

FILED

DEC 27 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

NO. 307751

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 06-1-00098-6

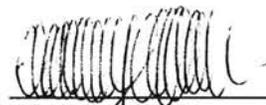
STATE OF WASHINGTON,
Respondent,

vs.

PETRONILO S. BARAJAS,
Appellant.

Consolidated with NO. 301541

BRIEF OF RESPONDENT



Kimberly S. Horner, WSBA #42534
Deputy Prosecuting Attorney

Adams County Prosecutor's Office
210 West Broadway
Ritzville, WA 99169
509-659-3219

Attorney for Respondent

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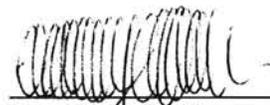
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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. Whether Appellant's guilty plea was knowing, voluntary, and intelligently made is more appropriately addressed in the context of his personal restraint petition, rather than through a direct appeal.
- B. Whether Appellant's motion to vacate his guilty plea is timely is more appropriately addressed in the context of his personal restraint petition, rather than through a direct appeal.
- C. Whether the performance of Appellant's trial counsel was deficient is more appropriately addressed in the context of Appellant's personal restraint petition, rather than through a direct appeal.
- D. By pleading guilty to two criminal counts, Appellant waived his right to appeal those convictions, and the trial court acted properly in informing Appellant of such fact.

II. STATEMENT OF THE CASE

On August 7, 2006, Appellant Petronilo Barajas pleaded guilty in the Adams County Superior Court to one count of Manufacturing a Controlled Substance (Marijuana) and one count of Animal Fighting. RP 1-3. His Statement of Defendant on Plea of

Guilty included the provision that Appellant was waiving his trial and appeal rights. CP 4-5. Prior to accepting Appellant's guilty plea, the court engaged in the following colloquy with Appellant:

THE COURT: I have your Statement of Defendant on Plea of Guilty. Did you read it? Do you read and write English or did Mr. Musik read it to you or did Mr. Szott.

THE DEFENDANT: They read it to me.

THE COURT: All right. Do you understand it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions about it?

THE DEFENDANT: No, Your Honor.

THE COURT: And you understand by pleading guilty, you're giving up your right to trial and your right to appeal.

THE DEFENDANT: Yes, Your Honor.

RP 4. (Emphasis added.)

Four and a half years later, on February 16, 2011, Appellant filed a motion to vacate his guilty plea after the United States

Supreme Court issued its ruling in Padilla v. Kentucky, 130 S.Ct. 1473 (2010). Appellant argued that he should be allowed to withdraw his plea because the attorney who represented him at the time he entered his guilty plea did not specifically inform him that he would certainly be deported as a result of such plea. Appellant also stated in his motion to vacate that he had been contacted by Immigration and Customs Enforcement and informed that his guilty plea in this case subjected him to immediate deportation, because he was not a citizen when he entered the plea. (See Defendant's Motion to Vacate Guilty Plea, attached hereto as Exhibit 1, pp. 1-2.)

On June 9, 2011, the Superior Court ordered that Appellant's motion be transferred to the Court of Appeals as a personal restraint petition, pursuant to Criminal Rule 7.8(c)(2). (See Findings of Fact, Conclusions of Law, and Order Transferring Motion to Court of Appeals, attached hereto as Exhibit 2.)

On April 13, 2012, Appellant filed a notice of direct appeal, which stated that Appellant "gives notice of direct appeal and seeks review by Division III Court of Appeals [*sic*] of the acceptance of [Appellant's] guilty plea and the finding of guilt in this matter by the Adams County Superior Court on September 21, 2006." CP 33. Commissioner Joyce McCown consolidated the direct appeal with

the personal restraint petition on August 2, 2012, and also referred a motion to dismiss the direct appeal, which had been previously made by this Court, to a panel of judges for determination. (See Commissioner's Ruling, attached hereto as Exhibit 3.) Appellant subsequently filed his appellate brief, raising essentially the same issues that had already been addressed through his personal restraint petition.

III. ARGUMENT

A. **Appellant cannot appeal his convictions because he waived his right to appeal when he pleaded guilty.**

Appellant seeks to address a number of substantive issues through his direct appeal, many of which were previously raised through his personal restraint petition. However, at the time he pleaded guilty in this matter, he waived his right to appeal his convictions. He signed the Statement on Plea of Guilty and even verbally informed the court at that time that he understood he was waiving his right to appeal by pleading guilty. Since “[a] voluntary guilty plea acts as a waiver of the right to appeal,” and “when a defendant completes a plea statement and admits to reading, understanding, and signing it, this creates a strong presumption that the plea is voluntary,” State v. Smith, 134 Wn.2d 849, 852, 953

P.2d 810 (1998), the State is requesting that this Court dismiss Appellant's direct appeal.

B. At this stage of the proceedings, filing a direct appeal is a procedurally incorrect method of challenging Appellant's convictions.

As has been previously stated, it is the State's position that Appellant may not directly appeal his convictions because he waived his right to appeal. However, even if Appellant had not waived his right to appeal, the 30 days in which to file a notice of appeal under RAP 5.2 expired several years ago.

Moreover, as is detailed in Appellant's Opening Brief, Appellant has filed a number of declarations with this Court since his initial motion to vacate his guilty plea, and he relies on those declarations to support many of the arguments made in his appellate brief. (See, e.g., Appellant's Opening Brief, pp. 2-5, 16, 22.) As the Washington Supreme Court has stated, however, "[i]f a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition . . ." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Therefore, the State is requesting that this Court dismiss

Appellant's direct appeal and direct its consideration only toward the personal restraint petition from this point forward.

IV. CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court dismiss Appellant's direct appeal.

DATED this 26th day of DECEMBER, 2012.

RANDY J. FLYCKT
Adams County Prosecuting Attorney

By: 
KIMBERLY S. HORNER, WSBA #42534
Deputy Prosecuting Attorney

EXHIBIT 1

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SUPERIOR COURT OF WASHINGTON
FOR ADAMS COUNTY

ADAMS COUNTY
FILED
37 FEB 16 2011
SUSAN K. KIRKENDALL, Clerk
BY SK

STATE OF WASHINGTON,

Plaintiff,

vs.

PETRONILO S. BARAJAS,

Defendant.

No. 06-1-00098-6

DEFENDANT'S MOTION TO
VACATE GUILTY PLEA
STATEMENT OF FACTS AND
MEMORANDUM OF AUTHORITIES

STATEMENT OF FACTS

On September 21, 2005, Petronilo S. Barajas, represented by attorney Paul Szott, pled guilty in the Adams County Superior Court to one count of Manufacture of Marijuana (RCW 9A.50.401(1) and also to one count of Animal Fighting RCW 16.52.117(1)(a). Mr. Barajas was then sentenced to 4 months confinement on each count to run consecutively.

At the time of his guilty plea, his attorney did not give Mr. Barajas any specific advice regarding the immigration consequences of his guilty plea. (See Exhibit "A" Affidavit of Attorney Paul Szott) Also his trial counsel did not take any steps to ascertain Mr. Barajas' citizenship status in order to provide any specific advice regarding the immigration consequences of his client's guilty plea, even though the immigration consequences were easy to ascertain. In February of 2011, Mr. Barajas met a representative of Immigration and Customs Enforcement (ICE). Mr. Barajas was informed that his guilty plea subjected him to immediate and lifelong

1 deportation from the United States without any chance for leniency or any second chance. (See
2 Exhibit "B" Affidavit of Petronilo Barajas)

3 Mr. Barajas is currently in immigration proceedings at the Executive Office for
4 Immigration Review court in Tacoma, Washington. This immigration court matter is currently
5 pending, awaiting the outcome of this motion.
6

7 8 ARGUMENT

9 10 **I. Immigration Consequences Are No Longer** 11 **Considered Collateral Consequences Of A Guilty** 12 **Plea; A Defendant Must Be Aware Of The Exact** 13 **Immigration Consequences Of His/Her Guilty Plea** 14 **When His/Her Guilty Plea Is Entered In Order For** 15 **the Guilty Plea To Not Be Invalid.**

16 ***A. Previous Historical Development of Washington Case Law; Immigration*** 17 ***Consequences Were Previously Considered Merely Collateral Consequences.***

18 Up until the U.S. Supreme Court case of *Padilla v. Kentucky*, 559 U.S. ____ (2010), it was
19 well settled in the State of Washington that immigration consequences were only collateral
20 consequences of a guilty plea. *State v. Holley*, 75 Wn. App. 191 (1994); *State v. Barton*, 93
21 Wn.2d 301, 305, 609 P.2d 1353 (1980); *State v. Malik*, 37 Wn. App. 414, 680 P.2d 770, review
22 denied, 102 Wn.2d 1023 (1984);

23 In *State v. Holley*, Abraham Holley, a permanent resident of the United States, (green card
24 holder) pleaded guilty to possession of a machine gun, possession of a controlled substance, and
25 unlawful use of a building for drug purposes. Holley was born in Ethiopia, orphaned, and then,
26 when he was approximately 4 years old, adopted and brought to the United States. His adoptive
27 parents neglected to complete the simple but necessary steps to make Holley a U.S. citizen.
28

1 Holley had no remaining family in Ethiopia, spoke only English and didn't understand or speak
2 any of the dialects spoken in Ethiopia. *Ibid* at 192.

3 As required by RCW 10.40.200, Mr. Holley's Guilty Plea Statement contained the
4 following language:

5 I understand that if I am not a citizen of the United States, a plea of guilty to an
6 offense punishable as a crime under state law is grounds for deportation, exclusion
7 from admission to the United States, or denial of naturalization pursuant to the
8 laws of the United States.

9 Paragraph 19 of Mr. Holley's Guilty Plea statement further provided:

10 I have read or have had read to me and fully understand all of the numbered
11 sections above (1 through 19) and have received a copy of this "Statement of
12 Defendant on Plea of Guilty" form. I have no further questions to ask of the court.

13 Although it was an absolute certainty under the immigration law that Mr. Holley would
14 be deported from the United States, the court found that immigration consequences were yet only
15 "collateral consequences" of Mr. Holley's plea. The *Holley* court, in reaching this decision,
16 relied on *Barton* and *Malik*.

17 In *Barton* the court explored the circumstances under which a sentencing consequence
18 could be either direct or collateral. Mr. Barton entered a plea of guilty to possession of stolen
19 property in the first degree. As a part of the plea bargain, the prosecutor agreed to recommend
20 probation if defendant had no prior felonies, nor more than three misdemeanors. The defendant
21 was advised by the court that the maximum sentence which could be imposed was 10 years'
22 confinement, a \$10,000 fine, or both. The possibility of enhancing the maximum sentence to life
23 imprisonment under the habitual offender statute was never mentioned by the trial court or by
24 defendant's counsel.
25

26 Subsequent to defendant's plea of guilty, the prosecutor discovered that Barton, in fact,
27 had three prior felony convictions in other states. The State then filed a supplemental sentencing
28

1 information accusing defendant of being an habitual offender. Prior to trial on the supplemental
2 sentencing information, the defendant filed a motion to withdraw his guilty plea on the ground
3 that the plea was not voluntary as it took place without the full understanding of the
4 consequences of his plea. The motion was heard and denied prior to sentencing on the original
5 conviction. The defendant later filed a pro se petition for review.
6

7 On appeal, the *Barton* court reaffirmed the precedent that it is a violation of due process
8 to accept a guilty plea without an affirmative showing that the plea was made intelligently,
9 voluntarily and with knowledge of the direct consequences of the guilty plea. *Boykin v. Alabama*,
10 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969).
11

12 Furthermore, that the record of a plea hearing or clear and convincing extrinsic evidence
13 must affirmatively disclose a guilty plea was made intelligently and voluntarily, with an
14 understanding of the full consequences of such a plea. *Wood v. Morris*, 87 Wn.2d 501, 554 P.2d
15 1032 (1976).
16

17 The court also stated that a defendant need not be advised of all possible collateral
18 consequences of his guilty plea. *Cuthrell v. Director*, 475 F.2d 1364 (4th Cir. 1973). The
19 distinction between direct and collateral consequences of a plea "turns on whether the result
20 represents a definite, immediate and largely automatic effect on the range of the defendant's
21 punishment". Quoting *Cuthrell* at 1366.
22

23 The *Barton* court held:

24 We hold that an habitual criminal proceeding is a collateral
25 consequence of a guilty plea. An habitual proceeding is not
26 automatically imposed after a defendant has entered a plea of guilty
27 even if the defendant has two or more prior felonies. Rather, the
28 prosecuting attorney has discretion on whether to file habitual
proceedings conditioned on the requirement that prosecutorial
discretion "must be tempered by procedural due process". *State v.*

1 *Gilcrist*, 91 Wn.2d 603, 614, 590 P.2d 809 (1979); *State v. Lee*, 87
2 Wn.2d 932, 558 P.2d 236 (1976).

3 Moreover, defendant's status as an habitual offender is determined
4 in a subsequent independent trial in which defendant has the right
5 to counsel, the right to subpoena and cross-examine witnesses, the
6 right to discovery, and the right to a trial by jury. *State v. Lee*,
7 *Supra*. Any enhancement of defendant's sentence is a collateral
rather than a direct result of defendant's guilty plea. Therefore,
defendant need not be advised of the possibility of an habitual
criminal proceeding.

8 Since we hold an habitual proceeding is not a direct consequence of
9 a plea of guilty and defendant's plea was voluntary and made with
10 an understanding of the full consequences of his plea, the
requirements of due process are satisfied. *Wood v. Morris, Supra*.

11 *Barton* was in accord with *Holley*, which stated:

12
13 "The distinction between direct and collateral consequences of a
14 plea 'turns on whether the result represents a definite, immediate
15 and largely automatic effect on the range of the defendant's
16 punishment.'" *State v. Barton*, 93 Wn.2d 301, 305 (1980) (quoting
17 *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir.),
18 cert. denied, 414 U.S. 1005 (1973)). The possibility of deportation
19 is a collateral consequence of a guilty plea. *State v. Malik*, 37 Wn.
20 App. 414, 416, 680 P.2d 770, review denied, 102 Wn.2d 1023
(1984); *State v. Ward*, 123 Wn.2d 488, 513, 869 P.2d 1062 (1994).
Thus, the fact that Holley entered guilty pleas, unaware of the
potential deportation consequence of conviction, does not, by itself,
establish a due process violation.

21 *Holley* at 194.

22 In *State v. Malik*, 37 Wn. App. 414, 680 P.2d 770, review denied, 102 Wn.2d 1023 (1984)

23 the Washington Supreme Court weighed in on whether immigration consequences were a direct
24 or collateral consequence of a guilty plea, it too decided that immigration consequences were
25 collateral consequences.
26
27
28

1 conviction relief on the ground that the Sixth Amendment's effective-assistance-of-counsel
2 guarantee did not protect defendants because deportation was merely a "collateral" consequence
3 of a conviction.

4 In a surprising enlargement of previous precedent, the Supreme Court held that recent
5 changes to immigration law have dramatically raised the stakes of a noncitizen's criminal
6 conviction. While once there was only a narrow class of deportable offenses and judges wielded
7 broad discretionary authority to prevent deportation, immigration reforms have expanded the
8 class of deportable offenses and limited trial court judges' authority to alleviate deportation's
9 harsh consequences. Because the drastic measure of deportation or removal is now virtually
10 inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal
11 advice for noncitizens accused of crimes has never been more important. Thus, as a matter of
12 federal law, deportation is an integral, and not collateral, part of the penalty that may be imposed
13 on noncitizen defendants who plead guilty to specified crimes. *Padilla, Supra.*

14 The Supreme Court rejected the arguments of State that the application of immigration
15 law to a guilty plea were too complicated or esoteric, and beyond the understanding of a trial
16 court or counsel. The Supreme Court stated:

17 The weight of prevailing professional norms supports the view that
18 counsel must advise her client regarding the deportation risk. And
19 this Court has recognized the importance to the client of "
20 '[p]reserving the . . . right to remain in the United States' " and
21 "preserving the possibility of" discretionary relief from deportation.
22 *INS v. St. Cyr*, 533 U. S. 289, 323. Thus, this is not a hard case in
23 which to find deficiency: The consequences of Padilla's plea could
24 easily be determined from reading the removal statute, his
25 deportation was presumptively mandatory

26 *Ibid.*

1 The government, in argument, also urged the Supreme Court to make its ruling apply only
2 to situations to where the defendant received affirmative misadvice regarding the immigration
3 consequences of his guilty plea. The Supreme Court specifically declined to adopt this narrow
4 reading and instead decided that where the immigration consequences are easily ascertained, that
5 the defendant must be informed of the specific immigration consequences of his guilty plea
6 before such guilty plea can be considered knowing, voluntary and with an understanding of the
7 consequences of his plea. (See *Padilla; Section IV*).

9 The Supreme Court rejected a holding limited to affirmative misadvice because such a
10 holding would invite two absurd results. First, it would give counsel an incentive to remain silent
11 on matters of great importance, even when answers about the defendant's deportability were
12 readily available. Silence under these circumstances would be fundamentally at odds with the
13 critical obligation of counsel to advise the client of "the advantages and disadvantages of a plea
14 agreement." *Padilla*, quoting *Libretti v. United States*, 516 U. S. 29, 50-51 (1995).

16 When it is known that clients face possible exile from this country and separation from
17 their families, they should be discouraged from remaining silent about such a fact or being
18 willfully ignorant of consequences vital to his client's interests. Second, it would deny a class of
19 clients least able to represent themselves the most rudimentary advice on deportation even when
20 it is readily available. It is a quintessential duty that a defendant be given specific advice about an
21 important issue such as deportation consequences. *Padilla, Supra*.

24 Finally, the Supreme Court found that professional treatises and practice norms have
25 already stated that a defendant must be given advice regarding deportation consequences. Where
26 a defendant is given no advice at all, a plea is not knowing, voluntary and with full knowledge of
27 the consequences of the guilty plea. National Legal Aid and Defender Assn., Performance
28

1 The Washington Supreme Court in *Malik* relied on the same case authority cited in
2 *Holley. Cuthrell v. Director*, 475 F.2d 1364 (4th Cir. 1973); See also, *State v. Barton*, 93 Wn.2d
3 301, 305, 609 P.2d 1353 (1980).

4 The *Malik* court looked to other current federal authority and held:

5 In a case involving the same problem, the Ninth Circuit Court of
6 Appeals stated:

7 "We agree with the Second Circuit that when, as in the case of
8 deportation, the consequence in issue "was not the sentence of the
9 court which accepted the plea but of another agency over which the
10 trial judge has no control and for which he has no responsibility"
11 *Michel v. United States*, 507 F.2d 461, 465 (2nd Cir. 1974), Rule
12 11 imposes no duty on the District Court to advise a defendant of
13 such consequences. The collateral consequences flowing from a
14 plea of guilty are so manifold that any rule requiring a district judge
15 to advise a defendant of such a consequence as that here involved
16 would impose an unmanageable burden on the trial judge and "only
17 sow the seeds for later collateral attack." *United States v. Sherman*,
18 474 F.2d 303, 305 (9th Cir. 1973). *Fruchtman v. Kenton*, 531 F.2d
19 946, 949 (9th Cir.), Cert. Denied, 429 U.S. 895 (1976).

20 We agree.

21 *Malik* at 416.

22 ***B. Padilla v. Kentucky Necessarily Overturns Washington Case Law Pertaining To***
23 ***Immigration Consequences; Malik, Barton And Holley Are No Longer Current Law.***

24 In the recent U.S. Supreme Court case of *Padilla v. Kentucky*, the Petitioner Padilla was a
25 lawful permanent resident of the United States for over 40 years, faced deportation after pleading
26 guilty to drug distribution charges in Kentucky. In post-conviction proceedings, he claimed that
27 his counsel not only failed to advise him of this consequence before he entered the plea, but also
28 told him "not to worry about deportation since he had lived in this country so long." Padilla
stated that he would have gone to trial had he not received this incorrect advice. Similar to State
of Washington laws and procedures, the Kentucky Supreme Court denied Padilla's post-

1 Guidelines for Criminal Representation §6.2 (1995); G. Herman, Plea Bargaining §3.03, pp. 20-
2 21 (1997); Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty
3 Pleas, 87 Cornell L. Rev. 697, 713-718 (2002); A. Campbell, Law of Sentencing §13:23, pp.
4 555, 560 (3d ed. 2004); Dept. of Justice, Office of Justice Programs, 2 Compendium of Standards
5 for Indigent Defense Systems, Standards for Attorney Performance, pp. D10, H8-H9, J8 (2000)
6 (providing survey of guidelines across multiple jurisdictions); ABA Standards for Criminal
7 Justice, Prosecution Function and Defense Function 4-5.1(a), p. 197 (3d ed. 1993); ABA
8 Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), p. 116 (3d ed. 1999) (See Exhibit "C" -
9 Padilla Practice Advisory)

11 ***C. The Defendant Currently Faces Certain Lifetime Deportation Based On His
12 Guilty Plea In This Matter.***

13 Conviction of, or mere guilty plea to, virtually any drug offense triggers deportability, even if
14 later vacated or expunged based on rehabilitation or participation in drug treatment. In fact, for
15 noncitizen defendants, a drug possession conviction or plea will almost certainly result in
16 deportation without any possibility of a waiver. If a defendant is convicted of virtually any drug
17 offense relating to a "controlled substance" as defined in section 102 of the Controlled
18 Substances Act (referencing federal controlled substance schedules published at 21 USC 812), a
19 defendant becomes deportable.
20
21

22 In fact, a conviction or plea involving "drug trafficking qualifies as an "aggravated
23 felony" subjecting the defendant/alien to mandatory deportation. See 8 U.S.C. § 1101(a)(43),
24 which is the INA (Immigration and Nationality Act section defining an aggravated felony as
25 being "illicit trafficking in a controlled substance (as defined in section 802 of Title 21),
26 including a drug trafficking crime (as defined in section 924(c) of Title 18)." 18 U.S.C. §
27 924(c)(2), which is the statute incorporated into the INA's definition of "drug trafficking crime"
28

1 It states that a drug trafficking crime is "any felony punishable under the Controlled Substances
2 Act."

3 This means that defendants' family contacts, U.S. citizen children, and length of residence
4 in the United States CANNOT save a defendant once convicted of an aggravated felony. There
5 are factually no avenues of relief. Although technically immigration law calls an offense an
6 "aggravated felony," the federal definition takes in all misdemeanors in Washington State due to
7 the possibility of "up to one year" of incarceration in the sentencing. (i.e. 365 days even with all
8 365 days suspended for certain types of offenses will be considered an aggravated felony whereas
9 364 days with 0 days suspended for the same offense will not be an aggravated felony)
10

11 In Mr. Barajas' case, it was a virtual certainty at the time of his guilty plea that such a
12 plea would result in his lifetime deportation from the United States with a loss of his legal
13 permanent residence status. There are no exceptions to the automatic application of the
14 immigration law that would allow Mr. Barajas to remain in the United States. As such it was a
15 consequence that was easily determinable by his counsel at the time of his guilty plea. His
16 counsel should have provided this information to Mr. Barajas. If Mr. Barajas had been provided
17 this information he would not have chosen to plead guilty. He would have had nothing to lose by
18 not proceeding to trial.
19
20

21 **The Motion Is Properly Before This Court**
22 **And Is Not Time Bared Under CrR7.8(c)(2)**

23 It is anticipated that the State in its answer to this motion may argue that this matter must
24 be transferred to the Court of Appeals for consideration as a "personal restraint petition".
25 However, such a transfer would be improper under the applicable court rules.
26
27
28

1 CrR 7.8(c) in its entirety provides:

2
3 (a) Clerical Mistakes. Clerical mistakes in judgments, orders or
4 other parts of the record and errors therein arising from oversight
5 or omission may be corrected by the court at any time of its own
6 initiative or on the motion of any party and after such notice, if
7 any, as the court orders. Such mistakes may be so corrected before
8 review is accepted by an appellate court, and thereafter may be
9 corrected pursuant to RAP 7.2(e).

10 (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered
11 Evidence; Fraud; etc. On motion and upon such terms as are just,
12 the court may relieve a party from a final judgment, order, or
13 proceeding for the following reasons:

14 (1) Mistakes, inadvertence, surprise, excusable neglect or
15 irregularity in obtaining a judgment or order;

16 (2) Newly discovered evidence which by due diligence could not
17 have been discovered in time to move for a new trial under rule
18 7.5;

19 (3) Fraud (whether heretofore denominated intrinsic or extrinsic),
20 misrepresentation, or other misconduct of an adverse party;

21 (4) The judgment is void; or

22 (5) Any other reason justifying relief from the operation of the
23 judgment.

24 **The motion shall be made within a reasonable time and for reasons**
25 (1) and (2) not more than 1 year after the judgment, order, or
26 proceeding was entered or taken, and is further subject to RCW
27 10.73.090, .100, .130, and .140. A motion under section (b) does
28 not affect the finality of the judgment or suspend its operation.

(c) Procedure on Vacation of Judgment.

(1) Motion. Application shall be made by motion stating the
grounds upon which relief is asked, and supported by affidavits
setting forth a concise statement of the facts or errors upon which
the motion is based.

(2) Transfer to Court of Appeals. The court shall transfer a motion
filed by a defendant to the Court of Appeals for consideration as a

1 personal restraint petition **unless the court determines that the**
2 **motion is not barred by RCW 10.73.090** and either (i) the
3 defendant has made a substantial showing that he or she is entitled
4 to relief or (ii) resolution of the motion will require a factual
5 hearing. (emphasis added)

6 (3) **Order to Show Cause.** If the court does not transfer the motion
7 to the Court of Appeals, it shall enter an order fixing a time and
8 place for hearing and directing the adverse party to appear and
9 show cause why the relief asked for should not be granted.

10 [Adopted effective September 1, 1986; amended effective
11 September 1, 1991; June 24, 2003; September 1, 2007.]

12 In referring to the rule regarding timeliness, RCW 10.73.090 in its entirety states:

13 (1) No petition or motion for collateral attack on a judgment and
14 sentence in a criminal case may be filed more than one year after
15 the judgment becomes final if the judgment and sentence is valid
16 on its face and was rendered by a court of competent jurisdiction.

17 (2) For the purposes of this section, "collateral attack" means any
18 form of post-conviction relief other than a direct appeal. "Collateral
19 attack" includes, but is not limited to, a personal restraint petition, a
20 habeas corpus petition, **a motion to vacate judgment**, a motion to
21 withdraw guilty plea, a motion for a new trial, and a motion to
22 arrest judgment. (Emphasis Added)

23 (3) For the purposes of this section, a judgment becomes final on
24 the last of the following dates:

25 (a) The date it is filed with the clerk of the trial court;

26 (b) The date that an appellate court issues its mandate disposing of
27 a timely direct appeal from the conviction; or

28 (c) The date that the United States Supreme Court denies a timely
petition for certiorari to review a decision affirming the conviction
on direct appeal. The filing of a motion to reconsider denial of
certiorari does not prevent a judgment from becoming final.

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**Mr. Barajas' Motion To Vacate Is Not Time
Barred Under The Doctrine Of Equitable Tolling**

Equitable tolling is, as its name suggests, an equitable remedy that when found can operate to halt a jurisdictional time limitation from expiring. The application of equitable tolling operates to permit a court to allow an action to proceed when justice requires it, even though a statutory time period for consideration has elapsed. See *State v. Duvall*, 86 Wn. App. at 874.

There have been several Washington appellate cases which have interpreted the doctrine of equitable tolling in the context of immigration consequences.

In *State v. Littlefair*, 112 Wn.App 749 (2002) the defendant was a Canadian citizen. His criminal defense lawyer apparently erroneously believed that Mr. Littlefair was a U.S. Citizen. In the *Statement of Defendant on Plea of Guilty*, the defense attorney had crossed out the section that explained that there could be immigration consequences that attached to the guilty plea.

The State in its argument in *Littlefair* also claimed that the defendant's motion was time barred. The trial court agreed and also went further to decide the motion on its merits and found that since immigration consequences were only collateral consequences that it was irrelevant that the section had been crossed out. *Littlefair* at 756.

The Court of Appeals disagreed with the trial court's analysis and found that the time for Mr. Littlefair to file his motion to vacate had been equitably tolled. The court relied on *In re Personal Restraint of Hoisington*, 99 Wn. App. 423, 993 P.2d 296 (2000) in finding that RCW 10.73.090 could be equitably tolled. In that case, Division Three held that "[t]he doctrine of equitable tolling applies to statutes of limitation but not to time limitations that are jurisdictional;" that RCW 10.73.090 "functions as a statute of limitation and not as a jurisdictional bar;" and thus that RCW 10.73.090 "is subject to the doctrine of equitable tolling." *Hoisington* at 431; see also *State v. Robinson*, 104 Wn. App. 657, 667, 17 P.3d 653, review

1 denied, 145 Wn.2d 1002 (2001) (recognizing that RCW 10.73.090 can be equitably tolled, but
2 declining to toll it in the particular case). See Also, *In re Pers. Restraint of Stoudmire*, 145
3 Wn.2d 258, 267, 36 P.3d 1005 (2001); *In re Pers. Restraint of Meyer*, 142 Wn.2d 608, 614, 16
4 P.3d 563 (2001); *Shumway v. Payne*, 136 Wn.2d 383, 397, 964 P.2d 349 (1998); *In re Pers.*
5 *Restraint of Benn*, 134 Wn.2d 868, 884 n.3, 952 P.2d 116 (1998).

6
7 In the instant case, Mr. Barajas did not have any knowledge that his guilty plea rendered
8 him absolutely and permanently deportable before the point that he was recently arrested by
9 Immigration and Customs Enforcement (ICE). (See Exhibit "B" Affidavit of Petronilo Barajas)
10 Mr. Barajas then took prompt action by seeking the advice of an experienced immigration lawyer
11 (See Exhibit "D" Affidavit of Attorney Carlos David Villareal) and then another attorney, Mr.
12 Brent De Young, to assist him with attempting to vacate his guilty plea. Mr. Barajas has acted
13 with all reasonable haste and has not been dilatory in making this application for relief. Thus, the
14 time limits for bringing this motion are properly equitably tolled.
15

16 **The Defendant Has Made A Substantial Showing**
17 **That He Is Entitled To Relief As Required Under**
18 **CrR 7.8(c)(2)(i)**

19 Under the applicable statutory authority, once the defendant has made a substantial
20 showing that he is entitled to relief, the matter is then to be set for a *Show Cause Hearing*. See
21 *CrR 7.8(c)(2)(i)*.

22 **CONCLUSION**

23
24 In the instant case, an analysis of Mr. Barajas guilty plea to one count of Manufacture of
25 Marijuana (RCW 9A.50.401(1) and the legal conclusion that such a plea would render him
26 immediately and permanently deportable from the United States does not require any esoteric
27 knowledge of the immigration laws either now nor at the time of Mr. Barajas guilty plea in 2006.
28

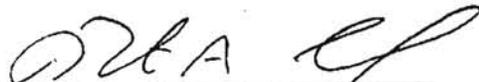
1 Drug trafficking was considered an "aggravated felony" for immigration purposes as
2 early as 1988. The Anti-Drug Abuse Act of 1988 (ADAA) introduced the "aggravated felony"
3 concept into the immigration law. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §7342,
4 102 Stat. 4181, 4469 (1988). The ADAA made commission of an aggravated felony a
5 deportable offense. *Id.* Mr. Barajas' offense has been an "aggravated felony" under the
6 immigration law continually and for the past 22 years. The Court in *Padilla* held: "For at least
7 the past 15 years, professional norms have generally imposed an obligation on counsel to provide
8 advice on the deportation consequences of a client's plea." (See *Padilla* at 15).

10 The State is likely to argue that the *Statement of Defendant on Plea of Guilty* forms are in
11 fact legally sufficient and that the *Padilla* decision will have no practical application in the State
12 of Washington. Such a reading of *Padilla* is egregiously narrow. The *Padilla* court stated:
13

14 There will, therefore, undoubtedly be numerous situations in which
15 the deportation consequences of a particular plea are unclear or
16 uncertain. The duty of the private practitioner in such cases is more
17 limited. When the law is not succinct and straightforward (as it is in
18 many of the scenarios posited by JUSTICE ALITO), a criminal
19 defense attorney need do no more than advise a noncitizen client
20 that pending criminal charges may carry a risk of adverse
21 immigration consequences. But when the deportation consequence
22 is truly clear, as it was in this case, the duty to give correct advice
23 is equally clear.

24 The fact of Mr. Barajas' deportability under the immigration law is fully within the ambit
25 of those situations which are "truly clear" as envisioned by the U.S. Supreme Court in *Padilla*.
26 His counsel thus had a duty to inform him that his guilty plea would render him immediately and
27 forever deportable. Mr. Barajas did not receive this required advice. Under the law, his guilty
28 plea was not knowing, voluntary and with a full knowledge of the consequences of his plea and
must be set for a *Show Cause Hearing* and ultimately vacated as a matter of law.

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4 RESPECTFULLY SUBMITTED this 16th day of February, 2011.
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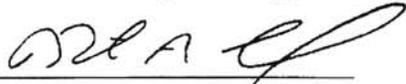
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8 
9 Brent A. De Young, WSBA #27935
Attorney for Defendant
10

11 CERTIFICATE OF SERVICE

12 I certify that on this day I caused a true and correct copy of the
13 document to which this declaration is attached to be served on
the following in the manner indicated below:

14 Prosecuting Attorney () U.S. Mail
210 W. Broadway (x) Hand Delivery
15 Ritzville WA 99169 () _____

16 Dated: This 16th day of February, 2011.

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4 **IN THE ADAMS COUNTY SUPERIOR COURT**
5 **STATE OF WASHINGTON**
6

7 STATE OF WASHINGTON,

8 Plaintiff,

9 vs.

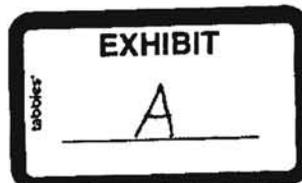
10 PETRONILO S. BARAJAS,

11 Defendant.

No. 06-1-00098-6

AFFIDAVIT OF
PAUL J. SZOTT

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**IN THE ADAMS COUNTY SUPERIOR COURT
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Plaintiff,

vs.

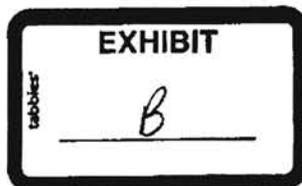
PETRONILO S. BARAJAS,

Defendant.

No. 06-1-00098-6

AFFIDAVIT OF
PETRONILO S. BARAJAS

TO BE PROVIDED





A Defending Immigrants Partnership Practice Advisory*
DUTY OF CRIMINAL DEFENSE COUNSEL REPRESENTING
AN IMMIGRANT DEFENDANT AFTER *PADILLA V. KENTUCKY*
April 6, 2010 (revised April 9, 2010)

On March 31, the Supreme Court issued its momentous Sixth Amendment right to counsel decision in *Padilla v. Kentucky*, 599 U.S. __ (2010). The Court held that, in light of the severity of deportation and the reality that immigration consequences of criminal convictions are inextricably linked to the criminal proceedings, **the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.**

Some Key *Padilla* Take-Away Points for Criminal Defense Lawyers

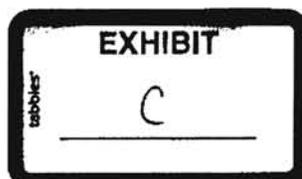
- **The Court found that deportation is a “particularly severe penalty” that is “intimately related” to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.**
- **Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.** In support of its decision, the Court relied on professional standards that generally require counsel to **determine citizenship/immigration status** of their clients and to **investigate and advise** a noncitizen client about the immigration consequences of alternative dispositions of the criminal case.
- **The Sixth Amendment requires affirmative, competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).** In reaching its holding, the Court expressly rejected limiting immigration-related IAC claims to cases involving misadvice. It thus made clear that a defense lawyer's silence regarding immigration consequences of a guilty plea constitutes IAC. Even where the deportation consequences of a particular plea are unclear or uncertain, a criminal defense attorney must still advise a noncitizen client regarding the possibility of adverse immigration consequences.
- **The Court endorsed “informed consideration” of deportation consequences by both the defense and the prosecution during plea-bargaining.** The Court specifically highlighted the benefits and appropriateness of the defense and the prosecution factoring immigration consequences into plea negotiations in order to craft a conviction and sentence that reduce the likelihood of deportation while promoting the interests of justice.

What is Covered in this Practice Advisory

This advisory provides initial guidance on the duty of criminal defense counsel representing an immigrant defendant after *Padilla*. The Defending Immigrants Partnership will later provide guidance on issues not covered here, including the ability to attack a *past* conviction based on ineffective assistance under *Padilla*.

- I. **Summary & Key Points of the *Padilla* Decision for Defense Lawyers** (pp. 2-4)
- II. **Brief Review of Select Defense Lawyer Professional Standards Cited by the Court** (pp. 4-6)
 - Duty to inquire about citizenship/immigration status at initial interview stage
 - Duty to investigate and advise about immigration consequences of plea alternatives
 - Duty to investigate and advise about immigration consequences of sentencing alternatives

Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)
Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources)



I. Summary & Key Points of the *Padilla* Decision for Defense Lawyers

A. Summary

Background. In *Padilla v. Kentucky*, the petitioner was a lawful permanent resident immigrant who faced deportation after pleading guilty in a Kentucky court to the transportation of a large amount of marijuana in his tractor-trailer. In a post-conviction proceeding, Mr. Padilla claimed that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he "did not have to worry about immigration status since he had been in the country so long." Mr. Padilla stated that he relied on his counsel's erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory.

The Kentucky Supreme Court's Ruling. The Kentucky Supreme Court denied Mr. Padilla post-conviction relief based on a holding that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a "collateral" consequence of his conviction.¹

The U.S. Supreme Court's Response. The U.S. Supreme Court disagreed with the Kentucky Supreme Court and agreed with Mr. Padilla that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." *Padilla*, slip op. at 2. The Court observed that "[t]he landscape of federal immigration law has changed dramatically over the last 90 years." *Id.* at 2. The Court stated:

While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.

Id. at 2 (citations omitted).

Based on these changes, the Court concluded that "accurate legal advice for noncitizens accused of crimes has never been more important" and that "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." *Id.* at 6.

In Mr. Padilla's case, the Court found that the removal consequences for his conviction were clear, and that he had sufficiently alleged constitutional deficiency to satisfy the first prong of the *Strickland* test – that his representation had fallen below an "objective standard of reasonableness."²

The Supreme Court's Holding in *Padilla*: Sixth Amendment Requires Immigration Advice. The Court held that, for Sixth Amendment purposes, defense counsel must inform a noncitizen client whether his or her plea carries a risk of deportation. The Court stated: "Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less." *Id.* at 17.

B. Key Points For Defense Lawyers

1. The Court found that deportation is a "particularly severe penalty" that is "intimately related" to the criminal process and therefore advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.

With respect to the distinction drawn by the Kentucky Supreme Court between direct and collateral consequences of a criminal conviction, the Court noted that it has never applied such a distinction to define the

scope of the constitutionally "reasonable professional assistance" required under *Strickland v. Washington*, 466 U.S. 668 (1984). *Padilla*, slip op. at 8. It found, however, that it need not decide whether the direct/collateral distinction is appropriate in general because of the unique nature of deportation, which it classified as a "particularly severe penalty" that is "intimately related" to the criminal process. *Id.* The Court stated:

Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in the deportation context. . . . Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. . . . 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.

Id. (citations omitted).

2. Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel.

In assessing whether the counsel's representation in the *Padilla* case fell below the familiar *Strickland* "objective standard of reasonableness," the Court relied on prevailing professional norms, which it stated supported the view that defense counsel must advise noncitizen clients regarding the risk of deportation:

We long have recognized that that "[p]revailing norms of practice as reflected in the American Bar Association standards and the like . . . are guides to determining what is reasonable . . ." . . . [T]hese standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law. . . . Authorities of every stripe—including the American Bar Association, criminal defense and public defender organization, 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.

Padilla at 9-10 (citations omitted).

3. The Sixth Amendment requires affirmative and competent advice regarding immigration consequences; non-advice (silence) is insufficient (ineffective).

Finding that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation," *id.* at 9, the Court concluded that counsel's misadvice in the *Padilla* case fell below the familiar *Strickland* "objective standard of reasonableness." The Court further noted 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." *Id.* at 10 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)).

The Court, though, did not stop there: it found that the Sixth Amendment requires affirmative advice regarding immigration consequences. It made this clear by rejecting the position of amicus United States that *Strickland* only applies to claims of misadvice, stating that "there is no relevant difference 'between an act of commission and an act of omission' in this context." *Id.* at 13 (citing *Strickland*, 466 U.S. at 690). The Court explained:

A holding limited to affirmative misadvice . . . 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.

Id. (citations omitted).

The Court acknowledged that immigration law can be complex, and that there will be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The Court stated that, when the deportation consequences of a particular plea are unclear or uncertain, "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." *Id.* at 11-12. But the Court then went on to say that "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* at 12. Whether or not the consequences are clear or unclear, however, the Court made clear that the governing test is the *Strickland* test of whether counsel's representation "fell below an objective standard of reasonableness," and that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 9 (quoting *Strickland*, 466 U.S. at 688). Under those norms, "[i]t 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.'" *Id.* at 14 (citation omitted).

4. The Court endorsed "Informed consideration" of deportation consequences by both the defense and the prosecution during plea-bargaining.

The Court recognized that "informed consideration" of immigration consequences are a legitimate part of the plea-bargaining process, both on the part of the defense and the prosecution. The Court stated:

[I]nformed consideration of possible deportation can only benefit both the State and the noncitizen defendants during the plea bargaining process. . . . By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. . . . 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 At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty

Id. at 16.

II. Brief Review of Select Defense Lawyer Professional Standards Cited by the Court

In support of its holding that defense counsel's failure to inform a noncitizen client that his or her plea carries a risk of deportation constitutes ineffective assistance of counsel for Sixth Amendment purposes, the Court cited professional standards that it described as "valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law." *Padilla*, slip op. at 9. The Court cited, among such standards, the National Legal Aid and Defender Association (NLADA) Performance Guidelines for Criminal Representation (1995) (hereinafter, "NLADA Guidelines"), and the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999) (hereinafter, "ABA Pleas of Guilty Standards").

In order to assist defense counsel seeking guidance on how to comply with their legal and ethical duties to noncitizen defendants, this section of the Practice Advisory will highlight some of the NLADA and ABA standards recognized by the Supreme Court as reflecting the prevailing professional norms for defense lawyer representation of noncitizen clients. While these standards provide that competent defense counsel must take immigration consequences into account at all stages of the process, this section will focus in particular on defense lawyer responsibilities at the plea bargaining stage, the stage of representation at issue in the *Padilla* case.

Duty to inquire about citizenship/immigration status at initial interview stage:

Defense lawyer professional standards generally recognize that proper representation begins with a firm understanding of the client's individual situation and overall objectives, including with respect to immigration status. For example, the ABA Pleas of Guilty Standards commentary urges counsel to "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces." *Id.* cmt. at 127. It then notes that "it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction." *Id.*

In order to comply with a defense lawyer's professional responsibilities, counsel should determine the immigration status of every client at the initial interview. See NLADA Guideline 2.2(b)(2)(A). Without knowledge that the client is a noncitizen, the lawyer obviously cannot fulfill his or her responsibilities—recognized by the Supreme Court and these professional standards (see "Duty to investigate and advise about immigration consequences of plea alternatives" and "Duty to investigate and advise about immigration consequences of sentencing alternatives" below)—to advise about immigration consequences. Moreover, merely knowing that your client is a noncitizen may not be enough: while the degree of certainty of the advice may vary depending on how settled the consequences are under immigration law, it is often not possible to know whether the consequences will be certain or uncertain without knowing a client's specific immigration status. Thus, it is necessary to identify a client's specific status (whether lawful permanent resident, refugee or asylee, temporary visitor, undocumented, etc.) in order to ensure the ability to provide correct advice later about the immigration consequences of a particular plea/sentence. See *State v. Paredes*, 136 N.M. 533, 539 (2004) ("criminal defense attorneys are obligated to determine the immigration status of their clients").

Duty to investigate and advise about immigration consequences of plea alternatives:

At the plea bargaining stage, NLADA Guideline 6.2(a) specifies that as part of an "overall negotiation plan" prior to plea discussions, counsel should make sure the client is fully aware of not only the maximum term of imprisonment but also a number of additional possible consequences of conviction, including "deportation"; Guideline 6.3(a) requires that counsel explain to the client "the full content" of any "agreement," including "the advantages and disadvantages and potential consequences"; and Guideline 6.4(a) requires that prior to entry of the plea, counsel make certain the client "fully and completely" understands "the maximum punishment, sanctions, and other consequences" of the plea. Again, while the advice may vary depending on the certainty of the consequences, investigation based on the client's specific immigration status is necessary in order to be able to provide correct advice about the certainty of the immigration consequences of a plea.

The ABA Standards set forth similar responsibilities. ABA Pleas of Guilty Standard 14-3.2(f) provides: "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." With respect specifically to immigration consequences, the ABA emphasizes that "counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." *Id.* cmt. at 127. The commentary urges counsel to be "active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." *Id.* cmt. at 126-27.

The fact that many states³ require court advisals regarding potential immigration consequences of a guilty plea does not obviate the need for defense counsel to investigate and advise the defendant. The ABA's commentary to ABA Pleas of Guilty Standard 14-3.2 states that the court's "inquiry is not, of course, any substitute for advice by counsel," because:

The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations which will not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial. Because this requires a careful evaluation of problems of proof and of possible defenses, few defendants can make this appraisal without the aid of counsel.

Id. See also ABA Pleas of Guilty Standard 14-3.2(f) cmt. at 126 (“[O]nly defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case.”).

Defense counsel should be aware that prosecutors also have a responsibility to consider deportation and other so-called “collateral” consequences in plea negotiations. Prosecutors are not charged merely with the obligation to seek the maximum punishment in all cases, but with the broader obligation to “see that justice is accomplished.” National District Attorneys Association, *National Prosecution Standards* § 1.1 (2d ed. 1991). Prosecutors are thus trained to take these collateral consequences into account during the course of plea bargaining. *E.g.* U.S. Dep’t of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997) (in determining whether to enter into a plea agreement, “the attorney for the government should weigh *all relevant considerations*, including . . . [t]he probable sentence or *other consequences* if the defendant is convicted”) (emphasis added). These prosecutor responsibilities can be cited whenever a prosecutor claims that he or she cannot consider immigration consequences because to do so would give an unfair advantage to noncitizen defendants.

Duty to investigate and advise about immigration consequences of sentencing alternatives:

At the sentencing stage, NLADA Guideline 8.2(b) requires that counsel be “familiar with direct and collateral consequences of the sentence and judgment, including . . . deportation”; and *id.* 8.3(a) requires the client be informed of “the likely and possible consequences of sentencing alternatives.” For example, some immigration consequences are triggered by the length of any prison sentence. In some cases, a variation in prison sentence of one day can make a huge difference in the immigration consequences triggered. *See, e.g.*, 8 U.S.C. 1101(a)(43) (prison sentence of one year for theft offense results in “aggravated felony” mandatory deportation for many noncitizens; 364-day sentence may avoid deportability or preserve relief from deportation).

For resources for defense lawyers on the immigration consequences of criminal cases, see attached Appendices:

Appendix A – Immigration Consequences of Criminal Convictions Summary Checklist (starting point for inquiry)

Appendix B – Resources for Criminal Defense Lawyers (more extensive national, regional and state resources for defense lawyers)

ENDNOTES:

* This advisory was authored by Manuel D. Vargas of the Immigrant Defense Project for the Defending Immigrants Partnership with the input and collaboration of the Immigrant Legal Resource Center, the National Immigration Project of the National Lawyers Guild, and the Washington Defender Association’s Immigration Project.

¹ Over the years, a number of courts have dismissed ineffective assistance of counsel claims based on failure to give advice on immigration consequences under the “collateral consequences” rule. *See, e.g., People v. Ford*, 86 N.Y.2d 397 (1995). Other courts — particularly since the harsh immigration law amendments of 1996 — have rejected this rule. *See, e.g., State v. Nunez-Valdez*, 200 N.J. 129, 138 (2009) (“[T]he traditional dichotomy that turns on whether consequences of a plea are penal or collateral is not relevant to our decision here.”).

² The Court remanded Mr. Padilla’s case to the Kentucky courts for further proceedings on whether he can satisfy *Strickland*’s second prong—prejudice as a result of his constitutionally deficient counsel.

³ Thirty jurisdictions including the District of Columbia and Puerto Rico have statutes, rules, or standard plea forms that require a defendant to receive notice of potential immigration consequences before the court will accept his guilty plea.

Appendix A
Immigrant Defense Project
Immigration Consequences of Convictions Summary Checklist*

GROUNDS OF DEPORTABILITY (apply to lawfully admitted noncitizens, such as a lawful permanent resident (LPR)—greencard holder)	GROUNDS OF INADMISSIBILITY (apply to noncitizens seeking lawful admission, including LPRs who travel out of US)	INELIGIBILITY FOR US CITIZENSHIP
<p>Aggravated Felony Conviction</p> <p>➤ <i>Consequences</i> (in addition to deportability):</p> <ul style="list-style-type: none"> ◆ Ineligibility for most waivers of removal ◆ Ineligibility for voluntary departure ◆ Permanent inadmissibility after removal ◆ Subjects client to up to 20 years of prison if s/he illegally reenters the US after removal <p>➤ <i>Crimes covered</i> (possibly even if not a felony):</p> <ul style="list-style-type: none"> ◆ Murder ◆ Rape ◆ Sexual Abuse of a Minor ◆ Drug Trafficking (may include, whether felony or misdemeanor, any sale or intent to sell offense, second or subsequent possession offense, or possession of more than 5 grams of crack or any amount of flunitrazepam) ◆ Firearm Trafficking ◆ Crime of Violence + 1 year sentence** ◆ Theft or Burglary + 1 year sentence** ◆ Fraud or tax evasion + loss to victim(s) > \$10,000 ◆ Prostitution; business offenses ◆ Commercial bribery, counterfeiting, or forgery + 1 year sentence** ◆ Obstruction of justice or perjury + 1 year sentence** ◆ Certain bail-jumping offenses ◆ Various federal offenses and possibly state analogues (money laundering, various federal firearms offenses, alien smuggling, failure to register as sex offender, etc.) ◆ Attempt or conspiracy to commit any of the above 	<p>Conviction or <i>admitted commission</i> of a Controlled Substance Offense, or DHS has reason to believe individual is a drug trafficker</p> <p>➤ No 212(h) waiver possibility (except for a single offense of simple possession of 30g or less of marijuana)</p> <p>Conviction or <i>admitted commission</i> of a Crime Involving Moral Turpitude (CIMIT)</p> <p>➤ Crimes in this category cover a broad range of crimes, including:</p> <ul style="list-style-type: none"> ◆ Crimes with an <i>intent to steal or defraud</i> as an element (e.g., theft, forgery) ◆ Crimes in which <i>bodily harm</i> is caused or threatened by an intentional act, or <i>serious bodily harm</i> is caused or threatened by a reckless act (e.g., murder, rape, some manslaughter/assault crimes) ◆ Most sex offenses <p>➤ <i>Petty Offense Exception</i>—for one CIMIT if the client has no other CIMIT + the offense is not punishable > 1 year (e.g., in New York can't be a felony) + does not involve a prison sentence > 6 months</p>	<p>Conviction or admission of the following crimes bars a finding of good moral character for up to 5 years:</p> <p>➤ Controlled Substance Offense (unless single offense of simple possession of 30g or less of marijuana)</p> <p>➤ Crime Involving Moral Turpitude (unless single CIMIT and the offense is not punishable > 1 year (e.g., in New York, not a felony) + does not involve a prison sentence > 6 months)</p> <p>➤ 2 or more offenses of any type + aggregate prison sentence of 5 years</p> <p>➤ 2 gambling offenses</p> <p>➤ Confinement to a jail for an aggregate period of 180 days</p>
<p>Controlled Substance Conviction</p> <p>➤ EXCEPT a single offense of simple possession of 30g or less of marijuana</p>	<p>Prostitution and Commercialized Vice</p> <p>Conviction of 2 or more offenses of any type + aggregate prison sentence of 5 years</p>	<p>Aggravated felony conviction on or after Nov. 29, 1990 (and murder conviction at any time) <i>permanently bars</i> a finding of moral character and thus citizenship eligibility</p>
<p>Crime Involving Moral Turpitude (CIMIT) Conviction</p> <p>➤ For crimes included, see Grounds of Inadmissibility</p> <p>➤ One CIMIT committed within 5 years of admission into the US and for which a sentence of 1 year or longer may be imposed (e.g., in New York, may be a Class A misdemeanor)</p> <p>➤ Two CIMITs committed at any time "not arising out of a single scheme"</p>	<p>CONVICTION DEFINED</p> <p>A formal judgment of guilt of the noncitizen entered by a court or, if adjudication of guilt has been withheld, where:</p> <p>(i) a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, AND</p> <p>(ii) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed.</p>	
<p>Firearm or Destructive Device Conviction</p>	<p>THUS:</p> <p>➤ A court-ordered drug treatment or domestic violence counseling alternative to incarceration disposition IS a conviction for immigration purposes if a guilty plea is taken (even if the guilty plea is or might later be vacated)</p> <p>➤ A deferred adjudication disposition without a guilty plea (e.g., NY ACD) is NOT a conviction</p> <p>➤ A youthful offender adjudication (e.g., NY YO) is NOT a conviction</p>	
<p>Domestic Violence Conviction or other domestic offenses, including:</p> <p>➤ Crime of Domestic Violence</p> <p>➤ Stalking</p> <p>➤ Child abuse, neglect or abandonment</p> <p>➤ Violation of order of protection (criminal or civil)</p>		
INELIGIBILITY FOR LPR CANCELLATION OF REMOVAL		
<p>➤ Aggravated felony conviction</p> <p>➤ Offense covered under Ground of Inadmissibility when committed within the first 7 years of residence after admission in the United States</p>		
INELIGIBILITY FOR ASYLUM OR WITHHOLDING OF REMOVAL BASED ON THREAT TO LIFE OR FREEDOM IN COUNTRY OF REMOVAL		
<p>"Particularly serious crimes" make noncitizens ineligible for asylum and withholding. They include:</p> <p>➤ Aggravated felonies</p> <ul style="list-style-type: none"> ◆ All will bar asylum ◆ Aggravated felonies with aggregate 5 year sentence of imprisonment will bar withholding ◆ Aggravated felonies involving unlawful trafficking in controlled substances will presumptively bar withholding <p>➤ Other serious crimes—no statutory definition (for sample case law determination, see Appendix F)</p>		

*For the most up-to-date version of this checklist, please visit us at <http://www.immigrantdefenseproject.org>.

**The 1-year requirement refers to an actual or suspended prison sentence of 1 year or more. [A New York straight probation or conditional discharge without a suspended sentence is not considered a part of the prison sentence for immigration purposes.]

Immigrant Defense Project

Suggested Approaches for Representing a Noncitizen in a Criminal Case*

Below are suggested approaches for criminal defense lawyers in planning a negotiating strategy to avoid negative immigration consequences for their noncitizen clients. The selected approach may depend very much on the particular immigration status of the particular client. For further information on how to determine your client's immigration status, refer to Chapter 2 of our manual, *Representing Noncitizen Criminal Defendants in New York* (4th ed., 2006).

For ideas on how to accomplish any of the below goals, see Chapter 5 of our manual, which includes specific strategies relating to charges of the following offenses:

- ◆ Drug offense (§5.4)
- ◆ Violent offense, including murder, rape, or other sex offense, assault, criminal mischief or robbery (§5.5)
- ◆ Property offense, including theft, burglary or fraud offense (§5.6)
- ◆ Firearm offense (§5.7)

1. If your client is a **LAWFUL PERMANENT RESIDENT**:

- First and foremost, try to avoid a disposition that triggers deportability (§3.2.B)
- Second, try to avoid a disposition that triggers inadmissibility if your client was arrested returning from a trip abroad or if your client may travel abroad in the future (§§3.2.C and E(1)).
- If you cannot avoid deportability or inadmissibility, but your client has resided in the United States for more than seven years (or, in some cases, will have seven years before being placed in removal proceedings), try at least to avoid conviction of an "aggravated felony." This may preserve possible eligibility for either the relief of cancellation of removal or the so-called 212(h) waiver of inadmissibility (§§3.2.D(1) and (2)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" in order to preserve possible eligibility for the relief of withholding of removal (§3.4.C(2)).
- If your client will be able to avoid removal, your client may also wish that you seek a disposition of the criminal case that will not bar the finding of good moral character necessary for citizenship (§3.2.E(2)).

2. If your client is a **REFUGEE** or **PERSON GRANTED ASYLUM**:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§§3.3.B and D(1)).
- If you cannot do that, but your client has been physically present in the United States for at least one year, try at least to avoid a disposition relating to illicit trafficking in drugs or a violent or dangerous crime in order to preserve eligibility for a special waiver of inadmissibility for refugees and asylees (§3.3.D(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid a conviction of a "particularly serious crime" in order to preserve eligibility for the relief of withholding of removal (§3.3.D(2)).

3. If your client is **ANY OTHER NONCITIZEN** who might be eligible now or in the future for LPR status, asylum, or other relief:

IF your client has some prospect of becoming a lawful permanent resident based on having a U.S. citizen or lawful permanent resident spouse, parent, or child, or having an employer sponsor; being in foster care status; or being a national of a certain designated country:

- First and foremost, try to avoid a disposition that triggers inadmissibility (§3.4.B(1)).
- If you cannot do that, but your client may be able to show extreme hardship to a citizen or lawful resident spouse, parent, or child, try at least to avoid a controlled substance disposition to preserve possible eligibility for the so-called 212(h) waiver of inadmissibility (§§3.4.B(2),(3) and (4)).
- If you cannot avoid inadmissibility but your client happens to be a national of Cambodia, Estonia, Hungary, Laos, Latvia, Lithuania, Poland, the former Soviet Union, or Vietnam and eligible for special relief for certain such nationals, try to avoid a disposition as an illicit trafficker in drugs in order to preserve possible eligibility for a special waiver of inadmissibility for such individuals (§3.4.B(5)).

IF your client has a fear of persecution in the country of removal, or is a national of a certain designated country to which the United States has a temporary policy (TPS) of not removing individuals based on conditions in that country:

- First and foremost, try to avoid any disposition that might constitute conviction of a "particularly serious crime" (deemed here to include any aggravated felony), or a violent or dangerous crime, in order to preserve eligibility for asylum (§3.4.C(1)).
- If you cannot do that, but your client's life or freedom would be threatened if removed, try to avoid conviction of a "particularly serious crime" (deemed here to include an aggravated felony with a prison sentence of at least five years), or an aggravated felony involving unlawful trafficking in a controlled substance (regardless of sentence), in order to preserve eligibility for the relief of withholding of removal (§3.4.C(2)).
- In addition, if your client is a national of any country for which the United States has a temporary policy of not removing individuals based on conditions in that country, try to avoid a disposition that causes ineligibility for such temporary protection (TPS) from removal (§§3.4.C(4) and (5)).

*References above are to sections of our manual.

Appendix B – Resources for Criminal Defense Lawyers

This Appendix lists and describes some of the resources available to assist defense lawyers in complying with their ethical duties to investigate and give correct advice on the immigration consequences of criminal convictions. This section will cover the following resources:

1. Protocol “how-to” guide for public defense offices seeking to develop an in-house immigrant service plan;
2. Outside expert training and consultation services available to other defense provider offices and attorneys;
3. National books and practice aids;
4. Federal system, regional, or state-specific resources.

1. Protocol “how-to” guide for public defense offices seeking to develop an in-house immigrant service plan

Many public defender organizations have established immigrant service plans in order to comply with their professional responsibilities towards their non-citizen defendant clients. Some defender offices maintain in-house immigration expertise with attorneys on staff trained as immigration experts. For example, The Legal Aid Society of the City of New York, which oversees public defender services in four of New York City’s five boroughs, has an immigration unit that counsels attorneys in the organization’s criminal division. Other public defender organizations consult with outside experts. For example, several county public defender offices in California contract with the Immigrant Legal Resource Center to provide expert assistance to public defenders in their county offices. Other public defender organizations have found yet other ways to address this need.

For guidance on how a public defender office can get started implementing an immigration service plan, and how an office with limited resources can phase in such a plan under realistic financial constraints, defender offices may refer to *Protocol for the Development of a Public Defender Immigration Service Plan* (May 2009), written by Cardozo Law School Assistant Clinical Law Professor Peter L. Markowitz and published by the Immigrant Defense Project (IDP) and the New York State Defenders Association (NYSDA). (*This is available at <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm>*).

This publication surveys the various approaches that defender organizations have taken, discusses considerations distinguishing those approaches, provides contact information for key people in each organization surveyed to consult with on the different approaches adopted, and includes the following appendices:

- Sample immigration consultation referral form
- Sample pre-plea advisal and advocacy documents
- Sample post-plea advisal and advocacy letters
- Sample criminal-immigration practice updates
- Sample follow-up immigration interview sheet
- Sample new attorney training outline
- Sample language access policy

2. Outside expert training and consultation services available to other defense provider offices and attorneys

For those criminal defense offices and individual practitioners who do not have access to in-house immigration experts, a wide array of organizations and networks has emerged in the past two decades to provide training and immigration assistance to public and private criminal defense attorneys regarding the immigration consequences of criminal convictions.

Some of the principal national immigration organizations with expertise on criminal/immigration issues (see organizations listed below) have worked together along with the National Legal Aid and Defender Association in a collaboration called the **Defending Immigrants Partnership** (www.defendingimmigrants.org), which coordinates on a national level the necessary collaboration between public defense counsel and immigration law experts to ensure that indigent non-citizen defendants are provided effective criminal defense counsel to avoid or minimize the immigration consequences of their criminal dispositions.

In addition to its national-level coordination activities, the Partnership offers many other services. For example, the Partnership coordinates and participates in trainings at both the national and the regional levels — including, since 2002, some 220 training sessions for about 10,500 people. In addition, the Partnership provides free resources directly to criminal defense attorneys through its website at www.defendingimmigrants.org. That website contains an extensive resource library of materials, including a free national training manual for the representation of non-citizen criminal defendants, see *Defending Immigrants Partnership, Representing Noncitizen Defendants: A National Guide* (2008), as well as jurisdiction-specific guides for Arizona, California, Connecticut, Florida, Illinois, Indiana, Maryland, Massachusetts, Nevada, New Jersey, New York, New Mexico, North Carolina, Oregon, Texas, Vermont, Virginia, and Washington. The website also contains various quick-reference guides, charts, and outlines, national training powerpoint presentations, several taped webcastings, a list of upcoming trainings, and relevant news items and reports. **Website: www.defendingimmigrants.org.**

- DIP partner **Immigrant Defense Project (IDP)** is a New York-based immigrant advocacy organization that provides criminal defense lawyers with training, legal support and guidance on criminal/immigration law issues, including a free nationally-available hotline. IDP also has trained dozens of in-house immigrant defense experts at local defender organizations in New York, New Jersey, Pennsylvania, and other states. In addition, IDP maintains an extensive series of publications aimed at criminal defense practitioners. For example, visitors to the IDP's online resource page can find a free two-page reference guide summarizing criminal offenses with immigration consequences (see Appendix A attached). The IDP website also contains free publications focusing on other aspects of immigration law relevant to criminal defenders, such as aggravated felony and other crime-related immigration relief bars. In addition, IDP publishes a treatise aimed specifically at New York practitioners, *Representing Immigrant Defendants in New York* (4th ed. 2006). **Telephone: 212-725-6422. Website: www.immigrantdefenseproject.org.**
- DIP partner **Immigrant Legal Resource Center (ILRC)** is a San Francisco-based immigrant advocacy organization that provides legal trainings, educational materials, and a nationwide service called "Attorney of the Day" that offers consultations on immigration law to attorneys, non-profit organizations, criminal defenders, and others assisting immigrants, including consultation on the immigration consequences of criminal convictions. ILRC's consultation services are available for a fee (reduced for public defenders), which can be in the form of an hourly rate or via an ongoing contract. ILRC provides in house trainings for California public defender offices, and many offices contract with the ILRC to answer their questions on the immigration consequences of crimes. ILRC also provides immigration technical assistance on California Public Defender Association's statewide listserve, with about 5000 members, and maintains its own list serve of over 50 in-house immigration experts in defender offices throughout California to provide ongoing support, updates, and technical assistance. In addition, ILRC provides support to in-house experts in Arizona, Nevada, and Oregon. ILRC writes criminal immigration related practice advisories and reference guides for defenders which are posted on its website and widely disseminated, and is the author of a widely-used treatise for defense attorneys, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other State Laws* (10th ed. 2009). **Telephone: 415-255-9499. Website: www.ilrc.org.**

- DIP partner **National Immigration Project** of the National Lawyers Guild (NIP/NLG) is a national immigrant advocacy membership organization with offices in Boston, Massachusetts that provides many types of assistance to criminal defense practitioners, including direct technical assistance to practitioners who need advice with respect to a particular case. These services are available free of charge and may be used by practitioners anywhere in the nation. NIP/NLG also provide trainings in the form of CLE seminars for defense lawyers, and is also responsible for publishing *Immigration Law and Crimes* (2009), the leading treatise on the relationship between immigration law and the criminal justice system, which is updated twice yearly and is also available on Westlaw. **Telephone: 617-227-9727. Website: www.nationalimmigrationproject.org.**

For other organizations and networks that provide training and consultation services in specific states or regions of the country, see section (4) below entitled "Federal System, Regional, or State-Specific Resources."

3. National Books and Practice Aids

- ***Immigration Consequences of Convictions Checklist*** (Immigrant Defense Project, 2008), 2-page summary, attached to this practice advisory, that many criminal defenders find useful as an in-court quick reference guide to spot problems requiring further investigation.
- ***Representing Noncitizen Criminal Defendants: A National Guide*** (Defending Immigrants Partnership, 2008), available for free downloading at <http://defendingimmigrationlaw.com>.
- ***Aggravated Felonies: Instant Access to All Cases Defining Aggravated Felonies*** (2006), by Norton Tooby & Joseph J. Rollin, available for order at <http://criminalandimmigrationlaw.com>.
- ***Criminal Defense of Immigrants*** (4th ed., 2007, updated monthly online), by Norton Tooby & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***The Criminal Lawyer's Guide to Immigration Law: Questions and Answers*** (American Bar Association, 2001), by Robert James McWhirter, available for order at <http://www.abanet.org>.
- ***Immigration Consequences of Criminal Activity*** (4th ed., 2009), by Mary E. Kramer, available for order at <http://www.aialpubs.org>.
- ***Immigration Consequences of Criminal Convictions***, by Tova Indritz and Jorge Baron, in ***Cultural Issues in Criminal Defense*** (Linda Friedman Ramirez ed., 2d ed., 2007), available for order at <http://www.jurispub.com>.
- ***Immigration Law and Crimes*** (2009), by Dan Kesselbrenner and Lory Rosenberg, available for order at: <http://west.thompson.com>.
- ***Practice Advisory: Recent Developments on the Categorical Approach: Tips for Criminal Defense Lawyers*** (2009), by Isaac Wheeler and Heidi Altman, available for free downloading at <http://www.immigrantdefenseproject.org/webPages/practiceTips.htm>.
- ***Safe Havens: How to Identify and Construct Non-Deportable Offenses*** (2005), by Norton Tooby & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***Tips on How to Work With an Immigration Lawyer to Best Protect Your Non-Citizen Defendant Client*** (2004), by Manuel D. Vargas, available for free downloading at <http://www.immigrantdefenseproject.org/webPages/crimJustice.htm>.
- ***Tooby's Crimes of Moral Turpitude: The Complete Guide*** (2008), by Norton Tooby, Jennifer Foster, & Joseph J. Rollin, available for order at <http://www.criminalandimmigrationlaw.com>.
- ***Tooby's Guide to Criminal Immigration Law: How Criminal and Immigration Counsel Can Work Together to Protect Immigration Status in Criminal Cases*** (2008), by Norton Tooby, available for free downloading at <http://www.criminalandimmigrationlaw.com>.

4. Federal system, regional, or state-specific resources

Federal System:

- Dan Kesselbrenner & Sandy Lin, *Selected Immigration Consequences of Certain Federal Offenses* (National Immigration Project, 2010), available at www.defendingimmigrants.org.

Regional resources:

Ninth Circuit Court of Appeals region

- Brady, Tooby, Mehr, Junck, *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

Seventh Circuit Court of Appeals region

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.

State-Specific Resources:

Arizona

- In 2007, the Arizona Defending Immigrants Partnership was launched to provide information and written resources to Arizona criminal defense attorneys on the immigration consequences of criminal convictions. Housed at the Florence Immigrant and Refugee Rights Project (FIRRP) and funded by the Arizona Foundation for Legal Services and Education, the partnership is run by Legal Director Kara Hartzler, who provides support, individual consultations, and training to Arizona criminal defense attorneys and other key court officials in their representation of noncitizens. Telephone: (520) 868-0191.
- Kathy Brady, Kara Hartzler, et al., *Quick Reference Chart & Annotations for Determining Immigration Consequences of Selected Arizona Offenses* (2009), available at www.ilrc.org and www.defendingimmigrants.org.
- Kara Hartzler, *Immigration Consequences of Your Client's Criminal Case* (2008), Powerpoint presentation available at www.defendingimmigrants.org.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.

California

- The ILRC coordinates the California Defending Immigrants Partnership to provide public defenders in California with the critical resources and training they need on the immigration consequences of crimes. In particular, the ILRC provides mentorship of in-house experts in defender offices across the state, coordination and monitoring of a statewide interactive listserv of in-house defender experts, technical assistance on immigration related questions posted on California Public Defender Association's Claranet statewide listserve, ongoing training of county public defender offices, and written resources. The ILRC also provides technical assistance to several county defender offices by contract. A comprehensive list and description of these and other criminal immigration law resources for criminal defenders in California is provided at www.ilrc.org.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws* (formerly *California Criminal Law and Immigration*) (2009), available at www.ilrc.org.
- Katherine Brady, *Quick Reference Chart to Determining Selected Immigration Consequences to Select*

California Offenses (2010), available at www.ilrc.org.

- Katherine Brady, *Effect of Selected Drug Pleas After Lopez v. Gonzales*, a quick reference chart on the immigration consequences of drug pleas for criminal defenders in the Ninth Circuit (2007), available at www.ilrc.org.
- *Immigration Criminal Law Resources for California Criminal Defenders*, available at www.ilrc.org.
- *Tooby's California Post-Conviction Relief for Immigrants* (2009), available for order at <http://www.criminalandimmigrationlaw.com>.
- The Immigrant Rights Clinic at the University of California at Davis Law School provides limited, but free consultation to public defender offices that have limited immigration related resources. Contact Raha Jorjani at rjorjani@ucdavis.edu.
- In Los Angeles, the office of the Los Angeles Public Defender offers free consultation through Deputy Public Defender Graciela Martinez. She also regularly presents trainings on this issue to indigent defenders and works with in-house defender experts in the Southern California region. She can be reached at gmartinez@pubdef.lacounty.gov.

Colorado

- Hans Meyer, *Plea & Sentencing Strategy Sheets for Colorado Felony Offenses & Misdemeanor Offenses* (Colo. State Public Defender 2009). Contact Hans Meyer at hans@coloradoimmigrant.org.

Connecticut

- Jorge L. Baron, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Connecticut* (2007), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.
- Elisa L. Villa, *Immigration Issues in State Criminal Court: Effectively Dealing with Judges, Prosecutors, and Others* (Conn. Bar Inst., Inc., 2007).

District of Columbia

- Gwendolyn Washington, *PDS Immigrant Defense Project's Quick Reference Sheet* (Public Def. Serv., 2008).

Florida

- *Quick Reference Guide to the Basic Immigration Consequences of Select Florida Crimes* (Fla. Imm. Advocacy Ctr. 2003), available at www.defendingimmigrants.org.

Illinois

- The Heartland Alliance's National Immigrant Justice Center (NIJC) offers no-cost trainings and consultation to criminal defense attorneys representing non-citizens, and also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings.
- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Selected Immigration Consequences of Certain Illinois Offenses* (National Immigration Project, 2003), available at www.defendingimmigrants.org.

Indiana

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- *Immigration Consequences of Criminal Convictions* (Indiana Public Defender Council, 2007), available at <http://www.in.gov/lpdc/general/manuals.html>.

Iowa

- Tom Goodman, *Immigration Consequences of Iowa Criminal Convictions Reference Chart*.

Maryland

- *Abbreviated Chart for Criminal Defense Practitioners of the Immigration Consequences of Criminal Convictions Under Maryland State Law* (Maryland Office of the Public Defender & University of Maryland School of Law Clinical Office, 2008).

Massachusetts

- Dan Kesselbrenner & Wendy Wayne, *Selected Immigration Consequences of Certain Massachusetts Offenses* (National Immigration Project, 2006), available at www.defendingimmigrants.org.
- Wendy Wayne, *Five Things You Must Know When Representing Immigrant Clients* (2008).

Michigan

- David Koelsch, *Immigration Consequences of Criminal Convictions (Michigan Offenses)*, U. Det. Mercy School of Law (2008), available at <http://www.michiganlegalaid.org>.

Minnesota

- Maria Baldini-Potermin, *Defending Non-Citizens in Minnesota Courts: A Practical Guide to Immigration Law and Client Cases*, 17 Law & Ineq. 567 (1999).

Nevada

- The ILRC and University of Nevada, Las Vegas Thomas & Mack Legal Clinic, William S. Boyd School of Law (UNLV) provide written resources, training, limited consultation, and support of in-house defender experts in Nevada public defense offices.
- The ILRC and UNLV are finalizing in 2010 portions of *Immigration Consequences of Crime: A Guide to Representing Non-Citizen Criminal Defendants in Nevada*, including a practice advisory on the immigration consequences and defense arguments to pleas to Nevada sexual offenses and the immigration consequences of Nevada drug offenses. They will be posted at www.ilrc.org and www.defendingimmigrants.org.

New Jersey

- The IDP, Legal Services of New Jersey, Rutgers Law School-Camden and the Camden Center for Social Justice collaborate with the New Jersey Office of Public Defender to provide written resources, trainings and consultations to New Jersey criminal defense lawyers who represent non-citizens.
- Joanne Gottesman, *Quick Reference Chart for Determining the Immigration Consequences of Selected New Jersey Criminal Offenses* (2008), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

New Mexico

- The New Mexico Criminal Defense Lawyers Association (NMCDLA) assists defenders in that state concerning immigration issues and has presented several continuing legal education programs in various locations of the state on the immigration consequences of criminal convictions and the duty of criminal defense lawyers when the client is not a U.S. citizen. NMCDLA regularly publishes a newsletter in which one ongoing column in each issue is dedicated to immigration consequences.
- Jacqueline Cooper, *Reference Chart for Determining Immigration Consequences of Selected New Mexico Criminal Offenses*, New Mexico Criminal Defense Lawyers Association (July 2005), available at www.defendingimmigrants.org.

New York

- The IDP and the New York State Defenders Association Criminal Defense Immigration Project collaborate with New York City indigent criminal defense service providers and upstate New York public defender offices to provide written resources, trainings and consultations to New York criminal defense lawyers who represent non-citizens. Additional information on IDP's services and written resources is available at www.immigrantdefenseproject.org.
- Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4th ed. 2006), available at www.immigrantdefenseproject.org.
- *Quick Reference Chart for New York Offenses* (Immigrant Defense Project, 2006), available at www.defendingimmigrants.org or www.immigrantdefenseproject.org.

North Carolina

- Sejal Zota & John Rubin, *Immigration Consequences of a Criminal Conviction in North Carolina* (Office of Indigent Defense Services, 2008).

Oregon

- Steve Manning, *Wikipedia Practice Advisories on the Immigration Consequences of Oregon Criminal Offenses* (Oregon Chapter of American Immigration Lawyers Association and Oregon Criminal Defense Lawyers Association, 2009), available at <http://www.aialaoregon.com>.

Pennsylvania

- *A Brief Guide to Representing Noncitizen Criminal Defendants in Pennsylvania*, (Defender Association of Philadelphia, 2010), soon to be available at www.immigrantdefenseproject.org.

Tennessee

- Michael C. Holley, *Guide to the Basic Immigration Consequences of Select Tennessee Offenses* (2008).
- Michael C. Holley, *Immigration Consequences: How to Advise Your Client* (Tennessee Association of Criminal Defense Law).

Texas

- *Immigration Consequences of Selected Texas Offenses: A Quick Reference Chart* (2004-2006), available at www.defendingimmigrants.org.

Vermont

- Rebecca Turner, *A Brief Guide to Representing Non-Citizen Criminal Defendants in Vermont* (2005)
- Rebecca Turner, *Immigration Consequences of Select Vermont Criminal Offenses Reference Chart* (2006), available at www.defendingimmigrants.org.

Virginia

- Mary Holper, *Reference Guide and Chart for Immigration Consequences of Select Virginia Criminal Offenses* (2007), available at www.defendingimmigrants.org.

Washington

- The Washington Defender Organization (WDA) Immigration Project provides written resources and offers case-by-case technical assistance and ongoing training and education to criminal defenders, prosecutors, judges and other entities within the criminal justice system. Go to: www.defensenet.org/immigration-project

- Ann Benson and Jonathan Moore, *Quick Reference Chart for Determining Immigration Consequences of Selected Washington State Offenses* (Washington Defender Association's Immigration Project, 2009), available at www.defendingimmigrants.org and <http://www.defensenet.org/immigration-project/immigration-resources>.
- *Representing Immigrant Defendants: A Quick Reference Guide to Key Concepts and Strategies* (WDA Immigration Project, 2008), available at <http://www.defensenet.org/immigration-project/immigration-resources>.
- Brady et al., *Defending Immigrants in the Ninth Circuit: Impact of Crimes Under California and Other State Laws (formerly California Criminal Law and Immigration)* (2009), available at www.ilrc.org.

Wisconsin

- Maria Baldini-Poterman, *Defending Non-Citizens in Illinois, Indiana and Wisconsin* (Heartland Alliance's National Immigrant Justice Center, 2009), available at www.immigrantjustice.org.
- Wisconsin State Public Defender, Quick Reference Chart – Immigration Consequences of Select Wisconsin Criminal Statutes.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

STATE OF WASHINGTON,

Plaintiff,

vs.

JUAN FRANCISCO PEREZ,

Defendant.

No. 05-1-00099-6

AFFIDAVIT OF
DEFENDANT

1. I am Juan Perez the defendant in the above numbered case.
2. I recall going to court for this case in 2005. My lawyer was Ryan Earl.
3. Mr. Earl never told me what the effects to my legal permanent resident status might be if I entered a plea of guilty to this crime. I was told that there were general immigration consequences, but it was never explained to me specifically what these consequences might be and what would happen to my legal permanent resident status.
4. In August of 2010, I was thinking of becoming a citizen and I visited Mr. De Young's office. He informed me that I had pleaded guilty to what was called an aggravated felony under the immigration laws. I was told that there was no possibility of pardon or forgiveness and that I would forever lose my right to be a legal permanent resident in the United States. Mr. De Young also told me that it was a mistake for Mr. Earl to make the police reports part of my guilty plea. I didn't know any of this until I met with Mr. De Young.
5. If I would have known that this guilty plea could get me deported for life I would never have pleaded guilty and would have either hired an immigration lawyer to also help me with this case, or I would have gone to trial to fight to keep my legal permanent resident status.

Signed under penalty of perjury under the laws of the State of Washington at Moses Lake,
Washington this 27th day of January, 2011.


Juan Perez

IN THE ADAMS COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

vs.

PETRONILO S. BARAJAS,

Defendant.

No. 06-1-00098-6

DECLARATION OF
CARLOS DAVID VILLARREAL

1. My name is Carlos David Villarreal. I am an attorney in good standing in Washington State. My Washington bar number is 38825.
2. I practice almost exclusively in the areas of immigration law and criminal defense. I have been an attorney since 2007. Presently I am a self-employed attorney. Previously I worked in the law offices of Tom Roach in Pasco, Washington. Mr. Roach has been practicing exclusively in the area of immigration law for the past 18 years.
3. I have been asked to review the record of conviction for the above-named defendant Petronilo Barajas. Mr. Barajas is a legal permanent resident (hereafter LPR) who has had his green card since September of 1989 and who has pleaded guilty on 09-21-2005 to one count of Manufacture of Marijuana (RCW 9A.50.401(1) and also to one count of Animal Fighting RCW 16.52.117(1)(a) and was then sentenced to 4 months confinement on each count to run consecutively.
4. The offense of Manufacture of Marijuana to which Mr. Barajas pleaded guilty is categorized as an "aggravated felony" under the immigration law. Aggravated felonies are the most serious category of criminal offenses under the immigration law. A person convicted of an aggravated felony may not present any equitable arguments to remain in the United States. This is so, even if the person has no remaining relatives in their former home country and even if the person was only an infant

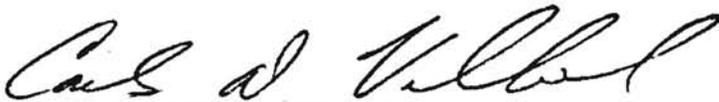


when brought into the United States or even if he or she doesn't know the language of their former home country.

5. Aggravated felonies can be contrasted to criminal offenses which are categorized as only "removable". For removable offenses, a long-time United States Legal Permanent Resident (green card status) may present equitable arguments as to why they should be allowed to stay in the United States. Removal (deportation) is therefore not a certainty for individuals with only "removable" offenses on their criminal record.
6. The terms "removable" and "deportable" are analogous terms used in the field of immigration law. When the Federal government rewrote the immigration laws in 1996, the term "removable" was used in the new law in place of the term "deportable" under the old law. The purpose of this was to make it clear that the procedure was under the new law rather than the old. The effects are exactly the same. The new law had no effect on the particular offenses to which Mr. Barajas pleaded guilty. Drug Manufacture was an "aggravated felony" as far back as 1988 and it remains an aggravated felony to this day.
7. I have read and I am familiar with the decision in the U.S. Supreme Court matter of *Padilla v. Kentucky*. My understanding of *Padilla* is that when the immigration consequences to a guilty plea are readily ascertainable, then the criminal defense counsel has a duty to inform his or her client of those consequences. The immigration consequences pertaining to Mr. Barajas were certain and easily ascertainable at the time of his guilty plea.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Signed in Kennewick, Washington



Carlos David Villarreal, WSBA #38825

EXHIBIT 2

ADAMS COUNTY
FILED
55
AUG 10 2011

SUSAN K. KIRKENDALL, Clerk
BY SK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF ADAMS

STATE OF WASHINGTON)	No. 06-1-00098-6
Plaintiff,)	
)	FINDINGS OF FACT, CONCLUSIONS OF
)	LAW, AND ORDER TRANSFERRING
)	MOTION TO COURT OF APPEALS
Vs.)	
PETRONILO BARAJAS)	
Defendant.)	

INTRODUCTION

Petronilo Barajas was charged with one count of Manufacturing a Controlled Substance (Marijuana) and one count of Animal Fighting on June 28, 2006. Mr. Barajas entered a plea of guilty to both counts and a judgment and sentence was entered on August 7, 2006. A direct appeal was never filed. On February 16, 2011 Mr. Barajas filed a motion to withdraw his guilty plea. A hearing on the motion was held on May 20 and after oral argument the Court made allowance for additional briefing. Mr. Barajas filed supplemental briefing on May 25 and the State filed a response on June 7. On June 9 the Court rendered an oral ruling transferring Mr. Barajas's motion to the Court of Appeals as a personal restraint petition. Mr. Barajas filed a motion for reconsideration, which was denied on July 18.

ADAMS COUNTY
Prosecuting Attorney
210 W Broadway
Ritzville, WA 99169
509-659-3219

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1 The Court, having considered the pleadings and the oral argument of counsel, hereby enters
2 the following Findings of Fact and Conclusions of Law:

3 FINDINGS OF FACT

- 4 1. Mr. Barajas entered a plea of guilty and was sentenced on August 7, 2006. A
5 direct appeal was never filed and no action was taken on the case until February
6 16, 2011 when Mr. Barajas moved to withdraw his guilty plea, alleging ineffective
7 assistance of counsel as to advisement of immigration consequences. Thus, four
8 years and six months have elapsed since the underlying judgment was entered.

9 CONCLUSIONS OF LAW

- 10 1. Criminal Rule 7.8 provides the procedural context of this case. Under CrR
11 7.8(c)(2), a motion seeking relief from judgment, including the withdrawal of a
12 guilty plea, "shall" be transferred to the Court of Appeals as a personal restraint
13 petition unless the motion is (1) not barred by RCW 10.73.090 and (2) the
14 defendant either (a) makes a substantial showing of entitlement to relief or (b) a
15 factual hearing is necessary to decide the motion.
- 16 2. RCW 10.73.090 requires the filing of a collateral attack on a judgment, including
17 the withdrawal of a guilty plea, within one year if the judgment is valid on its face
18 and issued by a court of competent jurisdiction.
- 19 3. Mr. Barajas's motion was filed four years and six months after entry of judgment.
20 He does not allege the judgment is invalid on its face or that it suffers a
21 jurisdictional defect. He also does not provide justification for tolling the time
22 limit under the facts of this case. Therefore, his motion is time-barred pursuant to
23 RCW 10.73.090.
- 24 4. Since Mr. Barajas's motion is barred pursuant to RCW 10.73.090, he cannot
25 satisfy the first exception to transfer of his motion to the Court of Appeals under
26

1 CrR 7.8(c)(2). Therefore, transferring the motion as a personal restraint petition is
2 the proper procedure in this case.

3 ORDER

4 Based upon the foregoing Findings of Fact and Conclusions of Law, the court hereby
5 ORDERS that Mr. Barajas's motion be TRANSFERRED to the Court of Appeals as a
6 personal restraint petition.

7
8 Entered this 10 day of Aug, 2011.

9
10
11 
12 Judge

13
14 Presented by:

15 Approved as to Form/Notice of
16 Presentation Waived:

17
18
19 
20 Michael J. Morgan
21 Special Deputy Prosecuting Attorney
22 WSBA 36815

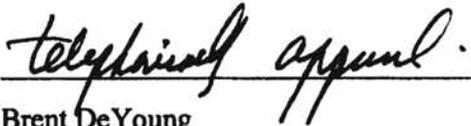
23
24 
25 Brent DeYoung
26 Attorney for Mr. Barajas
27 WSBA 27935

EXHIBIT 3

No. 30154-1-III

As to the motion to dismiss the direct appeal, in light of the holding in *State v. Chetty*, 167 Wn. App. 432, 272 P.3d 918 (2012), this matter is referred pursuant to RAP 17.2(b) to a panel of judges for determination.

August 2, 2012.



Joyce J. McCown
COMMISSIONER