

Supreme Court Requires Defense Attorneys to Advise on Immigration Consequences of Guilty Pleas

On March 31, 2010 the U.S. Supreme Court issued a long-awaited and welcome decision finding that the Sixth Amendment requires criminal defense attorneys to advise noncitizens of the immigration consequences of a guilty plea. *Padilla v. Kentucky*, -- S.Ct. -- 2010 WL 122274 (2010). The decision in *Padilla* arises from a post-conviction proceeding in a Kentucky state court in which Mr. Padilla sought to vacate his guilty plea based on ineffective assistance of counsel. He had pled guilty to a drug trafficking charge after his attorney misadvised him that his plea would not affect his U.S. legal permanent resident status. However, a conviction for drug trafficking, results in nearly automatic deportation from the U.S. and, therefore, despite the fact that Mr. Padilla had been a permanent resident for over forty years and a veteran of the Vietnam War, he faced deportation. Based on his conviction, Mr. Padilla was ineligible for any defenses to deportation, and would face a permanent bar from returning to the United States if deported.

In *Padilla*, the Court first addressed the issue of whether deportation was a direct or collateral consequence of a criminal conviction. Under the Sixth Amendment, the right to effective counsel only applied historically to direct consequences. In its decision, the Court noted the difficulty in classifying deportation as either a direct or collateral consequence given its close connection to the criminal process. It found the distinction ill-suited in evaluating a claim of ineffective assistance as relates to the risk of deportation, and concluded that advice regarding immigration consequences falls within the Sixth Amendment's right to counsel.

In analyzing Mr. Padilla's claim, the Court found that: 1) his attorney was deficient in failing to advise his client that his guilty plea subjected him to virtually certain deportation; and, 2) that his claim was subject to the test set forth in *Strickland v. Washington* not only to the extent that he alleged that his attorney provided affirmative misadvice, but also to the extent that he alleged omissions by his attorney. Thus, the Court decided that ineffective assistance can be found where a criminal defense attorney fails to advise or provides the wrong advice regarding the potential immigration consequences of a criminal conviction.

In determining whether there has been ineffective assistance of counsel under the *Strickland* standard, a court will first need to determine whether an attorney's representation fell below an objective standard of reasonableness, and then whether there is a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceeding would have been different.

We applaud the Supreme Court's decision in *Padilla* to hold all criminal defense attorneys to a higher standard in providing affirmative and competent advice regarding potential

immigration consequences of criminal convictions. The issue of right to counsel as relates to immigration issues was long overdue for review and was clearly on the Court's agenda to consider. Interestingly, at the same time that the Court granted certiorari in the *Padilla* case, it had also agreed to review a case with the same issue, *Santos-Sanchez v. U.S.*, In *Santos-Sanchez*, the petitioner, a lawful permanent resident, became deportable from the U.S. following a guilty plea to aiding and abetting the illegal entry of an alien. The petitioner challenged his conviction by filing a legal writ called *coram nobis*, arguing that his lawyer's failure to advise him justified that the conviction be vacated. A federal magistrate agreed but the Federal District Court overturned the grant and the Fifth Circuit Court of Appeals upheld that decision. In its decision, the Fifth Circuit reasoned that Mr. Santos-Sanchez's deportation was not a direct, but a collateral consequence of criminal conviction and, thus, there was no requirement that he have been advised of the immigration consequences of this guilty plea. The Supreme Court vacated the Fifth Circuit decision and remanded the case for further consideration in light of the *Padilla* decision.

Given the Court's decision in *Padilla*, defense counsel are now held to a much higher standard when representing noncitizen clients. To ensure compliance with the decision, counsel should make sure to inquire about the immigration status or citizenship of all clients during the initial meeting. They must also investigate and advise about different plea alternatives in order to avoid deportation. Finally, they should advise on the potential consequences of sentencing on a noncitizen's immigration status. Criminal defense attorneys must work closely with immigration attorneys in their jurisdictions to examine these issues. Fortunately, relationships between these two bars have grown steadily over the years across the country and immigration matters are familiar to many in the criminal defense field. The challenge will now be to ensure that all defense attorneys consider immigration issues at the same time that they are preparing their clients' cases for resolution.

Padilla represents a major victory for immigrant rights in the United States. The consequences of deportation are often times as harsh as or more so than criminal sentences received by many noncitizens charged in state and federal courts around the country. The Supreme Court has finally recognized that the effects of criminal convictions are not collateral but have direct consequences for noncitizens, their families and their communities. And, most importantly, the Court has mandated that noncitizens facing criminal charges are appropriately counseled on all consequences of a guilty plea.