

Chapter 1

Obligations of Defense Counsel

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Neil is a 24-year old lawful permanent resident of the United States. Born in Pakistan, Neil came to the U.S. when he was 6 years old, but he has not yet become a U.S. citizen. His mother, father, two sisters, brother, and several cousins all live in the U.S. Neil is a graduate of community college and employed as an auto mechanic. After being taunted with racial slurs and threatened by some former customers, Neil purchases a gun for his safety. One night as he is driving home from work, Neil is stopped by a police officer for reckless driving—for passing a car in a no pass zone with the vehicle lights cut off. The officer searches Neil’s car and finds the gun Neil recently purchased. Neil is charged with reckless driving and carrying a concealed gun. The prosecutor will dismiss the charge of reckless driving if Neil pleads guilty to the gun charge. Neil’s attorney tells him that a reckless driving conviction could result in a suspension of his

driver's license, which he needs to be able to drive to and from work, but not about the immigration consequences of the concealed weapon charge. Neil takes the deal. A few years later, Neil decides to become a citizen. After filing his citizenship application, Neil is notified by immigration officials that deportation proceedings are being initiated against him for a conviction of a firearm offense. His criminal lawyer was unaware that a misdemeanor firearm offense could lead to Neil's deportation and did not discuss these consequences with him. Had Neil negotiated a plea to the reckless driving offense rather than the carrying a concealed gun charge, or had he gone to trial and been acquitted, he would not be facing deportation today. He also might have succeeded in his application to become a U.S. citizen.

1.1 Purpose of Manual

For years, practice standards have recognized that defense counsel's role includes advising noncitizen defendants about the immigration consequences of a criminal conviction. The standards have recognized the serious impact a conviction can have on a person's immigration status. Now such advice is constitutionally required by the U.S. Supreme Court's landmark decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010). A failure to competently advise noncitizen clients about the immigration consequences of a criminal conviction may constitute ineffective assistance of counsel. It is therefore essential for defense counsel either to learn enough about this area of law to advise their noncitizen clients about the impact of the criminal case or know when and how to consult with experts who can assist in them in providing that advice. The purpose of this manual is to help criminal defense counsel navigate this highly technical area of law and live up to their constitutional obligation.

This manual presents both the law on immigration consequences of a criminal conviction and options to assist clients in reducing or eliminating those consequences. The manual does not purport to provide specific legal advice in individual cases. Defense counsel and their clients should seek advice from an immigration expert as necessary.

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.

1.3 How to Meet Your Obligations

To satisfy your obligations under *Padilla v. Kentucky* and competently represent your noncitizen clients (and avoid potential ineffective assistance of counsel litigation in the future), criminal defense counsel should follow certain basic procedures in identifying, advising, and, where appropriate, negotiating alternative pleas that mitigate or do not carry the immigration consequences of concern to the client. At a minimum, defense counsel should take the following steps in each case involving a noncitizen client.

A. Identify Your Client's Citizenship and Immigration Status

In every case, you must identify whether your client is a noncitizen. Chapter 2 of this manual, *Determining Your Client's Citizenship and Immigration Status*, explains how to determine whether a particular client is a noncitizen and thus subject to the immigration laws. Once you have determined that a client is a noncitizen, Chapter 2 helps you identify the client's particular immigration status and gather information on his or her immigration history. Identifying your client's particular status and immigration history is necessary to understanding the possible adverse immigration consequences of the criminal case.

B. Investigate Your Client's Criminal History

You need to gather your client's entire criminal history as this information is essential to analyzing the potential immigration consequences.

C. Analyze the Immigration Consequences of the Charged Offenses and Plea Offers and Advise your Client

Using the client's prior immigration and criminal history, you need to analyze the specific immigration consequences of the charged offense and plea offers. Important considerations include whether the proposed disposition would qualify as a "conviction" for immigration purposes. Chapter 4 of this manual, *Conviction and Sentence for Immigration Purposes*, assesses whether various North Carolina dispositions are considered convictions for immigration law purposes.

Another important consideration is whether the charges or proposed plea come within a ground of removal or a bar to relief from removal. Chapter 3 of this manual, *Criminal Grounds of Removal and Other Immigration Consequences*, presents detailed information about the types and categories of crimes that can result in adverse immigration

consequences. Appendix A of the manual, *Selected Immigration Consequences of North Carolina Offenses*, presents in chart form the immigration consequences of specific North Carolina offenses.

Chapter 5, *Determining Possible Immigration Consequences Based on Your Client's Immigration Status*, lays out the possible immigration consequences of the criminal case based on your client's particular immigration status. The chapter analyzes the consequences separately for lawful permanent residents, refugees, asylees, individuals with temporary status, and noncitizens without status.

After analyzing the immigration consequences, you must advise your client about them. As discussed *supra* in § 1.2, Obligations of Defense Counsel, the advice will vary based on the “clarity” of immigration consequences. In some cases, you may be able to advise that the plea is nearly certain to carry or not carry a specific immigration consequence. In other cases, you may only be able to advise that there is a risk that the plea will have a specific immigration consequence but that the law is not clear.

D. Ascertain Your Client's Goals in the Case and Defend the Case According to the Client's Priorities

You should discuss with your client the relative importance of any immigration consequences of conviction. Not every noncitizen client will have the same priorities or options with regard to immigration consequences. Some noncitizen defendants will care most about minimizing jail time. Others would be willing to plead to a more serious offense, take additional time, or even go to trial and risk a significantly higher sentence, if it meant that they might be able to remain in the U.S. with loved ones. Of course, a defendant can only make this crucial decision if he or she understands the potential criminal and immigration penalties. Thus, it is necessary to gauge the immigration goals of the case, as it will inform your ultimate strategy in the criminal proceeding.

For options for avoiding or mitigating adverse immigration consequences, consult Chapter 6 of this manual, *Options for Minimizing Adverse Immigration Consequences*.

E. Other Information

Also included in this manual are Chapter 7, *Procedures Related to Removal*, and Chapter 8, *State Post-Conviction Relief*. These chapters provide information about procedures, in immigration and criminal court, following conviction.

1.4 Important Terminology Used in this Manual

A. Noncitizen

The manual uses the term “noncitizen” to refer broadly to any individual who is not a citizen of the United States and who is therefore subject to potential immigration

consequences as a result of criminal conviction. The term includes lawful permanent residents, refugees, asylees, temporary visa holders, and undocumented people. These categories are described in more detail in Chapter 2 of this manual.

B. Removal

Removal is the deportation or expulsion of a noncitizen from the United States. Before 1996, immigration law provided for two types of processes to eject noncitizens from the U.S.: “deportation” and “exclusion.” Laws passed in 1996 ended the distinction and created a single process called removal (so that an individual is technically “removed” rather than “deported”). All immigration court proceedings that began on or after April 1, 1997, are called “removal” proceedings. Noncitizens can be removed from the U.S. because of certain criminal convictions. Removal and other adverse immigration consequences are described in more detail in Chapter 3 of this manual.

C. Conviction (for immigration purposes)

Immigration law defines “conviction” broadly. State law does *not* determine whether a state disposition will be considered a conviction for immigration law purposes. Chapter 4 discusses the immigration law definition of the term.

D. Immigration and Nationality Act

The Immigration and Nationality Act (INA) is the immigration statute. It is codified in Chapter 8 of the United States Code, and it establishes the basic structure of U.S. immigration law, including admission, exclusion, and naturalization. Section 212 of the INA, codified at 8 U.S.C. § 1182, enumerates the grounds of admissibility of noncitizens into the United States. Section 237 of the INA, codified at 8 U.S.C. § 1227, enumerates the grounds of deportability of noncitizens from the United States. When citing to the INA, this manual refers both to the pertinent INA section (e.g., INA § 212) and the codified section (e.g., 8 U.S.C. § 1182).

E. Department of Homeland Security

The Homeland Security Act of 2002 abolished the Immigration and Naturalization Service (INS) and created the Department of Homeland Security (DHS). The regulation and enforcement of immigration laws were placed under three new bureaus under DHS—U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and U.S. Citizenship and Immigration Services (USCIS), described below.

U.S. Immigration and Customs Enforcement (ICE). This branch of DHS is responsible for the detention and removal of noncitizens. ICE issues detainers (that is, holds) on noncitizens in jails and prisons and issues summonses for removal hearings. This is the branch of the Department of Homeland Security that defense attorneys and noncitizen defendants are most likely to deal with.

U.S. Customs and Border Protection (CBP). This branch of DHS conducts border inspections at ports of entry into the United States, including airports, seaports, and U.S. checkpoints. “Inspection” refers to inspection of travel documents from other countries, fingerprinting, and searches of people and belongings.

U.S. Citizenship and Immigration Services (USCIS). This branch of DHS has jurisdiction over the adjudication of applications for an immigration benefit, such as a visa, naturalization, asylum, and modification (called adjustment) of immigration status.

F. Immigration Court

Many removal proceedings are held in immigration court, which is an administrative court of the Department of Justice, Executive Office for Immigration Review. *See* INA § 240, 8 U.S.C. § 1229a. As part of the Department of Justice, immigration court is independent of the Department of Homeland Security. An individual placed into removal proceedings has a right to an attorney but at his or her own expense because such proceedings have been designated as civil, not criminal, in nature. One narrow exception exists for certain detained individuals who have a mental illness or disability rendering them incapable of representing themselves in detention or removal proceedings. *See Franco-Gonzalez v. Holder*, 2013 WL 3674492 (C.D. Cal. Apr. 23, 2013). An individual in removal proceedings also has a right to present any evidence on his or her own behalf, a right to cross-examine government witnesses and documents, and a right to appeal.

Either party can appeal the decision of the immigration judge to the Board of Immigration Appeals (BIA), an administrative court in Falls Church, Virginia. The noncitizen can appeal the decision of the BIA to the federal court of appeals in which the immigration court physically sits.

There is an immigration court in Charlotte, North Carolina. Removal proceedings for noncitizens who are not detained by DHS are generally held there. However, removal proceedings for noncitizens who are detained by DHS are generally held in Atlanta, in Stewart Detention Center in Lumpkin, Georgia, or other detention facility where a noncitizen may be detained. Removal hearings for a small number of individuals serving long sentences in North Carolina correctional facilities take place in Central Prison in Raleigh. A case arising out of a Georgia immigration court would be reviewed by the Eleventh Circuit Court of Appeals, and a case arising out of the Charlotte immigration court or Central Prison would be reviewed by the Fourth Circuit Court of Appeals. This difference can be important because the governing law varies by circuit.