

## IN PRACTICE

## CRIMINAL LAW

# The Hidden Costs of a Criminal Conviction

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The role of a criminal defense counsel has been changed dramatically by the decisions in *State v. Nuñez-Valdéz*, 200 N.J. 129 (2009), and *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). Both cases held that attorneys are obligated to provide accurate advice to criminal defendants regarding the risk of adverse deportation consequences. The *Nuñez-Valdéz* and *Padilla* rulings are already generating far-reaching repercussions for the criminal defense bar, because prior to the decisions, counsel were not obligated to advise criminal defendants about such consequences.

Further, the rulings have clouded the waters regarding whether and what advice attorneys must render to clients regarding the risk of any potentially serious consequence of a guilty plea. The defense bar is justifiably confused, as the number of federal and state consequences that stem from criminal convictions in New Jersey alone number in the thousands. Trying to catalog and under-

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stand which, if any, consequences can trigger the types of disclosure required by *Nuñez-Valdéz* and *Padilla* will be difficult for defense counsel. Regardless, the failure to understand and present these consequences to a client may raise ineffective assistance of counsel, legal malpractice and due-process issues with respect to any guilty plea.

In *Nuñez-Valdéz*, the defendant was a legal permanent resident who pled guilty to fourth-degree criminal sexual contact, and was then deported. He filed a petition for post-conviction relief, arguing that his counsel was deficient for erroneously advising him that the guilty plea would not result in deportation. After an evidentiary hearing, the trial court ordered a new trial, and the Appellate Division reversed. The New Jersey Supreme Court agreed with the trial court, and held that counsel's act of providing false or misleading information as to deportation consequences constituted ineffective assistance of counsel under the New Jersey State Constitution. The Court acknowledged that New Jersey no longer classified consequences into direct, penal and collateral categories, but that defendants must be informed of any consequences to guilty pleas if it was "fundamentally fair" to do so. The Court clarified that its analysis "d[id] not depend on whether deportation is a penal

consequence, [but r]ather, [on] whether it is ineffective assistance of counsel to provide misleading material information that results in an uninformed plea." The *Nuñez-Valdéz* Court acknowledged that a similar case (*Padilla*) was pending in the United States Supreme Court at the time of its decision, but stated that *Padilla's* holding would not have an effect on its own reasoning, which was decided under the New Jersey State Constitution.

In *Padilla*, the defendant was also a legal permanent resident who pled guilty to drug-distribution charges, and was then deported. The defendant filed a petition for post-conviction relief, alleging that counsel was deficient in rendering advice concerning the deportation consequences of a guilty plea. After the Kentucky Supreme Court upheld the trial court's denial of the petition, the United States Supreme Court reversed. The Court reasoned that it was "most difficult" to divorce the deportation consequence from the criminal conviction, as the consequence was an "integral part — indeed ... the most important part of the penalty," and courts had little to no discretion to ameliorate the effects of the deportation consequence. The Court held that counsel was required to inform a client whether a guilty plea clearly carried a risk of deportation, and if such a risk was unclear, to advise more generally of the possibility of deportation.

Although both *Nuñez-Valdéz* and *Padilla* dealt with a similar issue — whether counsel must accurately inform a defendant of the risks of deportation following a guilty plea — each interpreted ineffective assistance differently

under the respective constitutions. Under *Nuñez-Valdéz*, the New Jersey Supreme Court limited the scope of its holding to mis-advice, and situations where the consequence was “material” to a defendant’s guilty plea. Under *Padilla*, the United States Supreme Court held that the scope of an attorney’s obligations under the federal Constitution depended on whether the consequence was “important” and whether the risk of the consequence occurring was clear. The United States Supreme Court did not limit the scope of its holding to mis-advice, and instead held that counsel was affirmatively obligated to provide advice regarding deportation risks.

Most of the federal and state cases in New Jersey that have interpreted *Nuñez-Valdéz* and *Padilla* have focused on the deportation consequence and have narrowly interpreted the holdings in the two cases. However, the Justices who did not join the majorities’ opinion in *Nuñez-Valdéz* and *Padilla* were clear in their concerns that the majorities broke too far from established precedent, and broadly increased responsibilities for both counsel and the courts. For example, Justice Rivera-Soto focused on prior New Jersey Supreme Court precedent, and opined that counsel and courts should be responsible only for informing a defendant of “direct or penal” consequences.

Justice Alito’s concurrence in *Padilla* specifically recognized the potential problem: “This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil confinement, civil forfeiture, loss of right to vote, disqualification from public benefits ... and loss of business or professional licenses.” Further, “a conviction for a particular offense may render an alien excludable but not removable ... the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States.”

Perhaps confirming Justice Alito’s concerns, one New Jersey federal court has already referenced the apparent meaninglessness of any distinction be-

tween removal and exclusion. In *Gudiel-Soto v. United States*, 2011 WL 256297 (D.N.J. Jan. 25, 2011), the court stated as dicta: “Whether a person is removed from the United States or prevented from coming back in makes very little difference in that regard; he is ‘exiled’ either way.” And, the New Jersey Appellate Division, while citing to *Padilla*, has ruled that counsel must inform juveniles about the Megan’s Law consequences of a guilty plea. *In re C.P.H.*, 2010 WL 2926541 (App. Div. July 23, 2010). Finally, in *State v. R.S.*, 2011 WL 1196474 (App. Div. April 1, 2011), the case was remanded for an evidentiary hearing to understand, in part, how *appellate* counsel advised the client regarding the civil confinement consequence of a guilty plea.

These decisions reflect that, at least in New Jersey, counsel must inform defendants that their guilty pleas may subject them to the risk of deportation, exclusion from re-entry to the United States, civil confinement under the New Jersey Sexually Violent Predator Act (N.J.S.A. 30:4-27.24 to -27.38) and/or Megan’s Law registration, depending on the specific crime and the client’s particular circumstances. Taking the decisions together, there is a strong implication that counsel must inform defendants of *other* “important” or “material” consequences as well. Until there is more clarity from the courts, however, whether any particular consequence meets these thresholds is uncertain. But there will be continuing risks for all participants in the criminal justice system — for criminal defendants (by entering guilty pleas without understanding important consequences); criminal defense counsel (risking ineffective assistance and legal malpractice claims); and even prosecutors (risking the reversal of guilty pleas and convictions).

What should defense counsel do?

At a minimum, defense counsel should know their client, their client’s situation, and the types of consequences referenced in Justice Alito’s concurrence and the cases discussed above. These consequences include immigration issues, civil confinement, loss of civil rights

(such as voting rights), disqualification from public benefits, loss of financial aid for higher education, loss of the ability to engage in hobbies (such as gun ownership), and loss of business or professional licenses. If these consequences are “important” or “material” to the client, defense counsel should inform the client that there is a risk of such a consequence occurring. In addition, given potential ineffective assistance claims and other collateral attacks on guilty pleas, defense counsel would be well advised to document carefully their advice regarding any such consequences and the rationales for giving such advice.

Beyond that, counsel will need to educate themselves (through their own efforts or by relying on the specialized advice of others) on what *other* consequences may be “important” or “material,” and how they must advise their clients of these consequences prior to entry of a guilty plea. This will not be easy. Over the past 20 years, federal and state legislatures and administrative agencies have added thousands of statutory and regulatory consequences of criminal convictions. Even a cursory review of these statutes and regulations demonstrates that they are not only numerous and highly complex, but also confusing, as they consistently cross-reference each other and different statutes and regulations. (For example, compare 21 U.S.C. § 862 with N.J.S.A. 44:10-48(b), addressing public benefits.) The American Bar Association has sponsored the following database, which allows searches of adult criminal consequences by state: <http://isrweb.isr.temple.edu/projects/accproject/searchgain.cfm>.

Regardless of the difficulty, however, defense counsel will need to provide their clients appropriate advice. Of course, the understanding of what is “appropriate” will change dramatically over the next few years as courts digest and interpret *Nuñez-Valdéz* and *Padilla*. For their own benefit, and that of their clients, defense counsel should take a proactive approach to this issue and remain engaged as the legal landscape continues to evolve. ■