

## **POST CONVICTION RELIEF - PADILLA V. KENTUCKY AND OTHER BASIC CRIMINAL ISSUES IN IMMIGRATION MATTERS**

Any foreign citizen seeking to visit, or immigrate to, the United States, may be questioned about any prior arrests. In many cases the applicant may need to obtain assistance from a qualified US immigration lawyer in dealing with the possible US immigration consequences of that arrest, even if the applicant does not believe there was a "conviction" as most people might understand that term. The potential grounds of criminal inadmissibility are included on the link: [http://travel.state.gov/visa/frvi/ineligibilities/ineligibilities\\_1364.html](http://travel.state.gov/visa/frvi/ineligibilities/ineligibilities_1364.html)

For any non-citizen present in the U.S., any incident in which he or she is taken into police custody may have immigration consequences, sometimes very serious ones. No non-citizen should accept or reject a plea offer in a criminal case without first consulting with an immigration lawyer.

If a criminal defendant was convicted of a crime in the past, without receiving effective assistance from his or her lawyer, he or she may be entitled to have that conviction set aside through a process commonly referred to in State courts as "post conviction relief." Getting that relief does not mean that the criminal case is dismissed, but that the defendant is restored to the position he or she was in before the conviction.

On March 31, 2010 the United States Supreme Court held that a non citizen defendant in a serious state drug trafficking case had a federal constitutional right to be advised of the almost certain removal from the U.S. that his guilty plea would produce. Padilla v. Kentucky, 130 S. Ct. 1473, opinion issued (3/31/2010)

Standard form plea petitions used by courts in Oregon and many other states contain a warning to the effect that "if you are not a U.S. citizen, conviction may lead to adverse immigration consequences, removal from the United States or ineligibility for immigration benefits." But, in many cases, such as convictions for certain drug offenses, domestic violence charges, sexual abuse of minors and many other crimes, conviction will produce, not "possible", but almost certain removal from the U.S., even for long term permanent residents who can recall no other country as their home. The Padilla decision raises a number of questions for non U.S. Citizens who may now face removal because of a prior guilty plea in a criminal case. Unfortunately, the US Supreme Court has also recently ruled that, as a matter of federal constitutional law, its holding in Padilla is **not** retroactive, Chaidz v. U.S., (2/13/2013). The precise nature of the relief available, in Oregon for instance, following the Padilla decision, remains to be clarified by further Oregon court decisions.

Where a non citizen entered a guilty plea without being cautioned at all of the immigration risks, or was incorrectly or inadequately advised by his lawyer, but now faces

certain removal because of that conviction, the non-citizen may be entitled to "post conviction relief." However, depending on the facts, including the specific facts, timeliness of the application, and the attitude of the prosecution, that process can be quite involved, expensive and time consuming. In many cases the chances for success may be quite uncertain, or even unlikely. However, if a non citizen has no other realistic chance of avoiding removal from the United States, he, his friends and his family may decide there is no other option but to take the risk and spend the money to pursue post conviction relief.

Any non citizen at risk of removal due to a prior criminal conviction must be aware that many, if not most, states have statutes of limitations for the filing for this type of "post conviction relief." Oregon's statute is two years from the date the judgment of conviction became final. Any non citizen with a criminal conviction for which he or she might be entitled to Padilla post conviction relief, should consult with qualified legal counsel as soon as possible.