



Washington Defender Association's
Immigration Project
www.defensenet.org/immigration-project

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7 Steps to Putting Together Your PCR Claim

The following steps are essential to preparing a complete motion for immigration-related post-conviction relief as a result of ineffective assistance of counsel under the Sixth Amendment duties described in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). This resource is meant to be used in conjunction with WDA's Immigration Project's *Guide to Filing for Immigration-Related PCR Relief in Washington*, which provides a more comprehensive legal framework and analysis for briefing your PCR claim. It is available at <http://www.defensenet.org/immigration-project/immigration-resources>.

7 Steps to Putting Together Your PCR Claim

1. Obtain your Client's Complete Criminal Record
2. Identify your Client's Immigration Status & Consult With an Immigration Lawyer
3. Clearly Identify the Immigration Consequences Resulting from the Conviction
 - Removability (Deportability) and Loss of Lawful Status
 - Ineligibility for Relief from Deportation
 - Inability to Obtain Lawful Immigration Status
4. Establish Trial Counsel's Deficient Performance
5. Demonstrate Prejudice to Client by Tying Conviction to Immigration Consequences
6. Select Appropriate Forum for PCR
7. File motion in a Timely Manner

1. Obtain the Client's Complete Criminal Record

After meeting with a client who alleges ineffective assistance of counsel, the first step in any post-conviction relief proceeding is to conduct a thorough investigation of the case and assess the relevant facts. Defense attorneys should request a copy of the original casefile from the defender who represented the client at the plea hearing and obtain from the court the following case records:

- Information/Complaint
- Amended Information/Complaint
- Certification of Probable Cause
- Statement of Defendant on Plea of Guilty
- Judgment and Sentence
- Plea agreement
- Docket
- Transcript/recording of plea hearing
- Transcript/recording of sentencing hearing
- Trial Counsel's notes and communications

2. Identify the Client's Immigration Status & Consult With an Immigration Lawyer

Whether filing to withdraw a plea of guilty under CrR 7.8(b) or submitting a personal restraint petition (PRP) at the court of appeals on behalf of a non-citizen, the motion must clearly identify the client's immigration status and explain the immigration consequences resulting from the conviction. To correctly do so, defense counsel must consult with a competent private immigration attorney who can make a clear connection between the client's conviction and the resulting immigration consequences. The Washington Defender Association's (WDA) Immigration Project is also available to provide case-specific analysis and prepare an affidavit for use in post-conviction relief proceedings.

Whenever possible, defense counsel should obtain a signed affidavit from WDA's Immigration Project or immigration counsel clearly explaining the relevant immigration consequences and tying those consequences directly to the underlying conviction.

3. Clearly Identify the Immigration Consequences Resulting from the Conviction

Immigration consequences of a conviction will vary depending on the client's status, but will fall into one of three categories:

a. Removability (Deportability) and Loss of Lawful Status

Certain criminal convictions automatically trigger the initiation of deportation proceedings against the immigrant defendant after they are released from state custody. Any non-citizen, regardless of whether they are undocumented or present with legal status, may be subject to deportation subsequent to a conviction for a deportable offense.

If the individual is unsuccessful in applying for relief, or no form of relief is available to them, the immigrant is removed to their country of origin (most common) or to a safe third country. Non-citizens with legal status, such as lawful permanent residents (LPRs, colloquially known as green card holders), refugees, and current visa holders, are permanently stripped of their legal status upon being ordered deported by an immigration judge.

b. Ineligibility for Relief from Removal (Deportation)

Defendants in deportation proceedings may be eligible for various forms of relief that, if granted, allow them to avoid an order of deportation. For clients with lawful status, certain serious convictions, for example, those classified under immigration law as aggravated felonies, bar waivers of deportation even for long-time green card holders. For undocumented clients, there are a wide range of convictions that can preclude them from even applying for discretionary relief from deportation. For example, a conviction may render an undocumented defendant inadmissible to the United States. As a result, the defendant would be barred from applying for cancellation of removal which is often the only avenue an undocumented person has to avoid deportation. They would thus face virtually automatic deportation.

Another common scenario is that but for the undocumented client's conviction he would be eligible for an administrative relief program granting temporary "deferred action status." Currently, the government is choosing not to commence deportation proceedings against individuals with deferred action status. Deferred Action for Childhood Arrivals (DACA) provides temporary status for undocumented immigrants who entered the U.S. as children.¹

c. Inability to Obtain Lawful Immigration Status

Certain convictions trigger grounds of inadmissibility and deportation under the immigration laws which bar many paths to obtaining lawful status. There are several scenarios in which this could occur. For example, a conviction triggering one of these grounds might preclude an otherwise eligible LPR from becoming a United States citizen. It could also prevent an undocumented immigrant from adjusting to permanent residency (i.e. becoming a green card holder) upon

¹ See WDA's Immigration Project website for an advisory on DACA: <http://www.defensenet.org/immigration-project/immigration-resources>.

marriage to a United States citizen, for example. Additionally, a conviction might bar an immigrant client from applying for paths to lawful status such as asylum or a U-Visa (for undocumented crime victims).

4. Establish Trial Counsel's Deficient Performance

PCR lawyers must effectively demonstrate how the trial attorney failed to comply with prevailing professional norms in discharging his Sixth Amendment duty of effective assistance. If the answer to any of the following questions is "No," trial counsel did not comport with his *Padilla* obligations.

- Did counsel identify the client as a non-citizen and correctly ascertain his immigration status?
- Was the client given advice about immigration consequences and was that advice accurate?
- Did counsel factor immigration consequences into the plea negotiation and sentencing advocacy in accordance with the client's goals?

The next step is to assess which available resources at the time of the conviction that trial counsel should have consulted to determine the relevant immigration consequences. To identify whether a particular plea carries risk of deportation, a trial attorney should have done the following as a matter of practice:

- Perhaps most importantly, defense counsel should consult WDA's Immigration Project to obtain free and immediate case-specific analysis on the immigration consequences of Washington State crimes. WDA's Immigration Project is funded by the legislature to provide this exact service.
- Read the text of the applicable immigration statute(s) and relevant case law at the time of the conviction.
- Follow the advice of numerous practice guides including consulting treatises on immigration law. Note: this is particularly important if the conviction occurred prior to WDA's Immigration Project founding in 1999.
- Consult the American Bar Association and American Immigration Lawyers Association manuals on representing immigrant clients.

Ideally, PCR attorneys should obtain an affidavit from the trial attorney clearly outlining the steps she took (or failed to take) and articulating any immigration advice she provided to the client. If the trial attorney refuses to provide an affidavit, submit a statement in the briefing to this effect and highlight the defendant's story. Include an affidavit from competent immigration counsel detailing the immigration consequences by clearly stating the relevant statutes and case law. State what the best available alternatives would have been. Include in the defendant's affidavit what happened, the importance of immigration consequences and avoiding deportation, and how s/he would have rejected the plea offer and risked going to trial if s/he had been properly advised.

5. Demonstrate Prejudice to Client by Tying Conviction to Immigration Consequences

When defense counsel fails to adequately inform their non-citizen client of the immigration consequences of a guilty plea, the resulting detriment may include loss of status or eligibility for benefits, and as the *Padilla* Court noted, can be as severe as automatic deportation from the United States. Given the necessary showing of prejudice required to prove ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), it is paramount that lawyers filing for post-conviction relief consult with WDA's Immigration Project or a competent immigration attorney to identify the specific immigration consequences of the plea for the client given their immigration status, immigration history and criminal history at the time of the case.

In *State v. Sandoval*, the Court held that prejudice was established where counsel's misadvice resulted in deportation and foreclosed Mr. Sandoval's consideration of going to trial to avoid deportation. 240 P.3d 1015, 1022 (2011) ("Although Sandoval would have risked a longer prison term by going to trial, the deportation consequence of his guilty plea is also 'a particularly severe penalty.' Given the severity of the deportation consequence, we think Sandoval would have been rational to take his chances at trial.") (internal citations omitted) (quoting *Padilla*, 130 S.Ct. at 1481). Therefore, it is imperative that PCR counsel identify the specific immigration harm caused to their non-citizen client and link it directly to trial counsel's deficient performance to demonstrate prejudice.

Defense counsel should also obtain a declaration from the client establishing his status at the time of the conviction and outlining his relevant goals, e.g. to avoid deportation, preserve eligibility for relief, or to obtain or adjust lawful status at a future date. It is important to convey that the client would have been willing to go to trial to avoid or mitigate the potential immigration consequences had they understood them at the time of accepting the plea.

6. Select Appropriate Forum for PCR

Judgments prejudiced by ineffective assistance of counsel may be collaterally attacked via a motion to withdraw a plea of guilty under CrR/CrRLJ 7.8(b) (filed in the court of original jurisdiction) or through a personal restraint petition (PRP) (filed in appellate court). The grounds for relief are substantially similar in both petitions although the procedural requirements vary. The choice of vehicle hinges largely on the client's present circumstances. If time is a major consideration, petitioning under CrR/CrRLJ 7.8(b) would be the best choice since a motion can be brought to hearing in a relatively short period of time whereas it can take years for a decision to be reached on a PRP.

In addition to expediency, a 7.8(b) motion is often the best method for raising ineffective assistance claims because it lends to simplified settlement negotiations with the trial prosecutor and may create a stronger likelihood of resolution in the client's favor. By contrast, in PRP proceedings, appellate prosecutors generally do not respond to counsel until the acting Chief Judge requires a response. Another practical benefit to filing under 7.8(b) is that there is no filing fee, whereas there is a \$200 filing fee for PRPs.

Lastly, one of the most significant advantages of filing a motion under CrR/CrRLJ 7.8(b) is that it allows the petitioner two bites at the proverbial apple. If the petition is denied by the trial court (court of limited jurisdiction or superior court), the client has a right of appeal pursuant to RAP 2.2, whereas only discretionary review before the Supreme Court is available if the motion is initially filed as a PRP. Following the steps outlined in this guide will ensure that your client's PCR motion avoids being automatically transferred to the Court of Appeals pursuant to CrR 7.8(c)(2).

7. File Motion in a Timely Manner

Petitions for PCR based on ineffective assistance of counsel under CrR 7.8(b) and PRPs must be filed within one year of the conviction, pursuant to the time limit imposed by RCW 10.73.090. Therefore, it is imperative that PCR lawyers act within a reasonable time period to assess whether ineffective assistance of counsel occurred and, when appropriate, timely submit a petition for relief.

In instances where the client did not become aware of the immigration consequences of their guilty plea until after the one year time limit, defense counsel should consider whether there are any exceptions to the time limit taking into account the following options:

- **Pre-*Padilla* (2010) Convictions.** RCW 10.73.100(6) provides an exception to the one year time bar on collateral attacks. RCW 10.73.100(6) states that where there has been 1) a significant change in the law, 2) that is material to the conviction, and 3) which warrants retroactive application, the time limit specified in RCW 10.73.090 does not apply.

The Washington Supreme Court recently held in *In re Tsai*, that *Padilla* met these three requirements and therefore litigants raising claims under *Padilla*, for ineffective assistance of counsel which occurred prior to 2010, are exempt from RCW 10.73.090's one year time bar on collateral attacks. 183 Wash.2d 91, 107 (2015).

Therefore, for cases where the conviction occurred prior to when *Padilla* was decided (March 31, 2010), post-conviction relief counsel should argue that, under *Tsai*, the 1 year time bar does not apply.

- **Post-*Padilla* Convictions: Equitable Tolling.** Cases with convictions since *Padilla*, but where the 1 year has elapsed, tend to be the most challenging. PCR attorneys must argue that the 1 year time bar was equitably tolled. Where equitable tolling can be applied, the statute of limitations does not begin to run until the date that the defendant learned all of the facts relevant to his claim. See *Sate v. Littlefair*, 112 Wn.App. 749, 762-63 (2002), and 759 n.23. In such instances, the petitioner must file the motion within a year of the date he learned of the immigration consequences resulting from the plea.

- **1 Year Time Bar Inapplicable: RCW 10.73.100(1)-(5).** The one year time limit imposed by 10.73.090 applies only to judgments that are valid on their face and rendered by a court of competent jurisdiction. To get around the one year bar, defense lawyers should evaluate whether there is any reason the one year time limit may not be applicable pursuant to the exceptions listed in RCW 10.73.100(1)-(5) e.g. the discovery of new evidence or cases in which there was insufficient evidence to support a conviction.
- **Reinstatement of Appeal Rights.** If the defendant was not informed of his right to appeal, his appeal rights can be reinstated and the 1 year time clock does not start to run. The 1 year time clock on motions for collateral review begins on the date the judgment becomes final. A case on appeal is not considered final for purposes of filing for PCR. In order to re-open the window for filing an IAC claim, defense lawyers should file a motion to reinstate the time to file an appeal in cases where the defendant was not informed of their right to appeal or in which waiver of appeal was not knowing, voluntary, and intelligent (possibly due to misadvice/nonadvice on immigration consequences). *See, State v. Chetty*, 167 Wash.App. 432 (2012).

Pre-Filing Checklist

- Motion for Relief (7.8(b) or PRP)
- Declaration of client
- Affidavit from trial counsel
- Affidavit from WDA's Immigration Project or immigration attorney explaining immigration consequences
- Relevant court records
 - Information/Complaint
 - Amended Information/Complaint
 - Certification of Probable Cause
 - Statement of Defendant of Plea of Guilty
 - Judgment and Sentence
 - Plea Agreement
 - Docket
 - Transcript/Recording of Plea Hearing
 - Transcript/Recording of Sentencing Hearing
 - Trial Counsel's Notes and Communications