

VACATING A CONVICTION (THE *PADILLA* RULE)

This section applies to individuals who have pled to a crime and whose criminal lawyers did not tell them that their plea would lead to deportation.

Did my criminal lawyer have to tell me that my plea would lead to deportation?

- Criminal lawyers must advise their noncitizen clients of the consequences that taking a plea will have on their immigration status, such as deportation.
- Criminal lawyers who do not advise their noncitizen clients of the immigration consequences of their pleas violate their duty to provide effective assistance of counsel under the Sixth Amendment of the U.S. Constitution.

You MAY be able to get your conviction thrown out (vacated) if:

- You would have rejected the plea and gone to trial; AND
- One of the following is true:
 - Your defense lawyer never asked about your immigration status,
 - Your defense lawyer did not tell you that accepting the plea could lead to deportation.
 - Your lawyer told you that you would not be deported if you accepted the plea.

Pleas taken on or after March 31, 2010 (the date that *Padilla* was decided)

- The *Padilla* decision definitely applies to plea bargains **on or after** March 31, 2010. In Florida, it is very important that you file your *Padilla* post-conviction motion within two (2) years of the date of your plea. Normally, the rule is that post-conviction motions must be filed within this deadline. Given the U.S. Supreme Court's decision in *Chaidez v. US*, it is complicated to argue that pleas entered into prior to March 31, 2010 can be vacated under *Padilla*.

What does it mean to vacate your conviction?

- Vacating a conviction means that the guilty conviction will be removed from your record and *you can be charged again for the same criminal offense*. The second time you are prosecuted, you may be able to plead to an offense that does not result in deportation. ***However, the result might be worse. You might be found guilty again and have to serve another (potentially longer) sentence.***
- Before trying to vacate your conviction, you should consult with a criminal lawyer to see if filing the motion to vacate is the best option for you.

How do you vacate your conviction?

- You can try to vacate your conviction by filing a post-conviction motion to vacate plea, judgment and sentence. This motion is filed with the *criminal court* in which you were convicted. The motion would also explain that if you had known that you would be deported you would have taken the plea and would have gone to trial. In Florida, these motions are filed under Florida Rule of Criminal Procedure 3.850.

How do you show that your defense lawyer was ineffective?

- In your post-conviction motion, you must show that your lawyer's representation was objectively unreasonable.
- You should explain that your lawyer made a mistake because he or she did not ask you about your immigration status or tell you that you would be deported if you accepted the plea.
- You must also show that, if you had known of the immigration consequences, you would have rejected the plea agreement and would have gone to trial in your criminal case.
- You should explain that you were harmed by the lawyer's mistake because you are now in removal (deportation) proceedings.

It can be very difficult to prove that your lawyer was ineffective in representing you. It is usually best to have a criminal defense lawyer file a post-conviction motion for you.

Can I file a motion to vacate my conviction if my lawyer failed to warn me about something other than immigration?

- Yes, the U.S. Supreme Court has not yet said whether you can vacate your conviction because your criminal defense lawyer failed to advise you that accepting a plea would cause you to:
 - Lose welfare benefits;
 - Become ineligible to possess firearms;
 - Be dishonorably discharged from the Armed Forces;
 - Lose business or professional licenses;
 - Lose parental rights.
- However, you can try to vacate your conviction for one of these reasons.

What else should you know about post-conviction relief?

- Post-conviction relief is a long process.
- You may remain detained throughout the entirety of this process.
- The immigration judge usually will not indefinitely delay your immigration case to wait for the criminal court to decide on your motion to vacate. But you should tell the immigration judge if you have filed this motion.
- As mentioned above, you may also be placed in criminal jail again and serve another sentence.