

Post-*Chaidez* Claims of Ineffective Assistance of Counsel: A Guide for Using Vacatur and Re-Sentencing to Mitigate the Immigration Consequences of Convictions that Became Final Before March 31, 2010¹

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INTRODUCTION

On March 31, 2010, the U.S. Supreme Court issued its decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), thereby enunciating the constitutional basis for vacating convictions of immigrants whose criminal trial counsel had failed to properly advise them of the immigration consequences that would logically flow from those convictions. Subsequent history has shown the myriad challenges to benefitting from *Padilla*, particularly regarding pleas that apparently fell below acceptable contemporary constitutional norms, but pre-dated *Padilla*. This advisory will address some of the considerations for bringing post-conviction claims and circumventing the Supreme Court's decision in *Chaidez v. United States*, 133 S. Ct. 1103 (2013), that did not extend retroactive application to *Padilla*.

An immigrant defendant's chance at justice through post-conviction relief requires a showing of numerous component parts, including: 1) articulation of a constitutional or statutory vehicle for bring a claim, 2) demonstration of a ground of legal invalidity inherent in the original criminal proceeding, 3) description of the actual immigration catastrophe that has befallen the defendant as a result of the conviction, 4) a proposed solution to the catastrophe in the form of an alternate outcome that would potentially avoid the same immigration consequence, 5) demonstration of why the defendant should be found credible, and 6) a showing of the defendant's equities.

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Elimination of a conviction for immigration purposes requires a writ or order vacating judgment on a ground of legal invalidity that existed at the time the conviction first occurred. (*Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003), rev'd, *Pickering v. Gonzales*, 465 F.3d 263 (6th Cir. 2006)). Restated, in order for the vacatur of the conviction to be given full faith and credit by immigration authorities, the post-conviction action must be predicated upon a constitutional or procedural flaw in the proceeding. Sympathetic actions in the criminal courts, made simply to mitigate the immigration impact of the conviction, are not effective.

In contrast, an order amending a sentence need not identify a statutory or constitutional deficiency, as *Matter of Pickering* does not apply in this context. Therefore, the exclusive basis for a sentence reduction may be avoidance of adverse immigration consequences. (*Matter of Song*, 23 I & N Dec. 173 (BIA 2001); *Matter of Cotas-Vargas*, 23 I & N Dec. 849 (BIA 2005).

VACATING SENTENCES AS LEGALLY INVALID

Although the original sentence need not be attacked on a ground of legal invalidity to eliminate it for immigration purposes (in contrast to vacatur of the underlying conviction), courts in some jurisdictions may be reluctant to grant a modification unless the sentence is legally invalid. Many potential grounds of legal invalidity exist on which to vacate a sentence.² This paradigm can be illustrated through an antiquated example with real-world application in present resentencing litigation. Consider a historic case in which the record shows that defense counsel failed to request a Judicial Request Against Deportation (JRAD) before the Immigration Act of 1990 repealed the JRAD. Such an error by counsel was found to be ineffective assistance of counsel at sentencing in *Janvier v. United States*, 793 F.2d 449 (2nd Cir. 1986).

If a jurisdiction requires legal invalidity in order to modify a sentence, post-conviction counsel must identify a viable ground to challenge the sentence. For example, counsel may discover that the sentence was tainted because there was existing exculpatory material unrevealed by the prosecution or mitigating evidence inadequately investigated by the defense. Post-conviction counsel must develop and document this ground in the motion for sentence modification. In conjunction with the legal argument in the motion and supporting brief, counsel must actually proffer the previously unknown exculpatory material or mitigating evidence. Counsel must apply that evidence to establish a viable chance that a proper sentence, different from what was imposed, would have resulted in the underlying proceeding.

Even pre-*Padilla*, many states had procedural rules requiring counsel to consult their clients - generally or specifically - about immigration consequences. Other states had precedent that could remedy affirmative misadvice of counsel regarding immigration consequences. Another class of states had warnings generally incorporated into judicially-administered plea colloquies. In any of these schemes, failure to comply with

² A list of grounds of legal invalidity is given in Cafone, *Vacation of Illegal Sentences*, Chap. 46, in *CRIMINAL DEFENSE TECHNIQUES* (2003).

such procedural, statutory or common law requirements may have led an immigrant defendant to forego discussion, with counsel, of more favorable sentencing outcomes that would mitigate a catastrophic immigration result. Consequently, for example, violation of a state admonishment statute may cause immigration damage that flows from the sentence, rather than the conviction. This is an important distinction, because a court may be more receptive to modifying a sentence than to vacating the judgment, as this minimizes the impact on judicial economy and reopens the proceedings for sentencing purposes only.

ASSERTING INEFFECTIVE ASSISTANCE OF COUNSEL TO MODIFY SENTENCE OR VACATE JUDGMENT

Ineffective assistance of counsel may be alleged to attack a conviction *or* a sentence based on the failure of a criminal defense attorney to investigate the federal immigration consequences of a plea, give accurate advice to the client on the subject, and attempt to negotiate an immigration-safe disposition. Post-conviction counsel must document specifics about the ineffectiveness of trial counsel, such as any discussion (or lack thereof) regarding mitigating immigration consequences or any affirmative advice by counsel that the defendant was not susceptible to ultimately-imposed immigration consequences. Post-conviction counsel should also question the client about the court's compliance with any state-mandated admonishment about immigration consequences.

If trial counsel affirmatively misadvised a client as to immigration consequences, a viable ineffective assistance of counsel claim may exist for a pre-*Padilla* plea if the jurisdiction in which the plea occurred recognized such claims for affirmative misadvice prior to *Padilla*. See *Chaidez*, 133 S. Ct. at 1112.

Significantly, judicial admonishment of immigration consequences in compliance with a state statute or procedural rule does not cure affirmative misrepresentation of immigration consequences by trial counsel. In cases presenting this combination of factors, a defendant should document the affirmative misrepresentation as part of their claim that trial counsel's contradiction of the admonishment caused the defendant to believe that his plea lacked negative immigration consequences. See *Padilla*, 130 S. Ct. at 1486 n.15. These cases regularly hinge on the defendant's credibility, so additional supporting evidence should be submitted if possible to corroborate that the defendant trusted the advice of counsel, not the general warning provided by the trial judge.

STATE REMEDIES NOT GOVERNED BY *CHAIDEZ*

Post-conviction actions premised on ineffectiveness of counsel generally use as legal vehicles the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. However, counsel should not overlook state constitutional provisions guaranteeing the right to counsel, typically rooted in cases establishing the right to counsel for the indigent, a la *Gideon v. Wainwright*, 372 U.S. 335 (1963).

While *Chaidez* held, under federal law, that *Padilla* is not retroactive for cases already final as of *Padilla*'s publication on March 31, 2010, a retroactivity argument may be possible, under state law, based on state constitutional provisions, statutes and/or case law. This distinction is possible if the state jurisprudence did not derive from *Padilla* or from the underlying federal law on which *Chaidez* is based. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the Supreme Court held that state courts are not bound by the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989) and may fashion their own retroactivity formulations under state law when considering the application of federal constitutional rights. State appellate courts thus may find, under state law and in contrast to *Chaidez*, that *Padilla* is not a "new rule" and is retroactive. See e.g., *Commonwealth v. Sylvain*, 995 N.E.2d 760, 770-71 (Mass. 2013).

A noncitizen defendant may also have a viable ineffective assistance of counsel claim for failure to provide proper advice as to immigration consequences under state constitutional provisions. While *Padilla* was based on the Sixth Amendment right to effective assistance of counsel, concomitant state constitutional provisions may provide equal or greater rights than under the U.S. Constitution. For example, the Massachusetts highest appellate court held in *Sylvain*, 995 N.E.2d at 771, that a separate right to accurate advice regarding immigration consequences existed under the Massachusetts constitution.

PREJUDICE

Padilla did not discuss the required showing of prejudice under the second prong of *Strickland v. Washington*, 466 U.S. 668, 690-691 (1984). *Padilla* did not reach prejudice because the Kentucky court below found that trial counsel's performance was not deficient, under the first prong of *Strickland*, since immigration consequences were considered collateral and thus outside the scope of the Sixth Amendment right to effective assistance of counsel.

The standard for "prejudice" in an ineffective assistance claim varies from state to state. The traditional standard for prejudice is an outcome-determinative standard that asks: but for counsel's deficient performance, would the defendant have exercised his right to a jury trial and would this decision have been reasonable based on the probable outcome of the trial. *Hill v. Lockhart*, 474 U.S. 52 (1985). Post-*Padilla*, case law from various states has opined about how prejudice can be established in a *Padilla* claim, and some state court decisions have found that prejudice can be established in other than the traditional way, such as by showing that, had the defendant been properly advised, a disposition could have been fashioned with lesser immigration consequences or that avoiding immigration consequences was of such paramount importance to the defendant, that he would have risked going to trial even if the chances of acquittal were slim. See e.g., *State v. Sandoval*, 249 P.3d 1015 (Wash. 2011); *Commonwealth v. Clarke*, 949 N.E.2d 892 (Mass. 2011).

In the post-conviction process, this requires a brief explaining how the conviction clearly triggers an immigration consequence, i.e. either a ground of removal or foreclosing

otherwise available discretionary relief. Next, the defendant must demonstrate that a different course of action would have resulted, had she been properly advised of the nature of the immigration consequence. This alternate route could have included pursuing a trial or a more deliberate pre-trial route, including diversionary routes that may have impacted the immigration fate. Finally, the defendant must show that this route would have been reasonable for her to take. All of these factors are highly fact-dependent. Such cases likely require documentation of numerous elements, including the defendant's immigration history, family ties, motivation to stay in the U.S., and/or reasons for immigrating. Also important may be documentation of trends in prosecution of similar cases, i.e. statistics establishing disparity in the initial charges in similar cases and ultimate charges in the conviction (particularly where it is common to plead to lesser included offenses), rates of pre-trial diversion, or judge-specific sentencing trends.

CREDIBILITY AND EQUITIES

Credibility and equities will have a profound impact on the chances of obtaining post-conviction relief. If the client provides a declaration or testimony that is deemed incredible or the equities are insufficient, the post-conviction effort will be hopeless unless there are overwhelming grounds of legal invalidity.

CONCLUSION

Post-conviction relief requires successor counsel to identify a vehicle that meets the client's needs and is available, assert the grounds of legal invalidity, present the client as credibly as possible, and establish equities on which relief should be granted. While the non-retroactivity of *Padilla* under *Chaidez* poses an obstacle, state constitutional provisions provide independent grounds for the retroactive application of *Padilla*. Many states also provide defendants with other grounds for moving to vacate convictions, such as violations of judicial immigration admonishment statutes or pleas that were not knowingly and voluntary. These post-conviction grounds are independent of *Padilla* and therefore not impacted by the holding in *Chaidez*. All viable options must be explored and pursued in order for successor counsel to be effective and successful. Finally, where a defendant would benefit by resentencing alone, most states afford a vehicle to request sentence modification that does not require an allegation of ineffective assistance of counsel and is therefore also unaffected by the challenging obstacle posed by the non-retroactivity of *Padilla* under *Chaidez*.