

## ALERTS AND UPDATES

### U.S. Supreme Court's Sixth-Amendment Ruling Requires Defense Counsel to Inform Immigrant When Plea May Lead to Deportation

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Last week, the U.S. Supreme Court issued a significant decision regarding the rights and protections owed to immigrant defendants facing criminal charges. In *Padilla v. Kentucky*,<sup>1</sup> the Supreme Court held that the Sixth Amendment right to effective assistance of counsel provides that criminal counsel must inform an immigrant defendant whether a plea carries a risk of deportation. This requirement, the Court reasoned, allows the immigrant to weigh both the criminal and immigration consequences of a plea and make an informed decision that reflects both priorities.

*Padilla* involved a U.S. permanent resident for over 40 years, who had served in the U.S. armed forces during the Vietnam War. He pleaded guilty to the transportation of marijuana—an offense that subjected him to near-certain deportation. However, Padilla's criminal attorney incorrectly advised that a guilty plea would not subject him to deportation, because he had lived in this country for so long. Padilla sought to have his plea vacated, contending that he would not have accepted the plea had he been aware of the true immigration consequences and that his Sixth Amendment right to effective counsel had been compromised. The Supreme Court of Kentucky ruled that the Sixth Amendment's guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation, as this is merely a "collateral" consequence of a conviction. Every federal circuit court that has considered the issue agreed.

On March 31, 2010, seven Supreme Court Justices declared that because deportation is "a particularly severe 'penalty'" and is "intimately related" to the criminal process, criminal lawyers have a responsibility to advise their clients of the potential immigration consequences of an offense. Writing for the five-member majority, Justice Stevens held that "it is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and that failure to do so" implicates Sixth Amendment concerns. Writing separately but concurring in the judgment, Justice Alito, joined by Chief Justice Roberts, stated that the complexity of immigration law requires a competent attorney representing an immigrant in criminal proceedings to: (1) refrain from providing erroneous advice; and (2) advise the immigrant that a plea may have adverse consequences and suggest that he or she seek the advice of immigration counsel. Justice Scalia, joined by Justice Thomas, dissented.

The majority of the Court recognized that because deportation is such a severe consequence and since the Immigration and Nationality Act has become increasingly intertwined with criminal law, effective counsel requires criminal attorneys to inform their clients of the specific immigration consequences of a plea when such consequences are clear. Where the consequences of a plea "could easily be determined from reading the removal statute," as in Padilla's case, the failure to advise of such consequences "is not a hard case in which to find deficiency." Where the deportation consequences of a particular plea are "unclear or uncertain," the majority held that effective counsel requires criminal attorneys only to advise that the charges "may carry a risk of adverse immigration consequences." According to the Court, "[o]ur longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact on families living lawfully in this country demand no less."

Justice Alito noted, however, that immigration law is "quite complex," the consequences in any given case are rarely clear, and many criminal defense attorneys have "little understanding" of immigration law. Thus, he reasoned the Sixth

Amendment maintains that criminal attorneys have duties to refrain from affirmative misadvice and to advise of the possibility that a given plea may have adverse immigration consequences. Justice Alito pointed out that "reasonably competent attorneys" have a duty of candor, because silence or incomplete advice may be worse than no advice at all. Justice Alito formulated a so-called "*Padilla* rule":

When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject.

## Analysis

It is likely that the *Padilla* decision will put immigrant defendants in a better position to understand the full consequences of criminal charges and allow them to take into account potential immigration consequences when deciding whether to accept a plea. The Court observed that "as a matter of federal law, deportation is an integral part—indeed sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."

The Court appears to have placed considerable responsibility with defense counsel. While the five-member majority recognizes that "immigration law can be complex," Justice Alito highlights the numerous difficulties and level of knowledge required to accurately assess the immigration consequences of any criminal charge. Justice Alito notes, for example, that determining whether a particular offense creates deportability as an "aggravated felony" is "not an easy task" and that determining whether a crime involves "moral turpitude is no easier." *Padilla* thus creates a constitutional obligation on criminal defense counsel to become more familiar with immigration law. An ideal approach may be for criminal counsel and immigration counsel to collaborate when reviewing and crafting pleas. Both practice areas would be able to learn from the other and assist the client by understanding the dynamics in the criminal as well as the immigration context.

The contours of the *Padilla* decision are likely to be further defined in coming years. However, at this time, the decision underscores how a criminal attorney's failure to adequately advise a client that a given plea carries the risk of deportation may render counsel constitutionally deficient. *Padilla* appears to provide an opportunity for immigrant defendants to make more-informed choices, with a greater understanding of the extensive consequences of a criminal plea.

## For Further Information

If you have any questions about this *Alert* or would like more information, please contact any [member](#) of the [Immigration Practice Group](#), any [member](#) of the [White-Collar Criminal Defense, Corporate Investigations and Regulatory Compliance Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

## Note

1. *Padilla v. Kentucky*, 2010 U.S. LEXIS 2928 (U.S. Mar. 31, 2010).