

Defending Immigrants Partnership



The Padilla Advisory: Duty of Criminal Defense Counsel to Advise Clients of Immigration Consequences

May 12, 2010

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Introduction

Paulino Duran

Defender,

Sacramento County Public Defender

Chair, Executive Committee,

American Council of Chief

Defenders, NLADA

Agenda

- ☐ Summary of *Padilla v. Kentucky*
 - ☐ Immigration consequences of criminal dispositions
 - ☐ Defense steps to meet *Padilla* obligations
 - ☐ Resources
 - ☐ Institutionalizing immigration advisal at defender offices
 - ☐ Post-conviction relief
 - ☐ Frequently asked questions
 - ☐ Q&A (online and phone)
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Presenters

Defending Immigrants Partnership:

- Kathy Brady & Angie Junck, Immigrant Legal Resource Center
- Benita Jain & Manny Vargas, Immigrant Defense Project
- Dan Kesselbrenner, National Immigration Project of NLG

Public Defenders and In-House Experts at Defender Offices:

- Heidi Altman, Neighborhood Defender Service of Harlem (NY)
 - Caitlin Barry, Defender Association of Philadelphia (PA)
 - Annie Benson, Washington Defender Association (WA)
 - Paulino Duran, Sacramento County Public Defender (CA)
 - Hans Meyer, Colorado Immigrant Rights Coalition (CO)
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Padilla v. Kentucky:
Summary

Padilla v. Kentucky: The Facts

Who was Jose Padilla?

- Lawful permanent resident for 40 years
 - Vietnam War veteran
 - Charged with marijuana possession and trafficking for having marijuana in his commercial truck
 - Pled guilty for marijuana trafficking after defense attorney told him he did not have to worry about deportation because he had lived in US for so long
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Padilla v. Kentucky: Lower Court Decision

The Kentucky Supreme Court decided that deportation is a collateral consequence and therefore is outside the scope of the Sixth Amendment. Defense counsel's misadvice does not rise to the level of a Constitutional deprivation of right to counsel.

Padilla v. Kentucky: Supreme Court Response

- U.S. Supreme Court disagreed.
 - The Court observed increasing harshness of immigration laws over past 90 years and concluded: “Accurate legal advice for noncitizens accused of crimes has never been more important.”
 - The Court found that constitutionally competent counsel would have advised Mr. Padilla that his conviction for drug distribution made him subject to automatic deportation.
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Padilla v. Kentucky: Supreme Court Holding

- Sixth Amendment requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea
 - Absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel.
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Padilla v. Kentucky: Main Points 1

Deportation is a “particularly severe penalty” that is “intimately related” to the criminal process. Advice regarding deportation is not removed from the ambit of the Sixth Amendment right to effective assistance of counsel.

Padilla v. Kentucky: Main Point 2

Professional standards, such as ABA pleas of guilty standards and NLADA guidelines for defense lawyers, provide the guiding principles for what constitutes *effective assistance* of counsel.

Padilla v. Kentucky: Main Points 3

The Sixth Amendment requires affirmative, competent advice regarding immigration consequences. *Non-advice (silence) is insufficient (ineffective).*

Padilla v. Kentucky: Main Points 4

“Informed consideration” of immigration consequences by the defense *and the prosecution* during plea negotiations, in order to reduce likelihood of deportation and promote interests of justice, is appropriate.

Immigration Consequences of Criminal Dispositions

“[I]mmigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The ‘drastic measure’ of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.”

Padilla v. Kentucky, 599 U.S. ___, slip op. at * 2 (2010).

Immigration Consequences of Criminal Dispositions

- Deportation (sometimes mandatory)
 - Detention during deportation case (sometimes mandatory)
 - Bar to getting lawful immigration status (e.g. greencard, asylum, temporary protected status, student or work visas)
 - Bar to citizenship (temporary or permanent)
 - Bar to relief from deportation
 - Bar to returning to U.S. after trip abroad or after deportation.
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What offenses might have immigration consequences?

Almost any offense may have an immigration consequence for *some* non-citizens. Individualized analysis is key! This includes, for example:

- Murder, rape, sex abuse
 - Drug offenses (including marijuana possession)
 - Theft, burglary, robbery, fraud, tax evasion
 - Assault, domestic violence, OP violations
 - Firearm offenses
 - Bail jumping, perjury, bribery, forgery
 - Prostitution, gambling
 - Attempt, conspiracy and many others offenses!
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What dispositions might have immigration consequences?

- Convictions (defined under immigration law)
 - Vacated pleas/convictions (e.g. after rehab program)
 - Violations or other dispositions that are not considered “criminal” by convicting jurisdiction
 - Sometimes, even admissions to conduct, without a conviction, can have immigration consequences
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Meeting Padilla's Challenge: Defense Steps

Step 1

Investigate the Facts: Questionnaire

- ☐ Immigration status
- ☐ Criminal history
- ☐ Prior deportations
- ☐ Family ties

-ABA Pleas of Guilty Standard 14-3.2(f),
commentary at p. 127

Step 1: Tips

– *Use the Noncitizen Defendant Worksheet* –

a) Immigration Status is a bit complicated and a bit sensitive – be aware of your client's potential reluctance to discuss it

- a) Immigration status + entry to U.S. + time in status
 - b) LPR – Lawful Permanent Resident (green card)
 - c) Undocumented folks
 - d) Refugee or asylee
 - e) Current visa (what kind) or visa overstay (what kind)
 - f) U.S. citizen?
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Step 1: Tips

b) You need ALL prior criminal convictions

- a) Includes felony, misdemeanor & municipal
 - b) This includes diversion, deferred prosecutions & judgments, etc...
 - c) If statute is divisible – you need the EXACT statutory citation of conviction
 - d) Get details on any sentence to imprisonment, including any suspended sentence
 - e) Find out length of probation, amount of restitution
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Step 1: Tips

c) Prior deportations (i.e. removals) are sometimes difficult to identify

- a) Did your clients see an immigration judge
- b) Did your client sign his removal with ICE
- c) Did your client do something else (VD, vol. return)
- d) Call the Immigration Court System – (800) 898-7180

d) Family ties are critical to potential relief

- a) Family Relationship + Immigration Status = potential relief
 - b) Spouse, common law, fiancé
 - c) Children (ages) and parents
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Step 2

Ascertain the Client's Wishes

- ☐ Does the client want to prioritize getting a good immigration result or a lesser criminal penalty?
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Step 2: Tips

a) The client goal spectrum

- a) Avoid consequences that trigger deportation
 - b) Preserve eligibility to ask immigration judge to get or keep lawful immigration status
 - c) Preserve eligibility to obtain future imm. benefit
 - d) Get out of jail/custody ASAP
 - e) Immigration consequences not a priority
 - f) Desire to be deported as part of resolution
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Step 3

Analyze the immigration impact of key defense decisions and advise the client

- ☐ Consider both avoiding deportability and maintaining eligibility for relief from removal
 - ☐ This analysis determines whether the consequences of the plea are clear or unclear
- *Padilla* slip opinion at * 13
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Step 3: Tips

a) investigation + crim history + goal = advisement

- a) Develop the expertise yourself or consult written charts and resources; or
- b) Get information to a criminal immigration expert; *
and
- c) Advise on both the clear and unclear consequences of the charge, the offer and any alternate plea dispositions that may be attainable in the case

**Advisement models will be discussed later*

Step 4

Defend the case according to the client's priorities

- If client states immediate consequences are highest priority, conduct the defense with this in mind

- Padilla slip opinion at * 16

Step 4: Tips

- a) If current offer fits client goals = take offer
 - b) If offer doesn't fit client goals, then:
 - a) Negotiate sentencing concession
 - b) Negotiate plea offer to particular section of statute
 - c) Make counter offer with sentencing concession
 - d) Make counter offer pled to specific section of statute
 - e) Litigate case towards motions hearing and trial
 - f) Remember *Padilla*'s instruction on prosecutor's duty
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Defense Steps: Hypotheticals

Client considering marijuana possession plea

Step 1: Facts (2 scenarios)

- a. LPR + no priors + citizen spouse
- b. Undocumented + no priors + citizen spouse

Step 2: Ascertain Client's Wishes

Avoiding immigration consequences and deportation is a client's priority. LPR wants to maintain status, undoc wants to get status.

Defense Steps: Hypotheticals

Step 3: Analyze Immigration Impact

- a. (LPR) MJ poss will make client deportable if >30g on record. If 30g or less, will affect ability to naturalize or travel. Relief depends on other facts.
 - b. (Undoc) Client already deportable. MJ poss will bar ability to get legal status. Possibly eligible for waiver of bar if 30g or less (depending on family circumstances).
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Defense Steps: Hypotheticals

Step 4: Defend according to client's priorities

- a. (LPR) To avoid deportability, avoid mj conviction, plead to 30g or less, or keep amount of mj out of record. Advise client.
 - b. (Undoc) Client already deportable. Avoid mj conviction to maintain eligibility to get status. If client decides must PG to mj, allocute to 30g or less to maintain eligibility for waiver. Avoid contact with ICE. Advise client.
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Meeting Padilla's Challenge: Resources

Meeting Padilla's Challenge: Resources

- ❑ **Print Resources.** For state specific analyses, checklists, lists and excerpts of treatises go to www.defendingimmigrants.org
 - ❑ **Training.** Live and online training notices are posted at www.defendingimmigrants.org, under Trainings tab. DIP's training curriculum also posted.
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Meeting Padilla's Challenge: Resources

- ❑ **Consultation.** Many ways to obtain expert consultation: in-house research attorney with mentorship, free expert consult or contract with non-profit or private experts.
 - ❑ **Office-wide models.** See “Protocol for the Development of a Public Defender Immigrant Service Plan” at www.immigrantdefenseproject.org/webPages/crimJustice.htm
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Meeting Padilla's Challenge: Resources

- ❑ For a comprehensive list of national, regional, and local resources also consult Appendix B of *“Practice Advisory: Duty of Criminal Defense Counsel Representing an Immigrant Defendant After Padilla v. Kentucky”* which are part of the webinar materials at www.defendingimmigrants.org
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Meeting Padilla's Challenge: New and Missing Resources

- If you know of additional resources that are not listed in our materials or on our website, please feel free to share them with us by emailing Angie Junck at ajunck@ilrc.org.
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Institutionalizing Immigration Advisal at Defender Offices

Why Institutionalize?

- Every defender with any immigrant clients must understand and advise
 - Reliance on practices of individual defenders, instead of systems, means some people will fall through the cracks
 - Institutionalization = Efficiency
 - Institutionalization = Accuracy
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Learning from Experience

Protocol
for the Development
of a Public Defender
Immigration Service Plan

Bad name, good information!

In-House Expert Model

- One or more staff attorneys are designated as office's in-house immigration expert(s).
 - This on-site expert trains and advises colleagues on immigration consequences. May also provide deportation defense.
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In-House Expert Model: Case Study

Heidi Altman
*Neighborhood Defender
Service of Harlem*

Staff Split Model

- Defender office shares immigration expert with local immigration service provider
 - The immigration expert trains and advises defenders on-site, while also being able to access immigration colleagues at immigration organization
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Staff Split Model: Case Study

Caitlin Barry
*Defender Association of
Philadelphia*

Central Office Model

- Immigration expert is housed at a central office
 - Expert advises defenders in offices across the region/state (often by phone or email)
 - Expert may also train defenders on immigration consequences
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Central Office Model: Case Study

Annie Benson
*Immigration Project,
Washington Defender Assn.*

Contract Model

- Defender office outsources immigration advisal to a separate immigration organization
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Contract Model: Case Study

Paulino Duran
*Sacramento County Public
Defender, California*

Statewide Layered Model

- Combines benefits of other models for larger or multi-site defender offices
 - Statewide immigration supervisor, in-house experts and immigration liaisons work together to ensure that each office gets the services it needs while using office resources efficiently
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Post-Conviction Relief (Selected Issues)

General Standard

- In *Strickland v. Washington*, 466 US 668 (1984) the Supreme Court created a two-prong test to determine whether a person could vacate a conviction for ineffective assistance of counsel
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Strickland Prongs

- ❑ Prong 1- The quality of the attorney's representation fell below professional norms
- ❑ Prong 2-The defendant suffered prejudice as a result of the deficient performance

Strickland 466 U.S at 687

- ❑ Both prongs are required to win
-

Hypothetical Petitioner (HP)

We will use HP's facts in discussing post-conviction issues:

- ☐ HP, a permanent resident, convicted of unlawful possession of a firearm in 1999, a felony, had no other criminal history
- ☐ HP's counsel did not discuss immigration consequences
- ☐ HP had motion to suppress and defenses to charge
- ☐ Defense counsel did not try to plead down to unlawful possession of ammunition, a ~~misdemeanor, which is not a deportable~~ offense

State Law Challenges

- Each state has different rules governing post-conviction relief. Hurdles may include:
 - strict filing deadlines
 - narrow interpretation of custody requirement
 - procedural default rules
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Hurdles

- Whether HP can jump these hurdles turns on state law.
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State Exceptions to Custody Requirement

- In certain states, HP may have a remedy to challenge counsel's failure to advise even though HP:
 - has finished serving sentence, and
 - is no longer on probation or parole
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State Examples

- ❑ Assume HP is now in immigration custody after finishing sentence, probation
 - ❑ HP has a vehicle to obtain post-conviction in Georgia but has to overcome bad case law in California
 - ❑ Compare *Thorpe v. Head*, 272 Ga 596, 597 (2002) (defining restraint very broadly for purposes of state post-conviction relief) with *People v. Villa*, 45 Cal.4th 1063, 1069-70 (2009) (denying remedy in immigration case for detainee who finished serving sentence)
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Federal Rule

- If HP had a federal conviction, HP would have a remedy even after sentence served.

United States v. Denedo, 129 S. Ct. 2213 (2009) (permitting noncitizen who claimed ineffective assistance from failure to warn to challenge court-martial under 28 U.S.C. § 1651, the All-Writs Act)

Authority

- In *Williams v. Taylor*, 529 U. S. 362, 390-91 (2000), the Supreme Court held that applying *Strickland* to particular scenarios does not establish a “new rule” of constitutional law. A factfinder can apply *Padilla* to HP’s case because in reality the factfinder is applying *Strickland*, which is settled law.
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Retroactivity of *Padilla*

□ Under Supreme Court cases and language of *Padilla*, holding in case applies to challenges to convictions brought before or after Court decided *Padilla*.

Williams v. Taylor, 529 U.S. 362, 390-91 (2000) (applying Strickland test does not create a new rule of constitutional law and can be applied retroactively)

Padilla Court Acknowledges Retroactivity

- Court recognized that case was merely an interpretation of *Strickland*.

Padilla, 130 S.Ct. at 1485 n 12

- Court dismissed floodgate potential concerns, which is an implicit acknowledgement that case applies retroactively.

Padilla, 130 S.Ct. at 1485

Date of *Padilla* Norm

- The Supreme Court's decision in *Padilla* established that the norm for criminal defense counsel to advise "generally" went back "at least the past 15 years."

Padilla, 130 S.Ct. at 1485

Impact

- HP challenges should satisfy first prong of *Strickland* because:
 - HP's counsel failed to advise and
 - HP's 1999 conviction is within 15 year period since norm established
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Prejudice

- ❑ HP must also satisfy 2d *Strickland* prong to prevail.
 - ❑ HP must convince court that a decision to reject the plea bargain would have been rational under the circumstances. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480 (2000).
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Prejudice (2)

- ❑ HP could argue that:
 - ❑ HP would not have given up motion to suppress or defenses on merits had counsel advised HP about immigration cases
 - ❑ HP would have plead to an alternative charge that would not have had adverse immigration consequences
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Frequently Asked Questions

F.A.Q. 1

Q: If the immigration consequences of a plea are unclear, do I have a lesser duty to advise my client?

A: The certainty of the advice may vary, but the duty does not. A defender always has a duty to investigate and perform an individualized immigration analysis. You cannot determine whether immigration consequences are clear or certain until you do this. Eyeballing or making rigid lists of “clear” or “unclear” offenses will lead to mistakes.

F.A.Q. 2

Q. I don't know anything about immigration law. Am I still obligated to advise? Can I just refer client to an immigration lawyer?

A. The Court made clear that defense counsel have a duty to investigate the immigration consequences of criminal charges and pleas and advise their clients.

F.A.Q. 3

Q. If I don't know my client's immigration status, do I still have to advise of immigration consequences?

A: Yes. You have a duty to investigate your client's immigration status and possible immigration consequences. Do not assume citizenship based on accent, language, race or demeanor. Many immigrant defendants may not know that the criminal case could affect their immigration status until *you* tell *them!*

F.A.Q. 4

Q. My client seems reluctant to discuss immigration status. What do I do?

A: Like other interview techniques, you need to build trust with your client and know how to ask. It may help to tell them why you are asking for this information. It may also help to tell them that you are not with Immigration and will not share their information with Immigration.

F.A.Q. 5

Q: My state's rule is that affirmative misadvice constitutes ineffective assistance of counsel, but failure to advise does not. Does Padilla affect my responsibility in state cases?

A: Yes! *Padilla* held that defense counsel have an affirmative duty to advise clients of immigration consequences. Silence is insufficient to meet your duty. Because the holding was based on the Sixth Amendment to the U.S. Constitution, it applies to criminal proceedings in municipal, state and federal court.

F.A.Q. 6

Q. My state's standard plea form advises all defendants that a conviction may result in deportation. Do I still need to advise my client separately?

A. Yes. Judicial or other advisal does not supplant defense counsel's duty. Such advisals are generally not tailored to a defendant's specific situation (such as immigration status, priors, or the facts of the current criminal case or plea), and therefore will often not provide the level of individualized analysis and advice required by Padilla.

Your Turn: Question and Answers

We're just a call or click away!

- **Defending Immigrants Partnership**
defendingimmigrants.org
- **Immigrant Defense Project**
Phone: 212.725.6422
Email: info@immigrantdefenseproject.org
Web: immigrantdefenseproject.org
- **Immigrant Legal Resource Center**
Phone: 415.255.9499
Web: ilrc.org
- **National Immigration Project of National Lawyers Guild**
Phone: 617.227.9727
Web: nationalimmigrationproject.org