

LEGAL NOTE

Deportation, Effective Counsel, and Collateral Sanctions: *Padilla v. Kentucky* (2010)

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In its March 31, 2010 *Padilla v. Kentucky* decision, the U.S. Supreme Court held that defense counsel's failure to advise a noncitizen client of the deportation consequences of a conviction constituted ineffective counsel in violation of the Sixth Amendment. Hailed by advocates as "momentous" (Immigrant Defense Project, 2010) and a "*Gideon* decision for immigrants" (Rojas, 2010), the *Padilla* ruling has been greeted by supporters and detractors alike as a landmark in Sixth Amendment jurisprudence. Immigration statistics illustrate the decision's importance: from 2000 to 2009, more than 920,000 people were deported from the U.S. because of their criminal status (Office of Immigration Statistics, 2010:97-103). Beyond the immigration-law context, *Padilla* will affect the provision of indigent defense and influence the work of prosecutors, defense counsel, and judges negotiating and accepting plea deals in state and federal courts. *Padilla's* logic may prove to have even broader implications, as it could undercut the longstanding but increasingly controversial distinction between "direct" and "collateral" consequences of criminal convictions in the United States.

Drugs, a Plea, and a Deportation Order: Padilla Arrives at the Court. José Padilla lived in California and worked as a licensed truck driver. Born in Honduras, Padilla had been a lawful permanent resident of the United States for more than forty years. In September of 2001, the tractor-trailer truck Padilla was driving was searched in Kentucky and found to contain a large amount of marijuana. Padilla accepted a deal under which he would plead guilty to some charges and face a total sentence of ten years, with the latter five served as probation.

Padilla's attorney had told him he did not need to worry about deportation "since he had been in the country so long." This was badly wrong: virtually every drug infraction is a deportable offense under federal law, and deportation is now *mandatory* for trafficking crimes. Padilla sought relief, arguing that his lawyer had provided ineffective counsel and that he would have insisted on going to trial had he known that deportation would follow a conviction. A Kentucky circuit court denied Padilla's motion, but an appeals court remanded the case to the trial court for an evidentiary hearing. The Kentucky Supreme Court reversed the appeals court, declaring that since "collateral consequences are outside the scope of the guarantee of the Sixth Amendment right to counsel," Padilla was not entitled to post-conviction relief

(*Commonwealth of Kentucky v. Padilla*, 2008:485).¹ Padilla appealed, and the U.S. Supreme Court granted cert.

The case quickly drew the attention of the defense bar. Amicus briefs were submitted by the American Bar Association and a group of law professors, both urging reversal; the U.S. Solicitor General and a collection of twenty-eight state attorneys general argued for affirmance. The latter parties urged the Court to affirm that deportation is among the “collateral” consequences of a criminal conviction—restrictions on employment, access to public housing and benefits, firearms rights, military service, voting rights, jury eligibility, and other rights and privileges. Since most of these restrictions are imposed by other agencies and authorities, most courts have held that lawyers do not need to apprise defendants of such civil penalties they may face before entering a guilty plea. Standards of effective counsel have applied only to “direct” consequences: the attorney’s obligations begin and end with the penalties comprising the sentence proper, as imposed by the sentencing court. As the Kentucky circuit court had said in rejecting Padilla’s claim, “Padilla’s counsel does not make a deportation decision and neither does this Court” (*Commonwealth of Kentucky v. Padilla*, p. 483).

The amici also shined a bright light on plea bargaining, which the state attorneys general bluntly called “the backbone of the U.S. criminal justice system.” About 95 percent of all state felony convictions now result from plea agreements (Brief for States of Louisiana et al. 2009:ii, 9; *Padilla v. Kentucky*, p. 1485). Because collateral sanctions are not defined as punishments, these pleas are valid even if defendants are never informed of the civil restrictions they could face. Requiring counsel to inform non-citizen defendants of the immigration consequences of a conviction, the brief warned, would blur the line between direct and collateral consequences and “likely break the back of the plea agreement system”—raising the cost of indigent defense, calling into question the finality of plea deals, and changing the strategic calculations on which deals are negotiated (Brief for States of Louisiana et al., 2009:1, 9, 11).

An “Integral Part” of the Penalty for Non-Citizen Offenders: The Court Decides. With Justice Stevens writing for a five-justice majority, the Court ruled that the Sixth Amendment requires counsel to inform noncitizen clients of the possible deportation consequences of a conviction. The Court remanded the case to the Kentucky courts to assess whether Padilla’s plea deal was substantively prejudiced by his attorney’s failure.

Justice Stevens’s opinion emphasized four main conclusions. First, the Court noted that because of statutory changes expanding the list of deportable offenses and restricting the power of judges and the attorney general to lift this sanction, deportation is now “virtually inevitable for a vast number of noncitizens convicted of crimes” and is “nearly an automatic result for a broad class of noncitizen offenders” (*Padilla v. Kentucky*, pp. 1478, 1481). Deportation is not only an “integral part” of the penalty for such defendants, but “sometimes the most important part” (p. 1480).

¹ I will refer to the Kentucky Supreme Court decision as “*Commonwealth of Kentucky v. Padilla*,” and to the U.S. Supreme Court decision as “*Padilla v. Kentucky*” or simply “*Padilla*.”

Second, the Court concluded that Padilla's lawyer failed the ineffective-counsel standard set up in *Strickland v. Washington* (1984). Under the first part of *Strickland's* two-prong test, defense counsel must have been deficient "below an objective standard of reasonableness." Here the Court relied on publications by the American Bar Association and other organizations as indicators of professional practices and responsibilities (pp. 1482, 1483), observed that the removal consequences of a guilty plea "could easily be determined from reading the removal statute" (p. 1483), and concluded Padilla's counsel should have advised him of his certain deportation. Rejecting the U.S. Solicitor General's recommendation that only misadvice be prohibited, the Court imagined the perverse incentives of such an arrangement: the rational defense attorney might well "remain silent on matters of great importance" (*Padilla v. Kentucky*, p. 1484; see also Roberts, 2009).

A third essential piece of the *Padilla* opinion is its conclusion that deportation is "unique" (p. 1481). Because of its severity—it is a "drastic measure" with "harsh consequences" (p. 1478)—and its nearly automatic character, deportation has a "close connection to the criminal process" that makes it "uniquely difficult to classify as either a direct or a collateral consequence" (p. 1482). Thus, the majority said its holding did not disrupt the traditional division between direct and indirect penalties—yet intriguingly, the majority did so while denying that the Court itself had ever actually "applied a distinction between direct and collateral consequences" in Sixth Amendment cases (p. 1481).

Finally, the Court rejected the concern that ruling for Padilla would unsettle the law and practice of plea bargaining. After all, counsel in many jurisdictions have been required to provide such warnings for some time, under statutory and judge-made law. It will still be legally difficult and tactically risky to attempt to withdraw a plea, given that the best outcome such a challenge can lead to (from the convicted person's perspective) is the chance to face the charges anew—and possibly draw a tougher sentence. Indeed, the majority reasoned that prosecutors may find their negotiating position *strengthened* where defendants understand they are negotiating under the "threat of deportation" (p. 1486). By suggesting that prosecutors use deportation—heretofore a purely "collateral" consequence—as leverage in plea negotiations, the majority sought to answer the practical concerns of the state attorneys general, while underscoring the Court's conclusion that deportation is not only a *de facto* punishment but a particularly important one.

Concurring and Dissenting Opinions: A "Dramatic Departure." In a concurring opinion joined by Chief Justice Roberts, Justice Alito rejected the majority's "dramatic departure" from precedent and warned of "a major upheaval in Sixth Amendment law" (*Padilla*, pp. 1488, 1491, J. Alito concurring). However, the opinion's disagreement with the majority was not as great as such rhetorical flourishes suggest. Justice Alito agreed that Padilla's counsel's misadvice had been constitutionally defective, and reasoned that counsel must offer a *general* warning that "a criminal conviction may have immigration consequences" (p. 1487). This means there were actually seven votes for some form of deportation-notice requirement (Love and Chin, 2010:19-20).

In a dissent joined by Justice Thomas, Justice Scalia argued that this problem should be addressed by federal and state legislation rather than a judicial ruling, calling the decision “a sledge when a tack hammer is needed” (*Padilla*, p. 1494, J. Scalia, dissenting). Yet even the dissenters agreed that the law should offer Padilla some kind of relief: Justice Scalia suggested that the Due Process Clause might have offered a better foundation for Padilla’s claims, had he contended that his lawyer’s error meant his plea was not “knowing and voluntary” (p. 1496).

The Retroactivity Puzzle. The *Padilla* decision has already been cited in scores of cases related to plea deals and collateral sanctions in state and federal courts and is already changing the work of prosecutors, defense attorneys, and judges. After *Padilla*, some federal prosecutors have started adding language to plea agreements such as “I understand that if I plead guilty there will be immigration consequences” or “I will be required to register as a sex offender” (Atkins, 2010). The most immediate consequences of *Padilla* fall on defense counsel, who now must either familiarize themselves with the complexities of immigration law or hire an attorney specializing in that area. “Attorneys fear *Padilla* means more work,” said the headline of one legal publication, noting “mixed feelings” about the ruling among the defense bar (Lore, 2010:2). Practice advisories have been published by national and local advocacy groups (Immigrant Defense Project, 2010; National Association of Criminal Defense Lawyers and Defending Immigrants Partnership, 2010; Committee for Public Counsel Services, 2010). In time, *Padilla* may further shift the provision of public defense toward larger organizations, where specialized immigration advice can be offered in-house (Wright, 2011).

As a Maine Superior Court judge observed, “[c]ourts across the country are split as to whether *Padilla* applies retroactively” (*State of Maine v. Phu Truong*, 2010:11). The *Padilla* opinion was somewhat equivocal on this question: it concluded that “it seems unlikely” that the decision would affect convictions already obtained, but reached this result by reasoning that professional norms and legal requirements in most of the country *already* imposed this obligation on defense counsel (*Padilla*, p. 15). Thus, it seems the Court expected retroactive appeals where counsel either misadvised or did not advise clients of deportation consequences (Love and Chin, 2010:20; Committee for Public Counsel Services, 2010:4).

Trial courts have reached different answers to the question of whether *Padilla* created a new constitutional rule, and if so whether and how it applies to existing convictions. A Bronx, New York judge ordered an evidentiary hearing after concluding *Padilla* should be applied retroactively (*People v. Bennett*, 2010), as did a California court (*U.S. v. Hubenig*, 2010). Two different New York judges and a Michigan court declined to give *Padilla* retroactive effect, and the Maine judge followed their lead (*People v. Kabre*, 2010; *Gacko v. U.S.*, 2010; *Haddad v. U.S.*, 2010; *State of Maine v. Phu Truong*, 2010). However, in June of 2011, the Third Circuit Court of Appeals applied *Padilla* retroactively to a plea entered in 2004, concluding *Padilla* was based on “long-established professional norms” (*U.S. v. Orocio*, 2011: p.19). Meanwhile, *Padilla* is

already having an impact on the most recent pleas. One Boston attorney reported in January 2011 that he had already filed about thirty “*Padilla* challenges” seeking to withdraw pleas because of ineffective counsel and had been successful in some three-quarters of them (Bantz and Atkins, 2011).

For older cases, the retroactive impact of *Padilla* may be limited. One’s ability to challenge a conviction in state court depends on various state laws, particularly time-liness requirements. Federal law requires that state remedies be exhausted before a federal habeas claim is considered. And a deported person will likely find it extremely difficult to petition the U.S. legal system to reconsider a plea: logistical hurdles aside, a federal regulation prohibits the reopening of an immigration proceeding by persons outside the U.S. and subject to removal.

A “Unique” Penalty? What will be *Padilla*’s impact on other collateral consequences in American jurisprudence and defense practice? The majority appeared to seek to limit its holding by using the term “unique” and by emphasizing deportation’s near-certain application and its permanent, transformative effects on a person’s life—attributes not clearly present with some other collateral consequences. However, as noted above, the majority advanced this argument even as it denied any sharp doctrinal line between direct and collateral offenses.

The concurring and dissenting opinions certainly questioned whether the ruling’s purported limits would hold. Justice Alito pointedly observed that civil consequences such as disenfranchisement, forfeiture, and the loss of firearms rights and professional licenses are also “serious”—as are the reputational harms of a criminal conviction (*Padilla*, p. 1488, J. Alito, concurring). Justice Scalia wrote that “an obligation to advise about a conviction’s collateral consequences has no logical stopping point” (*Padilla*, p. 1496, J. Scalia, dissenting).

Criticizing *Padilla* as part of a Michigan Supreme Court proceeding related to setting up new rules for judges and attorneys, Justice Stephen J. Markman warned that the decision risked “opening up constitutional arguments that other possible collateral consequences of a guilty plea, to which there are no end, must also be the subject of warning and advice” (Michigan Supreme Court, 2010:4). A chief public defender in Minnesota noted he had “heard some concern among the defense bar” that *Padilla* could “expand into other areas as well, resulting in attorneys being required to be aware of even more of the consequences of a plea or conviction” (Lore, 2010:3). Because of their severity and relatively narrow application, sex-offender restrictions may be the most likely candidates for an extension of *Padilla* (Love and Chin, 2010). Already, a Pennsylvania Superior Court facing an ineffective-counsel claim applied *Padilla*’s logic to a state law stripping pension benefits from a man convicted of indecent assault, and a ruling by the Eleventh Circuit Court of Appeals related to civil commitment cited *Padilla* in allowing a habeas petition to go forward (*Commonwealth of Pennsylvania v. Abraham*, 2010; *Bauder v. Department of Corrections*, 2010).

Conclusion. The *Padilla* decision represents an overdue judicial realization that deportation has effectively become a punishment in American law. More broadly, while it is not a substantive attack on deportation and other collateral consequences, the ruling sheds valuable light on the punitive dimensions of these nominally “civil” penalties. Even Justice Alito’s concurrence notes that the legal and cultural collateral effects of a conviction are “serious.” By placing plea bargaining at center stage, *Padilla* offers a salutary reminder that almost all convictions in the United States come from plea deals, not trials. And paradoxically, *Padilla* also underscores the continuing importance of federalism in American criminal justice. Despite the putative nationalization that a Sixth Amendment footing represents, noncitizen defendants will continue to find that their fate rests on state policies such as timely filing requirements and the provision of specialized immigration-law support to indigent-defense counsel.

Padilla exposes one more intriguing problem. Many infractions are not subject to jail or prison penalties, and in the U.S. a person charged with a non-jail offense has no right to counsel (see *Argersinger v. Hamlin*, 1972). Meanwhile, thousands of defendants in American misdemeanor courts go without representation of any kind (Boruchowitz, Brink, and Dimino, 2009). Yet some of these offenses, even those legally defined as noncriminal “violations” or as misdemeanors (such as petty theft) may later be considered crimes of “moral turpitude” by immigration authorities—and a legal permanent resident convicted of two offenses displaying moral turpitude can be deported (see 8 U.S.C. § 1251 (a)(2)(A)(ii).). Noncitizens may not learn the gravity of their situation until years later: criminal records leading to deportation may surface during routine attempts by legal residents to win naturalization, for example, during a resident’s return to the United States after travel abroad, or in some other inquiry.

It is very likely, then, that some people will be subjected to the harsh sanction of deportation because of convictions resulting from legal proceedings for which they had no counsel and, indeed, no right to counsel. By bringing the Sixth Amendment into deportation law, the *Padilla* decision thus highlights a serious anomaly in U.S. law and legal practice. **jsj**

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