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A Defending Immigrants Partnership Practice Advisory¹

HOW MUCH TO ADVISE: WHAT ARE THE REQUIREMENTS OF *PADILLA V. KENTUCKY*?

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Note: This Advisory on *Padilla v. Kentucky* discusses in detail the Court’s reasoning and its requirements for defenders, and includes a discussion of the Court’s language regarding “clear versus unclear” consequences. For a shorter, practical Advisory on how to approach the task of representation under *Padilla*, see DIP, “Steps to Advising a Noncitizen Defendant under *Padilla v. Kentucky*.” For an analysis of all aspects of the case and a detailed list of resources for criminal defenders, see DIP, “Duty of Criminal Defense Counsel Representing an Immigrant Defendant After *Padilla v. Kentucky*.” These Advisories can be found at the Defending Immigrants Partnership website, www.defendingimmigrants.org.

In *Padilla v. Kentucky*² the Supreme Court held that because immigration penalties are inextricably enmeshed with the outcome of criminal proceedings, and because of the importance and potential severity of immigration consequences, criminal defense counsel have a duty under the Sixth Amendment to address the immigration consequences facing a noncitizen defendant.³

The reactions to this decision among defenders have ranged from exultation to panic. Many defenders want to know specifically what they are required to do in order to provide effective counsel. Some defenders who are not experienced in this area fear that advising on immigration consequences will be an overwhelming burden in an already complex job. Some are interpreting the Court’s discussion on “clear” versus “unclear” consequences as a severe limit on the steps defenders need to take to provide effective counsel to noncitizens. Others want to know if merely consulting a chart will be sufficient.

This Advisory will discuss the standards set out by the Court in *Padilla*, as well as the steps involved in representing a noncitizen defendant. In addition, this Advisory will provide some key information about the extensive resources -- many of them free or low cost -- that are available to assist defenders to represent noncitizens. Immigration representation in a criminal case is challenging, but doable. Many

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² *Padilla v. Kentucky*, 599 U.S. ____ (March 31, 2010).

³ See discussion of the entire case in DIP, “Duty of Criminal Defense Counsel Representing an Immigrant Defendant after *Padilla v. Kentucky*” at www.defendingimmigrantspartnership.org.

small and large defender offices have been providing competent advice for many years, assisted by print materials, trainings, and expert consultation on individual cases.

To give a preliminary answer to the basic question, according to *Padilla* and the published professional standards that it references, to adequately represent a noncitizen defendant regarding immigration consequences in each case counsel must determine the immigration status and criminal history of the defendant. Based on this information, counsel must investigate the specific immigration consequences that the proposed plea would have on the particular individual. In some cases this will be a quick process, for example when the client, after receiving some key warnings, states that he or she cares only about the criminal penalty. Where counsel undertakes the immigration analysis, in some cases counsel will be able to state the immigration consequences with some certainty, while in others counsel may need to advise that there is a risk that the plea will have a particular immigration consequence but that the law is not clear. If immigration consequences are a priority to the defendant, counsel will conduct the defense with this in mind. This process is required not just at plea, but in other key points in the defense such as before going to trial, conducting a delinquency or sentencing hearing, accepting diversion, etc. See more information at Part III.

I. What is the Scope of Counsel's Duty under *Padilla*?

Padilla provides several specific guidelines for defense practice.

Silence on the subject constitutes ineffective assistance of counsel. The Court held that immigration consequences of a conviction are included within the ambit of the Sixth Amendment right to counsel. Not only incorrect advice, but failure to provide advice is ineffective assistance of counsel. *Padilla v. Kentucky*, slip opinion at * 8-9, 13.

Published standards of practice for representing noncitizen defendants are guides for determining counsel's duty to advise. The Court then turned to standards for determining what constitutes effective assistance of counsel. Citing the familiar test in *Strickland*, the Court in *Padilla* stated that the first step in an ineffective assistance of counsel inquiry is to determine whether counsel's representation "fell below an objective standard of reasonableness," and the second step is to ascertain whether there was prejudice. *Id.* at *9. Regarding the first step, the Court said:

The first prong -- constitutional deficiency -- is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . ." Although they are "only guides," and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

Ibid, citations omitted.

The Court cited among such standards the American Bar Association (ABA) Standards for Criminal Justice, Pleas of Guilty (3d ed. 1999). See further discussion in Part II, *infra*.

The duty encompasses both avoiding becoming removable and preserving eligibility to apply for relief from removal. Noncitizen defendants wish to avoid becoming deportable (removable). In addition, a noncitizen defendant who is removable, whether because of a deportable conviction, simple lack of immigration status, or other factor, wishes to maintain eligibility to apply for status or relief from removal. Both issues are included within counsel's duty.

We too have previously recognized that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *St. Cyr*, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347 (quoting 3 *Criminal Defense Techniques* §§ 60A.01, 60A.02[2] (1999)). Likewise, we have recognized that "preserving the possibility of" discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, "would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *St. Cyr*, 533 U.S., at 323, 121 S. Ct. 2271, 150 L. Ed. 2d 347. We expected that counsel who were unaware of the discretionary relief measures would "follo[w] the advice of numerous practice guides" to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

Padilla slip opinion at * 10-11.

Defense counsel's duty is not just to advise, but to defend against adverse immigration consequences. Prosecutors also should take immigration consequences into account in plea bargaining. "Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties." *Id.* at * 16.

Justice Alito's concurrence suggests a different standard, but this was not signed by any of the five justices in the majority. In his minority concurrence with Justice Roberts, which none of the five Justices of the majority signed, Judge Alito stated that he agreed in the result in this case but disagreed with the requirement to advise that the court imposed upon defense counsel. He pointed out that many basic immigration questions are complex (for example, whether the defendant is a citizen or not), and also posited several complex immigration situations in which the law was both unsettled and complicated. Concurrence by Justice Alito, slip opinion. at * 4-8 (concurrence). He asserted that the Court should have found the proper standard of duty to be that "[w]hen a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject." *Id.* at * 14.

II. The Standard for Determining Competent Immigration-Related Advice under *Padilla*, and Why a Bifurcated "Clear vs. Unclear" Strategy is Incorrect

In the initial attempts to determine the scope of immigration-related advice required to be effective under *Padilla*, some criminal defense counsel have singled out the Court's use of the "clear" vs. "unclear" language. In *Padilla* the Court noted that due to the complexity of immigration law, the analysis may not always produce a clear answer.

There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.¹⁰ But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Padilla slip opinion at * 11-12.

In footnote 10 the Court stated, “As Justice Alito explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel’s advice.”

Based on this language, some criminal defense counsel have asked if they may obtain a list of offenses that carry “clear” immigration consequences, with the idea that they will warn a defendant specifically about a plea to these offenses, while just giving a generalized warning about offenses that carry “unclear” immigration consequences. While this might be a convenient characterization of *Padilla*, it is not a correct interpretation, and is inconsistent with the rest of the opinion, the published professional standards and practice advisories cited by the Court, and the reality of the factors that inevitably must be considered in an immigration analysis. This approach is akin to saying that a criminal defender can determine the outcome of a case by simply looking at the initial charging document.

In reality, to determine *whether* the immigration consequences threatening a particular defendant are clear or unclear, counsel must perform an actual immigration analysis.

First, *Padilla* must be understood in the context of how a conviction causes a particular individual to suffer adverse immigration consequences, which may vary depending on immigration status and prospects, criminal history, and other factors. While the immigration consequences of some offenses can be clearly characterized for – for example, unlawful possession of a firearm comes within the firearms deportation ground – this characterization alone is not enough to give competent advice to a defendant about the consequences of a plea. A correct analysis of the actual immigration consequences of a plea depends upon numerous factors beyond whether a particular offense clearly comes within a ground of deportation. Three of these factors are:

- **Immigration Status.** The immigration status of the defendant will affect the consequence of a particular plea. For example, a conviction such as unlawful possession of a firearm will cause a lawful permanent resident to become deportable, but will have no consequences for many undocumented defendants. Conviction of a different offense might be harmful to an undocumented person, but not make a permanent resident deportable.
- **Criminal History.** Analysis of immigration consequences of a plea will vary depending upon the prior criminal record of the individual. For example, if a defendant already is deportable, the defense goal may be to preserve eligibility for relief; or, if the defendant does not have any prior conviction of a crime involving moral turpitude, it is possible that he or she can take one such conviction without becoming inadmissible or deportable.
- **Specific Structure of the Criminal Statute & Defendant’s Plea Statement.** Many criminal statutes are “divisible” in that they reach some offenses that carry an immigration consequence and others that do not. The immigration consequences of a plea can depend upon whether counsel can negotiate a plea to a portion of the statute that avoids/minimizes immigration consequences. This often requires careful crafting of the factual basis for the plea contained in defendant’s plea statement.

These are not “unclear” situations. They are the normal issues that are present in the great majority of cases involving noncitizen defendants. Further, as the Court pointed out, competent representation on these issues goes beyond whether the plea will cause a noncitizen to become deportable, to whether the plea will eliminate eligibility for relief from deportation (“removal”). Consulting a list for offenses with a “clear” immigration consequence cannot address these issues.

Second, *Padilla* should be understood in light of requirements in the professional standards referenced by the Court. For a more thorough discussion of these standards see the Defending Immigrants Partnership “Duty of Criminal Defense Counsel” Advisory, *supra*, posted at www.defendingimmigrants.org. In sum, these standards provide that defense counsel must ascertain

every client's citizenship or immigration status at the initial interview. Counsel should advise the defendant of the full consequences of any plea or other disposition, including the certain or potential immigration consequences, and ensure that the client understands them. "[C]ounsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client." Counsel should be "active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant."⁴

Third, consider what was deemed "clear" in Padilla. In *Padilla* the defense counsel had advised a permanent resident that a conviction for transporting marijuana would not make the defendant deportable under the controlled substance deportation ground. The Court stated that "[t]his is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Id.* at *12.

The controlled substance ground of deportation is similar in structure and ease of interpretation to most of the 52 conviction-based grounds of deportation and the grounds of inadmissibility. Of these, most are no more complex or difficult to decipher. Some are arguably more difficult to interpret and apply to state convictions, such as the crime involving moral turpitude grounds⁵ and the aggravated felony crime of violence ground.⁶ These grounds, however, are the subject of extensive discussion in practice aids and case law. Once defense counsel has researched the matter, counsel may inform the defendant whether, e.g., the offense clearly will be held a crime involving moral turpitude, or whether the law is unclear but the offense *might* be so held. Counsel must provide this advice in the context of an immigration analysis, which in this example would include what the impact would be if the offense *were* ruled to be a crime involving moral turpitude, both on deportability and eligibility for relief.

III. What Are the Steps Required to Advise Regarding Immigration Consequences?

Competent representation in light of immigration consequences involves several steps.

1. In each case counsel must determine the immigration status and criminal history of the defendant. This can be done using a questionnaire; samples are posted at www.defendingimmigrants.org.
2. Based on this information, counsel should investigate the specific immigration consequences that the proposed plea would have on the particular individual. As with many aspects of defense strategy, in some cases counsel will be able to advise that the plea is nearly certain to have a particular immigration consequence, while in other cases counsel can say that it carries a risk but that the law is not clear. See discussion below of resources to help in this analysis.

This process must take place not only at plea, but in other key decisions such as before defendant goes to trial, enters a diversion or drug treatment program, handles a charge of violating the terms of probation or of a protection order, admits addiction, or conducts a sentencing or delinquency hearing. If an incarcerated defendant has an immigration hold or detainer, before obtaining release from criminal custody counsel should inform her/his client that DHS might detain him or her. Because

⁴ American Bar Association Pleas of Guilty Standard 14-3.2(f), commentary at p. 127.

⁵ 8 U.S.C. § 1227(a)(2)(A)(i)(I),

⁶ 8 U.S.C. § 1101(a)(43)(F).

persons often are transferred multiple times and long distances in immigration custody, criminal custody may be preferable.

3. In some cases the defendant may have to choose whether to prioritize getting a good immigration result versus a lesser criminal penalty. Some immigrant defendants care only about getting the smallest period of incarceration. Other immigrant defendants would trade any concern in order to remain with their families. They would be willing to plead to a more serious offense, take additional jail time, or even go to trial and risk a significantly higher sentence, if it meant that they might be able to remain in the U.S. with loved ones. A defendant can only make this crucial decision if he or she understands the potential criminal and immigration penalties.
4. If the defendant states that immigration consequences are the highest or a high priority, counsel will conduct the defense with this in mind.

IV. Meeting *Padilla*'s Challenge: Resources to Help Defenders Provide Competent Advice

A challenging question is how are criminal defenders – especially indigent defenders with limited budgets and time – going to be able to provide competent representation? This is a larger discussion that will be undertaken across the country in light of *Padilla*. These discussions should take account of existing resources, as well as how to create new ones. Keep in mind that many defense offices, including indigent defenders from small counties to state-wide organizations, currently provide competent representation on immigration consequences.

There are “numerous practice guides” for criminal defense counsel assisting noncitizens. *Id.* at * 11; see also Appendix B “Resources for Criminal Defense Lawyers” in *Defending Immigrants Partnership, “Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla v. Kentucky”* at www.defendingimmigrants.org. For example, see state-specific analyses of the immigration consequences of commonly charged offenses, manuals explaining immigration consequences, and other free resources written for criminal defenders, as well as information about obtaining hornbooks on the subject, at www.defendingimmigrants.org. Training materials including power points can be downloaded, and there is information about live and online trainings.

As important as print resources and training is the possibility of obtaining expert consultation on individual cases, which can save a lot of time and ensure a level of competence. Defender offices obtain expert advice under a range of different methods, so that not every attorney on staff needs to understand the immigration component. Offices may appoint a research attorney to devote part-time to becoming an in-house expert; may take advantage of free expert consultation, or else contract with non-profit or private experts to provide consultation on difficult cases; or may move for court funding for an immigration expert on a particular case. Private offices often require noncitizen clients to pay for immigration consultation as part of the defense work. See discussion of various immigrant service plan models in “Protocol for the Development of a Public Defender Immigrant Service Plan” at www.immigrantdefenseproject.org/webPages/crimJustice.htm.