Chapter 8
State Post-Conviction Relief

Post-conviction relief generally seeks to correct a legal error in the underlying criminal proceedings. Post-conviction relief, if warranted, may also provide an avenue to mitigate the adverse immigration consequences that flow from the criminal disposition. This chapter is intended to provide guidance, but it is not a comprehensive treatment of post-conviction challenges.

8.1 Authority for State Post-Conviction Relief

In North Carolina, the primary vehicle to collaterally challenge a conviction is a motion for appropriate relief (MAR), authorized by G.S. 15A-1411 through G.S. 15A-1422. An MAR is a post-trial motion, usually made at the trial level, to correct errors occurring before, during, or after a criminal trial. *See State v. Handy*, 326 N.C. 532 (1990). If filed within ten days of entry of judgment, an MAR can be used to address "any error committed during or prior to the trial." *See* G.S. 15A-1414(a). After ten days of entry of judgment, an MAR can be used to address specified errors, such as a violation of a defendant's constitutional rights. For possible grounds for relief, see G.S. 15A-1415(b).

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

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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).

8.3 Judge's Failure to Provide Immigration Advisement

G.S. 15A-1022(a)(7) requires judges to provide a general advisement to a defendant before accepting a guilty plea, warning the defendant that if he or she is a noncitizen the

conviction may result in adverse immigration consequences. A failure to provide the general advisement is a violation of the statute.

There is an argument that a trial court's failure to provide the advisement also affects the voluntariness of the plea and thus constitutes a violation of constitutional law as well. In *Padilla*, the Supreme Court recognized that immigration consequences of a criminal conviction are "uniquely difficult to classify as either a direct or a collateral consequence" of a guilty plea. *Padilla*, 559 U.S. 356, 366. The court further recognized that because deportation has such a "close connection to the criminal process" and is so significant for noncitizen defendants, the Sixth Amendment requires defense counsel to advise defendants about the immigration consequences of a conviction. *Id*. at 366–74. A similar argument can be made about a judicial advisement: that because deportation constitutes such a substantial and unique consequence of a plea, fundamental fairness requires the trial court to advise the defendant of that possibility. *See, e.g.*, *People v. Peque*, 3 N.E.3d 617, 621 (N.Y. 2013) ("We therefore hold that due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony."). Under this rationale, a court's failure to give a noncitizen defendant at least a general advisement about immigration consequences may violate the constitutional requirement that the plea be knowing and voluntary.

Such an error may be present in some cases. From a practical standpoint, however, it may be easier to demonstrate a Sixth Amendment violation under *Padilla* than establish a Fifth Amendment violation that the plea was not knowing and voluntary.

8.4 Other Errors

Other procedural defects or substantive violations that may form a basis for an MAR for noncitizen defendants include:

- The defendant's failure to understand the nature of the proceedings.
- The failure of the court to explain sufficiently the nature and right to a jury trial. (This requirement is particularly important for noncitizens who may have no previous experience with the U.S. legal system and may be unfamiliar with jury trials and other aspects of criminal justice and procedure in the U.S.).
- Violations in the use or conduct of interpreters.
- Other due process violations.

There should not be a retroactivity problem for these types of errors; therefore, they may provide relief for clients who are unable to seek relief under *Padilla* because of the date of their convictions. For a list of other established claims for post-conviction relief, see *generally* NORTON TOOBY & J.J. ROLLIN, POST-CONVICTION RELIEF FOR IMMIGRANTS (2004).

8.5 Immigration Effect of Motion for Appropriate Relief

A conviction vacated on the basis of a procedural or legal defect will eliminate the conviction for immigration purposes. *See Matter of Rodriguez-Ruiz*, 22 I&N Dec.1378 (BIA 2000). The immigration court may look to see if the vacating court had subject matter jurisdiction to vacate the judgment, but it may not look beyond the order to determine if such relief was proper under North Carolina law. *Id.* A conviction is not eliminated for immigration purposes, however, if it was vacated for reasons "solely related to rehabilitation or immigration hardships. . . ." *Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003)), *rev'd on other grounds*, 465 F.3d 263 (6th Cir. 2006); *cf. Yanez-Popp v. I.N.S.*, 998 F.2d 231, 235 (4th Cir.1993) ("[U]nless a conviction is vacated on its merits, a revoked state conviction is still a 'conviction' for federal immigration purposes.").

Thus, a conviction vacated through an MAR based on the grounds of ineffective assistance, involuntariness of a guilty plea, or other constitutional or statutory violations will be accorded full faith and credit by immigration authorities and eliminate the conviction for immigration purposes. However, even though an MAR is used to correct legal error, an order of relief that refers primarily to the petitioner's equities or immigration hardships might not be honored and may not eliminate the conviction for immigration purposes. The record of the proceedings—the motion papers, hearing, and order—should therefore reflect the legal errors justifying relief and should refer to immigration issues only as necessary to explain those errors (for example, prior counsel was ineffective for misadvising the petitioner about the possibility of removal and, but for counsel's deficient performance, the petitioner would not have pled guilty). If the MAR is by consent of the prosecutor (*see* G.S. 15A-1420(e) ("[n]othing in this section shall prevent the parties to the action from entering into an agreement for appropriate relief"), the record and judge's order granting the MAR should still reflect the legal errors justifying relief.