

# *Padilla v. Kentucky*: The Duty of Defense Counsel Representing Noncitizen Clients

by Hans Meyer

*This article provides an overview of the Sixth Amendment duty of criminal defense counsel to advise noncitizen defendants about the immigration consequences of a guilty plea in light of the 2010 U.S. Supreme Court decision in Padilla v. Kentucky.*

In March 2010, the U.S. Supreme Court issued its decision in *Padilla v. Kentucky*,<sup>1</sup> holding that the Sixth Amendment requires defense counsel to provide affirmative and competent legal advice to noncitizen defendants regarding the potential immigration consequences of a guilty plea.<sup>2</sup> The *Padilla* decision not only affirms the duty of defense counsel recognized by the Colorado Supreme Court in *People v. Pozo*,<sup>3</sup> but also clarifies that duty in important ways.

Currently, when representing noncitizen clients, defense attorneys are faced with a landscape in which criminal law and immigration law have become increasingly interdependent. Over the past several years, dramatic changes to federal immigration law have greatly increased the categories of criminal offenses that trigger immigration consequences, while also eliminating several types of discretionary relief from removal.<sup>4</sup> As a result, increasing numbers of noncitizens find their lives inexorably altered by mandatory immigration consequences that stem from convictions for what often are minor offenses.<sup>5</sup> In addition, an anti-immigrant enforcement strategy commonly known as “attrition through enforcement”<sup>6</sup> now dominates the immigration discourse. This strategy employs the use of state and local peace officers as a “force multiplier” for purposes of federal immigration enforcement.<sup>7</sup> Simultaneously, there has been an increase in state and local legislation targeting noncitizens.<sup>8</sup> This legislation pulls noncitizens into the criminal justice system and frequently compels state and local officers to act as a *de facto* first line of immigration enforcement, fur-

ther blurring the distinction between criminal law and federal immigration enforcement.<sup>9</sup>

Consequently, the fates of noncitizen defendants often depend on criminal defense counsel, who may well be the only line of immigration defense for their clients, because indigent noncitizens are not constitutionally entitled to appointed counsel in immigration proceedings. As the “attrition through enforcement” model draws more noncitizens into the criminal justice system, defense counsel must be aware of the challenges that this enforcement regime and its intersection of laws poses to the effective representation of noncitizen clients. In many ways, *Padilla* is more than an important case articulating the Sixth Amendment duty that defense counsel owes to noncitizens; it may well be the legal cornerstone to safeguard fundamental fairness for noncitizens in the criminal justice system and beyond.

This article provides an overview of the duty of defense counsel to advise noncitizen clients in Colorado in light of the *Padilla* decision. The first section discusses the duty previously recognized in *People v. Pozo*. The article then discusses the U.S. Supreme Court decision in *Padilla*, and how it both clarifies and modifies defense counsel’s advisement duty. Finally, the article addresses some issues likely to develop in the wake of the *Padilla* decision.

## The *People v. Pozo* Opinion

Colorado has long defined the duty that defense counsel owes to noncitizen clients regarding the immigration consequences of

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criminal convictions. In 1987, the Colorado Supreme Court decided *People v. Pozo*, holding that the failure to advise a noncitizen defendant of the potential immigration consequences of a criminal conviction may constitute ineffective assistance of counsel.<sup>10</sup>

In *Pozo*, the defendant filed a claim for post-conviction relief, alleging ineffective assistance of counsel because his defense attorney did not advise him about the potential immigration consequences of his plea to second-degree sexual assault and escape.<sup>11</sup> In its decision, the Court focused on the two-pronged test for evaluating ineffective assistance of counsel under *Strickland v. Washington*<sup>12</sup> and *Hill v. Lockhart*,<sup>13</sup> which requires a defendant to show that defense counsel's performance fell below professional norms and that the defendant suffered prejudice as a result.<sup>14</sup> *Pozo* explained that such claims should be evaluated on a case-by-case basis, considering the "objective standards of minimally acceptable levels of professional performance prevailing at the time of the challenged conduct."<sup>15</sup> As a result, *Pozo* found that when defense counsel possesses sufficient information to form a reasonable belief that a client is a noncitizen, the attorney "may reasonably be required to investigate relevant immigration law."<sup>16</sup>

The *Pozo* Court found that this duty stemmed from the premise that attorneys must inform themselves of material legal principles that could significantly impact the circumstances of their clients, because "thorough knowledge of fundamental principles of deportation law may have significant impact on a client's decisions concerning plea negotiations and defense strategies."<sup>17</sup> The Court then remanded the case to the trial court to address whether the attorney had reason to know the defendant was a noncitizen and, if so,

"what the standards of minimally acceptable professional conduct were at the time."<sup>18</sup>

Since 1987, *Pozo* has governed the evaluation of ineffective assistance of counsel claims related to immigration consequences in Colorado. Over time, and in response to the decision, the academic and legal community has provided analysis, training, and technical assistance to defense attorneys—as well as prosecutors, judges, and others in the criminal justice system—regarding the immigration consequences of convictions.<sup>19</sup> *Pozo* recognized an important duty in Colorado related to the representation of non-citizen defendants. During the last two decades, it has provided a narrow but essential post-conviction remedy in situations where representation by defense counsel is found to be ineffective.

### The *Padilla v. Kentucky* Opinion

José Padilla is a citizen of Honduras who has been a lawful permanent resident of the United States for more than forty years, serving honorably in the U.S. Armed Forces during the Vietnam War.<sup>20</sup> In 2002, Padilla was charged in a felony case in Kentucky state court, where he ultimately pled guilty to the transportation of a large amount of marijuana in his tractor-trailer.<sup>21</sup> This plea made his deportation to Honduras virtually mandatory. As a result, Padilla later filed a state claim for post-conviction relief and withdrawal of his plea based on ineffective assistance of counsel.

In his post-conviction proceedings, Padilla asserted that he was unaware that his plea would result in his mandatory deportation and claimed that he agreed to plead guilty to the charge only after his court-appointed attorney specifically assured him that he "did not have to worry about immigration status since he had been in the country for so long."<sup>22</sup> The trial court denied Padilla's motion, finding that deportation was a collateral consequence of the conviction and therefore beyond the ambit of Padilla's Sixth Amendment right to counsel.<sup>23</sup> The Kentucky Supreme Court agreed, holding that the right to effective assistance of counsel does not protect against an attorney's incorrect advice about what it classified as a collateral consequence of conviction.<sup>24</sup>

The U.S. Supreme Court granted *certiorari* to address the issue, which it defined as whether "Padilla's counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country."<sup>25</sup> On March 31, 2010, the Court issued a decision that clarifies the Sixth Amendment rights of noncitizen defendants, holding that because deportation is such

a serious consequence and so closely intertwined with the underlying criminal proceedings, defense counsel has a duty under the Sixth Amendment to provide affirmative and competent advice regarding the immigration consequences of a guilty plea.<sup>26</sup>

The decision has prompted some commentators to view *Padilla* as a landmark case in the area of criminal law, possibly “the most important right to counsel case since *Gideon*, and . . . may become as familiar a fixture of a criminal case as the *Miranda* warning.”<sup>27</sup> Indeed, the *Padilla* decision addresses several important issues regarding the Sixth Amendment and what constitutes ineffective assistance of counsel in the context of legal advice regarding immigration consequences.

### *Deportation as Penalty vs. Collateral Consequence*

In its decision, the *Padilla* Court was careful to explain that it had “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under *Strickland*.”<sup>28</sup> The Court gave two primary reasons the direct versus collateral consequence distinction did not apply in the immigration context. First, the Court found that the deportation consequence is unique in that it is a “particularly severe *penalty*”<sup>29</sup> that may result from a criminal conviction. Second, it found that immigration consequences are intimately related to the underlying criminal proceedings, thus making it exceedingly difficult “to divorce the *penalty* from the conviction in the deportation context.”<sup>30</sup> Thus, the *Padilla* Court reasoned that the deportation consequence of a criminal conviction is, because of its intimate connection to the underlying criminal case, “uniquely difficult to classify as either a direct or a collateral consequence.”<sup>31</sup>

In discussing its conclusion that immigration consequences are a penalty rather than a collateral consequence, the *Padilla* Court focused on the dramatic changes to immigration law over the last century, noting that “immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation.”<sup>32</sup> The Court discussed these changes—including the creation and expansion of categories of offenses that trigger deportation and the elimination of discretionary relief from removal—at great length, explaining that these restrictions have raised the stakes of a criminal conviction. As a result, “the importance of accurate legal advice for non-citizens accused of crimes has never been more important.”<sup>33</sup>

The Court also discussed the Judicial Recommendation Against Deportation, which provided state and federal judges with the power to provide relief from removal that was binding on immigration authorities. This statutory mechanism was eliminated entirely by Congress in 1990.<sup>34</sup> Due to these drastic changes, *Padilla* explained that deportation has become “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.”<sup>35</sup>

### *Effective Assistance of Counsel and Professional Norms*

After finding that the collateral consequence doctrine is ill-suited to the issue of deportation consequences, the Court then applied the *Strickland* ineffective assistance of counsel test to the facts in *Padilla*. The Court focused on *Strickland*’s first prong of whether counsel’s representation fell below “an objective standard of reasonableness.”<sup>36</sup> Here, the Court looked to professional norms that

instruct defense counsel to investigate and advise clients regarding immigration consequences—including standards by the National Legal Aid and Defender Association and the American Bar Association—as benchmarks with which to determine whether defense counsel’s performance was reasonable.<sup>37</sup>

The Court also cited one of its own prior decisions, recognizing that the preservation of discretionary relief from deportation “would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.”<sup>38</sup> Given these professional standards to advise regarding immigration consequences, which the Court found have generally imposed an obligation on counsel for at least the past fifteen years,<sup>39</sup> the Court determined that “the weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.”<sup>40</sup>

### *The Sixth Amendment Requires Affirmative and Competent Advice*

The Court then applied these professional standards to evaluate the performance of Padilla’s attorney. Given the facts of the case, the Court easily determined that the performance of Padilla’s counsel was deficient under the first prong of *Strickland*, explaining that the “consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.”<sup>41</sup> However, the Court went on to find that the Sixth Amendment requires affirmative advice by an attorney regarding immigration

consequences, explaining that a holding limited solely to the context of incorrect advice by defense counsel would invite absurd results:

It would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. . . . 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.<sup>42</sup>

Importantly, *Padilla* recognized the complexity in certain areas of immigration law where the immigration consequences of a particular plea may be “unclear or uncertain.”<sup>43</sup> In such situations where the law is not settled or succinct, the Court found that defense counsel may satisfy their Sixth Amendment duty when they “advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”<sup>44</sup> However, the Court reiterated that “when the deportation consequence is truly clear . . . the duty to give correct advice is equally clear.”<sup>45</sup> Thus, the facts of the *Padilla* case present an example of constitutionally deficient advice, while the holding of *Padilla* contemplates scenarios that may determine the outer boundaries of the Sixth Amendment duty defense counsel owes to noncitizen defendants.

### *Informed Consideration by the Prosecution*

The *Padilla* Court also stated that informed consideration of immigration consequences should not be an issue solely for the defense, but also one for the prosecution. As the Court explained, a prosecutor’s meaningful consideration of the immigration conse-

quences at stake in the plea negotiation process is important “to reach agreements that better satisfy the interests of both parties.”<sup>46</sup> When negotiating with immigration consequences in mind, defense counsel “may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation.”<sup>47</sup>

The Court also pointed out that the threat of deportation might give the defendant “a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.”<sup>48</sup> Thus, the *Padilla* Court suggests that open plea negotiations involving the prosecution’s informed consideration of immigration consequences might help ensure the finality of convictions and mitigate or avoid draconian immigration penalties.

### Aligning *Padilla* and *Pozo*

Interestingly, *Padilla* addressed many of the same issues that were at play in the *Pozo* case. Both *Pozo* and *Padilla* focused their analysis on the application of *Strickland* to claims of ineffective assistance of counsel related to advice regarding the immigration consequences of a plea agreement. However, *Padilla* goes a step further than *Pozo* in characterizing the deportation consequence as a “penalty” intimately tied to and often directly flowing from the criminal case, rather than through the lens of the collateral consequence doctrine. Like the *Pozo* decision, *Padilla* focused on the professional standards related to the representation of noncitizens in evaluating attorney competence under the first prong of *Strickland*. *Padilla* further clarified that, for at least the past fifteen years, these professional norms generally have imposed an obligation on counsel to provide advice regarding the immigration consequences of a plea to noncitizen defendants.<sup>49</sup>

*Padilla* also differs from *Pozo* in two important respects. First, *Padilla* does not include *Pozo*’s caveat that defense counsel are responsible for advising clients about immigration consequences only when they have a reason to believe that the client is a noncitizen. Rather, the *Padilla* decision appears to require defense counsel to determine the immigration status of their clients during the course of representation. Second, *Padilla* requires counsel to provide affirmative and specific advice regarding immigration consequences to noncitizen defendants, while *Pozo* found that attorneys may be required to investigate relevant immigration law only when they have reason to believe clients are noncitizens. Thus, *Padilla* appears to mandate that defense counsel determine whether their clients are noncitizens and, if so, provide affirmative and accurate legal advice regarding the immigration consequences of a plea offer, even though the scope and nature of that advice may vary depending on particular client circumstances and the clarity of the immigration consequence.

### Issues in the Wake of *Padilla*

*Padilla* clarified some questions regarding the Sixth Amendment duty of effective assistance of counsel in the representation of noncitizen defendants. It also left open a few thorny issues that are likely to be litigated in the courts over the next several years.

#### *Immigration Consequences: Clear vs. Unclear*

One interesting question left open by *Padilla* is how defense counsel is to determine what immigration consequences are clear

or unclear for purposes of fulfilling their Sixth Amendment advisement duty. To be certain, some immigration consequences may be unclear due to a lack of established case law, a split in interpretation by courts, or vagueness that may result from specialized definitions and terms of art in immigration law. In those situations, the immigration consequences of a particular offense may truly be unsettled and, therefore, require a more limited advisement duty from defense counsel.

However, much like the development of suppression issues in criminal cases, the immigration consequences of a particular offense often become clear by developing a few critical issues related to the case.<sup>50</sup> First, immigration status is a critical issue to consider because immigration law does not subject all noncitizens to one unified set of consequences.<sup>51</sup> Whether different criminal grounds of immigration law will apply often depends on a client’s specific immigration status and when it was obtained. Thus, understanding an individual client’s immigration history and status in many cases will serve to clarify both the immigration consequences that apply and the duty to advise about them.

Second, much like criminal history plays an important role for defense counsel in determining the sentencing exposure to a particular criminal offense, a noncitizen’s criminal history plays a significant role in whether a conviction will trigger a specific immigration consequence. A lack of prior criminal history sometimes will mean that a particular disposition does not trigger immigration consequences,<sup>52</sup> while other prior offenses may impact the consequence that attaches to a conviction. Thus, a clear summary

of a client's prior criminal history will help defense attorneys correctly advise their clients regarding the potential immigration penalty of a particular guilty plea.

Third, the particular statute of conviction and the structure of a plea agreement play a significant role in whether an offense carries an immigration consequence. This is because many statutes are "divisible," in that they contain some conduct that clearly triggers immigration consequences and other conduct that does not. Accordingly, defense attorneys often will be in a position to affirmatively counsel their clients on the consequences that inhere to problematic elements within a divisible statute. Furthermore, defense counsel may affirmatively advise clients regarding dispositions to specific elements under these types of statutes that avoid immigration consequences.

### *Padilla and Discretionary Relief from Removal*

*Padilla* may well contemplate a robust advisement duty for defense counsel because the decision not only addresses the duty to advise noncitizen clients regarding specific deportation consequences, but also discusses the importance of discretionary relief from removal as a potential aspect of that advisement duty. As the Court in *Padilla* referenced in a quote from one of its previous decisions, the Court expects that counsel who is "unaware of the discretionary relief measure would 'follow the advice of numerous practice guides' to advise themselves of the importance" of a particular form of discretionary relief to a noncitizen client.<sup>53</sup>

Much like a defendant may have certain defenses to a criminal charge—such as self-defense—a noncitizen defendant also may have certain defenses to removal, often referred to in immigration law as discretionary relief from removal.<sup>54</sup> Maintaining statutory eligibility for discretionary relief from removal often is contingent on a person's criminal convictions. Thus, the duty of defense counsel to affirmatively advise noncitizens of the immigration consequences of a plea potentially may encompass the impact that a particular conviction could have on eligibility for discretionary relief from removal. Whether *Padilla's* duty of advisement may reasonably encompass the impact of a plea agreement on discretionary relief is a decision likely to play out in the courts over time.

### *Padilla and Retroactivity*

Another issue unresolved by *Padilla* is whether its holding applies retroactively. In *Teague v. Lane*,<sup>55</sup> the U.S. Supreme Court examined whether new constitutional rules of criminal procedure should apply retroactively.<sup>56</sup> There, the Court held that generally, unless they fall under two narrow exceptions, new constitutional rules of criminal procedure should not apply to defendants whose convictions already have become final when the new rule is announced.<sup>57</sup>

State courts are not bound by the *Teague* rule<sup>58</sup> and, although courts likely cannot impose more stringent rules than *Teague*, they are free to be more flexible in their approach to retroactivity. Like many other states, Colorado currently follows the *Teague* rule of retroactivity.<sup>59</sup> However, not all constitutional decisions by the Supreme Court qualify as "new" rules for purposes of *Teague* retroactivity. In *Teague* itself, the Court admitted that it often is difficult to determine when a case announces a new rule.<sup>60</sup> As guidance, it provided two formulations for when a case establishes a new rule. First, a rule is new "when it breaks new ground or imposes a new obligation on the States or the Federal Government."<sup>61</sup> Second, "a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."<sup>62</sup>

Although *Padilla* recognizes that the right to effective assistance of counsel requires affirmative advice regarding immigration consequences, the decision can be read as a straightforward application of *Strickland*. Because the ineffective assistance of counsel test under *Strickland* is so well settled, courts often have found that merely applying it to a particular set of facts does not amount to a new rule.<sup>63</sup> In the months since *Padilla* was decided, several courts that have addressed this issue found that the *Padilla* holding should apply retroactively,<sup>64</sup> often focusing on *Padilla's* reasoning.<sup>65</sup> However, the case law is inconsistent; other courts have taken a different view and held that *Padilla* should not apply retroactively because it does create a new rule and does not fit into any of the exceptions outlined in *Teague*.<sup>66</sup>

Some commentators believe that *Padilla* does not announce a new constitutional rule of criminal procedure and, therefore, should apply retroactively.<sup>67</sup> The language of the opinion may suggest as much. The *Padilla* Court specifically rejected the government's claim that requiring counsel to advise regarding immigration consequences of a criminal plea would "open the floodgates" to a barrage of challenges to pre-existing convictions.<sup>68</sup> Rather, the Court explained that "surmounting *Strickland's* high bar is never an easy task"<sup>69</sup> and stated that it "seems unlikely that our decision today will have a significant effect on those convictions already obtained

as the result of pleas bargains.”<sup>70</sup> These statements arguably indicate that the Court did not announce a new rule, but rather anticipated retroactive application of its decision to claims of ineffective assistance of counsel for noncitizen defendants. Regardless, the issue of retroactivity undoubtedly will continue to develop as *Padilla* is applied to claims of ineffective assistance of counsel throughout the country.

## Conclusion

For counsel not familiar with immigration law, *Padilla* initially may seem to impose a difficult duty. As criminal law and immigration law continue to become increasingly interrelated, and as more noncitizens are drawn into the criminal justice system, the demand for constitutionally adequate advice by defense counsel is likely to increase in both volume and import. Successful advisement models are being implemented around the country, which indicates that the defense community can and will meet this duty of advisement.<sup>71</sup> *Padilla* makes clear that, given the seriousness of the deportation penalty at stake, and the fact that immigration consequences are so closely tied to the underlying criminal proceedings, the Sixth Amendment right to effective assistance of counsel demands no less.

## Notes

1. *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010).
2. *Id.* at 1486.
3. 746 P.2d 523 (Colo. 1987).
4. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, title VII, subtitle J, 102 Stat. 4181 (Nov. 18, 1988) (creating the aggravated felony category); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) (eliminating the Judicial Recommendations Against Deportation and adding new aggravated felony grounds); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996) (eliminating certain forms of relief from removal and broadening the definition of aggravated felony and crimes of moral turpitude); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, div. C, 110 Stat. 3009 (Sept. 30, 1996) (establishing new grounds of deportability, further abrogating discretionary relief from removal, and providing for mandatory immigration detention for broad classes of noncitizens due to criminal convictions or activity).
5. In 2009, U.S. Immigration and Customs Enforcement (ICE) removed 128,000 people with some level of criminal conviction. By comparison, in the year 2000, 72,000 people were removed. See Office of Immigration Statistics, U.S. Department of Homeland Security, *2009 Yearbook of Immigration Statistics* at Table 38, available at [www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois\\_yb\\_2009.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2009/ois_yb_2009.pdf).
6. See, e.g., Kobach, “Attrition Through Enforcement: A Rational Approach to Illegal Immigration,” 15 *Tulsa J. Comp. & Int’l L.* 155, 156-57, 159-63 (2008). See also Stumpf, “States of Confusion: The Rise of State and Local Power Over Immigration,” 86 *N.C. L.Rev.* 1557 (2008).
7. For additional information on ICE programs being integrated into the state and local criminal justice systems, see Kearney and Friedland, “Overview of ICE Access Programs: 287(g), the Criminal Alien Program, and Secure Communities,” (2009), available at [www.nilc.org/immlawpolicy/LocalLaw/ice-access-2009-11-05.pdf](http://www.nilc.org/immlawpolicy/LocalLaw/ice-access-2009-11-05.pdf).
8. During the 2005 legislative year, immigration was the subject of approximately 300 state bills throughout the country; by 2007, the number grew to more than 1,500. National Conference of State Legislatures, Immigration Policy Project, “2009 Immigration-Related Bills and Resolutions in the States” (April 22, 2009), available at [www.ncsl.org/documents/immig/2009ImmigFinalApril222009.pdf](http://www.ncsl.org/documents/immig/2009ImmigFinalApril222009.pdf).

9. See, e.g., CRS § 29-29-103 (requiring a peace officer who has “probable cause” or a sheriff who “reasonably believes” that the arrestee is not lawfully present in the United States to report the person to ICE).

10. *People v. Pozo*, 746 P.2d 523, 529 (Colo. 1987).
11. *Id.* at 525.
12. *Strickland v. Washington*, 466 U.S. 668 (1984).
13. *Hill v. Lockhart*, 474 U.S. 52 (1985) (applying the two-pronged test of *Strickland* to a Sixth Amendment claim of ineffective assistance of counsel in relation to a guilty plea).
14. See *Strickland*, *supra* note 12 at 687-88. The Colorado Supreme Court has held that the two-pronged *Strickland* test also applies to ineffective assistance of counsel claims based on the Colorado Constitution. See *Hutchinson v. People*, 742 P.2d 875, 886 (Colo. 1987).
15. *Pozo*, *supra* note 10 at 527.
16. *Id.* at 529, citing *People v. Soriano*, 194 Cal.App.3d 1470 (1987).
17. *Id.*
18. *Id.*
19. See, e.g., Van Gilder, “Ineffective Assistance of Counsel Under *People v. Pozo*: Advising Non-Citizen Criminal Defendants of Possible Immigration Consequences in Criminal Plea Agreements,” 80 *U. Colo. L.Rev.* 793 (2009) (analyzing the duty to advise in Colorado and arguing that it should be applied to all jurisdictions); Joseph and Elkind, “Immigration Consequences of Criminal Pleas and Convictions,” 35 *The Colorado Lawyer* 55 (Oct. 2006) (discussing the immigration consequences of criminal convictions and providing an overview of legal terms and categories of criminal convictions that trigger immigration consequences); Kowalski and Horne, “Defending the Noncitizen,” 24 *The Colorado Lawyer* 2177 (Sept. 1995) (same).

20. *Padilla*, *supra* note 1 at 1477.
21. See *id.*
22. *Id.* at 1478.
23. See *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008).
24. *Id.* at 485.
25. *Padilla*, *supra* note 1 at 1481.
26. See *id.* at 1483.
27. Colgate Love and Chin, “*Padilla v. Kentucky*: The Right to Counsel and the Collateral Consequences of Conviction,” *The Champion* 19 (May 2010) (“The systemic impact of this new obligation cannot be underestimated. *Padilla* may turn out to be the most important right to counsel case since *Gideon*, and the ‘*Padilla* advisory’ may become as familiar a fixture of a criminal case as the *Miranda* warning.”).
28. *Padilla*, *supra* note 1 at 1481.
29. *Id.*, citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (emphasis added).
30. *Id.*, citing *United States v. Russell*, 686 F.2d 35, 38 (D.C.Cir. 1982) (emphasis added).
31. *Id.* at 1482. Lower courts have extended the reasoning in *Padilla* to advice about other severe consequences of conviction traditionally considered collateral. See, e.g., *Taylor v. State*, 698 S.E.2d 384 (Ga.App. 2010) (sex offender registration); *Pennsylvania v. Abraham*, 996 A.2d 1090 (Pa.Super. Ct. 2010) (loss of pension).
32. *Padilla*, *supra* note 1 at 1478.
33. *Id.* at 1480.
34. *Id.*
35. *Id.* (emphasis added).
36. *Id.* at 1482, quoting *Strickland*, *supra* note 12 at 688.
37. *Id.*
38. *Id.* at 1483, quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001).
39. *Id.* at 1485.
40. *Id.* at 1482.
41. *Id.* at 1483.
42. *Id.* at 1484.
43. *Id.* at 1483.
44. *Id.*
45. *Id.*
46. *Id.* at 1486.

47. *Id.*

48. *Id.*

49. *Id.* at 1485.

50. For a more detailed discussion of the duty to advise and the issue of clear and unclear immigration consequences, see Benson, "How to Advise Noncitizen Defendants: What is 'Clear and Unclear' After *Padilla v. Kentucky*," *Washington State Defender's Association Immigration Project* (April 2010), available at [www.defensenet.org/immigration-project/immigration-resources/padilla-v.-kentucky-resources/WDAIP%20Padilla%20Advisory%20%232%20-%20Advice%20Required%204-28-10.doc/view](http://www.defensenet.org/immigration-project/immigration-resources/padilla-v.-kentucky-resources/WDAIP%20Padilla%20Advisory%20%232%20-%20Advice%20Required%204-28-10.doc/view). See also "A Defending Immigrants Partnership Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant After *Padilla v. Kentucky*," Immigrant Defense Project (April 2010), available at [www.immigrantdefenseproject.org/docs/2010/10-Padilla\\_Practice\\_Advisory.pdf](http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf).

51. See, e.g., 8 U.S.C. § 1227(a)(2) (the criminal grounds of deportability); 8 U.S.C. § 1182(a)(2) (the criminal grounds of inadmissibility).

52. See, e.g., 8 U.S.C. § 1227(a)(2)(A)(i) (providing for exception to deportability for one crime involving moral turpitude if committed more than five years after admission, or if committed within five years of admission, is an offense punishable by less than one year of imprisonment); 8 U.S.C. § 1182(a)(2)(A)(ii)(II) (providing for the "petty offense" exception to inadmissibility for one crime involving moral turpitude).

53. *Padilla*, *supra* note 1 at 1483, quoting *St. Cyr*, *supra* note 38 at 323 n.50.

54. See, e.g., 8 U.S.C. §§ 1229c (Voluntary Departure), 1229b(a) (Cancellation of Removal for Lawful Permanent Residents), 1229(b)(b) (Cancellation of Removal for Non-Lawful Permanent Residents), 245(a) (Adjustment of Status), 1158 (Asylum), and 1231(b)(3) (Withholding of Removal).

55. *Teague v. Lane*, 489 U.S. 288 (1989).

56. For a comprehensive analysis of *Teague* and retroactivity issues, see Lasch, "The Future of *Teague* Retroactivity, or 'Redressability,' after *Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings," 46 *Am. Crim. L. Rev.* 1 (2009).

57. *Teague*, *supra* note 55 at 310.

58. See *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008).

59. See *People v. McDowell*, 219 P.2d 332 (Colo.App. 2009).

60. *Teague*, *supra* note 55 at 301.

61. *Id.*

62. *Id.*

63. See *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). See also *Newland v. Hall*, 527 F.3d 1162, 1197 (11th Cir. 2008), citing recent cases where the Court determined that specific applications of *Strickland* were not new rules under *Teague*.

64. See *Martin v. U.S.*, 2010 WL 3463949 (C.D.Ill. Aug. 25, 2010); *United States v. Chaidez*, 2010 WL 3184150 (N.D.Ill. Aug. 11, 2010); *United States v. Hubenig*, 2010 WL 2650625 (E.D.Cal. July 1, 2010); *People v. Bennett*, 2010 WL 2089266 (Crim.Ct.Bx.Cty. 2010); *People v. Garcia*, 907 N.Y.S.2d 398, 400 (N.Y.Sup.Ct. 2010).

65. See, e.g., *Martin*, *supra* note 64 at \*3 ("The *Padilla* case likely did not break new ground or impose new obligations given the Supreme Court's emphasis on *Strickland*, prevailing professional norms, and the 'long recognized' importance of the plea negotiation phase.").

66. *United States v. Gilbert*, 2010 WL 4134286 (D.N.J. Oct. 19, 2010); *United States v. Perez*, 2010 WL 4643033 (D.Neb. Nov. 9, 2010).

67. See Kesselbrenner, "A Defending Immigrants Partnership Practice Advisory: Retroactive Applicability of *Padilla v. Kentucky*," National Immigration Project (June 24, 2010); Proctor and King, "Post *Padilla*: *Padilla's* Puzzles for Review in State and Federal Courts," 23 *Federal Sentencing Reporter* (Feb. 2011).

68. *Padilla*, *supra* note 1 at 1485. The Supreme Court confronted a similar "floodgate" argument in *Hill*, but nonetheless applied *Strickland* to a claim that counsel had failed to advise a defendant regarding a parole eligibility prior to pleading guilty. As the Court emphasized, "a flood did not follow in that decision's wake." *Id.*

69. *Id.*

70. *Id.*

71. See Markowitz, "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%20appendix.pdf](http://www.immigrantdefenseproject.org/docs/2010/10_Public%20Defender%20Immigration%20Protocol.with%20appendix.pdf). ■