

Outside Counsel

'Padilla' Highlights Immigration Consequences of Criminal Proceedings

A recent U.S. Supreme Court case highlights the need for criminal defense attorneys to be aware of potential immigration consequences of the cases of their non-U.S. citizen clients. *Padilla v. Kentucky* illustrates the impact that strategic decisions made by criminal defense attorneys can have on subsequent immigration proceedings. Bad or misleading advice given by defense attorneys can lead to a client being placed in deportation proceedings upon the conclusion of his sentence or the next time he exposes himself to immigration authorities through otherwise harmless activities such as traveling internationally or attempting to renew his green card. Attorneys who mislead a client about the collateral consequences of his conviction may also be subjected to ethical complaints.

Padilla v. Kentucky, which was argued before the Court in October, has yet to be decided. It centers around the possibility of reopening criminal cases in which criminal defendants have accepted pleas without understanding the consequence their conviction would have on their immigration status. The petitioner, Jose Padilla, a lawful permanent resident of the United States for 40 years, pled guilty to three drug trafficking offenses and was sentenced to 5 years in prison and 5 years of probation. He contends that when he asked his criminal defense attorney about the effect his conviction would have on his permanent residence status, he was told that he "did not have to worry about [his] immigration status because he had been in the country for so long." In fact, Mr. Padilla's conviction made him subject to both mandatory detention as well as removal without relief as an "aggravated felon" pursuant to INA, 8 USC §101(a)(43).

In 2004, the petitioner filed a pro se collateral attack on his conviction

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in the Hardin County Circuit Court, in Kentucky, arguing that his attorney had provided him with ineffective assistance of counsel in his failure to investigate and inform him of the immigration consequences of his plea and arguing that he would not have pled guilty had he been correctly informed about the deportation proceedings that would result from his conviction. The Hardin County Circuit Court denied the motion, noting that "[a] valid guilty plea does not require that a defendant be informed of every consequence" of his conviction.

'Padilla' illustrates the extent to which immigration and criminal law are intertwined.

On appeal, the Kentucky Court of Appeals vacated the Circuit Court decision. While the court observed that *Commonwealth v. Furtado*, 170 S.W.3d 384 (Ky. 2005), had "held that the validity of a defendant's guilty plea is not compromised by trial counsel's failure to render advice relating to the collateral consequences of the plea," the court distinguished *Furtado* because Mr. Padilla claimed that his counsel had affirmatively provided erroneous information regarding his client's risk of removal.

The Kentucky Supreme Court reversed the Court of Appeals decision, relying on *Furtado*. It rejected the argument that misadvice about collateral consequences of a criminal conviction is distinguishable from a failure to advise. "In neither instance is the matter required to be addressed by counsel," the Court stated, "and so an attorney's failure in that regard cannot constitute ineffectiveness entitling a

criminal defendant to relief under *Strickland v. Washington* [466 U.S. 668 (1984)]."

U.S. Supreme Court

The U.S. Supreme Court heard three positions on oral argument. Stephen B. Kinnaird, the attorney for the petitioner, argued that both misadvice and a failure to advise a client about the immigration consequences of a conviction should be grounds for reopening a case based upon ineffective assistance of counsel pursuant to *Strickland*, which requires a showing not only that the counsel's performance was deficient, but that the deficient performance prejudiced the defense so much as to deprive the defendant of a fair trial.

Several justices expressed concern over which types of collateral consequences would have to be analyzed by defense attorneys if this position were adopted by the Court—if attorneys were required to inform clients about deportation consequences, then other collateral consequences to a guilty plea, including loss of child custody, or loss of a professional license might also require analysis.

Kentucky Assistant Attorney General William Long Jr., on behalf of the Commonwealth of Kentucky, argued for affirmation of the Kentucky Supreme Court decision, contending that the Sixth Amendment extends only to criminal proceedings and not to the collateral consequences of those proceedings.

Deputy Solicitor General Michael R. Dreeben, as amicus curiae on behalf of the federal government, argued that the Court should adopt an intermediate position similar to that advocated by the Kentucky Court of Appeals. The amicus contends that while a failure to advise clients about the collateral consequences of their convictions is not a ground of ineffective assistance of counsel, attorneys who choose to offer affirmative advice have a duty to do so competently. The Solicitor General argues that the petitioner's case should not be reopened because the overwhelming evidence

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'Padilla'

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of his guilt precludes a showing of prejudice against him under *Strickland* because he chose not to go to trial.

Possible Outcomes

If the Court adopts either the petitioner's or the federal government's amicus position, it will increase the obligation criminal practitioners have to their clients. If the petitioner's stance is adopted, criminal defense attorneys will have to analyze their clients' immigration and criminal history and advise them as to whether or not a guilty plea makes them deportable. This is often an involved process. The Immigration and Nationality Act defines two categories of deportable offenses: aggravated felonies and crimes involving moral turpitude. Although aggravated felonies

are generally defined by statute, determining whether or not a conviction is a "crime involving moral turpitude" typically involves immigration case law.

Once the nature of the conviction is determined, the client's immigration history must then be examined to determine whether or not he is deportable and, if so, whether he qualifies for relief from deportation. This depends on a number of factors, including the presence of a qualifying U.S. citizen or lawful permanent resident relative, the extent of the hardship that the relative would suffer upon the deportation of the client, the presence of prior convictions, and the immigration status of the client.

Forcing criminal defense attorneys to competently advise their clients as to the immigration consequences of a conviction would place a heavy burden on them to understand an area of law in which they might have little or no expertise. This would espe-

cially place a strain on attorneys with a high volume of cases. Even misdemeanor shoplifting offenses are considered crimes involving moral turpitude which can make a non-citizen deportable in certain circumstances.

If the Court adopts the federal government's position, attorneys will be placed in the uncomfortable position of choosing whether or not to advise clients of the collateral consequences of a possible plea agreement, and consequently of whether or not to subject themselves to possible Sixth Amendment claims if the advice they offer is incorrect. Defense attorneys who are accustomed to offering their clients unsolicited immigration advice would be less likely to do so, once they realize that doing so may have professional consequences if the advice they offer turns out to be incorrect.

Perhaps the most interesting question raised by the Court is which collateral consequences

are serious enough to require advice. If the Court rules that criminal defense attorneys must advise their clients as to the immigration consequences of a plea agreement, are they also required to advise them as to the custody consequences or the professional licensing consequences of a conviction? While Mr. Kinnaird, attorney for the petitioner, suggested a potential special rule forcing attorneys to notify their clients of the deportation consequences of plea agreements due to their inherent seriousness, the Court seemed hesitant to be put in the position of determining which collateral consequences of plea agreements defendants must be advised of and which they need not be.

Moreover, a ruling requiring criminal defense attorneys to offer immigration advice would have consequences in the fields of both immigration and criminal law. While individual clients sometimes retain immigration lawyers to advise their criminal

defense attorneys on the effect of a criminal conviction on their immigration status, such collaborations would become far more commonplace if the Court adopts the petitioner's position. Criminal defense attorneys working for firms without immigration litigation departments may be forced to enter into partnerships with immigration firms to ensure that the advice they offer is correct. Clients and criminal defense attorneys with limited resources available to retain outside counsel may be forced to study immigration laws themselves in order to properly advise their clients.

While the advice given to Mr. Padilla that he would not be deported was clearly incorrect, the standards for what constitutes "misadvice" are also subject to scrutiny. Clients are often told that there "is a chance they may be placed in removal proceedings" when it is a certainty that they will be placed in immigration detention and removed upon the completion

of their jail sentence. A client who believes he has a chance of not being caught by immigration, which he does not actually have, may be less likely to go to trial than he would be if he realized that a conviction would inevitably lead to removal proceedings. Is the standard for what is considered competent immigration advice given by a criminal attorney the same as what is expected of an immigration attorney who offers advice in his area of expertise?

While immigration law is typically considered independently from other types of law due to the existence of specialized immigration courts, *Padilla* illustrates the extent to which immigration and criminal law are intertwined. Regardless of the Court's pending decision in *Padilla*, it is clear that an increased knowledge of the immigration consequences of criminal convictions and the forms of relief from deportation will enable criminal attorneys to better represent their clients.