



U.S. Supreme Court Rules that Non-Citizen Defendants Must Be Advised of Immigration Consequences of Criminal Charges (Published in *Mshale* - May 2010)

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Immigration regulations and criminal law intersect when a non-citizen is charged with a crime and faces possible immigration consequences, including deportation, if he is convicted of the offense. Criminal defense counsels sometimes advise their clients to plead guilty to obtain a reduced sentence or to avoid the risk of going to trial. For non-citizens, however, the effects of the criminal charge on their immigration status and their ability to stay in the United States have the deepest and most lasting consequences.

Recognizing this fact, the U.S. Supreme Court recently held in its landmark 7-2 decision, *Padilla v. Kentucky*, that criminal defense counsels must advise their non-citizen clients of the immigration consequences of a guilty plea. The court acknowledged that deportation is an extreme penalty and that immigration laws have become much more draconian over the years, making even minor crimes – such as shoplifting or marijuana possession – a deportable offense in some cases. “The severity of deportation – the equivalent of banishment or exile – only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation,” said Justice John Paul Stevens, who wrote the opinion for the court.

The appeal involved Jose Padilla, a lawful permanent resident of the U.S. for over 40 years, who pled guilty to transporting nearly 1,000 pounds of marijuana in Kentucky. Like many other drug trafficking crimes, his offense made him a deportable, aggravated felon under immigration law. The aggravated felony disqualified him from receiving nearly all forms of relief from deportation, including cancellation of removal. Padilla later moved to vacate the plea, claiming ineffective assistance of counsel because his defense attorney failed to warn him of the immigration consequences of the guilty plea and further assured him that it would not affect his immigration status because he had lived in the U.S. for so long.

The Supreme Court overruled the prior decision of the Supreme Court of Kentucky, which held that neither counsel’s failure to advise about the deportation risk nor misadvice about the

consequences was a basis for vacating the plea. The lower court reasoned that the Sixth Amendment does not protect criminal defendants from their counsels' misadvice about the immigration consequences of a guilty plea because they are merely "collateral" and not "direct" consequences – similar to losing a professional license or being denied access to public housing.

Disagreeing with the Kentucky court, the Supreme Court passed on deciding whether the risk of deportation is a direct or collateral consequence, finding that this distinction was unnecessary because counsel must, "at the very least," advise a non-citizen defendant that there may be adverse immigration consequences. The Court pointed to various sources, including the American Bar Association, criminal defense and public defender organizations, and state and city bar associations, all agreeing that defense counsel should advise of the immigration consequences of a criminal conviction.

Justice Stevens wrote, "Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence." He added that "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." The Court found that defense counsel did not provide reasonable professional assistance because constitutionally competent counsel would have advised Padilla that a drug trafficking conviction made him deportable. The Court did not, however, rule on whether Padilla was entitled to postconviction relief. Instead, it remanded the matter to the Kentucky courts to decide whether Padilla actually suffered prejudice; that is, whether counsel's deficient performance prejudiced him, resulting in a fundamentally unfair outcome.

The *Padilla* decision applies to all states, including those that have previously ruled differently. In *Alanis v. State*, the Minnesota Supreme Court rejected the defendant's argument that counsel's failure to inform him that his guilty plea might subject him to deportation constituted ineffective assistance of counsel. The Minnesota court reasoned that counsel was not required to advise him of the deportation risk because it was a collateral consequence. Under *Padilla*, however, criminal defense counsel's failure to warn non-citizens about deportation consequences of a guilty plea can no longer simply be dismissed as just a "collateral consequence" of a conviction or plea.

Before non-citizens enter a guilty plea, it is important that they or their criminal defense counsel consult with experienced immigration counsel to assess the immigration consequences of the plea. Pleading guilty to a different charge and for a specific maximum sentence could spare the non-citizen from being deported or being denied entry into the U.S. after traveling abroad. And now more than ever, criminal defense counsel should inform non-citizens of the potential immigration consequences of a guilty plea in order to provide effective assistance under *Padilla*.