

CHAPTER THREE¹

The Implications of *Padilla v. Kentucky* and *State v. Sandoval*

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3.1 OBLIGATION TO ADVISE OF ADVERSE IMMIGRATION CONSEQUENCES

In *Padilla v. Kentucky*², the Supreme Court held that a defense attorney has an obligation under the Sixth Amendment to advise noncitizens about the potential adverse immigration consequences of a plea to criminal charges, and that the absence of such advice may be a basis for claim of ineffective assistance of counsel.

Judges play an important role in ensuring that defendants are advised about potential immigration consequences of a conviction and that they have an opportunity to obtain such advice. Judges can assure the voluntariness of a plea and compliance under *Padilla* without requiring disclosures that would breach attorney-client privilege, RCW 10.40.200, or violate the Fifth Amendment right against self-incrimination.

¹ Information in this chapter was adapted in part from materials generously provided by Professor Nancy Morawetz and Professor Alina Das of the New York University School of Law Immigrant Rights Clinic and Manuel Vargas and Benita Jain of the Immigrant Defense Project.

² 130 S. Ct. 1473 (2010).

A. RCW 10.40.200 Precludes the Court from Compelling Disclosure of Status

Nearly thirty years ago the legislature enacted RCW 10.40.200 in recognition of the risk of serious immigration consequences facing noncitizen defendants. The statute requires the court to ensure that every defendant is advised that if the defendant is not a U.S. citizen, serious immigration consequences, such as deportation, may result from entering a plea that results in conviction. In so doing, the legislature specifically stated:

“It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court.”³

B. Fifth Amendment Protections Against Self-Incrimination⁴

All defendants, citizen and non-citizen alike, enjoy the constitutional protections of the Fifth Amendment. In *Mathews v. Diaz*, the Supreme Court held that every person, “even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”⁵ The Fifth Amendment right to avoid self-incrimination applies “to any official questions put to him [or her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him [or her] in future criminal proceedings.”⁶ Therefore, statements about citizenship/immigration status made on the record, either orally or in writing, including on plea forms, could be used as evidence in support of other criminal charges for offenses in which immigration status is an element, such as the federal crimes of illegal entry and illegal reentry following deportation, 8 U.S.C. §§ 1325 and 1326, respectively.⁷

³ RCW 10.40.200(1).

⁴ The Fifth Amendment states, “No person shall ... be compelled in any criminal case to be a witness against himself.” U.S. CONST. AMEND. V. However, its invocation is not limited to criminal trials. *See, e.g., United States v. Balsys*, 524 U.S. 666, 672 (1998) (“ [The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory,” when an individual believes information sought or discoverable through testimony, “could be used in a subsequent state or federal criminal proceeding”) (citing *Kastigar v. United States*, 406 U.S. 441, 444-45, (1972)); *see also McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (holding that Fifth Amendment privilege “applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it”). The Fifth Amendment applies to the states. *Malloy v. Hogan*, 378 U.S. 1 (1964) (making Self-Incrimination Clause of Fifth Amendment applicable to states through Fourteenth Amendment Due Process Clause).

⁵ 426 U.S. 67, 77 (1976). Citizens and non-citizens alike may invoke the Fifth Amendment. *See Mathews v. Diaz*, 426 U.S. at 77 (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law...Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”) (internal citations omitted); *see also Kastigar v. United States*, 406 U.S. 441, 444 (1972) (“[The Fifth Amendment] can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used.”); *Ramon-Sepulveda v. INS*, 743 F.2d 1307, 1310 (9th Cir. 1984) (individual subject to removal proceedings invoked Fifth Amendment, but court did not reach question of whether invocation was proper because it deemed the issue “not relevant to [its] decision”).

⁶ *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

⁷ Examples of federal crimes for which “alienage” is an element of the offense include:

8 U.S.C. § 1282(c) – Alien crewman overstays;

Consequently, requiring defendants to disclose citizenship or immigration status risks compelling individuals to incriminate themselves.

C. Judicial Code of Conduct

Section 2.3(a) of the Judicial Code of Conduct states that a judge shall perform duties of judicial office without bias or prejudice. The comment states that bias and prejudice does not include a reference to national origin, unless it is “legitimately relevant to the advocacy or decision of the proceeding.” In the 1999 disciplinary proceedings in *In Re Hammermaster*, the Supreme Court held that the judge’s practice of inquiring about the citizenship of some defendants in criminal cases violated the Code of Judicial Conduct.⁸

D. Attorney Client Confidentiality and Effective Assistance

Eliciting information about a defendant’s citizenship/immigration status may also invade the confidential attorney-client relationship.⁹ There may be instances where it is necessary for a defense counsel to disclose a defendant’s citizenship/immigration status in pursuing a particular resolution or course of action.¹⁰ However, even in these circumstances, it is generally not necessary to make specific inquiries regarding a defendant’s particular immigration status.

E. Immigration Status Issues at Custody Determinations Due to Presence of Immigration Detainers

As outlined at §2.3, the presence of an immigration detainer, although not definitive proof of immigration status, alerts the court that the defendant may not be a U.S. citizen and faces possible transfer to immigration authorities upon release. Assuming they are taken into ICE custody and placed in removal proceedings, there are numerous avenues of “relief from

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- 8 U.S.C. § 1306(a) – If overstay after 30 days and no fingerprints/registration;
 - 8 U.S.C. § 1304(e) – 18 or over not carrying INS documentation;
 - 8 U.S.C. § 1306(b) – Failing to comply with change of address w/in 10 days;
 - 8 U.S.C. § 1324c(e) – Failure to disclose role as document preparer;
 - 8 U.S.C. § 1324(a) – Alien smuggling;
 - 8 U.S.C. § 1325 – Entry Into United States without inspection or admission;
 - 8 U.S.C. § 1326 – Illegal Reentry after deportation;
 - 18 U.S.C. § 1546 – False statement/fraudulent documents;
 - 18 U.S.C. § 1028(b) – False documents;
 - 18 U.S.C. § 1001 False statement;
 - 18 U.S.C. § 911, 1015 – False claim to U.S. citizenship.

⁸ See *In re Hammermaster*, 139 Wn.2d 211, 244-45 (1999).

⁹ The Supreme Court has repeatedly recognized “the importance of the attorney-client privilege as a means of protecting that relationship and fostering robust discussion.” See, e.g., *Milavetz, Gallop & Milavetz, P.A. v. United States*, 130 S. Ct. 1324, 1338 (2010); see also *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (“The attorney client privilege is one of the oldest recognized privileges for confidential communications. ... The privilege is intended to encourage “full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice.”) (internal citations omitted).

¹⁰ See *In Re Barr*, 684 P.2d 712 (1984). See §5.3 for more on *In Re Barr* pleas and factual basis issues in light of immigration issues.

removal” available that would permit eligible noncitizens to remain lawfully in the U.S. See §§ 1.2 and 1.5(E) for an overview of avenues to obtain lawful status and relief from removal.

Moreover, many noncitizens, regardless of their immigration status, have significant ties to their communities. Consequently, under Washington law governing custody and bail determinations, the indication that a person may be a noncitizen due to the presence of an immigration detainer is one factor in determining conditions of release and does not require judicial inquiries into a defendant’s immigration or citizenship status. See §2 for more on noncitizens and custody determinations.

Chapter Five discusses in greater detail considerations of what constitutes a knowing and voluntary plea in light of immigration consequences. In short, judges can ensure that pleas are knowing and voluntary without inquiring into a defendant’s citizenship/immigration status. However, judges should determine whether defense counsel has advised the defendant about potential immigration consequences of entering the plea consistent with *Padilla*.

With the exception of the one Washington criminal offense that has alienage as an element¹¹, an individual’s nationality, citizenship or alienage has no bearing on his or her guilt or innocence regarding a criminal charge, or the factual basis of his or her plea.¹²

- **Disclosure of Citizenship and Immigration Status Can Have Significant Consequences for the Defendant and the Defendant’s Family.**

Disclosure of citizenship/immigration status on the record can result in adverse action against defendants or their families.¹³ For example, Customs and Border Protection (CBP) or Immigration and Customs Enforcement (ICE) officers may be present in the court room. And in immigration proceedings, the federal government can use evidence from court transcripts to meet its burdens of establishing alienage and that a particular conviction sufficiently matches a charged ground of deportation or inadmissibility.¹⁴

¹¹ RCW 9.41.171 (Alien possession of firearms).

¹² Under Washington Judicial Code of Conduct Rule 2.9(C), “A judge shall not investigate facts in a matter pending or impending before that judge, and shall consider only the evidence presented and any facts that may properly be judicially noticed, unless expressly authorized by law.”

¹³ Courts have recognized that the disclosure of immigration status can have harmful impacts. *See e.g., Perez v. United States*, 968 A.2d 39, 71 (D.C. Ct. App. 2009) (discussing potential prejudicial impact of disclosure of immigration status); *Serrano v. Underground Utilities Corp.*, 407 N.J. Super. 253, 280 (App. Div. 2009) (acknowledging chilling effect that disclosure of immigration status may have outside of particular case and requiring further proffer of admissibility (probative value outweighing prejudicial impact) before allowing inquiries regarding immigration status); *Arroyo v. State*, 259 S.W.3d 831, 836 (Tex. App. 2008) (holding that information regarding legal status in United States is admissible when relevant and finding court’s refusal to allow questions about citizenship to be valid exercise of discretion); *Hernandez v. Paicius*, 109 Cal. App. 4th 452, 460 (Cal. App. 4th Dist. 2003) (“[E]vidence relating to citizenship and liability to deportation almost surely would be prejudicial to the party whose status was in question.”).

¹⁴ *See* 8 U.S.C. § 1229a(c). Additionally, establishing alienage is a jurisdictional burden that the government must meet in order to pursue removal proceedings against someone.

Studies have found that the fear among immigrant communities that any contact with police could trigger removal has a chilling effect on reporting of crimes, resulting in further marginalization of already vulnerable populations.¹⁵ This is of particular concern in cases of domestic violence, when the victim wants to stop the abuse but does not want to lose a family member to ICE detention and/or possible deportation.¹⁶ Such fear and mistrust of the criminal justice system can have dangerous consequences, especially for the most vulnerable populations of women and children.

¹⁵ Many law enforcement agencies, public officials and civil society organizations have raised concerns about the impact that local enforcement of immigration laws could have on immigrant confidence in and cooperation with the criminal justice system. *See, e.g.,* MAJOR CITIES CHIEFS (M.C.C.) IMMIGRATION COMMITTEE RECOMMENDATIONS FOR ENFORCEMENT OF IMMIGRATION LAWS BY LOCAL POLICE AGENCIES: M.C.C. NINE (9) POINT POSITION STATEMENT, 5-6 (June 2006) (describing concerns with local enforcement of federal immigration laws, including risk of undermining trust and cooperation of immigrant communities), *available at* http://www.houstontx.gov/police/pdfs/mcc_position.pdf; National Immigration Law Center, *Why Police Chiefs Oppose Arizona's SB 1070* (June 2010), *available at* <http://www.nilc.org/immlawpolicy/LocalLaw/police-chiefs-oppose-sb1070-2010-06.pdf>; America's Voice, *Police Speak Out Against Arizona Immigration Law* (May 18, 2010), *available at* http://amvoice.3cdn.net/cf2c2c401fc6b2593_p6m6b9n11.pdf; United States Conference of Mayors, 2010 Resolutions, 78th Conference, "Opposing Arizona Law SB1070", "Calling Upon the Federal Government to Pass Comprehensive Immigration Reform that Preempts Any State Actions to Assert Authority Over Federal Immigration Law," at 67-70, *available at* http://www.usmayors.org/resolutions/78th_Conference/adoptedresolutionsfull.pdf; UNITED STATES CONFERENCE OF MAYORS, 2004 MEASURE TO AMEND THE CLEAR AND HSEA ACTS OF 2003, *available at* http://www.usmayors.org/resolutions/72nd_conference/csj_08.asp (expressing concern about distracting local law enforcement from primary mission, undermining federal legislation protecting immigrant victims, and creating "an atmosphere where immigrants begin to see local police as federal immigration enforcement agents with the power to deport them or their family members, making them less likely to approach local law enforcement with information on crimes or suspicious activity"); ACLU AND IMMIGRATION & HUMAN RIGHTS POLICY CLINIC, UNC-CHAPEL HILL, THE POLICIES AND POLITICS OF LOCAL IMMIGRATION ENFORCEMENT LAWS: 287(G) PROGRAM IN NORTH CAROLINA, *available at* <http://www.law.unc.edu/documents/clinicalprograms/287gp;availablepolicyreview.pdf>; CHRISTINA RODRIGUEZ ET. AL., MIGRATION POLICY INSTITUTE, A PROGRAM IN FLUX: NEW PRIORITIES AND IMPLEMENTATION CHALLENGES FOR 287(G) at 8-9 (Mar. 2010), *available at* http://www.migrationpolicy.org/pubs/287g_March2010.pdf.

¹⁶ For a discussion of these issues, *see* NEW YORK STATE JUDICIAL COMMITTEE ON WOMEN IN THE COURTS, IMMIGRATION AND DOMESTIC VIOLENCE: A SHORT GUIDE FOR NEW YORK STATE JUDGES at 1-4 (Apr. 2009), *available at* <http://www.courts.state.ny.us/ip/womeninthecourts/ImmigrationandDomesticViolence.pdf>. The report explains how the immigration consequences that abusers may face upon criminal conviction can discourage women from bringing charges:

Criminal proceedings, with their concomitant danger of deportation, are another kind of obstacle for abused immigrant women, who have reason not only to fear their own forced removal from the United States but that of their abuser.... Danger lurks for abused immigrant women in the possibility of their own arrests as well as the arrest of their abusers.... Abusers, too, may be subjected to deportation if criminal cases are pursued against them, and this is not necessarily a desirable outcome for abused immigrant women. If a victim depends on her abuser for support, the last thing she may want is to see him transported thousands of miles away, where he may be unable to earn a living and where support enforcement mechanisms may be meaningless. Immigrant victims also may need their abusers' presence in the United States to legalize their own status. VAWA self-petition remedies are often unavailable when abusers have been deported. Beyond these considerations, victims may have family, even children, who remain in their home countries. An abuser returning to a victim's village or locale may take revenge on family members he finds there."

See also, ASSISTING IMMIGRANT VICTIMS OF DOMESTIC VIOLENCE: LAW ENFORCEMENT GUIDE, *available at* <http://www.vaw.umn.edu/documents/immigrantdvleguide/immigrantdvleguide.pdf>

In response to these concerns, the King County Superior Court adopted a policy titled, “No Courtroom Arrests Based on Immigration Status.” See **Appendix K for the full text of this policy.**

3.2 JUDICIAL OBLIGATIONS AFTER PADILLA V. KENTUCKY AND STATE V. SANDOVAL

In *Padilla*, the Supreme Court held that defendants have a Sixth Amendment right to advice from defense counsel regarding the adverse immigration consequences of entering into a plea.¹⁷ The Court emphasized the unique nature of deportation and the importance of advising clients about the adverse deportation consequences of a criminal charge and entering into a plea. “We have long recognized that deportation is a particularly severe ‘penalty,’” and that while not a criminal sanction in a strict sense, “deportation is nevertheless intimately related to the criminal process.”¹⁸ The Court described recent changes in immigration law as having “made removal nearly an automatic result for a broad class of noncitizen offenders.”¹⁹

In *State v. Sandoval*, 171 Wn.2d 163 (2010), the Washington Supreme Court concluded the defendant established prejudice under the second prong of *Strickland* by showing that he would not have entered into the plea if he had known of the deportation consequences. Applying the U.S. Supreme Court's decision in *Padilla v. Kentucky*, the Court vacated defendant's conviction on the basis that he had received ineffective assistance of counsel regarding the advice provided on the immigration consequences of his conviction.

In *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), a native of Honduras faced deportation after pleading guilty to transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky. Padilla claimed that he pleaded guilty based on his attorney's advice that he “did not have to worry about immigration status since he had been in the country so long.” Contrary to his attorney’s advice, the drug charge made Padilla’s deportation mandatory. Padilla argued he was entitled to post-conviction relief because he would have gone to trial if he had received correct advice from his lawyer before agreeing to enter his plea. The Kentucky Supreme Court denied his request for post-conviction relief.

The United States Supreme Court reversed and remanded. Accepting Padilla's assertions as true, the Court concluded he carried his burden of showing his attorney provided ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984) by failing to advise him of the immigration consequences of the plea. Under *Strickland*, a defendant must demonstrate both deficient performance and resulting prejudice.²⁰

In *Padilla*, the Court held that an attorney has an obligation under the Sixth Amendment to advise a defendant regarding deportation consequences of entering into a guilty plea. “[A]dvice

¹⁷ *Padilla*, 130 S. Ct. at 1481-82.

¹⁸ *Padilla*, 130 S. Ct. at 1473 n.8.

¹⁹ *Id.* at 1482.

²⁰ *Strickland*, 466 U.S. 668, 687 (1984).

regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.”²¹ The Court emphasized the unique nature of deportation and the importance of advising defendants about the deportation consequences for a criminal charge.

[C]hanges to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part . . . —of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

....

.. The severity of deportation—“the equivalent of banishment or exile,” *Delgado v. Carmichael*, 332 U.S. 388, 390-91, 68 S. Ct. 10, 92 L. Ed. 17 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. *Padilla*, 130 S. Ct. at 1480, 1486.

The Court rejected the rationale previously used by other courts that there was a distinction between “direct” and “collateral” consequences, and that defense counsel did not have a duty to advise a client about immigration and deportation consequences.²²

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under *Strickland*. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

.....

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to *Padilla*’s claim.

The Court in *Padilla* rejected the “limited conception” that the Sixth Amendment right to effective assistance of counsel did not include advising a defendant about the immigration consequences of a criminal conviction.

The Court emphasized that for “at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea.” *Padilla*, 130 S. Ct. at 1485. The Court also defined the scope of the duty to advise a noncitizen client about immigration consequences as follows:

²¹ *Padilla*, 130 S. Ct. at 1482.

²² *Padilla*, 130 S. Ct. at 1481-82.

When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. . . . But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.²³

Padilla does not apply retroactively to convictions that become final before *Padilla*.²⁴

In *State v. Sandoval*, 171 Wn. 2d 163 (2011), the Washington Supreme Court followed the decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2010), and vacated the defendant's conviction because he received ineffective assistance of counsel regarding the advice his attorney provided on the immigration consequences of pleading guilty to rape in the third degree. The Court held that not only did defense counsel's performance fall below an objective standard of reasonableness, but the defendant also met his burden of showing prejudice under the *Strickland v. Washington* test.²⁵

Key Points

Issue Presented Was Narrowly Construed – The Court narrowly construed the issue presented to focus on the specific advice defense counsel gave to his client regarding deportation consequences of entering into a plea. The Court did not address other issues related to the immigration consequences, such as the filing of a criminal charge or a conviction on the ability of a noncitizen to obtain discretionary relief from removal.

Clear vs. Unclear Risk of Deportation – As in *Padilla*, the Court in *Sandoval* held that defense counsel has an affirmative duty under the Sixth Amendment to provide effective assistance of counsel regarding the deportation consequences of entering into a plea. In doing so, counsel must identify relevant provisions of the immigration statute and research relevant case law. The advice required depends on whether the risk of deportation is "truly clear." If immigration law is clear, defense counsel must correctly advise the client that pleading guilty would lead to deportation. If immigration law is not clear, counsel must advise the client that the charges may carry the risk of possible adverse immigration consequences. (It is not possible to craft a simple list of "clear" crimes that trigger deportation since such determinations are fact-specific.)

Boilerplate Advisory Language In Plea Form Does Not Meet Defense Counsel's Sixth Amendment Duty – The Court also held that under *Padilla*, the deportation warnings under RCW 10.40.200 that are in the plea form do not mitigate defense counsel's Sixth Amendment obligations.

Strickland's Prejudice Analysis – Unlike in *Padilla*, the Washington Supreme Court in *Sandoval* reached the prejudice prong of the *Strickland* test, and concluded the defendant showed that he would not have entered into the plea if he had known about the immigration

²³ *Padilla*, 130 S. Ct. at 1483.

²⁴ See *Chaidez v. United States*, 133 S. Ct. 1103 (2013).

²⁵ Washington has adopted the two-prong test set forth in *Strickland* in determining whether counsel was ineffective. *State v. Cienfuegos*, 144 Wn.2d 222, 226-27 (2001). Whether an attorney provided effective assistance of counsel is a fact-specific inquiry. *Strickland*, 466 U.S. at 688-89.

consequences. Although the disparity in the punishment between rape in the third degree and the charged crime of rape in the second degree was significant, the Court states that "given the severity of the deportation consequence," it would have been rational for a lawful, permanent resident to go to trial.

Duty of the Court to Ensure Advice is Given on Immigration Consequences

The Court must ensure each defendant is advised of possible immigration consequences as required by RCW 10.40.200. However as noted in *Padilla* and *Sandoval*, just providing the warnings in RCW 10.40.200 is not sufficient.

Defense counsel has a duty to properly advise their client of the actual immigration or deportation consequences. Accordingly, the Court should inquire on the record as to whether there has been an opportunity for defense counsel to do so. Sample colloquies for the court to give at arraignment, before taking a plea, and at the beginning of trial are set forth in the bench cards.

Any colloquy adopted by the Court regarding immigration consequences should be applied uniformly to all individuals since selecting individuals by their names, appearance, or ability to speak English is improper. The Court should not make inquiries regarding an individual's legal status or ask counsel what advice was provided to a client. The proper inquiry is whether such advice has been provided. If requested, the Court should afford counsel the opportunity to review the immigration consequences with a client by setting the matter over to the end of the calendar or continuing the plea to another day.

The Court may also refer counsel to the attorneys at the Washington Defenders Association's (WDA) Immigration Project. The WDA Immigration Project, funded by the State, provides guidance to assist defenders and prosecutors in addressing the complex interplay between immigration and criminal law. Nationally recognized experts, Immigration Project staff attorneys Ann Benson (abenson@defensenet.org) and Jonathan Moore (jonathan@defensenet.org) can be reached by email. Additional resources are available at the WDA website at: www.defensenet.org.

In *Chaidez v. United States*,²⁶ the U.S. Supreme Court concluded that because the decision in *Padilla* announced a new rule of criminal procedure, *Padilla* does not apply retroactively to convictions that became final before that decision. That is, a "defendant whose convictions became final prior to *Padilla* cannot benefit from its holding."

²⁶ 133 S.Ct. 1103.

F. Obligation to Ensure Effective Assistance of Counsel

Judges have an obligation to ensure that defendants have access to competent counsel that can meet his/her obligation under the Sixth Amendment.

As the Supreme Court made clear in *Missouri v. Frye*,²⁷ it is not enough for attorneys to inform defendants of potential consequences.²⁸ Rather, the *Frye* Court reaffirmed that defendants are entitled to effective assistance at all critical stages of the proceedings, and held that plea negotiations are a critical stage.

G. Statutory Obligations Under Washington Law

In 1983, the legislature enacted RCW 10.40.200. RCW 10.40.200 states that prior to accepting a plea, the court must make a determination that defendants have been advised of “the following potential consequences of conviction for a defendant who is not a citizen of the United States: Deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” The statute expressly states that no defendant be required to disclose her or his immigration status when entering a plea.

For many years, this requirement has been accomplished by including the following standardized language in plea forms:

If I am not a citizen of the United States, a plea of guilty to an offense punishable as a crime under state law may be/is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.²⁹

However, the Washington State Supreme Court in *Sandoval* made clear that this statutory advisal alone is not enough to satisfy defense counsel’s Sixth Amendment obligations.³⁰

²⁷ 132 S.Ct. 1399 (2012).

²⁸ *Frye*, 132 S.Ct. at 1347 (“[C]riminal defendants require effective counsel during plea negotiations”).

²⁹ Compare CrR LJ 4.2(g) (sample guilty plea statement) indicating that a conviction “may be” grounds for the stated consequences with CrR 4.2(g), indicating that a conviction “is” grounds for the state consequences, which is erroneous since not all convictions are grounds for these consequences.

³⁰ *Sandoval*, 171 Wash.2d at 173-74.

3.3 JUDICIAL BEST PRACTICES

One of the most effective things judges can do is to ensure that defense attorneys have had the opportunity to meet with and advise their client on immigration consequences. It will often boil down to making sure that counsel has the time necessary for providing such advice.

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.³¹

Nowhere are resources more readily available than in Washington State. Funded by the legislature, **The Washington Defender Association's Immigration Project** (WDA's Immigration Project) exists in large part to provide defense counsel with assistance regarding the immigration consequences facing any given noncitizen client. On average, WDA's Immigration Project staff respond to case inquiries within 48 hours, sooner if needed. WDA's Immigration Project also makes extensive resources, including crime-specific practice advisories, available on its website.

Defendants who choose to proceed *pro se* must be advised that there may be potential immigration consequences. Prior to accepting any waiver of counsel, a defendant considering proceeding *pro se* should be informed that they have the right to retain or request an attorney to obtain individualized advice regarding the immigration consequences of a plea or conviction. The court should also inform the defendant that if he or she is not a U.S. citizen, a conviction can trigger serious immigration consequences such as deportation, even if he/she has a green card (lawful permanent residence), and that if defense counsel is appointed, he/she has the right to have his/her defense attorney address the immigration consequences presented by the criminal charges.

Significant adverse immigration consequences, including removal, can result even (and sometimes especially) from low-level misdemeanor offenses. **Judges should always appoint counsel in criminal proceedings to ensure that if the defendant is a noncitizen, s/he will have the opportunity to receive individualized advice regarding immigration consequences.** Only counsel can provide such advice, since judges are not in a position to conduct the detailed factual investigation and legal analysis required to advise each individual defendant regarding his or her specific circumstances.

REAL LIFE EXAMPLE: Tomas (not his real name) is a noncitizen from El Salvador who came to the U.S in 1999. In 2002, he was granted employment authorization and the right to remain in the U.S. lawfully when the President designated noncitizens from El Salvador eligible for Temporary Protected Status (TPS)³² in the wake of the devastation brought upon that country by hurricanes. (TPS for Salvadorans has been subsequently renewed every 18 months by

³¹ *Padilla*, 130 S. Ct. at 1484.

³² See 8 U.S.C. § 1254a.

presidential decree.) In 2003, Tomas was convicted of DUI. In 2010, he was charged with the gross misdemeanor of Commercial Fishing Without a License under RCW 77.15.500. On advice from the Court, he waived counsel and was found guilty and fined \$150. Unbeknownst to him, Tomas will no longer be eligible for TPS since he now has two misdemeanor convictions. When he next applies to renew his TPS status, he will be denied and placed in removal proceedings.³³

The responsibility for compliance with *Padilla* ultimately rests with defense counsel. But judges should advise defendants early in the proceedings of the need to obtain advice about the actual immigration consequences of a plea or conviction before proceeding to a disposition. A judge should provide the defendant with sufficient time to obtain legal advice on immigration consequences.

Several other states have had statutes mandating that courts provide such additional time. There is little evidence that the practice has generated problems in their court systems.³⁴

Selectively issuing such notice to some defendants and not to others runs the risk of being under-inclusive. Providing notice only to those who state that they are non-citizens or whom the court believes to be non-citizens may mean that people who face potential immigration consequences of a conviction are not informed of their right to advice from counsel about those consequences. Assumptions about defendants' citizenship/immigration status and information provided in response to judicial questioning about citizenship may be erroneous and thus an unreliable basis on which to decide whether or not an immigration warning is necessary.³⁵ Universal administration of advisory notices of the right to receive advice on immigration issues will save courts time and resources in the long run.

Furthermore, selective questioning of some defendants and not others about their citizenship/immigration status on the basis of their race, ethnicity, accent, foreign-sounding name or use of interpreters, risks violating constitutional protections. Non-citizens and citizens alike enjoy protections under the law against discrimination on the basis of suspect classes and unreasonable search or seizure. That protection extends to government interrogation. Courts have held that racial or ethnic criteria are insufficient bases to question someone about their citizenship.³⁶

³³ 8 U.S.C. § 1254a(c)(2)(B)(i) (conviction of any felony or two or more misdemeanors committed in the United States renders a noncitizen ineligible for TPS).

³⁴ Currently, five states, including California, Connecticut, District of Columbia, Oregon, and Nebraska, mandate that courts should afford defendants additional time if they require advice from counsel regarding immigration consequences of their plea or conviction or further negotiations with the prosecution in light of those potential consequences.

³⁵ See *People v. DelVillar*, 235 Ill. 2d 507, 516, 519 (2009) (Illinois Supreme Court held that a court's failure to warn a defendant about the immigration consequences of a guilty plea is not automatically grounds for vacatur, while confirming that issuance of the advisal is nonetheless mandatory under state law and must be administered to defendants on the basis of the plea they are entering, not their citizenship or immigration status).

³⁶ See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (holding that officers may only stop vehicles on basis of specific 'articulable' facts that warrant suspicion vehicle contains "aliens who may be illegally in the country" and that Mexican appearance, alone, does not justify such stop). The Ninth Circuit discussed Supreme

When judges are advising defendants, it is important that the colloquy be administered regardless of the charge an individual is facing. Some convictions classified as misdemeanors and even alternative dispositions and sentences that do not constitute a “conviction” in criminal court may nevertheless carry potentially serious immigration consequences, including deportation. The potential impact of a given plea, admission or conviction on an individual’s immigration status can only be determined in view of the specific individual’s personal history, citizenship/immigration status, and past criminal record—specific facts that a judge does not have before him or her when processing a defendant at the arraignment or plea stage. Given the complex and intertwined nature of criminal and immigration law, any charge should be treated as though it may have the potential to impact an individual’s immigration status presently, or in the future. Whether that potential exists, and whether it can be avoided or mitigated through an alternative disposition, must be ascertained by the defense counsel, in conjunction with his or her client. **See Appendix I: Sample Immigration Colloquies for Judges.**

Court jurisprudence on this point in *United States v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000), holding that racial or ethnic appearance, without more, was of little probative value and insufficient to meet requirement of particularized or individual suspicion. *Id.* (“[T]he Supreme Court has repeatedly held that reliance ‘on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.’” (quoting *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267 (1986))). *See also Fullilove v. Klutznick*, 448 U.S. 448, 491(1980)); *Gonzalez-Rivera v. INS*, 22 F.3d 1441 (9th Cir. 1994) (finding that officer’s stop of individual solely on basis of race was egregious violation of Fourth Amendment, triggering exclusionary rule requiring suppression of evidence obtained); *Ohrorhaghe v. INS*, 38 F.3d 488 (9th Cir. 1994) (holding that search on basis of foreign-sounding name was egregious violation of Constitution warranting suppression of evidence obtained); *But see Mena v. City of Simi Valley*, 354 F.3d 1015, 1019 (9th Cir. 2004) (“The officers here deserve qualified immunity because a person who is constitutionally detained does not have a constitutional right not to be asked whether she is a citizen . . .”), *vacated and remanded by Muehler v. Mena*, 544 U.S. 93, 100-01 (2005) (holding that because mere police questioning does not constitute seizure officers did not need reasonable suspicion to ask for date and place of birth or immigration status during otherwise lawful detention/custody). While the federal government may distinguish among aliens in immigration matters, state action that discriminates between U.S. citizens and lawful permanent residents may be subject to stricter scrutiny.