



PRACTICE ADVISORY: POST-CONVICTION RELIEF IN VIRGINIA

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****NOTE: Although post-conviction relief may benefit some noncitizens facing removal, immigration attorneys are urged to note that noncitizens facing active removal proceedings, particularly those detained, likely will not benefit from the relief if the conviction is not vacated prior to the conclusion of the proceedings and deportation.****

In the 2010 case *Padilla v. Kentucky*, 559 U.S. 356 (2010) the Supreme Court held that criminal defense attorneys are required under the Sixth and Fourteenth Amendments to advise noncitizen clients of the immigration consequences of a plea deal. In 2015, the Supreme Court of Virginia issued a decision in the case of *Zemene v. Clarke*, 289 Va. 303 (2015), that articulated a broad view of defense attorneys' obligations under *Padilla* to their immigrant clients in Virginia.¹

Despite the powerful constitutional obligation set out in *Padilla* and *Zemene*, a large number of indigent noncitizens in Virginia are not advised of immigration consequences prior to taking a criminal plea and receive dispositions that trigger near-certain deportation without understanding what the impact will be. In Virginia there are few resources available for these indigent, detained noncitizens who are in deportation proceedings as a result of criminal plea deals in which they were not advised of the immigration consequences. There are also strict statutory limitations under Virginia state law restricting who may seek post-conviction relief, or "PCR," to vacate criminal conviction. This practice advisory provides a brief overview of the mechanism for PCR, jurisdictional bars, and legal standards for vacating a conviction in Virginia under *Padilla* and *Zemene*.

***Padilla* Post-Conviction Relief in Virginia: Petition for a Writ of Habeas Corpus**

The purpose of a PCR claim under *Padilla* is to vacate a noncitizen's criminal conviction that has triggered negative immigration consequences due to ineffective assistance of counsel. In Virginia, the primary procedure to bring a PCR claim is a petition for writ of habeas corpus in state court.² The petition is brought through a civil proceeding, with the cause of action being violations of the Sixth and Fourteenth Amendments. Although this advisory focuses on petitions for writ of habeas corpus, a motion to withdraw a guilty plea may also be a useful remedy for a noncitizen whose plea has had negative immigration consequences.³ Regardless of the mechanism, in order for the

¹ See CAIR Coalition Practice Advisory on *Zemene v. Clarke*:

<https://www.caircoalition.org/sites/caircoalition2016/files/blog/2015/11/20150306-Zemene-v-Clarke-Practice-Advisory-Final.pdf>

² The petition should be filed in the Circuit Court where the conviction was finalized. See Va. Code § 8.01-654(B)(1).

³ A motion to withdraw a guilty plea is available (1) during the time period between a finding of guilt/a guilty plea and the sentencing hearing and (2) in the case of a deferred disposition (i.e. Va. Code § 18.2-251; Va. Code § 18.2-57.3; and

vacatur or plea withdrawal to be valid for immigration purposes, the conviction must be vacated on account of substantive constitutional or procedural legal defect in the underlying plea.⁴

Jurisdictional Bars: Eligibility for Post-Conviction Relief in Virginia

There are two primary eligibility requirements for PCR on a state conviction in Virginia through a writ of habeas corpus:

- (1) the petition must be filed within two years from the date the plea was entered in order to be “within two years from the date of final judgment in the trial court”;⁵ and
- (2) the noncitizen must still be in the legal custody of Virginia so that he or she is detained “without lawful authority through challenge to a conviction”,⁶ i.e. with a suspended sentence that is still open⁷ (in which case the proper respondent to name on the habeas petition would be the county Sheriff or Director of the Virginia Department of Corrections⁸) or while still serving jail time on a sentence in a Virginia jail.

The Two Prongs of an Ineffective Assistance of Counsel Claim

The *Padilla* legal standard for PCR claims derives from *Strickland v. Washington*, 466 U.S. 668 (1984), which set out a two-pronged inquiry to determine ineffective assistance of counsel:⁹

- (1) The performance prong: Whether counsel’s performance fell below an objective standard of reasonableness; and
- (2) The prejudice prong: The defendant was prejudiced by counsel’s deficient

Va. Code § 19.2-303.2), during the deferred disposition period. Va. Code § 19.2-296 provides that “[a] motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of a sentence is suspended; but to correct manifest injustice, the court within twenty-one days after entry of final order may set aside the judgment of conviction and permit the defendant to withdraw his plea.” The reason that a guilty plea in a deferred disposition may need to be vacated is that for purposes of immigration law, a guilty plea constitutes a conviction regardless of whether the disposition is deferred and may be dismissed. *See Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011) (holding a Virginia deferred disposition is not a conviction for immigration purposes only if (1) the defendant pleads **not** guilty and (2) makes no admission of facts sufficient for a finding of guilt); CAIR Coalition Conviction Primer: <https://www.caircoalition.org/sites/caircoalition2016/files/20150904%20-%20Primer%20-%20Conviction.pdf>; CAIR Coalition Practice Advisory: Withdrawing a “Conviction” for Immigration Purposes <https://www.caircoalition.org/sites/caircoalition2016/files/blog/2016/04/4.28.16-PA-Avoiding-or-Withdrawing-Conviction.pdf>.

⁴ *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003). Pleas that are withdrawn upon completion of certain conditions imposed by the court or because of justice or humanitarian reasons are not considered to be withdrawn for immigration purposes.

⁵ Va. Code 8.01-654(A)(2). Alternatively, the petition must be filed “within one year from either final disposition of the direct appeal in state court or the time for filing such appeal has expired, whichever is later.” *Id.*

⁶ Va. Code § 8.01-654(B)(3) (habeas petition may allege “detention without lawful authority through challenge to a conviction, although the sentence imposed for such conviction is suspended.”).

⁷ Detention does not require physical custody but may be “a deprivation of liberty without present incarceration.” *Maleng v. Cook*, 490 U.S. 488 (1989); *see also* Letter Ruling, *Lopez v. Jett*, CL 15-976, at *2 (Va. Cir. Mar. 3, 2016).

⁸ *See* Va. Code § 8.01-658(A)(3) (stating that the respondent shall be the local sheriff if the suspended sentence is less than one year and the Director of the Dept. of Corrections if the suspended sentence is one year or more); *Com. v. Barrera*, No. 130772, 2014 WL 11398551, at *2 (Va. Feb. 27, 2014). The respondent is never the probation office.

⁹ *See also* ABA Standards for Criminal Justice Pleas of Guilty (3d. ed. 1999) cmt. 14-3.2(f).

performance.¹⁰

The chart below lays out the relevant standards to sufficiently satisfy each prong in order to present a successful PCR claim:

<i>(1) Performance Prong</i>	<i>(2) Prejudice Prong</i>
<p>Criminal defense attorney's failure to:</p> <ol style="list-style-type: none">1) Investigate "the precise nature" of the client's immigration status;<ul style="list-style-type: none">➤ I.e. asking nothing about status or merely asking "are you legal?" <i>Lopez v. Jett</i>, CL 15-976, at 2 (Va. Cir. Mar. 3, 2016).2) Determine if there are "potential negative consequences" to the client's immigration status arising from a contemplated plea;3) Broach the subject of any potential immigration consequences with the Commonwealth during plea negotiations;<ul style="list-style-type: none">➤ Particularly if another immigration-safe/safer plea disposition was reasonably available that would not have triggered deportation or preserved defenses against deportation.4) Discuss with the client the likelihood of the potential negative consequences that will flow from the plea.<ul style="list-style-type: none">➤ I.e. no advice or misadvice on immigration consequences. <i>Padilla</i>, 559 U.S. at 378.➤ Equivocal advice "when the deportation consequence is truly clear." <i>Padilla</i>, 559 U.S. at 369. <p><i>Zemene</i>, 289 Va. at 314.</p>	<ol style="list-style-type: none">1) Whether it would have been rational for the noncitizen to reject the plea and gone to trial in the first place had he or she been properly advised of the immigration consequences (standard is NOT whether the noncitizen can demonstrate a likelihood of acquittal at trial). See <i>Padilla</i>, 559 U.S. at 372; <i>Zemene</i>, 289 Va. at 316; <i>Clarke v. Galdamez</i>, Record # 151022 (Va. Jul. 2, 2015).<ul style="list-style-type: none">➤ Noncitizen willing to risk worse sentence with more jail time to avoid deportation.➤ Defenses available to original charge that would have made it rational to go to trial.➤ <i>But see Com. v. Barrera</i>, No. 130772, 2014 WL 11398551, at *3 (Va. Feb. 27, 2014) (whether noncitizen would have gone to trial inapposite if plea was to a conviction not originally charged).2) Whether counsel's constitutionally ineffective performance affected the outcome of the plea process. <i>Zemene</i>, 289 Va. at 314. <p>Additional factors to establish prejudice involving direct consequences triggered by the plea:</p> <ul style="list-style-type: none">➤ <i>Removal proceedings & deportation</i>➤ <i>Loss of client's lawful immigration status</i>➤ <i>Strong ties to US/separation from family</i>➤ <i>Mandatory no-bond immigration detention</i>➤ <i>Ineligibility for relief from removal</i>➤ <i>Deportation to persecution</i>➤ <i>Availability of "immigration-safe" disposition</i>

¹⁰ The *Strickland* test applies equally to ineffective assistance of counsel claims brought pursuant to guilty pleas as it does to those obtained at trial. *Missouri v. Frye*, 132 S.Ct. 1399, 1408 (2012); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

Potential Post-Conviction Relief Pitfalls

It is critically important to note that even if a conviction is successfully vacated for ineffective assistance of counsel, the noncitizen runs the risk that:

- (1) The prosecution may re-charge them with the same charges they faced originally;
- (2) They may have to be prepared to go to trial on those charges, and
- (3) If they lose at trial, they may receive an even worse criminal sentence than what they originally pled to (which could lead to more jail time and similar or worse immigration consequences).

On the other hand, after a noncitizen successfully vacates their conviction, there may be alternative pleas that the prosecution in the case is willing to negotiate to, which do not trigger the same severe immigration consequences as the original plea. For this reason, it is important to evaluate the alternatives in each potential PCR case prior to filing a petition for a writ of habeas corpus.

For questions about this practice advisory, please contact Adina Appelbaum at adina@caircoalition.org. For additional reference guides and practice advisories regarding the immigration consequences of Virginia offenses, visit our website at <https://www.caircoalition.org/legal-resources>.

This practice advisory does not constitute legal advice. It is intended for the use of legal professionals and is not meant to serve as a substitute for a lawyer's obligation to conduct independent analysis and provide legal advice tailored to the facts and circumstances of a client's case.