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Practice Advisory on *Padilla v. Kentucky* – April 8, 2010

I. Introduction

On March 31, 2010, the U.S. Supreme Court held that criminal defense attorneys are required under the Sixth Amendment to advise noncitizen clients of the immigration consequences of their guilty pleas. *Padilla v. Kentucky*, No. 08-651, 2010 U.S. LEXIS 2928 (Mar. 31, 2010). This decision has dramatic ramifications not only for immigrant defendants and defense attorneys, but also for prosecutors and for judges who are accepting guilty pleas from noncitizen defendants. This advisory discusses the landmark case, its implications for public defenders, and briefly discusses some of the issues it raises.

II. The *Padilla* Decision

The *Padilla* case arises from a state post-conviction proceeding in which Mr. Padilla sought to vacate his plea based on a claim of ineffective assistance of counsel. He pled guilty to a drug trafficking charge after his counsel misadvised him that the plea would have no effect on his lawful permanent residence. In fact, the drug trafficking conviction was an aggravated felony, the most serious type of offense for immigration purposes which results in nearly automatic deportation. Notwithstanding that Mr. Padilla had been a permanent resident for forty years and a U.S. veteran of the Vietnam War, he faced deportation from the U.S. for this conviction, he was not eligible for any defenses to deportation, and would be barred permanently from returning to the U.S.

In its decision, the Supreme Court first discussed whether deportation was a direct or collateral consequence of a criminal conviction, as the Sixth Amendment right to effective assistance of counsel has only applied historically to direct consequences. Writing for the majority of five members of the Court, Justice Stevens stated that it was difficult to classify deportation as a direct or collateral consequence, because

“[d]eportation 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.” *Padilla*, 2010 U.S. LEXIS at *15.¹ “Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process.” *Id.* at *18, citing *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). While not finding that deportation is a direct consequence of a conviction,² the Court held that the Sixth Amendment right to counsel includes advice regarding deportation, because of the close connection between crimes and deportation and the fact that “removal is practically inevitable” for anyone who has committed a deportable offense. *Padilla*, 2010 U.S. LEXIS at *14. Consequently, the standard for effective assistance of counsel under the Sixth Amendment, as set out in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to such advice.

Strickland requires a court to determine whether an attorney’s representation “fell below an objective standard of reasonableness,” as measured in part by prevailing professional norms. *Padilla*, 2010 U.S. LEXIS at *19, citing *Strickland*, 466 U.S. at 688. If counsel’s performance fell below that standard, the second prong of *Strickland* then requires a determination of prejudice to the defendant. In *Padilla*, the Court ruled only on the first prong of the *Strickland* test, because the state court had not reached the issue of prejudice. The Court found that defense counsel easily could have read the immigration statutes to determine that drug trafficking subjected Mr. Padilla to automatic deportation; thus, his incorrect advice to his client fell below the reasonableness standard. *Padilla*, 2010 U.S. LEXIS at *22. The Court then remanded the case back to the state court to determine the issue of prejudice under the second prong of *Strickland*.

While holding that the right to effective counsel includes advice regarding immigration consequences, the Court separated the type of advice required into two categories of cases. In the first category of cases, those in which the immigration consequences of the criminal offenses are “succinct, clear and explicit,” *id.*, defense counsel has a duty to give correct and detailed advice about such consequences. The Court found that Mr. Padilla’s case fit into this category.³ In the second category of cases, those in which the immigration consequences are not clear because “the law is not succinct and straightforward,” *id.* at *23, defense attorneys need only advise their clients that the criminal charges may have adverse immigration consequences.

In its decision, the Court addressed the position advocated by the Solicitor General that *Strickland* should only apply to cases in which criminal defense attorneys affirmatively misadvise their clients. The Court rejected this position on the basis that applying *Strickland* only to affirmative misadvice would encourage attorneys to remain silent about immigration consequences, and that this would conflict with their duty to inform clients of the advantages and disadvantages of pleading guilty. *Id.* at *26. The majority opinion also noted that discussing immigration consequences during plea negotiations will allow prosecutors and defendants to “reach agreements that better satisfy the interests of both parties.” *Id.* at *30-31.

A concurring opinion was written by Justice Alito and joined by Chief Justice Roberts. The concurrence agreed that defense attorneys have an obligation to warn clients of the immigration consequences of pleading guilty, but it disagreed with the majority about how much advice an attorney is required to provide. Alito stated that immigration laws are so complex that criminal defense attorneys should not be required to give specific immigration advice; rather, defense counsel should be required only to warn their clients that pending charges may cause adverse immigration consequences, and advise their clients to consult with experienced immigration attorneys.

A dissent was written by Justice Scalia and joined by Justice Thomas. Scalia wrote that the Sixth Amendment does not require effective assistance of counsel in collateral matters, and that this issue is a more appropriate topic for legislation. He also speculated that the holding in this case will open the floodgates for claims of ineffective assistance of counsel based on other collateral consequences of criminal convictions. Scalia even questioned the holdings of both *Strickland* and *Gideon v. Wainwright*, 372 U.S. 335 (1984), as inconsistent with the text and original meaning of the Sixth Amendment.

III. Impact on Criminal Defense Attorneys

Many public defender organizations and professional bar associations, including CPCS, the ABA and NLADA, already mandate that attorneys advise their clients about the immigration consequences of criminal charges prior to pleading guilty. *See* CPCS Performance Guidelines, 5.4(o). However, *Padilla* holds that such advice is constitutionally required and that failure to advise clients constitutes ineffective assistance of counsel. It is imperative, therefore, that defense attorneys learn enough about this area of law either to advise their clients themselves or know when and how to consult with experts who can assist them in advising their clients.

Counsel should presume that a client's case falls into the first category, discussed above, in which the immigration law is clear and the attorney is required to provide substantive advice about the specific immigration consequences resulting from disposition of the pending criminal charges. Motions to vacate pleas filed post-*Padilla* will likely argue that the immigration consequences were clear, and that counsel was ineffective by failing to provide specific advice. It is not enough merely to warn a client generally that he might face immigration consequences. Moreover, most indigent defendants do not have the resources to hire or consult with immigration attorneys and there is no right to appointed counsel in immigration proceedings. Thus, it is the duty of counsel to specifically advise their clients in every case.

If a client already has an immigration attorney, criminal counsel should confer with that attorney and work together to inform the client about immigration consequences of the criminal case and to minimize such consequences. If the client does not have an immigration attorney, counsel should utilize other resources available in Massachusetts, including the National Immigration Project of the National Lawyers Guild and the CPCS

Immigration Impact Unit. CPCS staff attorneys and appointed counsel may contact the Immigration Impact Unit for advice on the immigration consequences of individual cases. An intake form is attached to this advisory.

IV. Impact on First Circuit and Massachusetts Caselaw

The *Padilla* case overrules *U.S. v. Gonzalez*, 202 F.3d 20, 25 (1st Cir. 2000). This First Circuit decision held that immigration consequences were collateral to a criminal conviction and, therefore, a guilty plea could not be withdrawn due to failure to warn the defendant about immigration consequences of his plea. *See Padilla*, 2010 U.S. LEXIS at*16, n. 9.

Padilla also overrules *Commonwealth v. Fraire*, 55 Mass. App. Ct. 916 (2002), and *Commonwealth v. Monteiro*, 56 Mass. App. Ct. 913 (2002), which rejected motions to vacate based on counsel's failure to advise of the immigration consequences of the pleas. These cases applied the Sixth Amendment to claims of ineffective assistance of counsel, as analyzed by *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974), and found that immigration consequences were collateral; thus, counsel did not have a duty to advise the defendants of such consequences.

Padilla also impacts the questioning by judges during plea colloquies. Since counsel is now constitutionally mandated to advise clients of immigration consequences prior to pleading guilty, judges should ask defendants during plea colloquies whether counsel adequately explained the immigration consequences of pleading guilty.

V. Some Issues Raised by *Padilla*

Is *Padilla* retroactive?

Although the Court does not state specifically that its holding is retroactive for collateral attacks on guilty pleas that occurred prior to the *Padilla* decision, it implies as much by the following language:

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty.

Padilla, 2010 U.S. LEXIS at *29. This observation by the Court suggests that it anticipates the decision to cause some number, but not a significant amount, of post-conviction motions based on counsel's misadvice or lack of advice in pleas occurring prior to the decision.

The Supreme Court generally assumes non-retroactivity of its holdings when raised on collateral review. In determining retroactivity, however, the Court has noted that it must first determine if “a particular decision has really announced a ‘new’ rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law.” *Yates v. Allen*, 484 U.S. 211, 216 (1988). An argument can be made that *Padilla* does not announce a new rule, but rather confirms the “prevailing norms of practice,” including an implicit acceptance of the application of *Strickland* to advice pertaining to the immigration consequences of pleading guilty. *Padilla*, 2010 U.S. LEXIS at *29. Even if the case does announce a new rule pertaining to the Sixth Amendment, *Padilla* may fall within an exception to non-retroactivity when the new rule “requires the observance of those procedures that . . . are ‘implicit in the concept of ordered liberty.’” *Teague v. Lane*, 489 U.S. 288, 307 (1989), citing *Mackey v. United States*, 401 U.S. 667, 692 (1971).

Does *Padilla* apply to defendants who go to trial?

While the *Padilla* decision expressly discusses effective assistance of counsel in the context of guilty pleas, it does not address the applicability of its holding to cases in which defendants have gone to trial based on counsels’ misadvice or failure to advise of the immigration consequences of convictions. In this aspect, the case is similar to the Court’s decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), which held that defendants who pled guilty in reliance on the availability of certain waivers could continue to apply for those waivers even after the statute creating the waivers had been repealed. Indeed, the Court cites to the *St. Cyr* decision frequently in *Padilla*. The Supreme Court has not ruled on whether the holding in *St. Cyr* also applies to cases that have gone to trial, but some Circuit Courts of Appeal, including the First Circuit, have held that those who chose to go to trial cannot benefit from the *St. Cyr* holding, see *Dias v. INS*, 311 F.3d 456, 458 (1st Cir. 2002).

Does *Padilla* impact Massachusetts caselaw regarding other aspects of criminal procedure that treat deportation as a collateral consequence?

Although *Padilla* only addresses advice on immigration consequences in connection with guilty pleas, it calls into question many Massachusetts cases which generally hold that immigration consequences are collateral and should not be considered at any point in a criminal proceeding. See, e.g., *Commonwealth v. Quispe*, 433 Mass. 508, 513 (Mass. 2001) (immigration consequences are collateral and may not be a basis for a judge’s decision to dismiss criminal charges); *Commonwealth v. Hason*, 27 Mass. App.Ct. 840, 843 (1989) (but for M.G.L. c. 278, §29D, the Massachusetts immigration warnings statute, a trial judge would have no duty to warn of immigration consequences, because they are collateral). As discussed above, *Padilla* held that immigration consequences are not easily categorized as either direct or collateral; such a finding calls into question the basis of the holdings in these cases.

Should prosecutors consider immigration consequences in plea recommendations?

Some district attorney offices in Massachusetts currently have policies which prohibit prosecutors from considering the immigration status of defendants in plea recommendations. The stated reasons for such policies are that immigration consequences are collateral and that noncitizens should not receive preferential treatment as compared to U.S. citizens. Although *Padilla* does not require prosecutors to consider immigration consequences, it certainly encourages them to consider such consequences during plea negotiations. The decision states that “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process.” *Padilla*, 2010 U.S. LEXIS at *30. Moreover, as discussed above, the Court recognizes that immigration consequences often stem directly from criminal convictions, and are often even more important to a defendant than the criminal sentence he faces. *Id.* at *21. In light of the *Padilla* decision, defense counsel should encourage prosecutors to consider the immigration consequences to noncitizen clients during plea negotiations.

Does *Padilla* expand the Sixth Amendment right to effective assistance of counsel to include advice on other consequences of criminal dispositions?

The Court in *Padilla* states that it has never made a distinction between direct and collateral consequences in regard to “the scope of constitutionally ‘reasonable professional assistance,’” and states further that it need not decide where deportation falls because of the “unique nature of deportation.” *Id.* at *16. As discussed in Scalia’s dissent, this language may encourage litigation pertaining to other consequences of convictions that were previously found to be collateral.

Does *Padilla* give rise to an argument for the right to appointed counsel in removal proceedings?

As discussed above, the Court stated in *Padilla* that because deportation is an “integral part... of the penalty” imposed upon noncitizens who plead guilty to certain crimes, the Sixth Amendment extends to advice about immigration consequences. This finding creates an argument that the right to appointed counsel should extend also to noncitizens in removal proceedings that result from pleading guilty to deportable offenses. Although the Court’s ruling is rooted in the Sixth Amendment which applies only to criminal prosecutions, the right to counsel has been applied to other classes of people through the due process clause of the Fourteenth Amendment. *See e.g. In re Gault*, 387 U.S. 1 (1967) (right to appointed counsel for juveniles in delinquency proceedings despite characterization of such proceedings as “civil”).

VI. Conclusion

Padilla is a landmark case of untold significance to noncitizen defendants. Its inclusion of advice regarding immigration consequences as part of the Sixth Amendment right to effective counsel will prevent the unwitting deportation of countless immigrants.

The issues raised above represent our initial thoughts on the impact of this decision, which we will expand upon in future advisories. For additional analysis of the case, look at the practice advisory distributed by the Immigrant Defense Project at http://www.immigrantdefenseproject.org/docs/2010/10-Padilla_Practice_Advisory.pdf. The Immigration Impact Unit will continue to analyze this important decision, consider its impact and issue updated advisories with developments stemming from the case. We are available also to answer questions or discuss issues pertaining to this case and to consult with attorneys concerning individual clients.

¹ Page citations for *Padilla* refer to the preliminary Lexis version which is available at the time of this advisory. Pagination may change once the final published version of the case is issued.

² Notably, the Court stated that it has never made a distinction between direct and collateral consequences when evaluating the effective assistance of counsel. *Padilla*, 2010 U.S. LEXIS at *17.

³ Interestingly, the decision states that he is deportable for a controlled substance offense and that this is clear from reading the immigration statutes. *Padilla*, 2010 U.S. LEXIS at *22. This is accurate; however, simply being deportable under that ground would not necessarily make Mr. Padilla subject to automatic deportation, as he may be eligible for defenses to deportation. It is more significant that the offense is classified also as an aggravated felony under 8 U.S.C. §1101(a)(43)(B), which not only makes him deportable under 8 U.S.C. §1227(a)(2)(A)(iii), but also prevents him from applying for almost all waivers and other forms of relief from deportation. It is this classification as an aggravated felony that makes him subject to “automatic deportation.” *See id.* at *7. The absence of this analysis from the Court’s decision may prove the point made by the concurrence that there may be no circumstances in which immigration law is “succinct, clear and explicit.” *Compare id.* at *22 (majority opinion) and *38-43(concurring opinion).

CPCS Immigration Impact Unit Intake Form

Name of person requesting assistance: _____ Phone #/email: _____

Background Information of Immigrant

Full name: _____ Date of birth: _____

Alien number (eight or nine digit number starting with A that is on green cards and any documents issued by immigration): _____ Place of birth: _____

Immigration Status History

Date 1st entered U.S.: _____ Immigration status when 1st entered U.S. (visa, green card, entered unlawfully, refugee, etc.): _____

[Juveniles only] Entered U.S. with whom (name and contact information): _____

Current immigration status [permanent resident (green card), visa, TPS (work permit), asylum, etc.]: _____

Date obtained current status (exact date, if known): _____

Does client have any pending applications with immigration? Yes__ No__ If yes, what kind of application: _____

Has defendant left U.S. since first entry: Yes__ No__

If yes, list all dates left and returned: _____

Family in U.S., including parents, spouses, children, siblings, or fiancé(e) (please list relationship to client, age, and immigration status):

If any parents are U.S. citizens, how old was client when parent became citizen: _____

List any grandparents who are U.S. citizens: _____

Is client afraid to return to home country? If yes, why? _____

Does client suffer from any life-threatening illnesses or significant mental health problems? _____

Has client ever come into contact with U.S. immigration: Yes ___ No ___ Date(s) and description of contact: _____

Does client have a final order of removal from an immigration judge? Yes _____ No _____

If yes, please provide date and location of order: _____

CPCS Immigration Impact Unit Intake Form

Additional Information

Is client in custody? Yes___ No___ If yes, where? _____ If in immigration detention, date placed in custody: _____

Does client have an immigration detainer? Yes__ No__ If yes, please attach copy if available.

Does client have an immigration attorney? If yes, name and contact info: _____

By what date do you need to discuss this matter? _____

****PLEASE SEND THE FOLLOWING DOCUMENTS BY FAX, EMAIL OR REGULAR MAIL****

- **Updated CORI. List on attached sheet all out-of-state offenses that are not on CORI. If unable to send CORI, complete attached sheet, including all CWOs and dismissals (use additional pages if necessary);**
- **Complaints or indictments for pending case(s). If unavailable, complete attached sheet (use additional pages if necessary);**
- **Any available immigration documents (including detainer and any documents regarding client's status, such as green card, work permit or visa).**

COMPLETED FORMS AND DOCUMENTS SHOULD BE SENT TO:

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