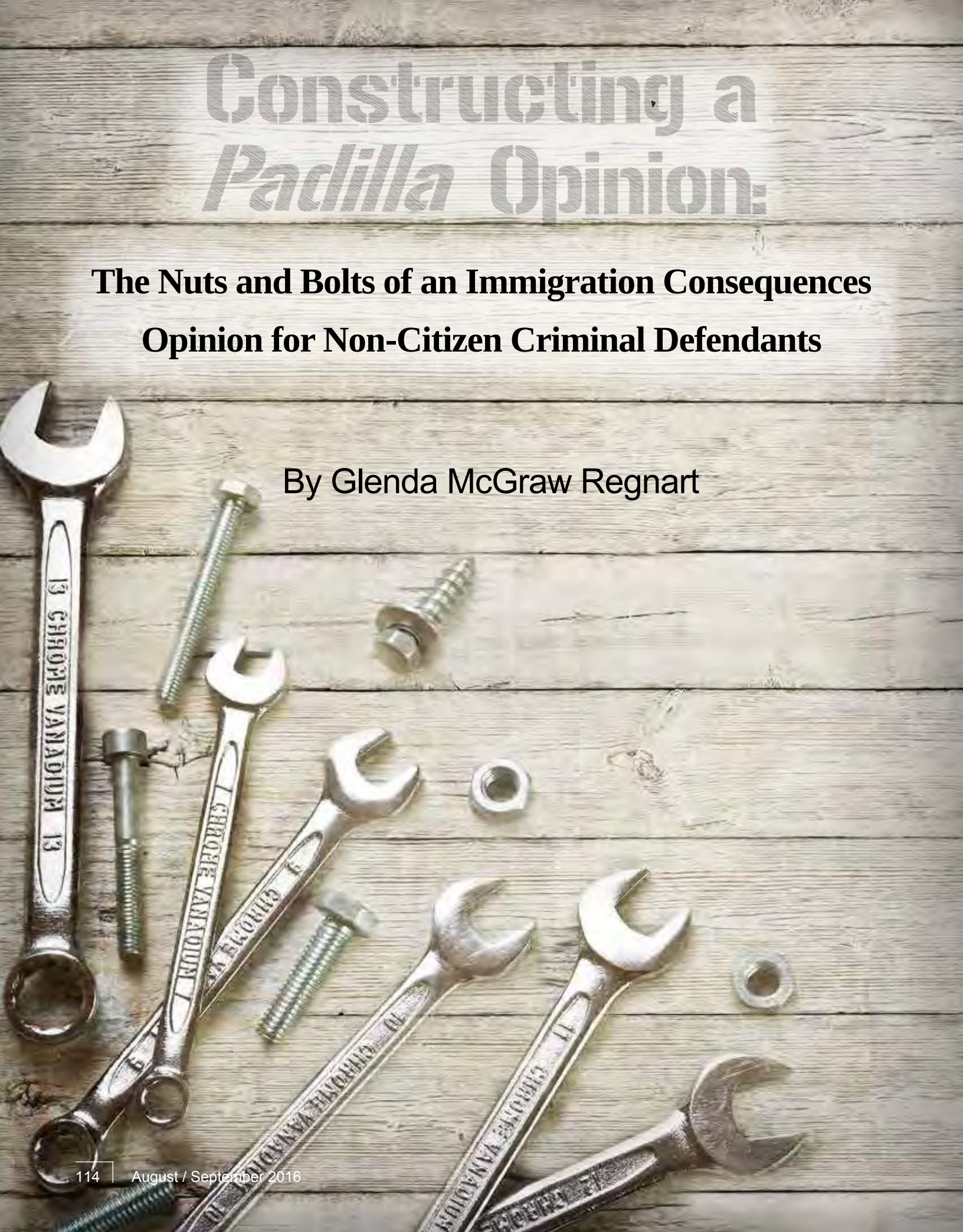
Constructing a *Padilla* Opinion:

The Nuts and Bolts of an Immigration Consequences Opinion for Non-Citizen Criminal Defendants

By Glenda McGraw Regnart



On March 31, 2010, the U.S. Supreme Court rendered *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed. 284 (2010), an undisputed watershed decision affecting criminal defense attorneys and immigration practitioners alike. As aptly stated by the Court:

> The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The "drastic measure" of deportation or removal is now virtually inevitable for a vast number of non-citizens convicted of crimes.[1]

The *Padilla* Court extended the Sixth Amendment's guarantee to effective assistance of counsel to non-citizen defendants, or immigrants, when entering a plea of guilty to any offense. In many instances, it is more reasonable for a non-citizen, who faces nearly automatic deportation, to decline a plea and go to trial — risking a longer prison term — than to plead guilty to an offense rendering deportation virtually certain.[2]

The Court specifically held that defense counsel were responsible for advising non-citizen clients of the risk of deportation arising from a guilty plea. Further, the Court provided that a defense attorney's failure to advise or misadvise could constitute ineffective assistance of counsel as outlined in *Strickland v. Washington*, 466 U.S. 668 (1984). The Court explained that, "by bringing deportation consequences into th[e] process," the parties may not only preserve the finality of pleas, but also may negotiate better agreements on behalf of the State and the non-citizen defendant.[3] Recognizing the significance of its holding, the Court cautioned:

> [I]mmigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain . . . When the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences. *But when the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear.*[4]

In the six years since the issuance of *Padilla*, criminal defense attorneys have grappled with the standard by which their counsel is measured. Criminal law, a legal specialty of its own, is now intersected with immigration law in a manner not previously conceived. Although the Court appeared to offer some level of comfort by limiting criminal defense attorneys to providing clear correct advice "when the deportation consequence is truly clear," the reality of immigration law is that the deportation consequence is rarely "truly clear." The volume of journal articles and scholarly works generated after *Padilla* is staggering and nuanced beyond the scope of this writing. In the years post-*Padilla*, prosecutors, defense counsel and judges were tasked with developing an understanding of immigration law and the consequences to ensure each defendant entered a knowing and intelligent plea able to withstand collateral attack.

Unfortunately for criminal attorneys, judges and prosecutors, casually venturing into immigration law is much like casually venturing into the federal tax code. Widely considered the most complex area of law, the immigration field is not the sort of landscape considered a safe harbor for dabbling. This article is designed to aid the criminal defense bar in partnering with immigration counsel to not only successfully satisfy the requirements prescribed in *Padilla*, but also to assist in navigating a path to avoid an adverse immigration consequence altogether.

Although the intersection of criminal and immigration law has long been artfully termed "crimmigration," the term generally referred to the convergence of the two methodologies. However, it did not wholly reference the skill set of providing counsel on the immigration consequences of criminal behavior. In recent years, savvy immigration practitioners found themselves uniquely poised to aid criminal attorneys in their efforts to fulfill the Court's mandate in *Padilla*. In doing so, a cottage industry was born. Today, the terms "*Padilla* opinion" and "*Padilla* advisals" are common parlance. The remainder of this article will focus on the nuts and bolts of a *Padilla* opinion, *i.e.*, what a criminal defense attorney should have available when advising a client of the potential immigration consequences of a guilty plea.

Enlist a Skilled Practitioner

As with many areas of the law, immigration law is often policy-driven, seemingly boundless and fluid. Its breadth encompasses family-based benefits, employer-based benefits, non-immigrant visas, removal defense, consular processing, asylum, refugees, pre- and post-order detention, etc. As recognized by the Massachusetts Supreme Judicial Court in *Commonwealth v. Lavrinenko*, "the ordinary, fallible criminal defense attorney may not be an expert on immigration law, but we expect such an attorney who learns of a complex immigration issue either to research the applicable immigration law or to seek guidance from an attorney knowledgeable in immigration law."[5] Indeed, courts addressing claims of ineffective assistance of counsel based on *Padilla* arguments are routinely chastising practitioners for deficiencies easily remedied by consultation.[6] To this end, the importance of securing a competent immigration attorney who specializes in removal defense or criminal consequences cannot be overstated.

Most state bar associations have immigration sections. Regardless, immigration attorneys are a well-organized group such that finding an advocate skilled in criminal consequences should not be onerous.[7] When hiring immigration counsel to draft an expert opinion or provide advice, a criminal defense attorney should anticipate assisting with as much information gathering as possible. Defense counsel will typically have immediate access to the non-citizen defendant and his or her family members,

all of whom are best suited to provide answers to standard intake questions and facilitate obtaining the factual and procedural background. A specialized immigration questionnaire is a highly advisable tool for use by defense counsel for issue spotting and fact gathering.[8]

Defendant Must Be a Non-Citizen to Trigger *Padilla*

Ostensibly, it may seem obvious whether an individual is or is not a U.S. citizen, yet the law of citizenship can be quite convoluted. Because *Padilla* advisals are not triggered when a U.S. citizen defendant enters a guilty plea, it is incumbent that an individual defendant's immigration status be conclusively determined by counsel. If a defendant states that he/she has lived in the United States for 12 years, that fact alone does not render him/her a citizen, nor does marriage to a U.S. citizen alone render a person a citizen. If a defendant claims to have been born abroad but believes himself/herself to be a U.S. citizen, conclusive proof should be sought to confirm. In numerous cases, an individual presumed to be an alien was in fact a U.S. citizen by either derivation or acquisition of citizenship through a parent(s) or grandparent. Conversely, an individual presumed to be a U.S. citizen can be rudely awakened to find himself/herself being deported to a country of which he/she has no memory.

Derivation of citizenship refers to citizenship that is acquired by operation of law without the need to apply for citizenship. Acquisition of citizenship refers to citizenship acquired at birth, by an individual born abroad, but whose parents or grandparents transmitted citizenship to the child pursuant to certain retention requirements.[9] The law of citizenship has evolved over time and, depending on an individual's date of birth, parents' marital status and their physical presence in the United States, the individual may have a viable claim to U.S. citizenship.

In 2000, Congress passed the Child Citizenship Act (CCA) which amended the Immigration and Nationality Act by providing that certain foreign-born children — including adopted children — currently residing in the United States as lawful permanent residents, could acquire citizenship automatically.[10] To be eligible, the child must meet the definition of "child" for naturalization purposes under immigration law and also must satisfy the following criteria:

- ► the child has at least one U.S. citizen parent (by birth or naturalization);
- ► the child is under 18 years of age;
- ► the child is currently residing permanently in the United States in the legal and physical custody of the U.S. citizen parent; and
- ► the child is a lawful permanent resident.

Thus, for non-citizen defendants born after Feb. 27, 1983, who hold a "green card" or Lawful Permanent Resident status, a close examination of their parents' and grandparents' immigration status is advisable to determine if the defendant may have become a U.S. citizen by operation of law. A *Padilla* opinion lacking discussion of a defendant's immigration status, including an analysis of potential derivation or acquisition of U.S. citizenship, is arguably patently defective.[11]

Immigration History

"Just as the ordinary physician must take a history from the patient before rendering a diagnosis, so too must the ordinary criminal defense attorney make a reasonable inquiry of his or her client regarding the client's history. . . ."[12] An expert immigration opinion necessarily includes a review of the non-citizen's immigration history. This should include birth date and location, all U.S. entry and/or admission information, any immigration benefits that have been conferred upon the individual and the dates of such, and all prior encounters with immigration officials. These encounters include any arrests, "returns" or removals (deportation) by U.S. Border Patrol, Customs and Border Protection, or Immigration and Customs Enforcement (ICE or legacy INS). The term "return" is often an informal reference to a Voluntary Return (VR) or a Voluntary Departure (VD). VR and VD are not equivalent under the law; if an individual indicates a prior return, he/she should be thoroughly interviewed to determine the scope of the events that occurred and how it may impact any future opportunities for discretionary relief.

Any appearances before an immigration judge (IJ) should be fully fleshed out. If the individual was previously granted an immigration benefit by an IJ, that information should be included, along with an explanation of its impact, if any, on the conferral of future immigration benefits. Because certain immigration benefits may only be granted one time per individual, it is important to know if that person has already received his/her opportunity to remain in the United States.[13] If a "one time" benefit has previously been accorded, even the seemingly smallest of crimes may render an individual subject to mandatory deportation.

In instances where a non-citizen defendant has an extensive immigration history, a Freedom of Information Act (FOIA) request to the Department of Homeland Security seeking the individual's "alien registration file" is the best practice to ensure all relevant information has been analyzed.

Complete Criminal History

The heart of any *Padilla* opinion is the discussion of the potential immigration consequences of the current or pending charges against the non-citizen defendant. However, those consequences will be addressed in a vacuum if the alien's full criminal history is not analyzed. For example, if a Lawful Permanent Resident (LPR or green-card holder) who has been a resident of the United States for more than 20 years is presently facing a sole criminal charge of forgery (presumably a crime involving moral turpitude) with a 30-day sentence, the immigration consequence for the conviction may be minimal, *i.e.*, a delay to his ability to naturalize. If that same LPR has a conviction from five years prior for mail fraud with a sentence of 10 months imprisonment, the immigration consequence becomes significant because that individual is now subject to deportation and mandatory detention for the pendency of his immigration case.[14]

For those non-citizens with a lengthy criminal history, each conviction should be addressed to determine its immigration impact on the defendant. It may well be that the non-citizen has heretofore been convicted of an aggravated felony offense and faces certain deportation, rendering any additional criminal conviction superfluous. But, that fact should be communicated in clear terms to afford the defendant an

opportunity to make a meaningful choice in the present case whether to enter plea negotiations or risk trial.

As part of any criminal history discussion, it is advantageous to incorporate a brief explanation of the term "conviction," as that term is not only statutorily defined under the Immigration and Nationality Act (INA) but also the subject of extensive case law interpretation.[15] The discussion also should mention the significance of any direct appeal of a criminal conviction *vis-à-vis* a collateral attack. Because a conviction for immigration purposes rarely comports with the term "conviction" under a state or federal construct, it is a topic worthy of elaboration in a *Padilla* opinion, as it can significantly impact defense litigation strategy.

Current or Pending Charges

The potential immigration consequences of a non-citizen's guilty plea to current or pending criminal charges are the core of the Court's directive to criminal defense attorneys in *Padilla*. Defense counsel should be prepared to provide complete charging documents to immigration counsel for review and analysis. Those pending charges will be juxtaposed to the non-citizen's immigration status, history and any prior criminal history to determine whether the defendant will be subject to certain deportation if he/she enters a plea of guilty to the offense as charged or to any negotiated offer by the prosecution, or decides to risk a trial. The required legal analysis, which exceeds the scope of this article, has evolved into a complex process of categorical, modified categorical and realistic probability tests which leave most practitioners adrift in an ocean of case law.[16] Complexities aside, immigration counsel should provide a thorough analysis of the statute of conviction (if the statute is divisible, the appropriate subsection), the conduct charged, and a determination of whether a guilty plea to the offense could result in either a charge of removability or inadmissibility. Ideally, immigration counsel will provide an analysis of both.

Returning to the example of the LPR with a prior forgery conviction currently facing a charge of mail fraud, as an LPR, he would be subject to removal from the United States. If, however, he travels abroad

for vacation, upon his return to the United States, an immigration officer must inspect him and determine if he is "admissible." The INA contains two distinct statutory schemes — one for those who are removable, and one for those who are inadmissible. The same individual may not be deemed removable from the United States but yet be deemed inadmissible should he/she depart and attempt to reenter. This is an especially important distinction for non-citizens since many foreign nationals regularly travel abroad to visit relatives in their home countries but, upon their return, potentially face an inadmissibility determination at the port of entry.

In addition to providing an analysis of the immigration consequence to a pending charge, immigration counsel will ideally assist defense counsel in negotiating a plea to an offense that avoids a deportation consequence altogether. Barring the best scenario result, at a minimum, the negotiated plea should render the non-citizen eligible for discretionary relief from removal.

Removal Process

For most attorneys, a brief overview of the removal process can prove beneficial by advising the non-citizen client of what may lie ahead. Under current law, aliens placed into removal proceedings are not entitled to appointed counsel, thus any legal representation must be obtained by the individual or by his/her family members. Given the nature of immigration law and the consequences it can bear, the importance of competent immigration counsel cannot be overstated and an immigration consequences opinion should include a brief explanation of the removal process and how that process differs from criminal proceedings.

Removal (formerly called deportation or exclusion) proceedings under § 240 of the INA are initiated by the U.S. Department of Homeland Security, with service of a Notice to Appear (NTA) in immigration court.[17] Although certain non-citizens may be ordered removed from the United States via other provisions of the INA, whatever method the Department of Homeland Security employs to attempt to deport an individual, the basis for deportation must be one which renders the person either removable or inadmissible.

Whether a particular individual will be served with a NTA or another type of immigration charging document depends on a number of factors. ICE, like any other government agency, has limited resources. Some of the factors unique to ICE include detention space constraints (approximately 34,000 detention beds nationwide) and well-publicized criteria for prioritizing and targeting certain types of individuals for removal from the United States. Under the current administration, ICE has tried to prioritize removals by focusing on individuals who pose a threat to national security, egregious criminal offenders, and recent border entrants.[18] A non-citizen defendant may first encounter ICE officers while serving a criminal sentence in state or federal custody or while reporting on probation. If ICE determines the individual is subject to removal from the United States, either through in-person interview or by remote document review, the agency will generally place a "detainer" on the individual. The detainer requests the custodian to notify

ICE when the alien has completed his/her criminal sentence and can be transferred into ICE custody for commencement of removal proceedings or to execute removal, if an outstanding order of removal already exists.[19]

Relief from Removal

Discretionary relief from removal is generally available for certain non-citizens who have not been convicted of an aggravated felony and otherwise meet the statutory criteria to apply for relief. In other words, an individual may be deportable, yet remain eligible for relief from deportation, sometimes referred to as a "waiver" or "cancellation."[20] Such relief is often requested before an IJ. Mere eligibility for the relief is not a guarantee that it will be granted. Again, the assistance of a competent attorney to determine eligibility for and the likelihood of receiving discretionary relief from removal is singularly important.

Naturalization

Part of any discussion of immigration consequences to criminal activity should be a succinct analysis of the consequence to a non-citizen's efforts to become a naturalized citizen. Serving a criminal sentence or being on probation for a criminal offense is a bar to obtaining U.S. citizenship.[21] Also, an applicant for U.S. citizenship must show "good moral character," which generally means that an applicant cannot have any serious criminal convictions, such as violent crimes, within the five years prior to the date on the application for naturalization.[22] More importantly, a conviction for an aggravated felony serves as a permanent bar to obtaining U.S. citizenship.[23] For those defendants who possess a green card, it is significant that they understand the fate of their future ability to become naturalized U.S. citizens.

Miscellaneous Caveats

As with most expert opinion letters, a *Padilla* letter typically contains a small host of caveats. Such caveats may include that: the opinion letter is based on immigration law as it exists today; the U.S. Government's interpretation and enforcement of immigration laws can change over time rendering the opinion inaccurate; and immigration laws have changed dramatically over time and could change again in the future and be applied retroactively. Such disclaimers should serve to make defense counsel aware that the shelf life of an immigration opinion may be short-lived, even if the client's criminality is not.

Conclusion and Recommendation

A conclusion section is axiomatic to any formal writing but, in the context of an immigration consequences opinion, the inclusion of specific recommendations to aid plea negotiations can prove highly valuable. For most criminal defense attorneys, simply being advised their client is facing certain deportation if he/she accepts the offer from the prosecution is helpful and may satisfy the threshold requirements of *Padilla*. But, being advised of possible non-deportable offenses, with which to barter, can make the difference between removal and remaining in the United States. The hallmark of a skilled criminal and immigration team is one with knowledge of lesser included offenses, sentencing strategies, and the impact of collateral orders — all of which may allow a defendant to avoid an immigration consequence altogether.

FOOTNOTES

1. Padilla, 130 S.Ct. at 1479 (internal citation omitted).

2. Padilla, 130 S.Ct. at 1484 ("[P]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence," *quoting* INS v. St. Cyr, 533 U.S. 289, 322 (2001) (alteration omitted)).

3. Padilla, 130 S.Ct. at 1486.

4. Padilla, 130 S.Ct. at 1484 (emphasis added) (internal citations omitted).

5. Commonwealth v. Lavrinenko, 473 Mass. 42, FN. 15 (Mass. Sup. Ct 2015) (*citing* ABA Criminal Justice Standards for the Defense Function, Standard 4-5.5 (4th ed. 2015)).

6. State v. Sandoval, 171 Wash.2d 163, 172 (2011) (counsel required to correctly advise or seek consultation to correctly advise of deportation consequence.); Lavrinenko, 473 Mass. 42 (remand after finding of deficient performance); U.S. v. Rodriguez-Vega, No. 13-56415, (9 Cir. Aug. 14, 2015) (attorney's, not the court's, duty to warn of consequences and warning after plea is deficient).

7. For additional resources, see *www.ailalawyer.com*; *www.ilrc.org*; and *www.americanimmigrationcouncil.org*.

8. For additional resources on intake questionnaires, see *https://cliniclegal.org*.

9. *See* 8 U.S.C. § 301, *et seq.*

10. Child Citizenship Act of 2000 (effective date Feb. 27, 2001); codified at 8 U.S.C. § 320(a)(1)-(3).

11. *See* Lavrinenko, 473 Mass. at 53 (failure of criminal defense attorney to make reasonable inquiry of client regarding immigration status is sufficient to satisfy the deficient performance prong of ineffective assistance analysis) (*citing* Commonwealth v. Clarke, 460 Mass. 30, 45 (2011)).

12. Lavrinenko, 473 Mass. at 51.

13. *See generally* 8 U.S.C. § 240A(c)(6) and 8 U.S.C. § 240B(c).

14. *See* 8 U.S.C. §§ 236(c)(1)(B) and 237(a)(2)(A)(ii).

15. *See* 8 U.S.C. § 101(a)(48)(A)-(B); Matter of Cuellar-Gomez, 25 I&N Dec. 850 (BIA 2012) (formal judgment of guilt by a municipal court is a conviction for immigration purposes); Matter of Calvillo-Garcia, 26 I&N Dec. 697 (BIA 2015) (term of confinement in a substance abuse treatment facility as a condition of probation constitutes a "term of confinement" under section 101(a)(48)(B) of the Immigration and Nationality Act).

16. For detailed discussions, *see* Taylor v. United States, 495 U.S. 575, 110 S.Ct. 2143 (1990); Moncrieffe v. Holder, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013); Descamps v. United States, 133 S.Ct. 2276 (2013).

17. *See* 8 U.S.C. §§ 239(a) and 240(a).

18. *See generally*, Memorandum from Jeh Johnson, Secretary of the U.S. Department of Homeland Security, to Acting Director Thomas S. Winkowski, U.S. Immigration and Customs Enforcement, "Policies for the Apprehension, Detention and Removal of Undocumented Immigrants" (Nov. 20, 2014) (copy on file with the U.S. Department of Homeland Security).

19. *See* Immigration Enforcement, *www.ice.gov/pep* (2016) for a broader discussion.

20. *See e.g.*, 8 U.S.C. §§ 212(h); 240A(a); and 240A(b).

21. 8 C.F.R. § 316.10(c)(1)(2015).

22. 8 C.F.R. § 316.10(b)(2)(2015).

23. 8 C.F.R. § 316.10((b)(ii)(2015).

Glenda McGraw Regnart, currently the executive director of Central Louisiana Interfaith Immigration Center in Alexandria, spent 15 years working in the federal government, mostly with the Department of Homeland Security, U.S. Immigration and Customs Enforcement. She was stationed at the Oakdale, La., Federal Detention Complex and prosecuted removal cases involving criminal aliens, national security and high-profile immigration removals. She holds a BS degree in economics from Louisiana College, an MBA degree from the University of Louisiana-Monroe and a JD degree from Mississippi College School of Law. She is a member of the Mississippi and Alaska Bar Associations and the American Immigration Lawyers Association. (gmraborn@gmail.com; 4400 Coliseum Blvd., Alexandria, LA 71303)