

## ***Inside this issue....***

***Annual Meeting Agenda – see page 23***

***SDTLA & YOUNG LAWYERS MIX IT UP!  
– see page 13***

***Criminal Defense Corner – What You Don't  
Know Will Hurt You: Criminal Defense &  
Immigration – see page 5***

***Representing an LLC? – see page 7***

***Our Presidents Past – see page 8***

***2011 Fall Seminar – September 22-23  
– see page 12***

***Meet Your Candidates for Board of Governors  
– see page 16***

***Verdicts and Settlements – see page 9***

***Law School Times***

***Court Update***

***and more!***

# **CRIMINAL DEFENSE CORNER – WHAT YOU DON'T KNOW WILL HURT YOU: CRIMINAL DEFENSE & IMMIGRATION**

By John Murphy

Many of us who practice criminal defense never took an immigration class in law school. If you did, the information is now so out of date that it is probably useless. Whether or not you have an interest in immigration law, if you want to practice criminal defense in a competent fashion, you are going to have to learn or relearn it.

Why? The short answer is Padilla v. Kentucky, \_\_\_ U.S. \_\_\_, 130 S.Ct. 1473 (2010). In Padilla, the Supreme Court held that if non-citizen defendants are not properly advised as to the deportation consequences of a guilty plea, the defendant's attorney will be deemed ineffective, and the defendant's guilty plea may be vacated. Id. at 1481-83.

Lawyers in South Dakota may think this issue doesn't pertain to them. After all, South Dakota is hardly a border state with Mexico. South Dakota is, however, close to Canada. Canadians represent a sizeable portion of the immigrants living in South Dakota. 2011 U.S. Immigration Report (<http://www.usimmigrationsupport.org/southdakota.html>). Canadians are apt to get charged with criminal acts just as any other group.

Moreover, the overall population of immigrants moving to South Dakota is increasing dramatically. In recent years, foreign-born immigrants have accounted for approximately 25% of the population increase in South Dakota. 2011 U.S. Immigration Report. Mexico accounts for approximately 10% of the persons moving to South Dakota. Id. Immigrants add to our population increase at a rate 10 times greater than the increase caused by native-born South Dakotans. Id. Immigration to South Dakota increased by 75% between the 1990 census and the 2000 census. Id. In the past few years, total immigration had declined due to the recession. Pew Hispanic Center, "U.S. Unauthorized Immigration Flows Are Down Sharply Since Mid-Decade", Sept. 1, 2010. However, as the economy rebounds we are likely to see immigration increase again.

Padilla raises two important questions for the criminal defense bar and for the judiciary as a whole: (1) What do criminal defense attorneys need to know about the immigration consequences of a plea agreement so we can properly advise our clients? (2) What role should judges and the legislature play in making sure defendants are properly advised as to these immigration consequences?

This article is intended to be the first in several on these issues. It is simply too big of a topic to cover in one article. If one reads the amicus briefs in support of the petitioner in Padilla, particularly the brief submitted by the National Association of Criminal Defense Lawyers (NACDL), 2009 WL 1567356, you will note the incredible volume of information on both topics.

In this article I will outline the issues raised by Padilla. And, I will address areas where we as a judicial system need to be

more proactive before we find ourselves behind the curve in addressing these topics. As addressed below, almost all of the states bordering South Dakota have already begun the process of training lawyers and enacting procedural rules and/or statutes to address the issues.

## ***The Consequence of Ignorance***

Padilla v. Kentucky is a must read for criminal defense attorneys, prosecutors and judges. So far it has not been cited in any published South Dakota decision, but it is only a matter of time before it is cited in habeas and appellate decisions.

In Padilla, the Supreme Court spoke clearly on the issue of counsel's responsibility to non-citizen' defendants:

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. "[A]uthorities of every stripe—including the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications—universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients..."

We too have previously recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief.

Padilla, 130 S.Ct. at 1482 (numerous citations omitted).

Padilla creates a duty to know and advise. The language quoted above may also serve to scare many of us practicing criminal defense. How many of us have a clue as to what circumstances were necessary to preserve the possibility of discretionary relief from deportation under 1951 INA § 212(c) prior to 1996, and how that has changed since 1996? Probably very few of us, yet this knowledge is presumed to be part of our colloquy with non-citizen clients when advising them as to whether to accept or decline a plea offer.

Prior to Padilla, appellate courts in some states had drawn a line between direct and collateral consequences of guilty pleas. In Kentucky, for instance, defense attorneys were only required to advise clients of the direct consequences of pleading guilty

(e.g. waiver of "Boykin" rights, waiver of certain appellate rights).

The *Padilla* decision rejected that distinction. Writing for the majority<sup>2</sup>, Justice Stevens noted that the competency of counsel analysis described in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), has never distinguished between direct and collateral consequences of a plea when determining whether an attorney's advice was sound. *Padilla*, 130 S.Ct. at 1481. Criminal defense attorneys are now on notice that they must know and advise non-citizen clients as to the deportation consequences that may occur as a result of a plea bargain.<sup>3</sup>

*Padilla* also rejects the notion that an attorney can be protected by remaining silent on the issue. In *Padilla*, the Respondent and the Solicitor General asked the Court to restrict its holding to cases where attorneys affirmatively mis-advised clients as to deportation consequences. In *Padilla*, the defense attorney gave clearly incorrect information to an immigrant who had lived legally in the United States for over 40 years. The Court, however, refused to limit its decision to cases where affirmative mis-advice was proven:

A holding limited to affirmative mis-advice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea agreement." When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so "clearly satisfies the first prong of the *Strickland* analysis."

*Padilla*, *supra*, at 1484.

#### **The Required Reading List**

The Court in *Padilla* went out of its way to show that there were many resources available to defense attorneys to give them guidance on the immigration related consequences of guilty pleas. The Court set forth a partial list of resources that are available to defense attorneys on the subject of immigration related consequences of guilty pleas. *Id.* at 1482-83.<sup>4</sup> The Court emphasized the need for defense attorneys to utilize such resources to familiarize themselves with the issues. And, the Court noted that organizations such as that National Association of Criminal Defense Lawyers (NACDL) submitted amicus briefs that included appendices listing at length the resources available to counsel on the topic. *Id.* (NACDL's brief with appendices can be downloaded at 2009 WL 1567356).

The clear implication is that competent counsel will find, read and relay the information contained in these resources. In the

next article on this topic, I will provide a summary of these resources and other current treatises on the topic.<sup>5</sup>

#### **Considerations for the Judiciary, Prosecution & Bar**

*Padilla* places the obligation of knowing the deportation consequences of a conviction and adequately advising non-citizen clients squarely on the shoulders of defense counsel. The courts, prosecutors and the bar have an interest in this process as well.

Courts and prosecutors don't want convictions vacated based on defense counsel's failures. The entire bar should want to make sure that non-citizen defendants are adequately advised prior to pleading guilty to protect the integrity of our system. And, as a society we want to make sure that people are not needlessly deported. Many of these individuals are long standing, productive and contributing members of our communities. We as a society don't benefit from their deportation based on minor offenses. As will be discussed in a follow up to this article, a host of relatively minor misdemeanors can be cause for deportation of legal immigrants. Moreover, as has been noted by many commentators, deportation of adults can have dire consequences for their children who may be citizens, may have never lived outside this country, but may be required to relocate if their parents are deported.

Many state bar associations and legislatures have been proactive in addressing the immigration consequences of criminal convictions. Almost 30 states have enacted statutes and/or created forms or checklists for courts to follow when dealing with non-citizens, including Iowa, Minnesota, Nebraska, Wisconsin and Montana.<sup>6</sup> Many state bar associations have presented extensive training programs on the issue, often year after year so that current developments are brought to the attention of practitioners.<sup>7</sup> As outlined in footnote 7 to this article, most of states bordering South Dakota have provided extensive live or on-line trainings on these issues, and trainings have been provided by bar associations across the nation. The issue is not one confined to states bordering Mexico. In the third in this series of articles I'll review the ways in which states have addressed and trained attorneys on this important topic.

#### **Conclusion**

If you are presently representing a non-citizen in a criminal case, you are charged with a formidable task. First, you have to make sure you competently represent him or her on the charges. Second, you have to advise him or her as to the collateral consequences of entering a plea bargain. It isn't easy to stay abreast of these matters. Good luck.

<sup>1</sup> Most discussions on the topic don't differentiate between illegal and legal immigrants as both may face deportation consequences as a result of a criminal conviction.

<sup>2</sup> The decision was 7-2, however Stevens' opinion was joined by four other justices.

<sup>3</sup> A recent ABA Journal article noted that collateral immigration consequences may be just the beginning of this trend. There is little in the *Padilla* case that suggests its analysis should be limited to deportation issues. Therefore, other

*continued to page 21*

continued from page 6

immigration consequences, and other collateral issues such as susceptibility to civil commitment, are also areas that defense counsel may be required to know and advise clients of prior to entry of a guilty plea. ABA Journal, "Weighing the Consequences: Task Force Probes Defense Lawyer's Role After Padilla," April 2011.

<sup>4</sup> This list includes: G. Herman, Plea Bargaining § 3.03, pp. 20-21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L.Rev. 697, 713-718 (2002); A. Campbell, Law of Sentencing § 13:23, pp. 555, 560 (3d ed.2004); S. Bratton & E. Kelley, Practice Points: Representing a Noncitizen in a Criminal Case, 31 The Champion 61 (Jan./Feb.2007); N. Tooby, Criminal Defense of Immigrants 1483 § 1.3 (3d ed.2003); 2 Criminal Practice Manual §§ 45:3, 45:15 (2009). *Id.* at 1482-1483.

<sup>5</sup> An abbreviated list of the resources identified in Appendix C of the NACDL's amicus brief contains: Larry Ainbinder, *Special Considerations in Representing the Non-Citizen Defendant, in Defending a Federal Criminal Case* (1983 - 2000); Karl Converse, *Criminal Law Reforms: Defending Immigrants in Peril*, The Champion (NACDL, Aug. 1997); Ramirez, Capriotti, Kay & Unger, *Small-Time Crime, Big-Time Trouble: The New Immigration Laws*, 13 Criminal Just. 4 (1998); John Ovink, *Why a Plea Bargain May No Longer Be a Bargain for Legal Permanent Resident Aliens*, 46 Fed. Law 49 (May, 1999); William R. Maynard, *Deportation: An Immigration Law Primer for the Criminal Defense Lawyer*, The Champion (NACDL, June 1999); Anna Marie Gallagher, *Immigration Consequences of Criminal Convictions: Protecting Your Client's Immigration Interests in Criminal Proceedings*, 2001 Immig. Briefings 1 (April 2001); Robert James McWhirter, *The Criminal Lawyer's Guide to Immigration Law: Questions and Answers* (A.B.A. 2001); Norton Tooby & Katherine Brady, *Criminal Defense of Immigrants* (2001-2007); *Immigration Consequences of Convictions Checklist* (Immigrant Defense Project, 2001-2008); Tova Indritz, *Puzzling Out the Immigration Consequences of Various Criminal Convictions: Part I*, 26 The Champion 12 (Jan.-Feb., 2002); *Part II*, 26 The Champion 20 (Mar., 2002); *Part III*, 26 The Champion 22 (April, 2002); Robert James McWhirter, *Immigration Law for Criminal Lawyers: Overview* (Winter, 2002); Jennifer Welch, *Defending Against Deportation: Equipping Public Defenders to Represent Non-citizens Effectively*, 92 Cal. L. Rev. 541 (2004); Manuel D. Vargas, *Tips on How to Work With an Immigration Lawyer to Best Protect Your Non-citizen Defendant Client* (2004); Norton Tooby & Joseph J. Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Offenses* (2005); *Representing Non-citizen Criminal Defendants: A National Guide by the Defending Immigrant Partnership* (2005-2008).

<sup>6</sup> Appendix B, NACDL Amicus Brief in *Padilla v. Kentucky*, 2009 WL 1567356; Alaska R. Crim. P. 11(c)(3); Ariz. R. Crim. P. 17.2(f); Cal. Penal Code § 1016.5; Conn. Gen. Stat. Ann. § 54-1j; D.C. Code Ann. § 16-713; Fla. R. Crim. P. 3.172(c)(8); Ga. Code Ann. § 17-7-93(c); Haw. Rev. Stat. §§ 802E-1, 802E-2, 802E-3; Idaho Crim. R. 11(d)(1); 725 ILCS 5/113-8 (Illinois); Iowa Code Ann. R. 2.8(2)(b)(3); Ky. Admin. Office of Courts, Form AOC-491 (Rev. 2/2003); Me. R. Crim. P. 11(h); Md. Rule 4-242(e); Mass. Gen. Laws Ann. ch. 278, § 29D; Minn. R. Crim. P. 15.01 subd. 1(10)(d) (felony cases); Minn. R. Crim. P. 15.02(2) (misdemeanor cases); Mont. Code Ann. § 46-12-210(1)(f); Neb. Rev. Stat. § 29-1819.02; N.J. Directive # 14-08 (Oct. 8, 2008); N.M. Dist. Ct. R. Cr. P. 5-303(F)(5); N.Y. Crim. Proc. Law § 220.50(7); N.C. Gen. Stat. § 15A-1022(a)(7); Ohio Rev. Code Ann. § 2943.031; Or. Rev. Stat. § 135.385(2)(d); P.R. Laws Ann. tit. 34, App. II, Rule 70 (Puerto Rico); R.I. Gen. Laws § 12-12-22 (Rhode Island); Tex. Code Crim. Proc. Ann. art. § 26.13(a)(4); VI. Stat. Ann. tit. 13, § 6565(c); Wash. Rev. Code § 10.40.200; Wis. Stat. § 971.08(1)(c).

<sup>7</sup> See "Dealing with the Effects of Clients' Criminal Activity on their Immigration Status," Florida Bar (Feb. 8, 2008); "Immigration Consequences of Criminal Offenses," Illinois State Bar Association, Chicago, Ill. (May 1, 2009); *Only a Misdemeanor? For Non-US Citizens Facing Criminal Charges, the Stakes Are Often Much Higher*, Maryland Bar Bulletin, Immigration Law (Sept. 2004); "Immigration Consequences of Criminal Conduct: Overview of Concepts & Discussion of Emerging Issues," Massachusetts Bar Association (Feb. 12, 2009); "Immigration and Criminal Defense Strategies: How to Keep Your Client from Being Deported (What Every Immigration Lawyer Needs to Know About Criminal Cases & "Visa" Versa)," Minnesota State Bar Association (Dec. 14, 2006); "The Immigration Consequences of Criminal Convictions," Nebraska State Bar Association (online seminar) (Mar. 19, 2004); "Immigration Consequences of Criminal Convictions & Removal (Deportation) & Inadmissibility," Ohio State Bar Association (March 17, 2009); "Immigration Consequences of Criminal Convictions," Oklahoma State Bar Association (Nov. 8, 2002, Oklahoma City, OK; April 20, 2006, Tulsa, OK; April 2, 2009, Tulsa, OK); "Dealing with Common Immigration Problems in Criminal Cases," Pennsylvania Bar Institute (available online) (June 8, 2007); "Food for Thought - The Immigration Consequences of Criminal Convictions," Rhode Island Bar Association (Sept. 26 & Oct. 11, 2007); "Representing Foreign Nationals in Family & Criminal Court," South Carolina Bar, Columbia, SC (live and webinar access) (July 25, 2008); "The Long Road for the Short and Quick Plea: How the Easy Plea in Criminal Court Can Permanently Ruin Your Immigrant Client's Life," Tennessee Bar Association (Feb. 2009); "Immigration Convictions & Collateral Consequences," Texas State Bar (July 2008); "Preventing, Reducing or Eliminating The Immigration Consequences of Criminal Convictions," Vermont Bar Association (Sept. 23, 2004); "Immigration Consequences of Criminal Convictions in Virginia," Virginia State Bar (March 27, 2007); "Crimes & Immigration Law," State Bar of Wisconsin (available online) (Oct. 20, 2005); "Crimes & Immigration: Preventing Removal and Preserving Relief Pre-and Post-Conviction," Wyoming State Bar (online seminar) (2008, 2009).

continued from page 7

<sup>1</sup> *Pramco, LLC ex rel. CFSC Consortium, LLC v. San Juan Bay Marina, Inc.*, 435 F.3d 51, 54 (1st Cir. 2006); *Handelsman v. Bedford Village Assocs. Ltd. P'ship*, 213 F.3d 48, 51-52 (2nd Cir. 2000); *Zambelli Fireworks Mfg. Co., Inc. v. Wood*, 592 F.3d 412, 420 (3rd Cir. 2010); *Gen. Tech. Applications, Inc. v. Exro Ltda*, 388 F.3d 114, 122 (4th Cir. 2004); *Harvey v. Grey Wolf Drilling Co.*, 542 F.3d 1077, 1079-80 (5th Cir. 2008) (stating that this makes LLCs "like limited partnerships and other unincorporated associations or entities"); *Homfeld II, L.L.C. v. Comair Holdings, Inc.*, 53 Fed.Appx. 731, 732 (6th Cir. 2002); *Wise v. Wachovia Securities, LLC*, 450 F.3d 265, 267 (7th Cir. 2008); *GMAC Commercial Credit LLC v. Dillard Dept. Stores, Inc.*, 357 F.3d 827, 828-29 (8th Cir. 2004); *Johnson v. Columbia Props. Anchorage, LP*, 437 F.3d 894, 899 (9th Cir. 2006); *Rolling Greens MHP, L.P. v. Comcast SCH Holdings L.L.C.*, 374 F.3d 1020, 1022 (11th Cir. 2004).

**SDTLA FALL SEMINAR**  
**September 22-23, 2011**  
**The Lodge at Deadwood**  
**Mark your calendars now!**