8.2 Challenges under *Padilla v. Kentucky*

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), 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. Chapter 1 of this manual focuses on the impact of the *Padilla* decision from the perspective of trial counsel—that is, the steps trial counsel should take to represent noncitizen clients effectively. The discussion below addresses *Padilla* and other decisions from the perspective of how they may support a post-conviction challenge to trial counsel's performance.

A. Standard of Proof

In North Carolina, the standard of proof for an ineffective assistance of counsel claim is governed by the two-prong test set out by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 688 (1984). *See State v. Braswell*, 312 N.C. 553 (1985) (adopting the *Strickland* test as the standard for evaluating ineffective assistance of counsel claims under the North Carolina constitution). To establish ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and that counsel's deficient performance was prejudicial.

The same two-pronged test applies to an ineffectiveness claim based on *Padilla*. *See State v. Nkiam*, ___ N.C. App. ___, 778 S.E.2d 863, 866 (2015).

B. Retroactivity

The North Carolina Court of Appeals has held that *Padilla* does not apply retroactively and does not afford relief to a person whose conviction was final before *Padilla* was decided on March 31, 2010. *State v. Alshaif*, 219 N.C. App. 162 (2012); *accord Chaidez v. United States*, 568 U.S. 342 (2013) (holding that *Padilla* does not apply retroactively to federal convictions).

Ineffective assistance of counsel claims based on other grounds may still be available to noncitizens whose convictions became final before March 31, 2010. These possibilities are discussed in section D., Material Misrepresentation, and section E., Duty to Negotiate below.

C. Deficient Advice

Counsel's Performance. Counsel has a bifurcated duty to advise under *Padilla*. The nature of the advice required varies according to the clarity of the immigration consequences. *Padilla*, 559 U.S. 356, 368–69. Where the immigration consequences are clear, defense counsel must provide specific and correct advice. *Id.* at 369; *Nkiam,* 778 S.E.2d 863, 868–69. For example, counsel's performance would be deficient if he advises his permanent resident client that a plea to cocaine sale *might* result in removal because such a conviction constitutes a drug trafficking aggravated felony resulting in virtually certain removal. Where the immigration consequences are unclear or uncertain, defense counsel at a minimum must still advise clients about immigration consequences, but the advice need only be that the criminal charges may carry adverse immigration consequences. *Padilla*, 559 U.S. 356, 369. For example, defense counsel's performance may be deficient where he or she fails to provide any immigration advice or simply refers the client to an immigration lawyer. *Id*. at 369 n.10.

Prejudice. In cases in which the defendant pled guilty, he must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty but instead would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *see also Lee v. United States*, ___ U.S. ___, 137 S. Ct. 1958, 1965 (2017) (applying *Hill* test to *Padilla* claim).

In applying this standard to a *Padilla* claim, the North Carolina Court of Appeals held that a defendant adequately demonstrates prejudice "by showing that rejection of the plea offer would have been a rational choice, even if not the best choice, when taking into account the importance the defendant places upon preserving his right to remain in this country." *Nkiam*, 778 S.E.2d 863, 874. The Court of Appeals found prejudice even though the defendant was likely to be convicted at trial. *Id*.

The U.S. Supreme Court has similarly held that it is not "irrational" for a noncitizen with substantial ties to the United States to take his chances at trial and risk additional prison time in exchange for whatever small chance there might be of an acquittal that would let him remain in the United States. *Lee v. United States*, 137 S. Ct. 1958, 1968–69 (finding that the noncitizen established that he was prejudiced by his attorney's misadvice regarding the immigration consequences). To demonstrate prejudice under *Lee*, a practitioner should submit contemporaneous evidence of a probability that the client would not have pled guilty if properly advised of the immigration consequences, including evidence of expressed concern regarding the immigration consequences and evidence of any strong connections to the United States. *Id*. at 1967–68.

Can prejudice be shown alternatively by the possibility that a different, immigration safe plea was available? In *Nkiam,* the Court of Appeals noted that had the immigration consequences of the plea been factored into the plea bargaining process, "trial counsel may have obtained an alternative plea that would not have the consequence of mandatory deportation." *Nkiam*, 778 S.E.2d 863, 875. This observation may support an argument that prejudice can be established or at least bolstered by showing that an alternative,

immigration-safe plea was available. *See, e.g.*, *United States v. Swaby*, 855 F.3d 233, 241 (4th Cir. 2017) (holding that a defendant establishes prejudice if there is a reasonable probability that the defendant could have negotiated a plea agreement that did not affect his immigration status) In *Lee*, the Supreme Court expressly reserved the question. *Lee*, 137 S. Ct. 1958, 1966 n.2.

Can prejudice caused by counsel's error be cured by an immigration warning or advisement by the trial court? In *Nkiam*, the Court of Appeals specifically addressed this question. It found that where defense counsel is required to provide specific advice, a boilerplate court warning merely advising of the risk of deportation is inadequate and does not cure any possible prejudice. *Nkiam*, 778 S.E.2d 863, 872.

D. Material Misrepresentation

Although *Padilla* does not apply retroactively (discussed in B., Retroactivity, above), noncitizen clients whose convictions were final before the issuance of *Padilla* may have an alternative Sixth Amendment challenge based on erroneous immigration advice. The U.S. Supreme Court and North Court of Appeals decisions holding that *Padilla* is not retroactive did not foreclose this alternative basis for relief.

In *Chaidez v. United States*, 568 U.S. 342 (2013), the U.S. Supreme Court explicitly distinguished *erroneous advice* claims from the *failure to advise* claim at issue in that case (in other words, wrong advice vs. no advice). The Court described a "separate rule for material misrepresentations," which is not particular to the type of misrepresentation. *Id.* at 356 (recognizing that "a lawyer may not affirmatively misrepresent[s] his expertise or otherwise actively mislead[s] his client on any important matter, however related to a criminal prosecution.") In *State v. Alshaif*, 219 N.C. App. 162 (2012), the court did not specifically address the issue.

North Carolina courts have recognized in other contexts that a conviction may be set aside where defense counsel erroneously advises the defendant about a collateral consequence and the defendant relies on that advice in pleading guilty. *See State v. Goforth*, 130 N.C. App. 603 (1998) (finding that lawyer who misadvised defendant about collateral consequences of plea was deficient in his performance; in this case, attorney misadvised defendant about appealability of sentence). Before *Padilla*, some noncitizens successfully argued under *Goforth* that counsel was ineffective when he or she provided incorrect advice about the immigration consequences of the plea. Because North Carolina courts have recognized erroneous advice claims with respect to collateral consequences at least since 1998, a defendant may be able to prevail on such a claim even for a conviction that became final before *Padilla* was decided.

For example, a noncitizen may be able to argue ineffective assistance based on erroneous advice for a pre-2010 conviction where the defense attorney advised that a deferred prosecution involving an admission of guilt is not a conviction for immigration purposes and does not result in adverse immigration consequences. For immigration law purposes

an admission of guilt coupled with court imposed conditions or punishment constitutes a conviction. *See supra* § 4.1, Conviction for Immigration Purposes

Practice Note: In framing material misrepresentation claims for noncitizen clients with pre-*Padilla* convictions, the focus should be on "affirmative misrepresentations," "erroneous advice," and "misleading the client," not on *Padilla*.

E. Duty to Negotiate

Recent U.S. Supreme Court cases and practice standards support a Sixth Amendment duty to negotiate effectively to avoid or minimize immigration consequences. *See supra* § 1.2D, Impact on Duty to Negotiate (discussing *Missouri v. Frye*, 566 U.S. 134 (2012), and *Lafler v. Cooper*, 566 U.S. 156 (2012)). Thus, if investigation of the immigration consequences reveals that the proposed plea will result in adverse immigration consequences, defense 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.

Where trial counsel failed to negotiate effectively for potentially available safe pleas, you may consider investigating a claim for deficient plea bargaining under *Missouri v. Frye* and *Lafler v. Cooper*. *See also State v. Redman*, 224 N.C. App. 363, 369 (2012) ("During plea negotiations defendants are entitled to the effective assistance of competent counsel.") (quoting *Lafler*, 566 U.S. 156, 162). For example, counsel's performance may be deficient if his or her LPR client is charged with discharging a firearm in violation of a local ordinance and counsel does not explore the possibility of a plea to disorderly conduct or other immigration-safe offense. Although only a Class 3 misdemeanor under North Carolina law, a plea to an ordinance violation involving discharge of a firearm (as that term is defined under federal law) will make an LPR client deportable (even if he or she has a gun permit), but a plea to disorderly conduct or even simple assault is a safe plea.

In making a claim that defense counsel did not secure a reasonably negotiable alternative plea or sentence to limit the adverse immigration consequences, practitioners should document the following: alternative safe pleas that would have been available for the charged offense in the respective jurisdiction; that local defense counsel seek such alternative safe pleas; and existing resources available to assist trial counsel to develop safe immigration pleas.

Such a claim may be available to noncitizens whose convictions predate *Padilla*. *Lafler* and *Frye* are not "new rules" and therefore should apply retroactively to pre-*Padilla* convictions. *See In re Graham*, 714 F.3d 1181, 1182 (10th Cir. 2013); *Gallagher v. United States*, 711 F.3d 315, 315–16 (2d Cir. 2013); *Williams v. United States*, 705 F.3d 293, 294 (8th Cir. 2013); *Buenrostro v. United States*, 697 F.3d 1137, 1140 (9th Cir. 2012); *In re King*, 697 F.3d 1189, 1189 (5th Cir. 2012); *Hare v. United States*, 688 F.3d 878, 879, 881 (7th Cir. 2012); *In re Perez*, 682 F.3d 930, 932–34 (11th Cir. 2012).