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Supporting the Criminal Defense Bar's Compliance with *Padilla*: It Begins With Conversations

Shanthi Prema Raghu

A Vietnam veteran, Jose Padilla, lived in the United States for the last forty years before he faced deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky. During his criminal proceeding, Padilla's attorney offered misadvice, informing him that he did not have to worry about the immigration consequences of his plea because he had been in the country for so long. In early 2010, the US Supreme Court ruled that the Sixth Amendment now requires defense counsel to advise a noncitizen criminal defendant of the potential immigration consequences of the client's plea. Absent such advice, counsel shall be deemed ineffective under the federal standard. The Constitution gives defendants the right to competent counsel and has derived this new "*Padilla* standard" from the previous understanding of competent counsel. In post-*Padilla* cases, an attorney must now advise and inform his or her client if the plea carries the risk of deportation or be faced with an appeal on the basis of ineffective assistance of counsel.[1]

I. INTRODUCTION

The Court in *Padilla* relied on standards set forth under the American Bar Association, as well as other professional norm standards, that speak to the duty that a criminal defense attorney has to investigate and advise on the immigration consequences of the criminal case. Following *Strickland v. Washington*,[2] the Court interpreted the Sixth Amendment to require defense counsel to inform clients if their plea carried with it the risk of deportation.[3]

"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 collateral consequence."[4] The Court decided against classifying deportation as either a direct or a collateral consequence and, instead, argued that this classification was not necessary to expand the right to counsel and determine whether or not counsel "fell below an objective standard of reasonableness."[5]

A criminal defense attorney thus should be versed enough on immigration law, or know who to approach and how to reach out to appropriate resources, to confidently and competently assess the consequences of a guilty plea. The attorney must go beyond simply avoiding misadvise, however, and should speak to the potential of deportation even in the most unclear of situations.[6]

However, the extent that an attorney is expected to advise his or her client on immigration law is still vague. Shall the attorney be expected to advise his or her client about alternative pleas that may mitigate the chance of deportation? Or shall the attorney be expected to propose a plea that might allow the client to remain eligible for status? In reality, how feasible is this expectation? Who is responsible for training defense attorneys to become sufficiently versed in immigration law and how is this to be reasonably envisioned given limited time and resources?

To attempt a preliminary exploration and begin the conversation, I spoke to several attorneys from advocacy organizations across the nation, including some who were involved in drafting the amicus brief that was submitted for the US Supreme Court's consideration. I spoke with these immigration attorneys about what they saw as their biggest challenges and limitations and their role in assisting the criminal defense bar in complying with *Padilla*.

II. BACKGROUND

Handled under the arm span of the federal government, immigration law is an area of increasing complexity, some say second only to the International Revenue Code.[7]

Congress has complete authority over immigration, with the President holding limited authority over refugee policy. Most immigration issues, aside from questions of constitutionality, are nonjusticiable. Today, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996 dictates much of what we understand as immigration law. The Act spells out the requirements for different entry visas, how persons may be admitted, who may be deported, and what relief from deportation may be available. Individuals having either immigrant or nonimmigrant visas may be admitted across the borders of the United States. Individuals who come across illegally without being formally admitted are often undocumented. Those others who have overstayed their visas fall out of status and become undocumented. These individuals may have relief from deportation, despite the fact that they have not been formally admitted. Both undocumented individuals as well as those individuals who are legal permanent residents or refugees fall prey to deportation, a result that, more likely than not, is permanent.[8]

In an article published by the Federal Bar Association, author Lee A. O'Connor describes the level of legal analysis required for immigration law, known as the categorical and modified categorical tests, to determine whether a criminal conviction could lead to adverse immigration consequences.[9] The expertise and knowledge base that is required for an attorney to competently and comprehensively advise on the immigration consequences of a criminal proceeding and to guide clients through the process go beyond the quick reference to a table or chart. Thus, how can we best support the criminal defense bar in complying with the requirements of *Padilla*? It seems that the ability for attorneys to advocate within

constitutional requirements—supporting justice for all—is directly restricted by the availability of funding, resources, and staffing.

As mentioned above, undocumented persons and those with immigrant and nonimmigrant visas may have forms of relief of which they are unaware. Individuals who end up in the criminal justice system can face deportation depending on the plea they agree to and their respective status or lack of status. Without proper investigation and advice at all stages of a criminal proceeding, individuals who may have a form of relief from deportation will likely damage their chances of gaining admission or staying in the United States.[10]

When a noncitizen, with or without status, is arrested and enters the criminal justice system, it is very likely that the Immigration and Customs Enforcement Agency (ICE) will become involved, even within a matter of hours of the individual being booked in jail. Whether or not a specific charge will likely result in deportation depends on the status of the noncitizen (i.e., undocumented, legal permanent resident, in possession of a nonimmigrant or immigrant visa, etc.). ICE has authority to place a hold or a detainer on individuals, a way of showing intent to transfer custody upon the individuals release from jail. Express statutory authority for the issuance of detainers is contained in the immigration statute at 8 U.S.C. § 1357(d). The federal regulations that purport to implement this statutory language are located at 8 C.F.R. § 287.7.[11]

Once a detainer is placed on an individual, that individual may be placed in removal proceedings. Thus, if the federal government believes that the individual is a noncitizen, and if the individual is even suspected to be in violation of immigration laws, ICE will likely place a detainer on the individual in criminal custody, sometimes even prior to the conducting an investigation. ICE may detain a noncitizen even if there is no criminal conviction pending against them. A conviction is not required to trigger a violation of immigration laws as they stand thereby instigating removal proceedings (a charge may be sufficient to affect a person's ability to

change status or even result in their deportation). Criminal law clearly overlaps with immigration law in complex and specific ways that are beyond the scope of this paper; however, it is evident that immigrants who enter the criminal justice system may risk deportation.[12]

In recent years, more and more criminal convictions have resulted in deportation. This could be partially due to the fact that the discretionary judicial recommendation against deportation is no longer followed, leaving less room for the immigration judge to consider the criminal charge in light of the state judge's recommendation.[13] In the past, from 1917 until 1990, a procedure to allow a discretionary judicial recommendation against deportation or "JRAD" was in place.[14] This gave the judge the ability to review criminal convictions before deportation become actionable. After the 1996 amendments to immigration law, certain offenses that were clearly deemed deportable were now without the prior mechanisms of judicial discretion or the attorney general's authority to provide relief from deportation.[15]

In contrast, certain criminal convictions *may* result in deportation, if one is to look carefully into case law. However, what are the limits and the requirements of an attorney's duty under *Padilla*? Is an attorney required to advise carefully regarding even the possibility that a criminal plea may warrant deportation, dependent upon the immigration judge's discretion? The Court in *Padilla* held that two possible categories for different types of advice are required. If a criminal offense has "succinct and straightforward" immigration consequences, then defense counsel shall give correct and full advice pertaining to the consequences; if deportation is a relatively uncertain consequence, defense counsel "need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[16] However, even with the Court's attempt to separate the duty into two categories of advice required by counsel, whether an offense is "straightforward" or not seems a tricky distinction to make.

Thus, whether or not a criminal proceeding will result in an individual being deported is not entirely clear. This is particularly true when dealing with "crimes of moral turpitude" (CMIT) or with aggravated felonies.[17] A crime of moral turpitude

> refers generally to conduct which is inherently base, vile, or depraved and contrary to the accepted rules of morality and the duties owed between persons or to society in general . . . . Moral turpitude has been defined as an act which is per se morally reprehensible and intrinsically wrong, or *malum in se*, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude.[18]

Criminal defense attorneys thus might be held to the standard that they must be able to understand the possibility that the crime that their client pleads to might potentially be understood as a CIMT by the immigration judge. Criminal defense attorneys, specifically public defenders, have fairly large case loads and requiring them to be aware of the grey areas of CIMT case law, for example, is perhaps unrealistic.

How best can organizations and immigration experts support the criminal bar in complying with *Padilla*? The *need* for immigration experts to be consulted on the consequences that a criminal proceeding may have on the same client's immigration case is clear; though, how they will be utilized in the current system is unclear. Holohan and Kiefer write, "These more detailed issues will likely be dealt with by state courts as the issues arise. *Padilla* has no doubt exposed to immigration judges the ignorance of many involved in state criminal proceedings about immigration consequences, and this may influence their judicial discretion where it exists."[19]

Currently, a noncitizen can be placed in removal proceedings based on the outcome of a criminal proceeding for a myriad of reasons, depending on the charges, the sentence agreed to, the convictions, and the bargained for plea agreement. Immigration law is an area of law that is continually

changing and developing. Because deportation is a potential consequence of the criminal proceeding, it is important that the criminal defense attorney is able to advise the client appropriately.

The following conversations were conducted with those I felt might offer the best insight from the perspective of the immigration experts in support of the criminal defense bar in regards to complying with *Padilla*. These well-known and respected attorneys helpfully identify areas that remain unclear and potential strategies that might be employed by individuals and organizations alike in meeting the challenges of what has essentially become an unfunded mandate.

III. CONVERSATIONS

A. Conversation with Ann Benson, Washington Defender Association (Washington)

The Washington Defender Association is the resource center for public defenders throughout Washington State. In 1999 WDA established the Washington Defender Association's Immigration Project (WDAIP). WDAIP provides criminal defense attorneys with individual case consultation as well as practice advisories to assist counsel in obtaining resolutions to criminal charges that avoid triggering crime-related grounds of deportation and inadmissibility. In addition to avoiding removal, WDAIP assist defense counsel in preserving avenues for discretionary relief from removal, as well as eligibility for future immigration benefits such as lawful permanent resident status and citizenship. Regardless of the outcome, defense counsel are advised to inform their client's to seek the advice of competent immigration counsel prior to departing the United States or applying for any immigration benefits.

The Washington Defender Association has worked hard over the years to train and inform the criminal defense bar of the potential immigration consequences for the clients, even prior to the US Supreme Court decision

in *Padilla v. Kentucky*. With the criminal defense bar now under a constitutional requirement to advise their clients appropriately of certain immigration consequences of their pleas and to work to preserve avenues of potential relief, there is now a concern of how to support the increased demand for expert services to assist already overburdened defenders in affirmatively providing the immigration-related advice they need to effectively represent noncitizen defendants.

I spoke with Ann Benson of the Washington Defender Association to understand her perspective on the decision and how organizations such as the Washington Defender Association can and are able to assist criminal defense attorneys in complying with the constitutional requirement post-*Padilla*.

Ann Benson and her colleague Jonathon Moore staff the WDAIP, responding to over 250 individual case inquiries from Washington State defenders each month. They also provide regular trainings to defenders, judges and prosecutors throughout the state. Additionally, they are involved in shaping policies that impact noncitizen defendant and criminal defenders, as well as providing expertise to judges and prosecutors. "Since the *Padilla* decision, inquiries and requests for case assistance have more than doubled," notes Benson. She believes that in light of the structure of public defense in Washington State (each county determines how to fund defender services) this centralized system to help and support the criminal defense bar is the best model to serve defenders in Washington State.

Attorneys are directed to fill out an intake form, available online. Jonathon Moore and Ann Benson make themselves available to answer case-by-case inquiries via email or phone. "For every 200 calls we receive, there are three times as many cases for which we could and should possibly provide case assistance on," Benson relates. Although Washington State is ahead of many other states who are struggling in the wake of the Padilla decision to create support services for defenders, garnering sufficient resources to effectively fund this work are even more pronounced in these

economically difficult times. The Washington Defender's Association is the leading resource organization in the state and is the only one dedicated to the issues of public defense. Trainings, conferences, advisories and case assistance are a few of the many different means of providing support to public defenders in Washington State.

After speaking with Benson, it was my understanding that she has always believed that truly effective assistance of counsel in the criminal defense context would preserve avenues of relief for future immigration issues. At the same time, she understands the reality of the situation and the difficulty for criminal defense attorneys to keep abreast of the all the changes in immigration law. "I have been working with good, experienced defenders in Washington State for over eleven years now, and I would be hard pressed to name one who can articulate the statutory requirements for cancellation of removal," she states.

My conversation with Ann Benson was informative and inspiring. Her passion and knowledge in the arena of immigration and criminal law comes across in her ability to constructively engage in the topic. The resources and advisories that the Washington Defender Association has put forth for the criminal defense bar in Washington State are extensive and practical.

B. Conversation with Manny Vargas, Immigrant Defense Project (New York)

Following my conversation with Ann Benson in Washington State, I reached out to Manny Vargas—the founder and senior counsel at the Immigrant Defense Project (IDP), partner organization in the Defending Immigrants Partnership—to hear his perspective on the stage that has been set for the criminal defense bar post-*Padilla*. The IDP is a resource for criminal defense attorneys, putting on trainings and producing legal resource materials to ensure that the defense attorney is able to accurately and effectively advise their client on the potential immigration

consequences of their plea. Collaborating with other immigration advocacy organizations such as Florence Immigrant and Refugee Rights Project, the Immigrant Legal Resource Center, and the National Immigration Project of the National Lawyers Guild, to name a few, the IDP wrote an amicus brief submitted to the US Supreme Court in *Padilla v. Kentucky*. Importantly, the brief was not only a collaboration with other immigrant advocacy organizations, but also with criminal defense organizations, such as the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defender Association.

The IDP was formerly an initiative of the New York State Defenders Association and works to defend the legal, constitutional, and human rights of immigrants facing criminal or deportation charges. The mission of the IDP is to keep families together and to minimize deportation and detention of individuals. Working as a legal resource and training center, advocating for immigrant justice, and promoting protective litigation via pro bono work, the IDP is a nonprofit organization largely dependent on funding by foundations and private individual donors. In 2002, the IDP joined with other organizations to collaborate on the Defending Immigrants Partnership (DIP). The DIP works at the national level with such organization as the Immigrant Legal Resource Center in San Francisco, the National Immigration Project of the National Lawyers Guild in Boston, and the National Legal Aid & Defender Association in Washington to support the defense bar in its representation of noncitizen clients.[20]

Vargas relayed that there were two priorities in helping to write the amicus brief as submitted in support of *Padilla v. Kentucky*: first, to inform the Supreme Court that the criminal bar supported the constitutional duty to advise a defendant of the immigration consequences of their plea in that the duty was workable, and second, to explain that the duty was not an undue burden. I asked Vargas what he foresaw as a hurdle that needed to be overcome post-*Padilla*. Vargas responded, "Indigent defense is already overburdened. It is a matter of resources—not a matter of ability." Vargas

went on to explain the decision in *Padilla v. Kentucky* "is more than just about a criminal defense lawyer giving correct advice about potential immigration consequences. There is more of an affirmative duty on the lawyer to defend the client." Vargas also explained his understanding of what it means to defend the client—to find a different plea, something that is workable, and, ultimately and hopefully, a disposition to avoid the immigration consequences altogether. Vargas is working with the IDP to get this message out to the defense community. "The feeling in the defense community is that there isn't much you can do to avoid immigration consequences, but when in fact you have the knowledge and expertise it is possible to work to try and maintain and ensure eligibility for status in many cases," Vargas stated. Another one of Vargas's concerns post-*Padilla* is that "unfortunately we are tending to limit our reading and understanding of the case to [Padilla's] crime."

As previously mentioned, there are several different models for how to support the criminal defense bar in complying with *Padilla*. Vargas spoke briefly about the different models that defense organizations have and could adopt to better equip the defense attorney to take on cases where immigration law will be an issue. Vargas mentioned that staff and in-house experts on immigration at public defenders were workable options in his mind.

The duty placed on criminal defense attorneys go beyond requiring some support from the legal community at large, including the immigration bar, the judiciary, and the prosecutorial branches. I asked Vargas to speak about the role he saw the judiciary playing post-*Padilla.* Wishing that the judiciary do everything they can to ensure that attorneys are fulfilling their constitutional duty, Vargas went on to suggest a few ways that the judiciary could support the decision. Judges "might be more accommodating in providing more time [for defense attorneys] to review the issues," but at the same time "should avoid stepping beyond and above their role." Other suggestions for the judiciary included approving expert fees to find

immigration experts when necessary, encouraging trainings or even enforcing mandatory requirements for assigned counsel, and providing advisals at stages earlier than when the plea is taken. Vargas also touched upon the prosecutorial duty to seek justice and to contemplate a full range of consequences of the charge.

Training and education on the overlap of criminal and immigration law needs to be done at both the local and the national level. The IDP will continue to provide a local and national hotline and work at both levels. "There is a danger of relying too much on state specific charts because in the end it all depends on the case and on the particular immigration status of the individual," explained Vargas. Like Benson, Vargas seemed to be wary of overreliance on the simplification of charts and checklists.

And, like Benson, Vargas was concerned about the lack of resources and funding to support the criminal defense attorneys in becoming the effective and competent attorneys advising their clients accurately about the immigration consequences of their plea. Regardless of the model adopted by the state or county—in-house, centralized, etc.—with criminal defense attorneys held to be constitutionally mandated to be versed on immigration law enough to advise their client, there is a need for more expertise to be made readily and easily available. Vargas states, ""Ultimately, I think the back up support should be coming from in-house or outside experts sources funded by the regular indigent defense funding allocations required to be provided by the government."

C. Conversation with Kara Hartzler, Florence Immigrant and Refugee Rights Project (Arizona)

Funding and availability of resources was also a big challenge and concern for Kara Hartzler, Legal Director and Criminal Immigration Consultant at the Florence Immigrant and Refugee Rights Project in Arizona. The Florence Immigrant and Refugee Rights Project, or FIRRP, was cited in *Padilla* as a potential model that could be used to meet the

needs of defense attorneys. Created in 1989 in response to Hon. McCarrick's concern—which he developed while presiding over the Florence Immigrant Court—that public defenders were not available in immigration removal proceedings. Currently, FIRRP serves about three thousand detained individuals at a given time in the detention centers in Florence, Eloy, and Phoenix (a total of 10 percent of the total ICE detention population in the nation). Services provided by FIRRP include prehearing rights presentations, individual interviews, case preparation, and direct representation. Additionally, FIRRP develops "best practices" and "know your rights" materials to be distributed nationally. FIRRP works to train and consult other similar organizations and projects across the country, having recently won the 2001 Peter F. Drucker Award for Nonprofit Innovation and becoming the model for the national Legal Orientation Program funded by the Executive Office of Immigration Review.

I spoke with Kara Hartzler over the phone before learning, through Ann Benson, that Hartzler was the only individual acting as support and immigration expert for all public defenders in the state of Arizona. I asked Hartzler what she saw as the biggest challenge in immigration law and criminal defense practice today. Speaking to the feasibility of supporting the criminal defense bar in efficiently and effectively advising their clients of potential immigration consequences, she explained that "the role of advocacy groups is highly dependent on resources. State courts in Arizona are usually not willing to pay for an immigration attorney or expert." With nonprofits unable to provide unlimited resources, there is a definite stretch. Hartzler elaborated that the situation in Arizona is a unique one. Previously, the Arizona State Bar had been providing funding to the project, thus, making training and consultation for criminal defense attorneys possible. Funding for the project was cut in the spring of 2009, before the *Padilla* decision came out the following spring. Without funding, Arizona is in a tight corner, finding the number of requests for case assistance on the rise since the decision in *Padilla*. Hartzler finds herself doing free consultations

and maintaining a one-hundred page chart on the immigration consequences of Arizona convictions. She explained that despite it being financially difficult to keep FIRRP going, the Project has found a way to do so. "Since *Padilla*, the number of requests for information has more than doubled. As a practical matter, this is not sustainable for nonprofits," Hartzler stated bluntly. However, "immigration law is so complicated and dependent on day to day changes in case law—it is nearly impossible for a person who is not an immigration attorney to competently advise on immigration issues…trainings only do so much." Hartzler concedes that although some cases are relatively more straightforward, once an attorney encounters the grey areas, it becomes increasingly difficult for the defense attorney to comply with the *Padilla* advisal.

"My personal opinion is that you should ideally have a trained immigration attorney to provide consultation on certain cases." To Hatzler, it seems to make little difference as to what model is employed (i.e., whether the attorney expert works at the defender's office itself acting more as an in-house counsel, or is contracted with said office, working at a separate organization). The need for immigration expertise is there, however, the need remains largely unfunded. This concern about funding and who is to shoulder the financial responsibility is one that is shared by many.

D. Conversation with Matt Adams, Northwest Immigrant Rights Project (Washington)

Matt Adams of the Northwest Immigrant Rights Project (NWIRP) believed that the trend would be to have a central place for criminal defense attorneys to go to for trainings, information, resources, and case management. He believes that other states are slowly realizing the benefits of this model. "It is bad luck that the *Padilla* decision came at such a time when states are cutting funding," Matt said. He believes that ultimately it

becomes a state issue to find funding for immigration experts to support the defense bar.

Washington State employs a centralized model. Washington State criminal defense attorneys have the luxury of going to the Washington Defender's Association, as funded through the state, with questions and requests for case management pertaining to their noncitizen defendant's criminal case that may or may not have immigration consequences. The Washington Defender's Association, led by Ann Benson (interviewed above) and Jonathon Moore, is highly equipped to support the defense bar with the resources necessary to comply with the standards of representation set forth under *Padilla.* NWIRP's clients also often have at least one criminal matter pending. Others have a more complex criminal history. Thus, NWIRP's clients directly benefit from the resources provided by Washington Defenders Association to the criminal defense bar, resources, which when used correctly and timely, can make it possible for a client to preserve avenues of immigration relief. Thus the two organizations, in effect, work in collaboration to advocate for noncitizen defendants.

The Northwest Immigrant Rights Project focuses on providing direct legal services for low-income immigrants and refugees, along with public policy and education. NWIRP was founded in 1984, originally to address the legal needs of Central American refugees and others legalizing status under Amnesty programs. Currently, NWIRP's clients include those from more than one hundred countries. The organization relies on the work of their staff attorneys as well as pro bono attorneys, partnering with Volunteer Advocates for Immigrant Justice, American Immigration Lawyers Association, and both area law schools (University of Washington School of Law and Seattle University School of Law).

Shortly after *Padilla*, Matt gave a presentation to judges about the impact of the criminal charges that noncitizen defendants face. He continues to work to educate about the importance of effective criminal defense, especially in light of *Padilla.*

Because NWIRP does not represent their clients in their respective criminal cases, Matt explained that he is constantly looking for pro bono criminal defense attorneys to do post-conviction relief for their immigration clients. The practice of criminal defense in light of the bar's standards and *Padilla* is under scrutiny. Matt referenced the Washington State Supreme Court case, *State v. Sandoval*, a case in which our state will interpret and apply *Padilla* within the context of our State's constitution, and given the facts of the case, speaks to available resources in support of the criminal defense bar.

IV. STATE OF WASHINGTON V. SANDOVAL[21]

In the shadow of *Padilla* arose *State v. Sandoval.* Arguments were heard in front of the Washington State Supreme Court on June 10, 2010. In *Sandoval*, it was argued that the noncitizen criminal defendant would not have pled guilty to rape, a felony, had he known that he would face deportation. His attorney advised otherwise. The Washington Defender's Association filed an amicus brief, explaining the resources readily available to Sandoval's criminal defense attorney who, it is argued, failed to advise adequately as required by *Padilla.*

Washington State courts have been required to inform criminal defendants that their pleas may have criminal consequences under RCW 10.40.200. Additionally, the WSBA Board of Governors created Standards for Indigent Defense Counsel in 2007.[22] The standards acknowledged that Washington state criminal defense counsel had the capacity to address immigration consequences. The amicus brief in *Sandoval,* as presented by the Washington Defender's Project, attests to the availability of necessary resources for criminal defense attorneys to adhere to aforementioned standards and to comply with *Padilla.*

The Washington State Supreme Court entered a decision on *State v. Sandoval* on March 17, 2011, applying the holding in *Padilla v. Kentucky*. Where the attorney misadvised his client that a deportation consequence

could be mitigated, the court held that counsel was ineffective.[23] Sandoval had accepted the plea bargain, thereby reducing his charge to third degree rape and agreeing to plead guilty to the charge only after his attorney assured Sandoval of his opportunity to ameliorate any potential deportation consequences of his plea and assuring him that the potential deportation proceedings would not likely occur immediately. The attorney thus gave his client the illusion that deportation was a remote possibility.

The Court held that compliance with statues such as RCW 10.40.200, under *Padilla,* does not excuse defense counsel from giving sufficient warnings regarding deportation consequences. Further, the Court found that Sandoval's crime was one in which immigration law was straightforward in regards to the immigration consequences. Finally, the court held that Sandoval was prejudiced, thus, reversing the Court of Appeals, vacating his conviction, and remanding the proceeding to trial court.[24]

The decision in *Sandoval* was ground breaking in that Washington became one of the first states to apply *Padilla*. Since the Washington Supreme Court's decision in March, the WDA has put together trainings and webinars with CLE credits pursuant to the facts of the case.

V. CONCLUSION

Throughout my research and exploration, I reached out to various individuals, authors, professors, and organizations. One of the individuals I had the pleasure of speaking with was Sejal Zota, Immigration Law Specialist at the School of Government at the University North Carolina. She explained that with only ten percent of the North Carolina criminal bar working in the public defense arena (the same ten percent do close to 40 percent of the indigent defense representation), a different sort of work needs to be done to correctly support the efforts of attorneys to advise correctly post-*Padilla* given the particularities of the practice of criminal defense in North Carolina. Our conversation focused on the marketing, the selling of a message, and the creation of post-*Padilla* trainings for criminal

defense attorneys. Sejal informed me that her experience has indicated an upsurge of requests for case management after *Padilla*; requests died off for a period, but have since increased.

Without a clear understanding of how many immigrants go through the criminal system and what is actually and exactly being done to avoid potential deportation consequences, individuals trying to support the criminal defense bar in complying with *Padilla* are left in a tricky situation and have to adapt to circumstances that are relatively unknown. It is clear that each state will have to find a model to support their respective criminal bars in a manner that makes the most sense to the state's current need, which is restrained, of course, by funding, staffing, and existing models.

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[1] OREGON STATE BAR ASSOCIATION, WHAT DEFENSE LAWYERS NEED TO KNOW ABOUT IMMIGRATION: MALPRACTICE PREVENTION EDUCATION FOR LAWYERS (2010), *available at* http://osbplf.org/docs/inbrief/Def%20Lawyers%20Immigration%20Nov10.pdf; Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

[2] Strickland v. Washington, 466 U.S. 668 (1984).

[3] *Id.* Padilla, 130 S. Ct. at 1483.

[4] John L. Holahan & Shauna Faye Kieffer, *Padilla Motions: Effective Assistance of Counsel Where Please Mandate Deportation,* 67 Bench & B. Minn. 25 (2011), *available at* http://mnbenchbar.com/2010/08/padilla-motions/.

[5] Strickland, 466 U.S. at 688.

[6] Padilla, 130 S. Ct. at 1482.

[7] Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1987); Lee A. O'Connor, *Understanding the Categorical and Modified Categorical Test*, 57 FED. BAR ASSN. 48 (2010).

[8] CORNELL UNIVERSITY LAW SCHOOL, LEGAL INFORMATION INSTITUTE, IMMIGRATION LAW: AN OVERVIEW, *available at* http://topics.law.cornell.edu/wex/immigration

[9] *Id.*

[10] *Id.*

[11] Washington Defender Association Immigration Detainer Advisory, March 23, 2010, *available at* http://www.defensenet.org/immigration-project/immigration-resources/immigration-detainers-and-ice-enforcement-actions/WA%20General%20Detainer%20Overview%20Jan-%202010.doc/view?searchterm=at%208%20C.F.R.%20%C2%A7%20287.7.

[12] *Id.*

[13] Padilla v. Kentucky, 130 S. Ct. 1473, 1478 (2010).
[14] 8 C.F.R 240.1(d) states:

> When removability is not determined under the provisions of paragraph (c) of this section, the immigration judge shall request the assignment of an Service counsel, and shall receive evidence as to any unresolved issues, except that no further evidence need be received as to any facts admitted during the pleading. The alien shall provide a court certified copy of a Judicial Recommendation Against Deportation (JRAD) to the immigration judge when such recommendation will be the basis of denying any charge(s) brought by the Service in the proceedings against the alien. No JRAD is effective against a charge of deportability under former section 241(a)(11) of the Act or if the JRAD was granted on or after November 29, 1990.

[15] Holahan & Kiefer, *supra* note 4.
[16] Mathew Millen & Phoebe P. Liu, *Supreme Court Sends a Message to Criminal Defense Attorneys Whose Clients Are Not Citizens: Do Not Ignore the Defendant's Immigration Status*, 57 FED. LAWYER 20 (2010); Padilla, 130 S. Ct. at 1483.
[17] The American Bar Association admits that determining what is and what isn't an aggravated felony is not a question that can easily be resolved and is dependent on numerous factors, including, yet not limited to which circuit court.
[18] Matter of Franklin, 20 I & N Dec. 867, 868 (BIA 1994), aff'd, 72 F.3d 571 (8th Cir. 1995).
[19] Holahan & Kiefer, *supra* note 4.
[20] *See Staff and Supporters,* IMMIGRANT DEF. PROJECT, http://www.immigrantdefenseproject.org/webPages/aboutIDP.htm
[21] Amicus Curiae Brief of the Washington Defender Association, The Washington Association of Criminal Defense Lawyers, the Northwest Immigrant Rights Project, the American Immigration Lawyers Association and One America, *State v. Sandoval,* 249 P.3d 1015 (Wash. 2010) (No. 82175-5); Petitioner's Supplemental Brief, *State v. Sandoval*, 249 P.3d 1015 (Wash. 2010) (No. 82175-5).
[22] Washington State Bar Association Standards for Indigent Defense, *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/WSBA_Indigent.pdf.
[23] State v. Sandoval, 249 P.3d 1015 (Wash. 2011).
[24] *Id.*