

## What Defense Lawyers Need to Know About Immigration

On March 31, 2010, the U.S. Supreme Court issued *Padilla v. Kentucky*, 130 S Ct 1473 (2010), holding that the Sixth Amendment requires defense counsel to advise a noncitizen criminal defendant regarding the immigration consequences of a guilty plea. Absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel. An advisory opinion that explains *Padilla* in more detail is available at [www.aialaoregon.com](http://www.aialaoregon.com).

The defendant in *Padilla* pled guilty to a drug charge that made his deportation virtually mandatory under the immigration laws. However, Padilla's defense counsel erroneously advised him that he did not have to worry about his immigration status since Padilla had been in the United States for so long. The Court held that under the Constitution's right to competent counsel, counsel must inform their client whether a plea carries a risk of deportation.

The Oregon Constitution requires defense counsel to advise clients who are not U.S. citizens that a criminal conviction "may result" in deportation. *Gonzalez v. State of Oregon*, 340 Or 452, 134 P3d 955 (2006) (citing *Lyons v. Pearce*, 298 Or 554, 694 P2d 969 (1985)); ORS 135.385(2) (d). However, under *Padilla*, giving Oregon's general warning may not be sufficient to meet the federal constitutional standard of "reasonable professional assistance" of counsel. Counsel must be "active, rather than passive, taking the initiative to learn about the rules in this area rather than waiting for questions from the defendant."

*Padilla* also made it clear that prosecutors should take immigration consequences into account in plea bargaining, since "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deporta-

tion consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."

What are some of the immigration consequences that noncitizen defendants may face from a criminal disposition? Will they be deportable, without any relief, as an "aggravated felon" (a term that often includes no-jail misdemeanors)? Will they become ineligible to get a green card because the offense makes them inadmissible to the country as a result of a crime involving moral turpitude? If they are deportable or inadmissible, do they have any chance of getting relief (forgiveness) in immigration court? These are the types of questions that defense counsel must consider.

### Defense Counsel's Responsibilities

Defense counsel's duty includes not only informing a client of the immigration consequences of a conviction, but also helping the client *avoid* a potential disaster during the course of representation. Defense counsel must ask the relevant questions of a client and work to determine the client's immigration consequences **before** the client 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 before a sentencing or delinquency hearing. All of these events can have unintended consequences that may affect the client's immigration status. In some cases, the immigration consequences of a plea may be far more serious than the criminal consequences.

*Padilla* does not require counsel to provide a definitive answer in situations where the law

#### DISCLAIMER

IN BRIEF includes claim prevention information that helps you to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate research.

may be unclear as to the immigration consequences of a conviction. However, in order for defense counsel to determine whether a client's potential immigration situation is straightforward or unclear, defense counsel must work with the client to obtain the necessary information, and the proper research must be done.

In addition to the charges, counsel needs to know the defendant's prior criminal history and any mitigating and aggravating factors, such as:

- **Immigration Status:** Is the defendant a long-time green-card holder? Does the defendant have any documents? A firearm conviction may trigger deportation for a lawful permanent resident but not a defendant who entered the United States unlawfully. Someone married to a U.S. citizen, or whose parents are in the United States, may have options in immigration court unavailable to others.

- **Criminal History:** The implications of a current charge or conviction vary depending on whether the defendant has a prior conviction. A defendant's prior criminal history will also determine whether he or she can get relief in immigration court.

- **What Deal Is on the Table:** Many criminal statutes are "divisible" – one set of elements will cause deportation and the other may not. The immigration consequences may depend on whether counsel can negotiate a plea to a portion of the statute that avoids or minimizes immigration consequences. This often requires careful crafting of the factual basis for the plea contained in defendant's plea statement.

Sample intake forms are available at [www.defendingimmigrants.org](http://www.defendingimmigrants.org) and [www.lojlr.com](http://www.lojlr.com). Simply consulting a list of the grounds of removal cannot address these issues. You must also understand your client's goals – for example, does the client want to avoid deportation at all costs? Or does the client care more about his or her criminal record?

## Resources Available to Lawyers

Criminal defense counsel in Oregon currently have the following resources to help them understand immigration consequences:

- **Education:** Numerous resources are available for learning directly how a criminal conviction may affect a defendant's immigration situation. See, for example, [www.defendingimmigrants.org](http://www.defendingimmigrants.org). The defense bar may wish to pursue other options to make this easier in the future, such as the Washington Defender's Immigration Project in Washington state. See [www.defensenet.org/immigrationproject](http://www.defensenet.org/immigrationproject). Also see the box of additional re-

sources accompanying this article.

- **Consultation with Immigration Counsel:** You may want to consider consulting immigration counsel, even from the beginning of a case. Some immigration practitioners in Oregon are well-versed in these issues and can work with defense counsel in determining the immigration consequences of the charges alleged and in identifying alternatives that may avoid removal, or at least give the defendant a possibility to seek relief from removal in immigration court.

- **Client Contact with Immigration Counsel:** The defendant or family members can contact an immigration attorney directly. Whenever possible, defense counsel should assist in locating an experienced immigration attorney and should be sure to follow up with the family or the attorney directly before any criminal proceeding with potential immigration consequences.

Finally, post-conviction counsel should be aware that there are arguments still to be made that the *Padilla* decision should apply to final convictions and that the case presents an exception to the two-year statute of limitations (starting March 31, 2010).

Even though determining the immigration consequences of a conviction may be a complex process, and counsel may ultimately discover that the law is unclear, there are resources and attorneys available to help educate defense counsel so that they can provide the best assistance possible to their clients.

JULIE A. KRULL  
ATTORNEY AT LAW

JOSEPH JUSTIN ROLLIN  
LAW OFFICES OF JOSEPH JUSTIN ROLLIN

## Additional Immigration Resources

- **Immigrant Defense Project** ([www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org)): Practice advisories regarding the latest immigration issues, including the *Padilla* case; one-page checklist summarizing criminal offenses that might have immigration consequences (“Resources” tab, “Criminal Justice System”).
- **National Immigration Project** ([www.nationalimmigrationproject.org](http://www.nationalimmigrationproject.org)): Under the “What We Do” menu, select “Criminal & Deportation Defense”; offers assistance to criminal defense attorneys anywhere in the United States, including advice on a particular case; services are free.
- **American Immigration Lawyers Association** ([www.aialaoregon.com](http://www.aialaoregon.com)): Oregon Chapter.
- **Washington Defender Association** ([www.defensenet.org](http://www.defensenet.org)): Under “Immigration Project” tab; “Immigration Resources” for *Padilla* practice advisory; client intake worksheet.
- **Immigrant Legal Resource Center** ([www.ilrc.org](http://www.ilrc.org)): Training and help with immigration law.