padilla* requires individualized advice by counsel based on specific facts that the court is not in a position to adduce. A judicial colloquy on these penalties does not supplant a defense attorney’s duties under *Padilla*.

⁵ The definitions of qualifying adjudications vary by jurisdiction. *See, e.g.,* www.nilc.org/immlawpolicy/removcrim/removcrim046.htm.

⁶ See Craig N. Winston, *The National Crime Information Center: A Review and Evaluation* (August 3, 2005) (finding that of 174 million arrests on file with the FBI, only 45 percent have dispositions). In 2007, the Bronx Defenders partnered with a major New York law firm in a pilot project to review and correct rap sheets. Fully 62 percent of the random sample of official state rap sheets contained at least one significant error; 32 percent had multiple errors.

and unrecorded vacated warrants. ♦ Each of these errors can lead to automatic denial of employment, housing, and benefits applications.

• While a criminal case is pending, a rap sheet error can significantly impact bail, plea, and sentencing decisions. ♦ Knowing the serious incidence of inaccuracy and the severe consequences, prosecutors, defenders, and judges have a duty to find and root out the error patterns present in their own jurisdiction.

ORDERS OF PROTECTION

• Closely consider whether a full Temporary Order of Protection is really warranted, or whether a **limited TOP** would suffice. ♦ TOPs can render defendants homeless and separate them from their children, and violations of certain portions of a TOP can render defendants deportable. ♦ Always issue TOPs “*subject to Family Court Order of Visitation.*”

• Avoid issuing a full TOP that will prevent a **teenager** from attending school (when the arrest was at a school and a teacher/student is the complaining witness). ♦ The school will be conducting a parallel disciplinary proceeding that will determine if suspension is necessary, and the courts should defer to the expertise of the schools in these issues.

FINANCIAL CONSEQUENCES

• Prior to accepting a plea, review with defendant the financial consequences of the conviction, including fines, fees and surcharges. ♦ Where applicable, review other financial consequences such as probation supervision and other probation fees, driver’s license fees, and civil penalties. ♦ Explain whether the defendant can apply for a waiver of any fees for indigence.

• Prior to accepting the plea, explain how these financial penalties are collected (from bail, from inmate account, and civil judgments) and that the defendant’s credit report might be affected.

RESTORATION OF RIGHTS

• Some jurisdictions permit judges to issue certificates or other instruments to restore rights or relieve civil penalties for people with criminal records. ♦ These mechanisms are invaluable tools that promote rehabilitation by removing civil disabilities, allowing people to seek job and housing opportunities on their own merit. ♦ While they generally will not avoid deportability or inadmissibility for non-citizens, these relief mechanisms may have a positive effect on some forms of discretionary relief.

RESOURCES FOR PRACTICE

- ❖ ABA Adult Collateral Consequences Survey (every jurisdiction, forthcoming)
- ❖ Survey of Federal Enmeshed Penalties: *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations* (The ABA Commission on Effective Criminal Sanctions and the Public Defender Service for the District of Columbia, January 2009) (www.reentry.net/search/item.232200)
- ❖ Defending Immigrants Partnership (www.defendingimmigrants.org): practical resources for public defenders
- ❖ Immigrant Defense Project (www.immigrantdefenseproject.org; 212-725-6422): written resources, individual consultations and technical assistance on the immigration consequences of criminal cases
- ❖ The Center for Holistic Defense at The Bronx Defenders (www.holisticdefense.org): practical resources and technical assistance to support client-centered, interdisciplinary advocacy
- ❖ Reentry Net (www.reentry.net) & Reentry Net/NY (www.reentry.net/ny) - comprehensive information clearinghouse on reentry and enmeshed penalties
- ❖ *Relief From The Collateral Consequences Of A Criminal Conviction: A State-By-State Resource Guide* (by Margaret Colgate Love, 2008) (www.reentry.net/library/attachment.114643)
- ❖ For an extensive New York practice guide, see *The Consequences of Criminal Proceedings in New York State: A Guide for Criminal Defense Attorneys and Other Advocates for Persons with Criminal Records* (The Bronx Defenders, February 2010) (www.reentry.net/ny/library/attachment.172234)

Description and Website For:
A Bench Guide to Immigration Issues in Juvenile and Family Cases

Steven Weller and John A. Martin
Center for Public Policy Studies
<http://www.centerforpublicpolicy.org/>

The Center for Public Policy Studies has produced a *Bench Guide to Immigration Issues in Juvenile and Family Cases* to provide state trial court judges with an overview of areas of Federal immigration law that might intersect with a juvenile or family case. It is designed to provide judges with quick a summary of key areas of immigration law that they can access electronically from the bench. Judges using the guide should be aware that it is not meant to be an in-depth treatise on immigration law. Its purpose is twofold: (1) to help judges in family or juvenile cases spot immigration issues; and (2) to help judges identify people who might be referred for advice on immigration rights.

There are millions of children in the U.S. who may potentially be affected by or directly subject to Federal immigration laws. A recent Pew Hispanic Center assessment found that in 2008, there were 5.5 million children living in families with at least one undocumented parent. Of these children, about 1.5 million were themselves undocumented and 4 million were U.S. citizens by birth. Further, it is common for different children in single family to have different immigration status, with the younger children of undocumented immigrants being far more likely to be U.S. citizens than are the older children.

Many immigrant families find themselves in state family or juvenile proceedings, due to divorce, protection orders, dependency, or delinquency. In those cases the treatment of families and children under Federal immigration law can work to undermine the goals of state family and juvenile law. In removal proceedings involving an alien family with children, the interests of the children are not considered in determining the immigration rights of the parents. As a result, Federal immigration law may separate a family that a state court might have sought to keep together, or may send a child legally in the U.S. to another country with a deported parent rather than allowing the family to remain in the U.S. for the welfare of the child.

In contrast, contemporary thinking about family and juvenile law across the United States suggests that troubled families and juveniles should be treated with a therapeutic perspective that emphasizes improving the families' capacity to increase the quality of life of all family members. This means attempting to create a coordinated court service infrastructure to treat families in a comprehensive and systemic way. Some of the desired outcomes of therapeutic justice include:

- For the children, a focus on best interests of the child, including safety, permanency, and physical and emotional well being, either through preservation of the family as a unit where possible or through placement in another stable environment; and

- For the parents, safety, preservation of the family where possible, or rearranging of relationships after termination of the family unit.

The Bench Guide will help state and local judges achieve appropriate outcomes for immigrant families and children. Some of the outcomes that the guide will help judges achieve include:

- Completing cases involving children of immigrant families in a timely fashion;
- Assuring that immigrant families and children receive needed services;
- Assuring that immigrant families are able to achieve court-imposed conditions for reunification;
- Promoting family preservation; and
- Promoting the best interests of the child.

Guide Contents

The Bench Guide includes clickable web links to relevant statutory references and references to relevant decisions of the Board of Immigration Appeals. Immigration is covered by in U.S. Code Title 8. The date of the Guide represents the date of last update for case law and statutory references. The Guide does not include references to Federal circuit court case law, which also should be consulted, as Federal circuits may conflict with one another as well as the Board of Immigration Appeals on particular immigration issues. In addition, immigration case law should be consistently checked, as this area of the law can be highly fluid. The web links require internet access.

The Guide also includes clickable links between certain highlighted words or phrases and other sections of the Guide, to assist judges in navigating the Guide quickly. Each page of the bench guide also has clickable links back to the table of contents.

The Guide contains two types of analyses: (1) topical discussions that examine how immigration law can affect the issues that may arise in a family or juvenile case; and (2) summaries of select areas of Federal immigration law regarding legal entry or exposure to removal.

Topical Discussions

- Introduction
- Glossary of Terms
- Aspects of Immigration Law That May Affect Child Custody or Placement Decisions
- Aspects of Immigration Law that May Affect Eligibility to Work
- Aspects of Immigration Law that May Affect Ability to Meet Probation Conditions or Eligibility for Benefits or Services

Legal Summaries

- Categories of Legal Immigration Status
- Good Moral Character
- Inadmissible Aliens
- Grounds for Removal
- Eligibility for Cancellation of a Removal Order
- Aggravated Felony
- Crime of Moral Turpitude
- Crime of Domestic Violence
- Illegal Activity Not Requiring a Criminal Conviction

The Guide is downloadable from the website of the Center for Public Policy Studies, at the following web page:

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A Defending Immigrants Partnership Practice Advisory¹

HOW MUCH TO ADVISE: WHAT ARE THE REQUIREMENTS OF *PADILLA V. KENTUCKY?*

April 20, 2010

Note: This Advisory on *Padilla v. Kentucky* discusses in detail the Court’s reasoning and its requirements for defenders, and includes a discussion of the Court’s language regarding “clear versus unclear” consequences. For a shorter, practical Advisory on how to approach the task of representation under *Padilla*, see DIP, “Steps to Advising a Noncitizen Defendant under *Padilla v. Kentucky*.” For an analysis of all aspects of the case and a detailed list of resources for criminal defenders, see DIP, “Duty of Criminal Defense Counsel Representing an Immigrant Defendant After *Padilla v. Kentucky*.” These Advisories can be found at the Defending Immigrants Partnership website, www.defendingimmigrants.org.

In *Padilla v. Kentucky*² the Supreme Court held that because immigration penalties are inextricably enmeshed with the outcome of criminal proceedings, and because of the importance and potential severity of immigration consequences, criminal defense counsel have a duty under the Sixth Amendment to address the immigration consequences facing a noncitizen defendant.³

The reactions to this decision among defenders have ranged from exultation to panic. Many defenders want to know specifically what they are required to do in order to provide effective counsel. Some defenders who are not experienced in this area fear that advising on immigration consequences will be an overwhelming burden in an already complex job. Some are interpreting the Court’s discussion on “clear” versus “unclear” consequences as a severe limit on the steps defenders need to take to provide effective counsel to noncitizens. Others want to know if merely consulting a chart will be sufficient.

This Advisory will discuss the standards set out by the Court in *Padilla*, as well as the steps involved in representing a noncitizen defendant. In addition, this Advisory will provide some key information about the extensive resources -- many of them free or low cost -- that are available to assist defenders to represent noncitizens. Immigration representation in a criminal case is challenging, but doable. Many

¹ This advisory was authored for the Defending Immigrants Partnership by Katherine Brady and Angie Junck of the Immigrant Legal Resource Center, in collaboration with the Immigrant Defense Project, the National Immigration Project of the National Lawyers Guild, the Washington Defenders Association, Rebecca Turner and Norton Tooby.

² *Padilla v. Kentucky*, 599 U.S. ____ (March 31, 2010).

³ See discussion of the entire case in DIP, “Duty of Criminal Defense Counsel Representing an Immigrant Defendant after *Padilla v. Kentucky*” at www.defendingimmigrantspartnership.org.

small and large defender offices have been providing competent advice for many years, assisted by print materials, trainings, and expert consultation on individual cases.

To give a preliminary answer to the basic question, according to *Padilla* and the published professional standards that it references, to adequately represent a noncitizen defendant regarding immigration consequences in each case counsel must determine the immigration status and criminal history of the defendant. Based on this information, counsel must investigate the specific immigration consequences that the proposed plea would have on the particular individual. In some cases this will be a quick process, for example when the client, after receiving some key warnings, states that he or she cares only about the criminal penalty. Where counsel undertakes the immigration analysis, in some cases counsel will be able to state the immigration consequences with some certainty, while in others counsel may need to advise that there is a risk that the plea will have a particular immigration consequence but that the law is not clear. If immigration consequences are a priority to the defendant, counsel will conduct the defense with this in mind. This process is required not just at plea, but in other key points in the defense such as before going to trial, conducting a delinquency or sentencing hearing, accepting diversion, etc. See more information at Part III.

I. What is the Scope of Counsel's Duty under *Padilla*?

Padilla provides several specific guidelines for defense practice.

Silence on the subject constitutes ineffective assistance of counsel. The Court held that immigration consequences of a conviction are included within the ambit of the Sixth Amendment right to counsel. Not only incorrect advice, but failure to provide advice is ineffective assistance of counsel. *Padilla v. Kentucky*, slip opinion at * 8-9, 13.

Published standards of practice for representing noncitizen defendants are guides for determining counsel's duty to advise. The Court then turned to standards for determining what constitutes effective assistance of counsel. Citing the familiar test in *Strickland*, the Court in *Padilla* stated that the first step in an ineffective assistance of counsel inquiry is to determine whether counsel's representation "fell below an objective standard of reasonableness," and the second step is to ascertain whether there was prejudice. *Id.* at *9. Regarding the first step, the Court said:

The first prong -- constitutional deficiency -- is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable" Although they are "only guides," and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

Ibid, citations omitted.

The Court cited among such standards the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999). See further discussion in Part II, *infra*.

The duty encompasses both avoiding becoming removable and preserving eligibility to apply for relief from removal. Noncitizen defendants wish to avoid becoming deportable (removable). In addition, a noncitizen defendant who is removable, whether because of a deportable conviction, simple lack of immigration status, or other factor, wishes to maintain eligibility to apply for status or relief from removal. Both issues are included within counsel's duty.

We too have previously recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *St. Cyr*, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (quoting 3 *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347. We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

Padilla slip opinion at * 10-11.

Defense counsel's duty is not just to advise, but to defend against adverse immigration consequences. Prosecutors also should take immigration consequences into account in plea bargaining. "Finally, informed 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." *Id.* at * 16.

Justice Alito's concurrence suggests a different standard, but this was not signed by any of the five justices in the majority. In his minority concurrence with Justice Roberts, which none of the five Justices of the majority signed, Judge Alito stated that he agreed in the result in this case but disagreed with the requirement to advise that the court imposed upon defense counsel. He pointed out that many basic immigration questions are complex (for example, whether the defendant is a citizen or not), and also posited several complex immigration situations in which the law was both unsettled and complicated. Concurrence by Justice Alito, slip opinion. at * 4-8 (concurrence). He asserted that the Court should have found the proper standard of duty to be that "[w]hen a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject." *Id.* at * 14.

II. The Standard for Determining Competent Immigration-Related Advice under *Padilla*, and Why a Bifurcated "Clear vs. Unclear" Strategy is Incorrect

In the initial attempts to determine the scope of immigration-related advice required to be effective under *Padilla*, some criminal defense counsel have singled out the Court's use of the "clear" vs. "unclear" language. In *Padilla* the Court noted that due to the complexity of immigration law, the analysis may not always produce a clear answer.

There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.¹⁰ But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Padilla slip opinion at * 11-12.

In footnote 10 the Court stated, “As Justice Alito explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice.”

Based on this language, some criminal defense counsel have asked if they may obtain a list of offenses that carry “clear” immigration consequences, with the idea that they will warn a defendant specifically about a plea to these offenses, while just giving a generalized warning about offenses that carry “unclear” immigration consequences. While this might be a convenient characterization of *Padilla*, it is not a correct interpretation, and is inconsistent with the rest of the opinion, the published professional standards and practice advisories cited by the Court, and the reality of the factors that inevitably must be considered in an immigration analysis. This approach is akin to saying that a criminal defender can determine the outcome of a case by simply looking at the initial charging document.

In reality, to determine *whether* the immigration consequences threatening a particular defendant are clear or unclear, counsel must perform an actual immigration analysis.

First, *Padilla* must be understood in the context of how a conviction causes a particular individual to suffer adverse immigration consequences, which may vary depending on immigration status and prospects, criminal history, and other factors. While the immigration consequences of some offenses can be clearly characterized for – for example, unlawful possession of a firearm comes within the firearms deportation ground – this characterization alone is not enough to give competent advice to a defendant about the consequences of a plea. A correct analysis of the actual immigration consequences of a plea depends upon numerous factors beyond whether a particular offense clearly comes within a ground of deportation. Three of these factors are:

- **Immigration Status.** The immigration status of the defendant will affect the consequence of a particular plea. For example, a conviction such as unlawful possession of a firearm will cause a lawful permanent resident to become deportable, but will have no consequences for many undocumented defendants. Conviction of a different offense might be harmful to an undocumented person, but not make a permanent resident deportable.
- **Criminal History.** Analysis of immigration consequences of a plea will vary depending upon the prior criminal record of the individual. For example, if a defendant already is deportable, the defense goal may be to preserve eligibility for relief; or, if the defendant does not have any prior conviction of a crime involving moral turpitude, it is possible that he or she can take one such conviction without becoming inadmissible or deportable.
- **Specific Structure of the Criminal Statute & Defendant’s Plea Statement.** Many criminal statutes are “divisible” in that they reach some offenses that carry an immigration consequence and others that do not. The immigration consequences of a plea can depend upon whether counsel can negotiate a plea to a portion of the statute that avoids/minimizes immigration consequences. This often requires careful crafting of the factual basis for the plea contained in defendant’s plea statement.

These are not “unclear” situations. They are the normal issues that are present in the great majority of cases involving noncitizen defendants. Further, as the Court pointed out, competent representation on these issues goes beyond whether the plea will cause a noncitizen to become deportable, to whether the plea will eliminate eligibility for relief from deportation (“removal”). Consulting a list for offenses with a “clear” immigration consequence cannot address these issues.

Second, *Padilla* should be understood in light of requirements in the professional standards referenced by the Court. For a more thorough discussion of these standards see the Defending Immigrants Partnership “Duty of Criminal Defense Counsel” Advisory, *supra*, posted at www.defendingimmigrants.org. In sum, these standards provide that defense counsel must ascertain

every client’s citizenship or immigration status at the initial interview. Counsel should advise the defendant of the full consequences of any plea or other disposition, including the certain or potential immigration consequences, and ensure that the client understands them. “[C]ounsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.” Counsel should be “active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant.”⁴

Third, consider what was deemed “clear” in Padilla. In *Padilla* the defense counsel had advised a permanent resident that a conviction for transporting marijuana would not make the defendant deportable under the controlled substance deportation ground. The Court stated that “[t]his is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.” *Id.* at *12.

The controlled substance ground of deportation is similar in structure and ease of interpretation to most of the 52 conviction-based grounds of deportation and the grounds of inadmissibility. Of these, most are no more complex or difficult to decipher. Some are arguably more difficult to interpret and apply to state convictions, such as the crime involving moral turpitude grounds⁵ and the aggravated felony crime of violence ground.⁶ These grounds, however, are the subject of extensive discussion in practice aids and case law. Once defense counsel has researched the matter, counsel may inform the defendant whether, e.g., the offense clearly will be held a crime involving moral turpitude, or whether the law is unclear but the offense *might* be so held. Counsel must provide this advice in the context of an immigration analysis, which in this example would include what the impact would be if the offense *were* ruled to be a crime involving moral turpitude, both on deportability and eligibility for relief.

III. What Are the Steps Required to Advise Regarding Immigration Consequences?

Competent representation in light of immigration consequences involves several steps.

1. In each case counsel must determine the immigration status and criminal history of the defendant. This can be done using a questionnaire; samples are posted at www.defendingimmigrants.org.
2. Based on this information, counsel should investigate the specific immigration consequences that the proposed plea would have on the particular individual. As with many aspects of defense strategy, in some cases counsel will be able to advise that the plea is nearly certain to have a particular immigration consequence, while in other cases counsel can say that it carries a risk but that the law is not clear. See discussion below of resources to help in this analysis.

This process must take place not only at plea, but in other key decisions such as before defendant goes to trial, enters a diversion or drug treatment program, handles a charge of violating the terms of probation or of a protection order, admits addiction, or conducts a sentencing or delinquency hearing. If an incarcerated defendant has an immigration hold or detainer, before obtaining release from criminal custody counsel should inform her/his client that DHS might detain him or her. Because

⁴ American Bar Association Pleas of Guilty Standard 14-3.2(f), commentary at p. 127.

⁵ 8 U.S.C. § 1227(a)(2)(A)(i)(I),

⁶ 8 U.S.C. § 1101(a)(43)(F).

persons often are transferred multiple times and long distances in immigration custody, criminal custody may be preferable.

3. In some cases the defendant may have to choose whether to prioritize getting a good immigration result versus a lesser criminal penalty. Some immigrant defendants care only about getting the smallest period of incarceration. Other immigrant defendants would trade any concern in order to remain with their families. They would be willing to plead to a more serious offense, take additional jail time, or even go to trial and risk a significantly higher sentence, if it meant that they might be able to remain in the U.S. with loved ones. A defendant can only make this crucial decision if he or she understands the potential criminal and immigration penalties.
4. If the defendant states that immigration consequences are the highest or a high priority, counsel will conduct the defense with this in mind.

IV. Meeting *Padilla*'s Challenge: Resources to Help Defenders Provide Competent Advice

A challenging question is how are criminal defenders – especially indigent defenders with limited budgets and time – going to be able to provide competent representation? This is a larger discussion that will be undertaken across the country in light of *Padilla*. These discussions should take account of existing resources, as well as how to create new ones. Keep in mind that many defense offices, including indigent defenders from small counties to state-wide organizations, currently provide competent representation on immigration consequences.

There are “numerous practice guides” for criminal defense counsel assisting noncitizens. *Id.* at * 11; see also Appendix B “Resources for Criminal Defense Lawyers” in *Defending Immigrants Partnership, “Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla v. Kentucky”* at www.defendingimmigrants.org. For example, see state-specific analyses of the immigration consequences of commonly charged offenses, manuals explaining immigration consequences, and other free resources written for criminal defenders, as well as information about obtaining hornbooks on the subject, at www.defendingimmigrants.org. Training materials including power points can be downloaded, and there is information about live and online trainings.

As important as print resources and training is the possibility of obtaining expert consultation on individual cases, which can save a lot of time and ensure a level of competence. Defender offices obtain expert advice under a range of different methods, so that not every attorney on staff needs to understand the immigration component. Offices may appoint a research attorney to devote part-time to becoming an in-house expert; may take advantage of free expert consultation, or else contract with non-profit or private experts to provide consultation on difficult cases; or may move for court funding for an immigration expert on a particular case. Private offices often require noncitizen clients to pay for immigration consultation as part of the defense work. See discussion of various immigrant service plan models in “Protocol for the Development of a Public Defender Immigrant Service Plan” at www.immigrantdefenseproject.org/webPages/crimJustice.htm.

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PRACTICE ADVISORY:

*A Defending Immigrants Partnership Practice Advisory:
Retroactive Applicability of Padilla v. Kentucky*

June 24, 2010

By Dan Kesselbrenner¹

I. Overview

In *Padilla v. Kentucky*,² the Supreme Court held that criminal defense counsel's failure to advise about immigration consequences falls below accepted professional norms. This practice advisory addresses whether a person who files for post-conviction relief after the Supreme Court's decision in *Padilla* can benefit from the Court's decision. The advisory concludes that *Padilla* governs petitions for post-conviction relief that were pending before the Court's decision and those filed after the Court's decision.

The advisory begins by discussing general principles regarding the retroactive applicability of Supreme Court decisions to post-conviction relief and explaining why *Padilla* does not create a new rule of criminal constitutional law. Next, it addresses how *Padilla* applies to post-conviction relief for federal convictions. Then, the advisory discusses how *Padilla* applies to post-conviction relief for state convictions. Finally, it raises certain strategic concerns and suggests arguments for addressing them.

The advisory assumes general familiarity with the Court's decision in *Padilla*. For those seeking more general information about the *Padilla* decision or a list of helpful resources, please see earlier advisories prepared by the Defending Immigrants Partnership.³ A detailed discussion of eligibility requirements and procedural default rules governing habeas proceedings also is beyond the scope of this advisory.

II. Retroactivity Principles

A. General Rules

When deciding requests for post-conviction relief, courts generally look to the law that existed when a case became final on direct appeal because the post-conviction petition is

¹ Dan Kesselbrenner, of the National Immigration Project of the National Lawyers Guild, wrote this advisory for the Defending Immigrants Partnership. The author thanks Nancy Morawetz, of New York University Law School, Norton Tooby, of the Law Offices of Norton Tooby, Benita Jain and Manuel D. Vargas, of the Immigrant Defense Project, and Trina Realmuto, of the National Immigration Project/NLG, for their invaluable assistance.

² 130 S.Ct. 1473 (2010).

³ *A Defending Immigrants Partnership Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant after Padilla v. Kentucky*, April 6, 2010 (revised April 9, 2010). Please go to http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf to download a copy.

deciding whether the decision was unfair when initially rendered.⁴ If a Supreme Court case creates a new criminal rule after a petitioner's case became final, then the default will be that a petitioner for post-conviction relief cannot benefit from the new rule because it was not the law when the decision became final.

Not all new Supreme Court decisions that expand legal rights of a criminal defendant create new rules, however. If a new Supreme Court case merely applies an existing rule to a different set of facts, then it does not create a new rule, but merely applies correctly the law that existed when a person's case became final.⁵ *Padilla* is an example of such a case. And, a Supreme Court decision applying an old rule applies to post-conviction review and cases on direct appeal.⁶

B. Case Law Strongly Suggests that *Padilla* Does Not Create a New Rule

The Supreme Court defines a "new rule" as one that was not dictated by precedent that existed when the defendant's conviction became final.⁷ The Supreme Court's decision in *Strickland v. Washington*⁸ is the default rule for ineffective assistance of counsel claims.

In his opinion concurring in the judgment in *Wright v. West*,⁹ Justice Kennedy observed:

If the rule in question is one which of necessity requires a case-by-case examination of the evidence, then we can tolerate a number of specific applications without saying that those applications themselves create a new rule.... Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

In *Williams v. Taylor*,¹⁰ the Court held that applying *Strickland* to a particular set of facts did not constitute a new rule because *Strickland* is the general test governing ineffectiveness assistance claims. A recent New York State decision relied on *Williams* to hold that *Padilla* could be applied retroactively.¹¹

⁴ *Teague v. Lane*, 489 U.S. 288 (1989).

⁵ *Williams v. Taylor*, 529 U.S. 362, 390-91(2000).

⁶ *Whorton v. Bockting*, 549 U.S. 406, 416 (2007).

⁷ *Whorton v. Bockting*, 549 U.S. 406, 416 (2007); *Saffle v Parks*, 494 U.S. 484, 488 (1990); *Teague v. Lane*, 489 U.S. 288, 301 (1989).

⁸ *Strickland v. Washington*, 466 U.S. 668 (1984).

⁹ *Wright v. West*, 505 U.S. 277, 301 (1992) (Kennedy, J, concurring in judgment).

¹⁰ 529 U.S. 362, 390-91 (2000).

¹¹ *People v. Bennett*, --- Misc.3d ----, 2010 WL 2089266 (Crim Ct, Bx Cty 2010).

The Supreme Court has repeatedly applied the two-part test in *Strickland* for purposes of determining what is “clearly settled” Supreme Court law for purposes of 28 U.S.C. § 2254(d)(1), which provides the standard for granting habeas review.¹²

C. The Language in *Padilla* Strongly Suggests that the Decision Does Not Create a New Criminal Rule

The Court in *Padilla* goes to great pains to advise that its decision will not “open the floodgates” to a significant number of new post-conviction petitions.¹³ This extensive discussion would not make sense if *Padilla* only applied prospectively. In addition, it appears the Court is treating *Padilla* as another application of *Strickland* when it discusses “the 25 years since we first applied *Strickland* to claims of ineffective assistance at the plea stage.”¹⁴ Moreover, the Court’s statement that “[i]t seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains” also seems to contemplate a retroactive application of the Court’s decision.¹⁵ Finally, the Court’s discussion of the relationship between *Hill v. Lockhart*¹⁶ and *Strickland* reinforces the position that the Court is not articulating a new rule in *Padilla*.¹⁷ In following its approach in not treating applications of *Strickland* as a new rule, the *Padilla* Court does everything short of saying that the decision does not create a new rule.

D. Supreme Court Precedent Explains Why Lower Courts Must Apply *Padilla* Retroactively

The government in opposing post-conviction relief may attempt to attach significance to the *Padilla* Court’s failure to make an explicit retroactivity holding. Court precedent in post-conviction cases provides a powerful rejoinder.

An explicit holding of retroactivity by the Supreme Court has specific meaning in federal habeas review of a state conviction. For example, in determining whether a petitioner can file a second or successive habeas petition under 28 U.S.C. § 2254(b)(2)(A) the Court required that for a decision to apply retroactively, it must be an express holding of retroactivity that cannot be dictum, which must happen in another person’s case on collateral review.¹⁸ Under the Court’s governing test, it could not have held that the *Padilla* decision was retroactive. According to the Court:

The Supreme Court does not “ma[k]e” a rule retroactive when it merely establishes principles of retroactivity and leaves the

¹² *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1419 (2009); *Schriro v. Landrigan*, 550 U.S. 465, 478 (2007).

¹³ *Padilla v. Kentucky*, 130 S.Ct. 1473, 1485 (2010).

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ 474 U.S. 52 (1985).

¹⁷ *Padilla v. Kentucky*, 130 S.Ct. 1473, 1485 n.12 (2010),

¹⁸ *Tyler v. Cain*, 533 U.S. 656, 663 (2001). It may be that the Court in the future applies *Padilla* retroactively to a second or successive habeas petition, but that will have to wait for another day.

application of those principles to lower courts. In such an event, any legal conclusion that is derived from the principles is developed by the lower court (or perhaps by a combination of courts), not by the Supreme Court.¹⁹

Thus, the Court distinguishes between making an explicit holding of retroactivity that would permit a future petitioner to file a second or successive habeas petition challenging an underlying state conviction on the one hand, and articulating principles of retroactivity on the other. When, as in *Padilla*, the Court invokes language suggesting retroactivity, it is consciously avoiding an explicit determination and expressly intending for lower courts to apply those retroactivity principles.

E. If *Padilla* Creates a New Rule of Criminal Procedure, it is Arguably a Watershed Decision

The government is arguing in post-conviction cases that *Padilla* creates a new constitutional rule. The lead case governing when a new criminal constitutional rule applies retroactively is *Teague v. Lane*.²⁰ Under *Teague*, new constitutional rules are not retroactive unless they are substantive rules or created pursuant to a watershed decision. If *Padilla* were to create a new criminal rule, it would not apply retroactively to a collateral post-conviction challenge unless *Padilla* was a “substantive rule”²¹ or it was “a watershed case.”²²

An example of a substantive rule is *Lawrence v. Texas*,²³ which held that it was unconstitutional to make same-sex lovemaking criminal.²⁴ There is no meaningful argument that a court would treat the *Padilla* decision as a substantive rule because the decision does not narrow what a particular criminal statute proscribes.

The test for what constitutes a “watershed decision” is high. In the course of holding that a case is not a watershed decision, the Court has identified only *Gideon v. Wainwright*²⁵, as an example of a “watershed case.”²⁶ This may be a difficult argument however. If *Crawford v. Washington*,²⁷ which dramatically expands the right to confrontation under the Sixth

¹⁹ Ibid.

²⁰ 489 U.S. 288 (1989).

²¹ A substantive rule is one that holds that a statute improperly makes conduct criminal. *Teague v. Lane*, 489 U.S. 289, 301 (1989); *United States v. Bousley*, 523 U.S. 614, 620 (1998).

²² See, e.g., *Whorton v. Bockting*, 549 U.S. 406, 419 (2006); *Schiro v. Summerlin*, 542 U.S. 348 (2004); *Beard v. Banks*, 542 U.S. 406, 417 (2004).

²³ 539 U.S. 558 (2003).

²⁴ 539 U.S. 558, 578 (2003).

²⁵ 372 U.S. 335 (1963).

²⁶ *Whorton v. Bockting*, 549 U.S. 406, 419 (2006) (rejecting retroactivity of new rule set forth in *Crawford v. Washington*, 541 U.S. 36 (2004) expanding Sixth Amendment right to confront witnesses); *Schiro v. Summerlin*, 542 U.S. 348 (2004) (rejecting retroactivity of *Ring v. Arizona*, 546 U.S. 584 (2002) that prevented trial judge from imposing death penalty, which is a question for jury); *Beard v. Banks*, 542 U.S. 406, 409 (2004) (rejecting retroactivity new rule articulated in *Mills v. Maryland*, 486 U.S. 367 (1988) relating to mitigating evidence in capital case).

²⁷ 541 U.S. 36 (2004).

Amendment, and *Batson v. Kentucky*,²⁸ which protects a defendant against prosecution bias in jury selection, do not constitute watershed decisions, it may be difficult for a court to find that *Padilla* is a watershed decision as the Supreme Court uses that term. Nevertheless, given the nature of the decision, it is an alternative argument that counsel should consider. That said, *Padilla* arguably applies retroactively because it is not a new criminal constitutional rule.

III. Post-Conviction Relief for Federal Convictions

A. Federal Habeas Corpus

Congress confers habeas corpus jurisdiction pursuant to 28 U.S.C. § 2255 for a person to challenge the constitutionality of her or his federal conviction. Habeas relief under this section is available for one year after the conviction becomes final. A person who is still in custody, but who did not file a timely habeas petition, may still may have a coram nobis remedy under 28 U.S.C. § 1651, the All-Writs Act. A petition for a writ of coram nobis does not have a filing deadline.²⁹ Whether a petitioner is eligible for federal habeas corpus relief is properly the subject of a multi-volume treatise, and certainly beyond the scope of this advisory.³⁰ Subject to satisfying the timing and other requirements for the writ, a person in federal custody may be eligible obtain a writ of habeas corpus to challenge a federal conviction where counsel failed to advise the petitioner about immigration consequences.

B. Federal Coram Nobis

Similarly, coram nobis may be available to challenge federal convictions in the wake of the *Padilla* decision. At common law, the writ of coram nobis existed to correct errors of fact or to make technical corrections in a judgment.³¹ The modern version of this writ is broader than at common law.³² Now, the writ of coram nobis is limited to “extraordinary” cases that present compelling circumstances “to achieve justice” where no other remedies are available.”³³ According to the Supreme Court, a coram nobis petition is not a new proceeding, but an extension of the original proceeding for which 28 U.S.C. § 1651, the All-Writs Act, provides jurisdiction to an Article I or Article III court to correct an earlier legal or factual error.³⁴ United States district courts, circuit courts of appeal, and the Supreme Court are all Article III courts.

²⁸ 476 U.S. 79 (1989).

²⁹ *United States v. Denedo*, 129 S.Ct. 2213 (2009);

³⁰ *See, e.g.*, Leibman and Hertz, *Federal Habeas Corpus Practice and Procedure* 5th Ed.

³¹ *United States v. Morgan*, 346 U.S. 502, 507 (1954).

³² *United States v. Denedo*, 129 S.Ct. 2213 (2009).

³³ *United States v. Morgan*, 346 U.S. 502, 510-11 (1954).

³⁴ *United States v. Morgan*, 346 U.S. 502 (1954) (recognizing Article III court jurisdiction to consider coram nobis to correct deprivation of counsel in violation of Sixth Amendment); *United States v. Denedo*, 129 S.Ct. 2213 (2009) (recognizing Article I court jurisdiction to consider coram nobis petition to correct failure to advise about immigration consequences where court assumed violation of Sixth Amendment for purposes of resolving question before it).

In *United States v. Denedo*,³⁵ a veteran of the U.S Armed Forces filed a coram nobis petition after DHS initiated removal proceedings against him for a court-martial conviction that had been final for eight years. At the time the petitioner sought a writ of coram nobis, he was neither still serving in the military nor in custody. The Court assumed for purposes of deciding the jurisdictional question presented that defense counsel's representation was ineffective. A practitioner seeking relief for a noncitizen ineligible under 28 U.S.C. § 2255 because custody has expired should investigate whether coram nobis relief is a possible vehicle to obtain a remedy for defense counsel's failure to advise about immigration consequences. Where the petitioner is still in actual or constructive custody (i.e., on supervised release), coram nobis is unavailable until custody has expired.³⁶

IV. State Post-Conviction Remedies

States have various collateral mechanisms to allow a person to challenge a constitutionally defective plea. Eligibility for state post-conviction relief under the various state procedures is beyond the scope of this advisory. Fortunately, a resource already exists that addresses state post-conviction remedies in a variety of state jurisdictions.³⁷

Habeas corpus review generally requires that the petitioner is in custody.³⁸ There are both court-created and statutory bars to pursuing collateral challenges. An individual who is no longer serving a sentence, and is no longer on parole or probation still may have a remedy under state law even though she or he is not in custody. This means that whether an individual noncitizen qualifies for state post-conviction relief will depend on the post-conviction law of the state of conviction. If a suitable vehicle exists, however, a practitioner can use the arguments in this advisory to obtain post conviction relief on the merits for someone who has a remedy under *Padilla*.

A state court defendant may raise a constitutional challenge to her or his conviction by filing for habeas review in state court and then in a federal district court pursuant to 28 U.S.C. § 2254. Unfortunately, Congress has provided a variety of obstacles to such federal challenges.³⁹ In general, a federal court will not conduct habeas review of the state offense if the petitioner did not first seek review of the issue on direct appeal.⁴⁰

V. Strategic Concerns

A. General Standards Under *Strickland v. Washington*

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court created a two-prong test to determine whether a person could vacate a conviction for ineffective assistance of

³⁵ 129 S.Ct. 2213 (2009).

³⁶ *United States v. Morgan*, 346 U.S., 502, 503, 511-12 (1954).

³⁷ See D. Wilkes, *State Postconviction Remedies and Relief Handbook* (2009) for a state-by-state summary of post-conviction vehicles and procedures.

³⁸ See, e.g., *Maleng v. Cook*, 490 U.S. 488 (1989) (per curiam).

³⁹ See, e.g. 28 U.S.C. § 2244 which creates complicated timing and numerical bars to such petitions.

⁴⁰ *Bousley v. United States*, 523 U.S. 614 (1998).

counsel. The first prong is that the quality of the attorney’s representation fell below professional norms. The second prong is that the defendant suffered prejudice as a result of the deficient performance. A petitioner seeking post-conviction relief must establish both prongs to prevail.

1. Establishing that Attorney’s Representation Fell Below Professional Norms

In *Padilla*, the Supreme Court found that at a minimum “[F]or at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.”⁴¹ This means that if a defendant pleaded guilty after March 1995, then criminal defense counsel had the obligation to provide advice about immigration consequences. Thus, any failure to provide such advice falls below accepted professional norms. If the conviction is older than 15 years, then a practitioner would need to show that professional norms in effect on the date of the plea required that defense counsel provide advice about immigration consequences.

2. Establishing Prejudice

A person seeking to vacate her or his plea must show that the outcome would have been different in order to satisfy the second prong in *Strickland*. Moreover, to obtain relief on this type of claim, a petitioner must convince a factfinder that a decision to reject the plea bargain would have been rational under the circumstances.⁴²

A petitioner also must be aware that after vacating her or his conviction that the case does not go away, but rather starts all over again. This means that a successful petitioner faces all original charges when the conviction is set aside, even those that were dismissed under a plea bargain. There is also a chance that the petitioner might receive a greater sentence the second time around. Proper post-conviction practice requires advising the client of the possibility of a worse criminal outcome, or a worse immigration outcome, if the conviction is reopened. Before deciding to go forward with the post-conviction petition, counsel also should explore less harmful alternative pleas, the likelihood of success at trial, and the prosecution’s position regarding charge bargaining after a conviction has been vacated.

- B. Immigration Impact of Conviction Vacated under *Padilla*

In general, the Board of Immigration Appeals (BIA or Board) will give full faith and credit to state court orders that appear to vacate a noncitizen’s criminal conviction.⁴³ The Board recognizes an exception to the general rule if a noncitizen obtained a vacatur “solely on the basis

⁴¹ *Padilla v. Kentucky*, 130 S.Ct. 1473, 1485 (2010).

⁴² *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486 (2000).

⁴³ *Matter of Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000). Under Fifth Circuit law, a vacated conviction still can be used to establish deportability because the statutory definition of conviction, 8 USC § 1101(a)(48)(A) does not include an exception for a conviction that has been vacated. *Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002). The Court’s decision in *Padilla* may supersede the Fifth Circuit’s decision, however.

of immigration hardships or rehabilitation, rather than on the basis of a substantive or procedural defect in the underlying criminal proceedings.”⁴⁴ A conviction vacated for violating a defendant’s Sixth Amendment right to counsel would certainly satisfy the Board’s test. That the underlying nature of the legal defect involves failure to warn about immigration consequences does not change that the court vacated the conviction because of a substantive defect.⁴⁵ Even if the state statute that confers jurisdiction provides for a vacatur in the “interest of justice” or some similar language that sounds equitable in nature, a vacated conviction should eliminate the conviction if the underlying writ is granted, even in part, on the basis of a constitutional defect. That is, if the court vacated the conviction, at least in part, on constitutional grounds, then the court did not vacate it solely for equitable reasons and, thus, the Board should give it full faith and credit.⁴⁶

⁴⁴ *Matter of Chavez-Martinez*, 24 I&N Dec. 272, 273 (BIA 2007). *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

⁴⁵ *See Matter of Adamiak*, 23 I&N Dec. 878 (BIA 2006) (recognizing that conviction vacated because of a violation of a state plea warning about immigration consequences was not a conviction for immigration purposes because failure to notify constituted a substantive defect in the underlying criminal proceedings).

⁴⁶ *Matter of Chavez-Martinez*, 24 I&N Dec. 272, 273 (BIA 2007). *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

