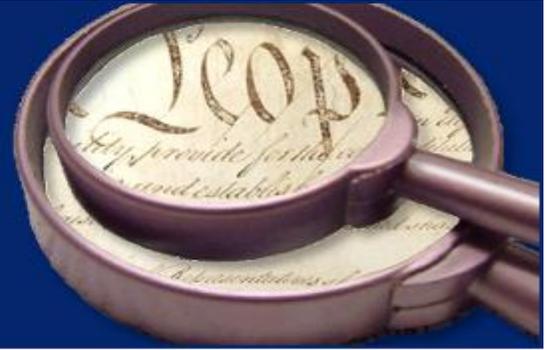




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Issue Brief

Immigration Assistance for Indigent Defenders

Sejal Zota and John Rubin

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American Constitution Society | 1333 H Street, NW, 11th Floor | Washington, DC 20005

Immigration Assistance for Indigent Defenders

Sejal Zota* and John Rubin**

For years, practice standards have recognized that defense counsel’s role includes advising noncitizen defendants about the immigration consequences of a criminal conviction because of the serious impact a conviction can have.¹ Now that such advice is constitutionally required under the U.S. Supreme Court’s recent decision in *Padilla v. Kentucky*,² however, there is a new urgency to ensuring that indigent defenders are positioned to competently advise noncitizen defendants. This Issue Brief addresses the need to provide immigration support to indigent defenders. It addresses three types of immigration support—reference materials, training, and advice. It focuses particularly on the importance of the last type of support and the role that the federal government can play in initiating pilot projects to help indigent defenders meet their obligations in this area.

I. IMPACT OF *PADILLA*

In *Padilla v. Kentucky*, the Supreme Court held that the Sixth Amendment requires defense counsel to provide competent advice to noncitizen defendants about the immigration consequences of guilty pleas.³ The nature of the advice required varies according to the clarity of the immigration consequences. When the immigration consequences are clear, defense counsel must provide specific and correct advice.⁴ In cases in which the immigration consequences are unclear or uncertain, defense counsel need only advise clients that the criminal charges may carry adverse immigration consequence.⁵ A failure to provide any advice at all is constitutionally deficient representation under *Padilla*.⁶

This will not be an easy task for defense counsel. To meet *Padilla* obligations, defense counsel must learn basic immigration law, particularly the immigration consequences of crimes, so they are able to determine when these consequences are clear and, thus, when they must provide specific advice to noncitizen clients. Some defenders are ahead of the curve and have

* Sejal Zota is an immigration law specialist at The University of North Carolina School of Government, where she specializes in the intersection of immigration and criminal law, among other things.

** John Rubin is a Professor of Public Law and Government at the School of Government and specializes in criminal law and indigent defense.

¹ See STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY, Standard 14-3.2(f) (3d ed. 1999), available at www.abanet.org/crimjust/standards/pleasofguilty.pdf (“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.”); *id.* at cmt. to Standard 14-3.2(f) (“it may well be that many clients’ greatest potential difficulty, and greatest priority, will be the immigration consequences of conviction”); see also NAT’L LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 6.2(a)(3) (1995) (citing the duty of defense counsel in the plea bargaining process to “be fully aware of . . . consequences of conviction such as deportation . . .”), available at www.nlada.org/Defender/Defender_Standards/Performance_Guidelines#sixtwo.

² *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

³ *Id.* at 1486.

⁴ *Id.* at 1483.

⁵ *Id.*

⁶ *Id.* at 1484.

for some time incorporated this area of law into their practice, but many defense attorneys are simply unaware, or at least insufficiently aware, of the immigration impact of a criminal conviction. Recently, a highly regarded defense attorney in our state, North Carolina, represented a lawful permanent resident who pled guilty to discharging a firearm within city limits, a municipal code violation that constituted a misdemeanor. The attorney did not discuss the potential immigration consequences with his client, who has lived in the United States as a permanent resident for 28 years, because the attorney assumed that such a minor offense could not possibly carry immigration consequences. His client was taken into custody by U.S. Immigration Customs and Enforcement (ICE) and transported to a detention center in Texas for deportation for a firearms conviction. Once he realized his error, the attorney assisted the client in moving to vacate the plea, and he was able to find an immigration attorney to represent the client at no cost. Fortunately, the plea was vacated, the client was released, and the immigration charges were dismissed, but there is no guarantee that such errors can always be fixed after the fact.

This is not an isolated example. In several other jurisdictions, noncitizen defendants have filed *Padilla* motions, making claims of ineffective assistance of counsel when they have received insufficient or outright incorrect advice. Correcting these errors after the fact through litigation is not only disruptive to the lives of clients, but also to the entire court system, including prosecutors who must resurrect old cases.

II. EFFORTS IN NORTH CAROLINA TO SUPPORT INDIGENT DEFENDERS

In North Carolina, the University of North Carolina School of Government (SOG) has helped to educate defense counsel about their obligations and the basic law on immigration consequences of crimes. SOG has a unique partnership with the Office of Indigent Defense Services (IDS) to provide education to the state's indigent defenders.⁷ Public defender organizations in other states, using their training resources, have adopted similar strategies to provide necessary education to defenders.

SOG and IDS have employed a threefold strategy to educate defense counsel about the law on immigration consequences of crimes. First, we have conducted in-person trainings for public defender attorneys who work full-time in a public defender office. We have conducted these trainings at both state-level conferences and for individual public defender offices. Like many other states, North Carolina has a mix of full-time public defenders, contract attorneys, and private assigned counsel, so we also are planning to do an online training for assigned counsel and in-person regional trainings. It is of particular importance to reach assigned counsel, who may not have access to institutional support in this area. Training is effective in alerting counsel to their obligations and the resources available in this area to support them and in raising their awareness about the seriousness of immigration consequences for noncitizen clients. In our experience, training has been critical to educating defense counsel about the basic analysis involved in determining the immigration consequences of criminal convictions.

⁷ The North Carolina Office of Indigent Defense Services was created in 2000 by the state legislature to oversee the provision of legal representation to indigent defendants in North Carolina.

With support from SOG and IDS, the authors also have written a manual, specific to North Carolina, about the immigration consequences of a criminal conviction.⁸ The manual uses a step-by-step approach of organizing and presenting the body of law relevant to understanding immigration consequences of convictions in North Carolina. It also includes strategies to avoid adverse immigration consequences and a chart analyzing the immigration consequences of more than 100 North Carolina offenses. The manual has been an enormously useful reference for the defense bar, as it provides a level of detail that is difficult to convey at trainings. Because the manual is available online at no cost, it provides information to attorneys that have been unable to attend trainings. It has proven to be a useful reference as well to others who need to understand this challenging area of the law, such as judges and immigration attorneys.

Both training and reference manuals are necessary components to educate indigent defenders on the law of immigration consequences, but they are not sufficient. Indigent defenders in North Carolina and other jurisdictions also require access to expert assistance to meet their *Padilla* obligations. Defense counsel can master the rudiments of immigration consequences, but parts of the law are incredibly complex, hyper-technical, and rapidly evolving. Cases that require specific advice because the immigration consequences are relatively clear still may involve complicated analysis. For example, cases involving refugees, asylees, and individuals with Temporary Protected Status (TPS) are generally more complicated and involve unique sets of rules. Another example involves crimes of domestic violence. The immigration statute makes clear that a crime of domestic violence is a deportable offense,⁹ but questions often arise because there are no offenses labeled officially as “domestic violence” in North Carolina (and presumably elsewhere).

It will be difficult for defense counsel to develop and maintain the expertise necessary to give specific, accurate advice without some access to expert assistance. Training and reference manuals are not enough because they are static, and attorneys need to work through specific facts involving their clients’ particular immigration status, prior criminal record, current criminal charges, and possible sentence.

The capacity to provide expert assistance is limited in North Carolina thus far. SOG is able to provide some advice but will be unable to meet the increased demand in light of *Padilla*. A recent continuing legal education program in North Carolina suggested that assigned counsel make applications to the court in appropriate cases for funds to obtain an expert immigration consultation. This is a haphazard and, therefore, likely ineffective approach to providing immigration support to indigent defenders for the reasons discussed in Section III.E., below.

To assure the effective practice of law in this area, jurisdictions need a more systematic response to support defenders. Any system should provide for the timely delivery of accurate expert advice of the immigration consequences of pleas in criminal cases.

⁸ SEJAL ZOTA & JOHN RUBIN, IMMIGRATION CONSEQUENCES OF A CRIMINAL CONVICTION IN NORTH CAROLINA (2008), available at www.ncids.org (follow “Reference Manuals” hyperlink; then follow “Immigration Consequences Manual” hyperlink).

⁹ 8 U.S.C. § 1227(a)(2)(E) (2006).

III. MODELS FOR PROVIDING IMMIGRATION ASSISTANCE

Outlined below are the models of immigration service plans that are currently being employed by defender offices around the country and some of the relevant considerations in determining the appropriate model of assistance for defense counsel in other jurisdictions. The basic “models” of immigration assistance discussed here are drawn from Professor Peter Markowitz’s work, and the authors of this Issue Brief gratefully acknowledge his analysis.¹⁰ His paper provides more detailed information on an overall immigration support plan for interested readers. The discussion here focuses on the various models of service delivery and their pros and cons, with particular emphasis on ways that the federal government can have the most impact. Many of the considerations and conclusions described here are grounded in the authors’ experiences in this field in both North Carolina and New York.

A. Some Considerations for Determining an Appropriate Model of Immigration Assistance

There are some basic considerations about any model of immigration support. They are:

- **Coverage of the indigent defense bar.** Does the plan provide assistance to all indigent defenders in the jurisdiction, including assigned counsel? This is a consideration for the federal government in supporting the states and any entity broader than an individual defender office.
- **Costs associated with the plan.** What are the costs of the plan? What are the costs on a per client basis? Is there sufficient funding to cover the costs of the plan?
- **Range of services provided.** What services will the plan provide? Does the plan only provide advice about immigration consequences? Does it include training for defenders, direct client counseling, and/or direct services? What should the priorities be?
- **Change in culture.** Will the plan help change the culture of criminal practice to include an awareness of potential immigration consequences?
- **Preferences of indigent defenders.** What are the preferences of the public defender offices? What are the preferences of nonprofit defenders? What appeals most to assigned counsel? It may be useful to survey or meet with affected indigent defense providers to learn about their preferences and what services would be of most help to them.

¹⁰ PETER L. MARKOWITZ, IMMIGRANT DEF. PROJECT & N.Y. STATE DEFENDERS ASS’N, PROTOCOL FOR THE DEVELOPMENT OF A PUBLIC DEFENDER IMMIGRATION SERVICE PLAN (2009), *available at* www.immigrantdefenseproject.org/docs/2010/10_Public%20Defender%20Immigration%20Protocol.with%20appendice.pdf.

B. Central Office Model / Immigration Resource Counsel

Some large multi-site defender offices employ a Central Office Model, in which one or more immigration experts are housed in the central office and provide immigration consultations to defenders in that jurisdiction on request. Examples of offices that employ a Central Office Model are the New York Legal Aid Society, Los Angeles County Public Defender Office, Colorado State Public Defender Office, and Massachusetts Committee for Public Counsel Services. A number of offices have started their immigration assistance plans by making a joint application with a recent law school graduate for a post-graduate fellowship. Grant money also may be available to establish a pilot position, which has the advantage of allowing an organization to hire an attorney with experience in immigration and criminal law.

The federal government could have the greatest impact by funding immigration support through this model, particularly at the statewide level. By funding a statewide Immigration Resource Counsel, the federal government could affect the quality of indigent representation across an entire state. The costs of funding statewide positions are relatively low when measured on a per client basis, especially when compared to the costs of in-house experts discussed in Section III.C. One or more pilot projects would provide a roadmap for other states, demonstrating how to get such a service off the ground with proven results. The federal government may be able to fund statewide Immigration Resource Counsel positions even without an established statewide organization, although in a state with limited organizational infrastructure it would prove more difficult to connect the Resource Counsel with indigent defenders. Other pros and cons are as follows:

Pros

- The expert would provide accurate and timely advice on the immigration consequences of pleas and alternative dispositions to mitigate adverse consequences. If housed within a statewide organization such as North Carolina's Office of indigent Defense Services or a comparable statewide entity, the organization could ensure that the expert is well-qualified and remains current on the law. With a focus on immigration issues only, the expert should have the capacity to do trainings for public defender offices and assigned counsel and publish written case law updates and other materials.
- It is relatively inexpensive to implement. Employing a Central Office Model generally allows offices to benefit from economies of scale and keep the cost of their assistance down, at least as measured on a per client basis.
- A central office expert housed at a statewide organization would be accessible to assigned counsel.

Cons

- Central office experts are generally unable to meet in person with defenders and interview clients, which can be helpful in assessing a client's immigration history.

- A central office expert is unable to counsel clients directly and less likely to provide immigration advice at the conclusion of a case (post-plea advice).¹¹ The expert is also unable to provide direct representation to clients in immigration court, which may be less of a priority to state-level organizations.
- Being off-site makes it harder for the expert to raise the awareness of immigration issues within individual public defender offices, and possibly to absorb the culture of criminal practice in specific jurisdictions.

C. In-House Model

In this model, a staff attorney is designated as a particular office's immigration expert and is housed in the defender office. This model may work well for larger public defender offices but may pose a problem for smaller offices. In the case of smaller offices, devoting a percentage of one staff member's time may be sufficient,¹² or defenders in smaller offices may call on experts in larger offices. Examples of offices that employ an In-House Model include The Bronx Defenders, Neighborhood Defender Service of Harlem, Defender Association of Philadelphia, and Public Defender Service for the District of Columbia.

A federally-funded pilot project using this model will likely have less impact than a pilot project employing the Central Office Model. There are many benefits to this model as discussed below, but it is not well suited to covering a state or jurisdiction's entire indigent defense bar, in particular assigned counsel. Such a federal pilot would also be harder to get off the ground because it would require working with multiple offices within a state or jurisdiction. Other pros and cons are as follows:

Pros

- An on-site immigration expert provides defenders easy and on-demand access to immigration assistance. It is easier to walk down the hall than to pick up the phone and call someone across the state. Expert advice therefore might be sought in more cases.
- It allows the expert to meet in person with defenders and clients in the office and, when necessary, in court or the jail. It allows the expert to interview the client and gather important information that may be harder to collect for the defender.
- It helps incorporate immigration advice into an office's culture of criminal representation by having someone in-house who can routinely conduct immigration trainings and share success stories where innovative strategies were used to mitigate immigration consequences.

¹¹ Immigration advice at the conclusion of a case may involve advice about future international travel; advice about future domestic contact with immigration; advice on eligibility for permanent resident status (green card) or U.S. citizenship; or documentation such as a plea transcript to provide to immigration authorities in future deportation proceedings or in support of affirmative applications for immigration benefits, such as naturalization.

¹² The amount of immigration expert services an office requires depends on: (1) the number of noncitizen defendants represented by the office and (2) the range of services the immigration expert will provide.

- An on-site expert will quickly learn the local policies of prosecutors and judges, improving the utility of the advice an expert can deliver, such as advice about alternative pleas.
- In-house experts are generally positioned to do more than provide routine advice during plea negotiations because of higher expert-to-defender ratios. In-house experts may conduct trainings, write formal plea advice memos, provide post-plea advice letters, and provide some level of direct representation to noncitizens clients in immigration court.

Cons

- This model presents higher costs than the other models. Finding funding for a dedicated in-house immigration expert in several offices within a state is a significant obstacle.
- An in-house expert in a particular public defender office will not be as accessible to assigned counsel, particularly in districts that are not part of the public defender office's district.
- It is not clear that this model has proven effective in all offices, where it may be done on an informal basis and may be by staff attorneys who do not have the time or expertise to provide complete advice.

D. Contract Model

Another option is outsourcing immigration advice to a separate organization or attorney with expertise in the intersection of criminal and immigration law. The California State Public Defender employs the Contract Model in collaboration with the Immigrant Legal Resource Center, a non-profit immigration advocacy organization. In North Carolina, there are few organizations with the expertise and the staff levels to enter into this sort of arrangement. Any contract would, therefore, likely involve individual attorneys or law practices.

This model may prove problematic for a federal pilot program. A federal pilot based on the contract model may work if the state involved has a prominent immigration legal services or advocacy organization well positioned to meet the statewide demand for expert services. If accessible to both public defenders and assigned counsel, the pilot could have a large-scale impact within the state. Such a pilot may, however, be harder for other states to model depending on the presence of similar organizations, without which such an initiative is much harder to administer. It is also harder to develop and employ expert best practices since the advice would be outsourced. Other pros and cons are as follows:

Pros

- The primary benefit of this model is efficiency. An organization can pay for as much immigration expertise as it requires—per consultation or per hour.

- If funded at the state or county level, it can be made accessible to assigned counsel.
- There is potentially less investment. If it does not work out, the organization can cancel the contract.
- Contract attorneys are likely to be specialized immigration practitioners who are more attuned to immigration court outcomes.

Cons

- Like the Central Office Model, a contract system generally does not allow the immigration experts direct access to defenders and clients.
- Contract attorneys are less likely to provide post-plea advice and unlikely to deliver any significant direct immigration services, at least not without increasing costs significantly.
- Training for defense attorneys and written case law updates will likely present additional costs.
- The lack of on-site immigration experts under the Contract Model makes it harder to raise the immigration awareness within an office.
- The delivery of advice may not be as timely as in other models, depending on the contractor's other responsibilities.

E. Funding by the Court for "Expert" Immigration Advice

Funding by the court on a case-by-case basis and on request of the indigent defender is not an actual model, but it has been discussed locally as an option to help defense counsel meet *Padilla* obligations.

Pros

- It would provide attorneys with a vehicle to obtain assistance in this area.
- It does not require administering a more systemic response.

Cons

- It presents higher costs than the other models. Hiring private immigration counsel on a case-by-case basis to provide assistance in a significant percentage of cases involving noncitizen defendants is not an efficient use of resources.
- It would be harder to assure the quality of the assistance that would be provided. In North Carolina, for example, there are presently a small number of immigration attorneys who specialize in immigration consequences of crime (that, however, may change).

- Immigration is an area of law fraught with “notarios,” individuals who exploit the trust of immigrants and hold themselves out as attorneys who are qualified to help. The authors know of instances when defenders relied on bad advice from immigration attorneys who did not specialize in this area, and their clients were facing removal as a result.
- It is generally a haphazard system, in which some cases may receive funding from the court and others may not.

IV. CONCLUSION

This is a watershed moment. The U.S. Supreme Court has recognized the seriousness of deportation as a consequence of a criminal plea, which is “sometimes the most important part of the penalty” for a noncitizen defendant.¹³ Defense counsel has a large burden to shoulder, and some are unsure of how to proceed. The federal government could play an enormously valuable role by helping to shape and fund support in this area, ensuring that expert advice about immigration consequences is provided in a systematic and competent way. It has an opportunity to ensure that the quality of indigent defense across the nation continues to improve and the rights of noncitizen defendants are protected.

¹³ *Padilla*, 130 S. Ct. at 1480.