

Update to Chapter 1 -- Introduction and Overview

§ 1.1 Criminal Defense: Special Factors in Representing Noncitizens

The Supreme Court held that noncitizen defendants have a Sixth Amendment right to be advised of the immigration consequences of a proposed plea. Criminal defense counsel's failure to provide advice will be held ineffective assistance of counsel sufficient to vacate the conviction, if prejudice is shown. *Padilla v. Kentucky*, 599 U.S. __ (March 31, 2010). Some key points in the decision are:

- **Deportation is a “penalty”, not a “collateral consequence”, of the criminal proceeding.** The Court held that deportation is a “particularly severe ‘penalty’” and made clear that the “direct vs. collateral” distinction does not apply to immigration consequences and does not preclude ineffective assistance of counsel (IAC) claims based upon faulty immigration advice.
- **Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.** In support of its holding on what is required for an IAC claim, the Court relied on professional standards that generally require defense counsel to **investigate and advise** a noncitizen client regarding the immigration consequences of a 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 affirmative 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.
- **Counsel’s duty to advise encompasses how to avoid becoming removable and/or how to remain eligible for status or relief from removal, as appropriate based on the individual case.**
- **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.

See two Practice Advisories on *Padilla* in Appendix to this Update, one summarizing the whole opinion, and one discussing the steps criminal defense counsel must take under *Padilla*.

Resource: Working with District Attorneys, Los Angeles. The Los Angeles District Attorney's Office, referring to the California Rules of Court requiring the sentencing judge to take account of collateral immigration consequences in deciding whether to grant probation, has enacted a Special Directive allowing prosecutors to depart from normal plea bargaining and post-conviction policies where collateral consequences "have so great an adverse impact on a defendant that the resulting punishment may not fit the crime." This provision authorizes a departure from policy when "unusual or extraordinary circumstances exist which demand a departure in the interest of justice." "All departures from policy based on collateral consequences must be approved by the appropriate supervisor." This District Attorney's Office contains some 600 attorneys. These policies may be found on the District Attorney's website at <http://da.co.la.ca.us/sd03-04.htm>.

Resource: Collateral consequences in general. For a discussion of the many types of collateral consequences of a criminal conviction (with just a few pages dedicated to immigration consequences), see the American Bar Association Commission on Effective Criminal Sanctions & Public Defender Service for the District of Columbia, *Internal Exile: Collateral Consequences of Conviction in Federal Laws and Regulations* (January 2009), www.abanet.org/cecs/internalexile.pdf.

§ 1.4 Rules for Permanent Residents Who Travel Abroad

Resource: Arriving aliens. AILF has updated its "Arriving Alien" and Adjustment of Status Litigation Issue Page. This page provides information about developments relating to the ability of an "arriving alien" in removal proceeding to adjust status. It includes summaries of circuit court decisions and links to AILF's Practice Advisories on this issue. http://www.aifl.org/lac/clearinghouse_102306.shtml

Report: Admission under *Camins*. In accordance with *Camins v. Gonzales*, 500 F.3d 872, 885 (9th Cir. 2007), San Francisco CBP's Deferred Inspections Unit has stopped issuing NTAs to LPRs returning from a brief, casual, and innocent trip abroad, because their pre-April 1, 1997 guilty or no contest plea no longer renders them inadmissible under INA § 212(a)(2). (For further discussion of *Camins*, see *Defending Immigrants in the Ninth Circuit*, § 1.5.) Instead, these cases are referred to ICE when there may be a possible charge under INA § 237(a)(2). Unfortunately, ICE's policy on taking people into custody is much stricter than CBP's. Therefore, people are being placed in mandatory detention that otherwise may have been released on their own recognizance. Thanks to Joren Lyons.

§ 1.6 Verifying Immigration Status, Criminal Records

Resource: Online results of FOIA requests can be obtained by going to www.uscis.gov and clicking on "About USCIS" and then "Freedom of Information and Privacy Act (FOIA)."