

IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS

Introduction

Public Defenders and all criminal defense attorneys have a certain expertise in one area of law, criminal law. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the United States Supreme Court has declared criminal defense attorneys must expand their knowledge and expertise to the area of immigration law, at least to the extent to be able to inform criminal defendants of the immigration consequences of a criminal conviction. The Supreme Court has declared failure to do so, is tantamount to ineffective assistance of counsel. “Criminal defense counsel have an **affirmative** duty to inform a noncitizen defendant of the immigration consequences of a plea. A failure to give this advice, coupled with a showing of prejudice, meets the test for ineffective assistance of counsel under *Strickland v. Washington*, 104 S. Ct 205 (1984), and is the basis to vacate the conviction on Sixth Amendment grounds.” *Id* at 1481-1483.

Nebraska Statute § 29-1819.02, states that prior to accepting a guilty or no contest plea to an offense punishable as a crime, the court must advise a defendant that if they are not a United States citizen, a conviction for the crime may have the consequence of removal from the United States or the denial of naturalization. The statute also states that upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement.

It is at this point in the proceedings that a defendant looks to defense counsel for advice. It is simply not enough under *Padilla* for counsel to either tell a defendant they might be deported if they plea, to tell the defendant they do not know what the possible immigration consequences could be, or to remain silent. The *Padilla* Court stated the following:

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. 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. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear. *Id* at 1483.

Further, they held, “When attorneys know that their clients face possible exile from the country and separation from their families, they should not be encouraged to say nothing at all.” *Id* at 1484.

Under *Padilla*, criminal defense attorneys need to have an understanding of the possible immigration consequences of entering a plea to any criminal charge for their noncitizen clients. This is necessary so when a client turns to you after a judge advises them under Neb. Rev. Stat. § 29-1819.02, you can do more than shrug your shoulders.

It seems that *Padilla* has been met with indifference by some criminal defense attorneys and panic by others. As in, “My job is to get a good deal and limit how much time my client gets, not act as an immigration attorney.” or, “Oh my God, I know nothing about immigration law. How can I be expected to advise my clients?” What follows is a list of readily accessible, generally free, resources for criminal defense attorneys to use to educate themselves about the immigration consequences of criminal convictions. Hopefully, the information from these resources will calm the panic of some criminal defense attorneys and motivate others to live up to the standard the United States Supreme Court has set in *Padilla*.

RESOURCES

UNL College of Law Professor Kevin Ruser, has published a great manual titled, “The Nebraska criminal law practitioner's guide to representing non-citizens in state court proceedings.” See the review by Jessica Milburn in the March/April 2009 *Habeas Corpus*. Ruser’s manual can help you determine your client’s immigration status, help you learn the difference between deportability v.s. inadmissibility, and the immigration consequences of a criminal conviction for your client. Ruser’s manual also has an appendix that contains analysis of selected Nebraska criminal statutes in relation to immigration consequences and an analysis of the likely effect a conviction for each will have for your noncitizen clients.

The manual is available for purchase at the bargain price of \$85. For questions or to purchase the manual, contact Marcy Tintera at the UNL College of Law, (402) 472-1258.

mtintera@unl.edu.

The following websites offer a wealth of information regarding immigration law and resources for criminal defense attorneys who have clients that are facing immigration consequences as a result of possible criminal convictions.

www.criminalandimmigrationlaw.com

Go to the “free resources” section. Here you will find useful items such as:

- ▶ Free copy of Tooby’s Guide to Criminal and Immigration Law. This 230 page book is free to download as a pdf file. Excellent resource.
- ▶ Free newsletter on Immigration and Criminal Law topics with archives.
- ▶ Immigration Consequences Charts for federal and selected state crimes.
- ▶ Basic Immigration Status questionnaire. Good to help determine your client’s status and consequences of conviction.
- ▶ Other resources such as guides for defending noncitizens and sample pleadings.

www.defeningimmigrants.org

You can join the site for free and have access to an extensive library of materials. These include:

- ▶ Client Immigration Questionnaires.
- ▶ Immigration Consequences Conviction Summary Checklist. List grounds for deportation, inadmissibility, crimes that make one ineligible for citizenship. Good for quick check of what crimes could effect your clients status.
- ▶ Strategies for Effectively Defending Noncitizen Clients.
- ▶ Training videos covering topics such as; Determining Defense Goals and Categorical Analysis; Definition of a Conviction and Pleading Out a Drug Case; Crimes Involving Moral Turpitude; Safe Pleas in Domestic Violence Cases.

- ▶ Materials on other topics such as Defending Noncitizen Juveniles, Immigration Enforcement in the Criminal Justice System (Immigration hold/detainers and the 48 hour rule and immigration detention.)
- ▶ This site has a great search application so you can search the entire library by topic.

www.immigrantdefenseproject.org

Free site. Go to the “resources” section and access resources concerning: Criminal Justice System, Deportation System, and Know Your Rights sections.

- ▶ Go to the Criminal Justice Systems in “resources” and click on the “Immigration Consequences of Conviction Checklist”. This checklist is much like the ones found on the above sites but includes a back page on suggested approaches for representing noncitizens in criminal cases. Great one page guide to have with you whenever you are working on a case with a client who is either a permanent legal resident, a refugee or has been granted asylum, or any other noncitizen.
- ▶ Be sure to check out the sections on: Aggravated Felony Practice Aid, Aggravated Felonies Alphabetically, Alphabetical List of Offenses that are or might be aggravated felonies, and Sample Aggravated Felonies case law determinations from assault to vehicular Homicide.
- ▶ Other resources include Crim-Imm Practice Tips, How to Work with Immigration Lawyers to Protect Your Noncitizen Client, Amicus Briefs, and Crim-Imm News.

Other sites that have helpful information can be found at:

<http://nationalimmigrationproject.org>

www.ilrc.org (Immigrant Legal Resource Center)

Attorneys to contact.

The following Nebraska attorneys participated in a notional training seminar on immigration consequences of criminal convictions. They have agreed to have their contacts posted for criminal defense attorneys with questions to contact.

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