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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.