

1.2 Obligations of Defense Counsel

- A. The U.S. Supreme Court Decides *Padilla v. Kentucky*
 - B. North Carolina Follows *Padilla* in *State v. Nkiam*
 - C. Impact on Duty to Advise Clients
 - D. Impact on Duty to Negotiate
 - E. Relevance of Practice Standards
 - F. Severity of Immigration Consequences
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1.2 Obligations of Defense Counsel

A. The U.S. Supreme Court Decides *Padilla v. Kentucky*

Seven years ago, in *Padilla v. Kentucky*, the U.S. Supreme Court established that criminal defense attorneys have an obligation, as part of the Sixth Amendment guarantee of effective assistance of counsel, to advise noncitizen clients about the immigration consequences of the criminal charges against them. The nature of the advice required varies according to the clarity of the immigration consequences. *Padilla*, 559 U.S. 356, 368–69. When the immigration consequences are clear, defense counsel must provide specific advice. In cases in which the immigration consequences are unclear or uncertain, defense counsel need only advise clients that the criminal charges may carry adverse immigration consequences. *A failure to provide any advice at all is constitutionally deficient representation under Padilla.*

B. North Carolina Follows *Padilla* in *State v. Nkiam*

The North Carolina Court of Appeals has confirmed the approach established in *Padilla*. In *State v. Nkiam*, ___ N.C. App. ___, 778 S.E.2d 863 (2015), the first North Carolina appellate decision to address the merits of a *Padilla* claim, the Court of Appeals found that the defendant’s counsel failed to meet this obligation.

The defendant in *Nkiam*, an asylee turned lawful permanent resident, accepted a plea offer, after conferring with counsel, to aiding and abetting common law robbery and conspiracy to commit common law robbery. Although his attorney advised him that there was a risk of deportation—that is, that he *could* be deported as a result of the plea—his attorney did not advise him that deportation was presumptively mandatory—that is, that he *would* be deported. The plea, however, carried serious immigration consequences. Deportation was “presumptively mandatory” for the defendant’s robbery conviction because it is an “aggravated felony” under federal immigration law. (Aggravated felonies include theft offenses when the person receives a one-year sentence of imprisonment, active or suspended.). Deportation was a paramount concern to the defendant, who feared political and ethnic persecution were he returned to the Democratic Republic of Congo.

Applying *Padilla*, the court in *Nkiam* agreed that the attorney’s advice was insufficient. The court recognized that *Padilla* established a bifurcated duty for defense counsel—that is, “when the consequence of deportation is unclear or uncertain, counsel need only

advise the client of the risk of deportation, but when the consequence of deportation is truly clear, counsel must advise the client in more certain terms.” *Nkiam*, 778 S.E.2d at 868, *citing Padilla*, 559 U.S. at 369. The court found that deportation was a “truly clear” consequence in this case because it could be discerned from the plain language of the immigration statutes. *See Nkiam*, 778 S.E.2d at 870 (distinguishing cases in which the immigration consequences were not truly clear, as when the federal courts had divergent views or had not addressed the issue). The court rejected the State’s argument that various forms of immigration relief were available to the defendant and therefore that the consequence of deportation was unclear. As the court recognized, such relief is rarely granted; its theoretical availability does not relieve counsel of the obligation to give “correct advice” about the likelihood of deportation. *Nkiam*, 778 S.E.2d at 871, *quoting Padilla*, 559 U.S. at 369.

C. Impact on Duty to Advise Clients

What do *Padilla* and *Nkiam* mean for defense counsel? The decisions have the following impact:

- When the immigration consequences are clear, counsel must give specific advice about those consequences; merely indicating that the consequences are possible or are a risk is not enough.

Practice Note: The following is an example of specific advice that would meet your Sixth Amendment obligations. Suppose your client is charged with cocaine distribution. You learn that she is a lawful permanent resident and that this is her first encounter with the criminal justice system. Cocaine distribution is a drug trafficking aggravated felony. *See infra* § 3.4A, Aggravated Felonies Generally. You should advise her that a conviction of the offense is a conviction for an aggravated felony and carries the most severe immigration consequences. Specifically, you should advise her that she faces almost certain removal (or words to that effect), that she is barred from most forms of relief from removal, that she is subject to mandatory detention, as well as the other consequences associated with an aggravated felony, discussed further in § 3.4A.

- Not giving any advice or referring the client to an immigration lawyer is insufficient. The Sixth Amendment, as interpreted in *Padilla* and *Nkiam*, places the obligation on defense counsel to provide effective advice about immigration consequences in connection with a guilty plea. Further, indigent clients are usually not in a position to hire separate immigration counsel to obtain the advice they need about the consequences of the criminal case. An indigent person does not have the right to appointed counsel in immigration proceedings.
- Attorneys cannot meet their Sixth Amendment obligations by telling all noncitizen clients that they *will* face immigration consequences as a result of the conviction. Where the consequences do not attach or are less certain, such advice is likewise inaccurate and could lead a client to reject a favorable plea in the mistaken belief that adverse immigration consequences would result. *See Lafler v. Cooper*, 566 U.S. 156 (2012) (holding that attorney may be found ineffective if advice led to improvident

rejection of plea offer). Such blanket advice also could lead clients not to seek the assistance of an immigration attorney after the criminal proceedings in the mistaken belief that adverse immigration consequences are inevitable.

- A judge’s general advisement during the plea colloquy about potential immigration consequences is not an adequate substitute for specific advice by counsel. *See Nkiam*, 778 S.E.2d 863, 872. Such judicial advisements do *not* satisfy counsel’s Sixth Amendment obligations.
- As a practical matter, defense attorneys must do sufficient investigation and research to determine the specific immigration consequences of an offense. Or, they need to consult with an expert who can help them determine those consequences.

D. Impact on Duty to Negotiate

Padilla also has implications for defense counsel’s role in negotiating a favorable plea for clients, one that best addresses the client’s criminal and immigration concerns.

In *Padilla*, the Supreme Court explained that counsel’s duty includes investigating the immigration consequences of the plea, not only to inform the defendant’s choice regarding a guilty plea but also to inform defense negotiations: “Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.” *Padilla*, 559 U.S. at 373.

Two years later, the Supreme Court in *Missouri v. Frye* and *Lafler v. Cooper* reaffirmed that defense counsel’s duty to provide effective assistance includes “the negotiation of a plea bargain.” *Missouri v. Frye*, 566 U.S. 134, 141–44 (2012) (“In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”) (citing *Padilla*); *Lafler v. Cooper*, 566 U.S. 156, 162 (2012).

More recently, in discussing the methodology for assessing whether a noncitizen is deportable, the Supreme Court in *Mellouli v. Lynch* again recognized defense counsel’s role in negotiating and mitigating adverse immigration consequences. ___ U.S. ___, 135 S. Ct. 1980, 1987 (2015) (explaining that approach “enables aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter ‘safe harbor’ guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions”).

These cases support a Sixth Amendment duty to negotiate effectively to avoid or minimize immigration consequences. In addition, the professional standards relied on by *Padilla* in determining defense counsel’s duties provide that immigration consequences should inform negotiation strategy. *See, e.g., National Legal Aid & Defender Assn., Performance Guidelines for Criminal Representation* § 6.2 (1995) (“In order to develop

an overall negotiation plan, counsel should be fully aware of, and make sure the client is fully aware of . . . other consequences of conviction such as deportation. . . . In developing a negotiation strategy, counsel should be completely familiar with . . . the advantages and disadvantages of each available plea according to the circumstances of the case.”); [ABA Standards for Criminal Justice, Prosecution Function and Defense Function](#), Standard 4-5.4 (4th ed. 2015). (“Defense counsel should include consideration of potential collateral consequences in negotiations with the prosecutor regarding possible dispositions, and in communications with the judge or court personnel regarding the appropriate sentence or conditions, if any, to be imposed).

Thus, if the preliminary investigation of the immigration consequences reveals that the proposed plea will result in adverse immigration consequences, counsel should assist the client in seeking to obtain an alternative disposition that would avoid or mitigate those consequences, particularly where the client has conveyed that the immigration consequences are a priority.

E. Relevance of Practice Standards

Both *Padilla* and *Nkiam* are consistent with a number of practice standards, which have long recognized that criminal defense counsel’s role includes investigating and advising noncitizen clients about the potential immigration consequences of a criminal case. *See, e.g.,* [ABA Standards for Criminal Justice, Pleas of Guilty](#), Standard 14-3.2(f) (3d ed. 1999) (“To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.”); Commentary to Standard 14-3.2(f) (“it may well be that many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of conviction”).

Some of these standards reinforce *Padilla*. For example, in 2015 the American Bar Association (ABA) approved a new standard focused entirely on immigration consequences. It recognizes that defense counsel should determine a client’s citizenship and immigration status; investigate and identify potential immigration consequences, including removal, exclusion, bars to relief from removal, immigration detention, and denial of citizenship; advise the client of all such potential consequences; and determine with the client the best course of action for the client’s interests. *See* [ABA Standards for Criminal Justice, Prosecution Function and Defense Function](#), Standard 4-5.5 (4th ed. 2015).

Other standards are weaker than what *Padilla* requires and no longer control. *See, e.g.,* [IDS Performance Guidelines for Indigent Defense Representation in Non-Capital Criminal Cases at the Trial Level](#), Guideline 8.2(b) (2004) (counsel should be familiar with deportation and other possible immigration consequences that may result from the plea).

F. Severity of Immigration Consequences

It is essential for defense counsel to provide effective assistance to noncitizen clients because of the severity of the immigration consequences they face. Deportation is virtually automatic for certain convictions; in later immigration proceedings, the immigration judge does not have the ability to provide any relief or leniency, regardless of the client's equities. A noncitizen client may be subject to virtually automatic deportation even if he or she has been in this country since an early age, has been a lawful permanent resident (i.e., is a "green card" holder), and has no prior convictions. Thus, by the time the client gets to immigration court, the consequences may be set in stone. Even if the client has access to one, an immigration lawyer may be unable to mitigate the impact of the criminal disposition. For many, the adverse immigration effects of a criminal case may be far more important than the sentence imposed in the underlying criminal case.

A criminal conviction can also result in adverse immigration consequences other than deportation. A conviction can disqualify a person from legalizing his or her status, from obtaining admission back into the United States after traveling abroad, from becoming a U.S. citizen, from obtaining a grant of asylum, and from various forms of relief from removal. It can also result in extended civil detention.

Some attorneys assume that only felony offenses carry immigration consequences, but a person can be deported for relatively minor misdemeanor offenses, such as a minor theft or carrying a concealed gun. Sometimes it is possible for a client to avoid the adverse consequence by accepting a plea to a different violation, to a lesser included or related offense, or to the offense as charged but with a shorter sentence.

This manual is a guide to understanding the immigration consequences of convictions and advising noncitizen clients of all such consequences.