

## POST-PADILLA ISSUES

Padilla v. Kentucky, 559 U.S. 356 (2010) – “It 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”. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.”

Padilla: “When the law is not succinct and straightforward 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.”

Padilla: “In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction.” “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.”

So counsel’s immigration advice – either lack thereof or erroneous advice – implicates the Sixth Amendment right to counsel. Therefore, we must look to the Strickland v. Washington, 466 U.S. 668 (1984) two-part test to determine if the Sixth Amendment right to effective assistance of counsel has been violated in a specific case.

Two-Part Test: Strickland

- 1) Constitutional deficiency prong - First determine if counsel’s representation “fell below an objective standard of reasonableness.”
- 2) Prejudice prong - If so, then consider whether “there is reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.

So what is Padilla’s impact on us?

First: Whether pleas entered by noncitizens are freely, voluntarily and understandingly made with the effective assistance of counsel.

Second: MARs or post-conviction challenges.

Lee v. United States, 532 U.S. \_\_\_\_; 137 S. Ct. 1958 (2017) – The Court, having found counsel’s performance to be constitutionally deficient, applied the prejudice prong.

“As we held in Hill v. Lockhart, 474 U.S. 52 (1985), when a defendant claims that his counsel’s deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a ‘reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’”

“Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.”

Chaidez v. United States, 568 U.S. 342 (2013) - “We conclude that, under the principles set out in Teague v. Lane, 489 U.S. 288 (1989), Padilla does **not** have retroactive effect. (see also State v. Alshaif, 219 N.C. App. 162 (2012))

## IMMIGRATION LAW BENCH SHEET

### Common Deportation Grounds

1. Present in violation of law. Padilla and Lee only address those who are **lawfully** in the country. Anyone who is unlawfully present is deportable. 8 USCS §1227(a)(1)(B).
2. Crimes of **moral turpitude**. Any alien who is convicted of crime involving moral turpitude committed within 5 years after the date of admission and the offense is one for which a sentence of one year or more may be imposed is deportable. 8 USCS §1227(a)(2)(A)(i). Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable. 8 USCS §1227(a)(2)(A)(ii). Federal law does not define crimes of “moral turpitude”. Lacking an established definition, this is likely an area where **the law is not “succinct and straightforward”**. Thus, the general warning is likely sufficient in these cases.
3. Any alien who is convicted of an aggravated felony at any time after admission is deportable. 8 USCS §1227(a)(2)(A)(iii). **Aggravated Felony** includes:  
8 USCS §1101(a)(43).
  - a. Murder, rape, or sexual abuse of a minor;
  - b. Illicit trafficking in a controlled substance;
  - c. Illicit trafficking in firearms or destructive devices;
  - d. A crime of violence for which the term of imprisonment is at least one year;
  - e. A theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year;
  - f. An offense relating to child pornography;
  - g. An offense that relates to the owning, controlling, managing, or supervising of a prostitution business;

- h. An offense that involves fraud or deceit or tax evasion in which the loss to the victim(s) exceeds \$10,000;
- i. An offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;
- j. An offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;
- k. An offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and
- l. An attempt or conspiracy to commit (also includes aiding and abetting) an offense described in this paragraph.

All prison terms refer to an active or suspended sentence. 8 USCS § 1101(a)(48)(B).

See State v. Nkiam, 778 S.E.2d 863; 2015 N.C. App. LEXIS 910 (2015) wherein the Court of Appeals found that "the deportation consequences resulting from a guilty plea to an aggravated felony may, depending on the particular offense, be truly clear within the meaning of Padilla." "In this case...there was no need for counsel to do anything but read the statute."

Therefore, the above offenses should be considered grounds for "**presumptively mandatory deportation.**"

4. Controlled substances. Any alien who at any time after admission has been convicted of (or a conspiracy or attempt to violate) any law or regulation of a State or the U.S. relating to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable. 8 USCS §1227(a)(2)(B)(i). Under Padilla, the law in this area is clear and results in "**presumptively mandatory deportation.**"
5. Drug abusers and addicts. Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable. 8 USCS §1227(a)(2)(B)(ii). This ground does not require a conviction. But query: Does this subject 90-96, deferred prosecution, and drug treatment court offenders to possible deportation?
6. Firearm offenses. Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying (or a conspiracy or attempt to violate) any weapon, part, or accessory which is a firearm or destructive device is deportable. 8 USCS §1227(a)(2)(C) . A conviction fitting within these parameters is likely grounds for "**presumptively mandatory deportation.**"

7. Domestic violence, stalking, and child abuse. Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. 8 USCS §1227(a)(2)(E)(i). A conviction fitting within these parameters is likely grounds for “**presumptively mandatory deportation.**”
8. Violators of protection orders. Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person(s) for whom the protection order is deportable. 8 USCS §1227(a)(2)(E)(ii). A conviction fitting within these parameters is likely grounds for “**presumptively mandatory deportation.**”
9. Unlawful voters. Any alien who has voted in violation of any Federal, State, or local constitutional provision, statute, ordinance, or regulation is deportable. 8 USCS §1227(a)(6). A conviction fitting within these parameters is likely grounds for “**presumptively mandatory deportation.**”

This is **not** an exhaustive list of all deportation grounds. For more detailed information, please review the applicable USCS section and/or the “Immigration” tab on the Indigent Defense Manual Series (School of Government website) by John Rubin and Sejal Zota.

“Conviction” is defined as a formal judgment of guilt entered by a court or, if adjudication of guilt has been withheld, where:

- (1) A judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
- (2) The judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed. 8 USCS §1101(a)(48)(A).

## HOW BEST TO PROCEED

Federal System amended the plea colloquy in part due to Padilla. The Federal District Court Judges are now directed to inquire as follows:

1. Are you a citizen of the United States?

2. Have you discussed the possible immigration consequences of a guilty plea with your attorney?
3. Do you understand that if you are not a citizen of the United States, in addition to the other possible penalties you are facing, a plea of guilty may subject you to deportation, exclusion, or voluntary departure, and prevent you from obtaining U.S. citizenship?
4. Then the court is directed to warn the defendant as follows: "If convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future."  
Rule 11(b)(1)(O) Federal Rules of Criminal Procedure and Benchbook for U.S. District Court Judges, Sixth Edition, Section 2.01.

United States v. Akinsade, 686 F.3d 248 (4<sup>th</sup> Cir. 2012).

"In order for a district court's admonishment to be curative, it should address the particular issue underlying the affirmative misadvice. Here, the district court's admonishment touches upon the consequence of deportation but does not correct the particular misadvice given by counsel."

So in essence, the general warnings are not sufficient to protect against or to remedy specific and erroneous legal advice from counsel (unless the applicable federal law is not succinct and straightforward as to the immigration consequences – see Padilla).

Further, State v. Nkiam, 778 S.E.2d 863, 2015 N.C.App. LEXIS 910 (2015) makes clear that any equivocation (plea "could" result in deportation) in the colloquy is problematic.

Question 8 – Transcript of Plea form – Do you understand that, if you are not a citizen of the United States of America, your plea(s) of guilty or no contest **may** result in your deportation from this country, your exclusion from admission to this country, or the denial of your naturalization under federal law?

This question is likely sufficient if the applicable federal law is not succinct and straightforward. It is clearly not sufficient if the deportation consequences are clear under federal law.

State v. Nkiam, 778 S.E.2d at 870: "When other courts have found deportation consequences unclear for particular guilty pleas, they have pointed to the need for trial counsel to look beyond the plain language of the United States Code in order to reach a conclusion regarding the deportation consequences for the Defendant." "In this case, however, (referring to Nkiam) there was no need for counsel to do anything but read the statute."

So our test is: Are the deportation consequences clear in the United States Code?

With that test as our guide, I propose to you the following approach. First, if the plea before you falls into one of the “presumptively mandatory deportation” categories listed above, then I suggest the addition of the following questions to your plea colloquy:

### **FOR PRESUMPTIVELY MANDATORY DEPORTATION**

1. Are you a citizen of the United States? (If no, then proceed to question 2.)
2. Do you understand that, if you are not a citizen of the United States of America, your plea(s) of guilty or no contest may result in your deportation from this country, your exclusion from admission to this country, or the denial of your naturalization under federal law?
3. Have you discussed the possible immigration consequences of a guilty plea with your attorney? (If no, then direct the attorney to his/her professional obligation under *Padilla/State v. Nkiam* and allow for further consultation before proceeding with the plea. If yes, then proceed with next question.)
4. Because of the offense to which you are pleading guilty, do you understand that you face presumptively mandatory deportation under federal law?
5. Has anyone made any specific representations to you to the contrary regarding presumptively mandatory deportation? (If yes, then you must ask for clarification as to the representations made and, without any equivocation by the court or by counsel, you must establish that the Defendant clearly understands that he faces “presumptively mandatory deportation.”)
6. Despite the consequence of presumptively mandatory deportation, do you still wish to enter this plea?

### **FOR ALL OTHER PLEAS**

1. Are you a citizen of the United States? (If no, then proceed to question 2.)
2. Do you understand that, if you are not a citizen of the United States of America, your plea(s) of guilty or no contest may result in your deportation from this country, your exclusion from admission to this country, or the denial of your naturalization under federal law?
3. Has anyone made any specific representations to you regarding possible immigration consequences?
4. Despite the possible immigration consequences of your plea, do you still wish to enter this plea?

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