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Life After *Padilla v. Kentucky*: What Defense Attorneys Should Know

The Supreme Court issued a landmark decision on March 31, 2010 regarding the Sixth Amendment right to counsel. In *Padilla v. Kentucky*, 599 U.S. ___ (2010), the Supreme Court held that, pursuant to the Sixth Amendment, criminal defense counsel has a **duty to provide affirmative and competent advice** to a noncitizen defendant regarding the immigration consequences of a guilty plea. **Absent such advice**, the noncitizen client may raise a **claim of ineffective assistance of counsel**.

❖ **UNDERLYING FACTS OF *PADILLA V. KENTUCKY***

The defendant, Mr. Jose Padilla resided in the U.S. as a lawful permanent resident (i.e., “green card holder”) for at least 25 years. He faced deportation charges and removal from the U.S. following a guilty plea to the transportation of a large quantity of marijuana. Once in removal, Mr. Padilla filed a post conviction relief motion claiming ineffective assistance of counsel because his criminal defense attorney provided him with affirmative misadvice on the potential immigration consequences of deportation that resulted from his guilty plea. In addition, Mr. Padilla claimed that his Sixth Amendment right to effective assistance of counsel was violated when his attorney failed to provide competent advice on how his guilty plea would negatively impact his U.S. immigration status.

Mr. Padilla’s claims were rejected by the Kentucky Supreme Court which held that the Sixth Amendment guarantee of effective assistance does not extend to advice about the immigration consequences of a guilty plea because those consequences are deemed merely “collateral.”

The Supreme Court, however, disagreed with the Kentucky Supreme Court and held that competent defense counsel would have advised Mr. Padilla that his drug conviction for transportation of a controlled substance would have subjected him to deportation and removal from the United States. The Court recognized the dramatic changes that have evolved over the last 90 years involving the immigration consequences of criminal convictions and concluded that the “drastic measure” of deportation is now inevitable for most noncitizens convicted of a crime and that “[a]ccurate legal advice for noncitizens accused of crimes has never been more important” *Padilla*, slip. op. at 6.

❖ KEY POINTS FROM THE *PADILLA V. KENTUCKY* DECISION:

- **SIXTH AMENDMENT GUARANTEES AFFIRMATIVE, COMPETENT ADVICE ON IMMIGRATION CONSEQUENCES**

The Sixth Amendment guarantee of effective assistance requires defense counsel to provide affirmative, competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea, and, absent such advice, a noncitizen may raise a claim of ineffective assistance of counsel. *Padilla v. Kentucky*, 599 U.S. ___ (2010).

- **SIXTH AMENDMENT GUARANTEES OF EFFECTIVE ASSISTANCE OF COUNSEL INCLUDES TAKING STEPS TO PRESERVE DISCRETIONARY RELIEF FROM DEPORTATION AND REMOVAL**

The duty of effective assistance of counsel pursuant to the Sixth Amendment includes providing affirmative, competent advice and seeks ways of **preserving discretionary relief from deportation** for a noncitizen defendant.

“[P]reserving the possibility of discretionary relief from deportation...would have been one of the principle benefits sought by defendants deciding whether to accept a plea offer or instead of proceed to trial.” *Padilla*, slip. op. at 10.

- **DEPORTATION AS A “PENALTY”**

Deportation is no longer recognized as a collateral consequence of a criminal conviction.

“Deportation is a “penalty” and an “integral part – indeed sometimes the most important part – of the penalty that may be imposed on noncitizens.” *Id.* at 6.

- **NO ADVICE (SILENCE) IS INSUFFICIENT**

The Court expressly rejected option of limiting application of *Strickland* to claims of affirmative misadvice recognizing that:

[a] “holding limited to affirmative misadvice...would give counsel an incentive to remain silent on matters of great importance...when answers are readily available.” *Id.* at 13.

- **“INFORMED CONSIDERATION” OF DEPORTATION CONSEQUENCES NECESSARY IN PLEA NEGOTIATIONS**

The Court recognized the benefits and importance of considering the immigration consequences during plea negotiations between defense counsel and the prosecution.

- **EFFECTIVE ASSISTANCE SHOULD INCORPORATE PROFESSIONAL STANDARDS**

The Court cited to professional standards of the American Bar Association and the National Legal Aid and Defender Association in establishing the duty to (1) be informed of a client’s immigration status, (2) investigate possible immigration consequences of a guilty plea and sentence and (3) advise on possible immigration consequences of a guilty plea and sentence.

❖ WHAT CONSTITUTES EFFECTIVE ASSISTANCE OF COUNSEL?

STEP ONE: CREATE AN OFFICE POLICY, PROCEDURE OR PROTOCOL TO ADDRESS NONCITIZEN REPRESENTATION

- Design & Implement a Screening Method to Identify the Immigration Status of All Clients – Consult “Protocol for the Development of a Public Defender Immigration Service Plan” written by Peter Markowitz, NYSDA and IDP and published at www.nysda.org and www.immigrantdefenseproject.org
- Create and Follow an Immigration Worksheet When Representing a Noncitizen Client – See attached sample Immigration Worksheet
- Schedule a Consultation with an Immigration Expert Before Accepting Any Plea Offers – See “Helpful Resources” below
- Obtain Helpful Advisory Opinions In Support of a Plea that Lessens or Eliminates Potential Immigration Consequences
- Document Advice Offered to Noncitizen Client
- Consider Assisting Your Client in Filing a Direct Appeal or Post Conviction Remedy

STEP TWO: PROVIDING EFFECTIVE ASSISTANCE TO A NONCITIZEN CLIENT

- **Investigate The Facts:**
 - a. Identify client’s Immigration Status – obtain client’s Alien Registration Number (8 or 9 digit number assigned by immigration authorities beginning with the letter “A”), if available
 - b. Identify if client at risk for removal from the United States – includes anyone who is NOT a United States citizen!
 - c. Learn of client’s U.S. Family Ties – obtain information relating to U.S. immigration status of grandparents, parents, spouse, partner and children
 - d. Inquire into client’s length of residence in the United States – including any dates of departures from the U.S. since first arrival
 - e. Determine client’s duration of immigration status in the United States – determine if client has any upcoming expiration dates of status
 - f. Determine if there is any lodged ICE/immigration Detainer Against Your Client
 - g. Review client’s Criminal History – note any prior or pending charges, dates of convictions and sentences) and record present charges and any plea or sentencing offers

Hint: Helpful Questions To Ask:

Where were you born? - Ask to see a passport, birth certificate or naturalization certificate. If client is born in the U.S., Puerto Rico or Guam, he/she is a United States citizen.

When did you first come to the United States?

How did you enter the United States?

What is your immigration status in the United States?

- **Determine Your Client's Goals for Representation:**

- a. Prioritize client's goals and represent your client according to his/her defense priorities.
- b. Keep those goals in mind when negotiating a plea and advising your client of any potential negative immigration consequences:

- **Avoid conviction that triggers deportation:**

- a. Preserve eligibility to get future immigration benefits (i.e., lawful permanent resident or "green card" status, citizenship, Temporary Protected Status, obtaining a special immigrant visa – U visa (victim of crime), T visa (victim of trafficking) or a battered spouse eligible for VAWA relief)
- b. Preserve ability to ask immigration judge to stay in U.S.
- c. Get your noncitizen client released from jail ASAP to avoid ICE detainer and transfer Immigration consequences not a priority for your client
- d. Client seeks expedited transfer to ICE for removal from the US

- **Analyze immigration consequences:**

- a. Determine likelihood that charge/plea will trigger deportation
- b. Determine likelihood that charge/plea will trigger inadmissibility
- c. Determine impact of charge/plea offer or sentence on "discretionary relief" or other immigration status (i.e., how will charge/plea or sentence impact TPS status, LPR status or future eligibility for citizenship, etc.)

Helpful Hint: See attached ***NYSDA Immigrant Defense Project: Immigration Consequences of Convictions Summary Checklist*** and "Resources" listed below.

- **Strategize and Prioritize Your Client's Defense Goals:**

- a. Seek assistance on immigration analysis
- b. Advocate for a plea that lessens or eliminates the potential for removal from the United States
 - Negotiate to non-deportable offense;
 - Sterilize record of conviction;
 - Obtain sentence of less than 365 (or 180 for CIMT) days;
 - File an appeal of conviction/sentence;
 - Get client out of jail before an immigration detainer is lodged;
- c. Educate the courts and district attorney's office on the unintended immigration consequences (i.e., provide an advisory letter/opinion during any plea negotiations)

❖ WHERE TO GET HELP?

LEGAL ASSISTANCE OR CONSULTATION:

New York State Defenders Association – Criminal Defense Immigration Project
JOANNE MACRI
(716) 913-3200 or (518) 465-3524
jmacri@nysda.org

Immigrant Defense Project - Hotline
(Available Tues. & Thurs. 1:30 p.m.-4:30 p.m.)
(212) 725-6422
www.immigrantdefenseproject.org

HELPFUL RESOURCES:

IDP Practice Advisory: **Duty of Criminal Defense Counsel Representing Immigrants After Padilla v. Kentucky** (April 6, 2010) available at
http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf

DIP National Practice Advisory: **Steps to Representing a Noncitizen Defendant Under Padilla v. Kentucky** available at
<http://defendingimmigrants.org/http://defendingimmigrants.org/>

Manuel D. Vargas, *Representing Immigrant Defendants in New York* (4th ed. 2006), available at
www.immigrantdefenseproject.org.

NYSDA IDP: **Quick Reference Chart for New York Offenses** (2006), available at
www.immigrantdefenseproject.org.

Defending Immigrant Partnership: **Representing Noncitizen Criminal Defendants: A National Guide** (2008), available for free downloading at
<http://defendingimmigrationlaw.com>

HELPFUL WEBSITES:

New York State Defenders Association; www.nysda.org

Immigrant Defense Project www.immigrantdefenseproject.org

Defending Immigrants Partnership www.defendingimmigrants.org

NLG National Immigration Project www.nationalimmigrationproject.org

Immigrant Legal Resource Center www.ilrg.org

NON CITIZEN CLIENT: IMMIGRATION WORKSHEET

Attorney: _____

CLIENT INFORMATION

NAME	CASE NO.	Date
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CLIENT'S IMMIGRATION STATUS

Lawful Permanent Resident?	<input type="checkbox"/>	If yes, issuance/ expiration dates? /
Refugee or Granted Asylum?	<input type="checkbox"/>	If so, when?
Undocumented (entered illegally)?	<input type="checkbox"/>	If yes, when?
Temporary Protected Status?	<input type="checkbox"/>	If yes, when?
Previously ordered Deported?	<input type="checkbox"/>	If yes, when?
Other status?	<input type="checkbox"/>	If yes, explain.

CUSTODY STATUS

Client in custody?	YES <input type="checkbox"/>	NO <input type="checkbox"/>	If yes, where?
ICE Detainer Lodged?	YES <input type="checkbox"/>	NO <input type="checkbox"/>	

CRIMINAL HISTORY (TYPE OF CONVICTED OFFENSE, DATE & SENTENCING DETAILS-INCLUDING DIVERSION, OR OTHER DEFERRED SENTENCE INCLUDING YOUTHFUL OFFENDER STATUS, ETC.)

CURRENT PLEA NEGOTIATIONS

CURRENT CHARGE(S)?	Plea Offer?
CURRENT CHARGE(S)?	Plea Offer?

CLIENT'S FAMILY HISTORY

FAMILY MEMBERS	US CITIZEN	Lawful Permanent Resident	Undocumented (Illegal Entry)	Living in the US?
SPOUSE				
PARTNER				
CHILDREN				
MOTHER				
FATHER				
GRANPARENTS				

CLIENT GOALS:	(CHECK)
Release from custody and avoid immigration detainer?	<input type="checkbox"/>
Avoid being referred to the immigration court for removal proceedings?	<input type="checkbox"/>
Preserve eligibility for lawful permanent resident status or naturalization?	<input type="checkbox"/>
Preserve ability to seek a waiver from removal before an immigration judge?	<input type="checkbox"/>
Interested in being referred for removal from the United States as soon as possible?	<input type="checkbox"/>
Other goals?	

LIKELIHOOD THAT PLEA OR SENTENCE WILL IMPACT CLIENT'S IMMIGRATION STATUS:					
OFFENSE OR SENTENCE	DEFINITE IMPACT	LIKELY IMPACT	POSSIBLE IMPACT	UNLIKELY IMPACT	WILL NOT IMPACT

ELIGIBILITY OF RELIEF FROM IMMIGRATION CONSEQUENCES AVAILABLE:

RECOMMENDED STRATEGIES TO LESSEN IMMIGRATION IMPACT:	(CHECK)
Secure release of client prior to ICE detainer being lodged	<input type="checkbox"/>
Negotiate a lesser offense for plea bargain	<input type="checkbox"/>
Negotiate a reduced sentence	<input type="checkbox"/>
Sterilize the record of conviction	<input type="checkbox"/>
Negotiate pre-plea diversion program	<input type="checkbox"/>
File a direct appeal on behalf of the client	<input type="checkbox"/>
Withdraw plea of guilty prior to sentencing	<input type="checkbox"/>
Vacate prior conviction, judgment or sentence	<input type="checkbox"/>
Other goals?	<input type="checkbox"/>

DEFENSE STRATEGIES AND ADDITIONAL NOTES:

AVAILABLE RESOURCES:	(CHECK)
NYSDA CDIP – Joanne Macri Tel. (716) 913-3200 <input type="checkbox"/>	Fax (518) 465-3249 <input type="checkbox"/>
	Email jmacri@nysda.org <input type="checkbox"/>
Immigrant Defense Project Tel (212) 725-6422 <input type="checkbox"/>	Website www.immigrantdefenseproject.org <input type="checkbox"/>
Defending Immigrants Partnership	Website www.defendingimmigrants.org <input type="checkbox"/>
Other Resources <input type="checkbox"/>	