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SUPREME COURT'S *PADILLA* DECISION INCREASES RISK OF REPRESENTING NONCITIZEN CRIMINAL DEFENDANTS

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On March 31, 2010, the U.S. Supreme Court issued an important Sixth Amendment “right to counsel” decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). In sum, the Court held that the Sixth Amendment *requires* defense counsel for noncitizen criminal defendants to provide affirmative and competent advice to their clients on the immigration law consequences – including deportation – of a guilty plea. Should counsel fail to do so, the noncitizen defendant may make a claim of ineffective assistance of counsel.

By so ruling, the Court has made much more difficult the job of criminal defense attorneys who represent noncitizen defendants by requiring defense counsel to be well-versed in the complicated and ever-changing field of immigration law. By definition, this ruling increases the pitfalls and dangers for defense attorneys with noncitizen clients, as well as increases their exposure to malpractice claims and disciplinary proceedings.

I. *Padilla v. Kentucky*

The facts are straightforward. In 2001, Kentucky authorities arrested Jose Padilla, a native of Honduras who had lived in the United States for 40 years, after finding more than 1,000 pounds of marijuana in his truck. Mr. Padilla, a legal U.S. permanent resident, pleaded guilty to marijuana trafficking, a felony, and received a five-year sentence. He later claimed that he had agreed to the plea based on his lawyer’s incorrect advice that it would not affect his immigration status. However, since Mr. Padilla’s crime was a deportable offense under federal law, his guilty plea made his deportation virtually mandatory.

In post-conviction proceedings, Mr. Padilla claimed that his counsel failed to advise him of this consequence before entering the guilty plea, and further told him not to worry about deportation since he had been living in the United States for so long. Mr. Padilla alleged that he would have refused the plea and gone to trial but for his attorney’s erroneous advice.

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The Kentucky Supreme Court denied Padilla's petition for post-conviction relief on the grounds that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from "erroneous deportation advice" because deportation is only a "collateral" consequence of conviction. By a 7-2 vote (Justices Scalia and Thomas dissenting), the U.S. Supreme Court reversed the Kentucky high court.

The Court based its ruling on four factors. First, the Court argued changes in the complex field of immigration law necessitated this ruling. The Court noted that landscape of federal immigration law has changed dramatically over the last 90 years. Whereas previously only a narrow class of deportable offenses existed and judges had broad discretionary power regarding deportation, changes in immigration law have greatly expanded the class of deportable offences and have limited the discretion of judges not to order deportation. This has created a legal landscape in which deportation or removal is now virtually inevitable for a large number of noncitizens convicted of crimes. Since changes in immigration law have "dramatically raised the stakes of a noncitizen's criminal conviction," the Court opined that the importance of accurate legal advice for noncitizens accused of crimes "has never been more important." 130 S. Ct. at 1480.

Second, the Court rejected the Supreme Court of Kentucky's holding that the advice that Padilla sought about deportation concerned only "collateral" matters. The unique and severe nature of deportation was a factor here. Although deportation is not a criminal sanction, the Court found that deportation is "intimately related to the criminal process." *Id.* at 1481. Due to this close connection, the Court held that deportation was "uniquely difficult" to classify as either a "direct" or "collateral" consequence. *Id.* at 1482. Because the Court did not adopt the "direct/collateral" distinction in the deportation context, it held that *Strickland v Washington*, 466 U.S. 688 (1984), applied. *Strickland* holds that a criminal defendant is entitled to "effective assistance of counsel" before pleading guilty. As such, advice regarding deportation is included within the scope of the Sixth Amendment right to counsel.

Third, applying the first part of the two-pronged *Strickland* test, the Court found that Padilla's representation did, in fact, fall "below an objective standard of reasonableness." *Id.* (The Court remanded the issue of the second prong, whether Padilla was prejudiced by the ineffective counsel, back to the Kentucky court system.) Further, the Court found that the terms of the immigration statute at issue were "succinct, clear, and explicit in defining the removal consequences for Padilla's conviction." *Id.* at 1483. The Court stated that Padilla's counsel easily could have determined that Padilla's removal was mandatory by a simple reading of the statute.

It is noteworthy that the Court attempted to limit its holding to situations in which the immigration risk to the noncitizen defendant is clear on its face. The Court recognized that immigration law "can be complex and . . . is a legal specialty of its own [that some defense attorneys] may not be well versed in." *Id.* In essence, the Court tried to create a "safe harbor" for those "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id.* In situations where relevant immigration law issue is not clear, the Court offers that the defense attorney's duty is "more limited" in that counsel need only advise that the pending criminal charges "may carry a risk" of adverse immigration consequences. *Id.* But when the deportation consequence is truly clear, the attorney's "duty to give correct advice is equally clear." *Id.*

Fourth, the Court rejected the argument that *Strickland* applies to Padilla's claim only to the extent that he received *incorrect* immigration advice – as opposed to *no* immigration advice – from his counsel. The Court rejected this position on the grounds that it could provide attorneys with incentive to protect themselves by electing to remain silent on the client's immigration law consequences.

II. *Padilla* Has Made the Work of Defense Attorneys More Difficult and Risky

By increasing the scope of the Sixth Amendment right to counsel to include deportation consequences during plea-bargaining, the Court has made the job of criminal defense attorneys more difficult and has increased their exposure to malpractice lawsuits and to disciplinary actions. After the *Padilla* decision, criminal defense attorneys had better consider the following points:

1. Under the Sixth Amendment, defense attorneys must now provide *affirmative* and *competent* advice on the immigration consequences of a guilty plea. Lawyers cannot escape this duty by remaining silent. Justice Alito wrote a concurring opinion in which he opined that criminal defense counsel should not be required to provide advice on immigration law. Here, Justice Alito would have limited noncitizen defendants' claims for ineffective assistance to cases in which an attorney provided "unreasonable" and "incorrect" advice on deportation. Thus, Justice Alito's opinion would have allowed silence to be a "safe harbor" for defense attorneys. He based his opinion on the realization that immigration law is complex and that it is simply "unrealistic to expect [defense attorneys] to provide expert advice on matters that lie outside their area of training and expertise." *Id.* at 1487-88.

Specifically, this increased burden on criminal defense counsel may arise in several different stages of the defense process. First, defense attorneys now arguably have a duty to inquire in detail about the client's citizenship/immigration status at the initial interview stage. Without knowledge that a client is a noncitizen, the lawyer cannot fulfill his responsibility under *Padilla*. Second, defense lawyers have a duty to investigate and advise about the immigration consequences of plea alternatives at the plea-bargaining stage. Third, defense attorneys may have a duty to investigate and advise about the immigration consequences of sentencing alternatives at the sentencing stage. For example, whether a prison sentence is less than or greater than one year may be the determining factor under federal law on whether mandatory deportation is triggered.

2. Professional standards for defense lawyers provide the guiding principles for what constitutes effective assistance of counsel. The Court stated that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Id.* at 1482. In determining what constitutes "prevailing professional norms," the Court cited ABA standards, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications. The problems and pitfalls here are many.

First, Justice Alito noted in his concurrence that these standards may represent only the “aspirations of a bar group rather than an empirical assessment of actual practice.” *Id.* at 1488. Thus, a working attorney’s knowledge of the prevailing professional norms in practice may not prevail against an ABA document which argues that different, and stricter, norms should be applied. Second, it is not difficult to imagine a circumstance in which defense counsel simply makes a mistake in his reading of immigration law. This is especially true when an attorney is forced to research professional norms outside his field of expertise, *i.e.*, a criminal defense attorney studying immigration law. Such mistakes, of course, can only increase that lawyer’s professional liability exposure.

3. *Padilla’s* purported “safe harbor” may provide little protection in actual practice. As noted, this “safe harbor” is meant to protect defense attorneys in situations where potential immigration law consequences of a criminal plea are “unclear.” However, as noted by Justice Alito in his concurrence, the majority’s “safe harbor” solution is faulty for several reasons. As a threshold matter, it is not always be easy to determine whether the meaning of an immigration statutory provision is, in fact, “succinct” or “clear” – let alone what the correct application of the statute is to the specific facts at hand. This difficulty exists not only for attorneys who lack immigration law expertise, but even for experienced immigration attorneys.

Justice Alito cited commentary asserting that most crimes affecting immigration status are not specifically mentioned by the federal Immigration and Nationality Act, but which fall under a broad category of crimes, such as those involving “moral turpitude” or “aggravated felonies.” *Id.* at 1488. Citing expert commentary, Justice Alito observed that it is often extremely difficult to determine which offenses constitute moral turpitude or aggravated felonies. Justice Alito’s point is simple: if immigration law experts cannot agree on these points, what hope is there for a lawyer who is not well-versed in immigration law? Immigration law is just too complex to require defense attorneys to provide advice on these matters. What may appear “clear” at first blush may quickly become “unclear” in practice. For Justice Alito, the majority’s purported “safe harbor” fails to provide any true protection because the triggering threshold question – whether the meaning of the immigration statute is “clear” – will not usually be able to be satisfactorily resolved.

Justice Alito’s suggestion that the majority’s “safe harbor” may be a mirage is well taken. As a practical matter, it seems doubtful that a convicted criminal will undertake a careful assessment of the “clear versus unclear” question before launching the allegation – either in post-conviction criminal proceedings or in a civil malpractice lawsuit or both – that his defense lawyer violated his *Padilla* rights.

4. *Padilla’s* enlargement of the Sixth Amendment right to counsel might not be the end of the Court’s expansion of the scope of this right. Justice Alito observed that criminal convictions carry a wide variety of serious civil consequences other than deportation, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the military, and the loss of business or professional licenses. *Id.* No doubt many defendants would consider these adverse consequences of a criminal conviction to be as serious as deportation. The Supreme Court has not yet had ruled that a defense attorney’s Sixth Amendment duties extend to providing competent advice about these other potential consequences of a guilty plea. In his dissenting opinion, though, Justice Scalia noted that the rationale of the *Padilla* majority opinion provides no logical stopping-point to prevent the expansion of the right to counsel to encompass these additional civil consequences. *Id.* at 1496.

Although *Padilla* does not expand the Sixth Amendment right to counsel beyond the consequences of deportation, defense attorneys should be aware that a greater expansion – as discussed by Alito’s and Scalia’s opinions – may be in the offing.

III. Post-*Padilla*, Defense Attorneys Face Greater Malpractice Exposure

One of the net results of the *Padilla* ruling is clear: the exposure of criminal defense attorneys to malpractice and disciplinary actions has increased. The U.S. Supreme Court has expanded the scope of the noncitizen criminal defendant’s right to effective assistance of counsel. Criminal defense lawyers must now provide correct advice to clients on immigration law matters. This is true whether or not counsel are knowledgeable about this field of law, which is difficult and oft-changing. This is also true whether or not the criminal defense firm – be it public or private – has the resources to train its lawyers in immigration law or hire on additional counsel with immigration law expertise.

In the wake of the *Padilla* decision, criminal defense lawyers face more opportunities to make mistakes – or allegedly make mistakes – and get sued as a result. Even if such “ineffective counsel” lawsuits prove to be baseless and are defeated, the criminal defense lawyer will still have to incur the time, trouble, and expense of defending against them.