Swinging a Sledge: The Right to Effective Assistance of Counsel, the Law of Deportations, and *Padilla v. Kentucky*

*By Joseph M. Ditkoff**

In *Padilla v. Kentucky*,[1] the Supreme Court decided that the Sixth Amendment's guarantee of the effective assistance of legal counsel requires that counsel inform his client whether his guilty plea in a criminal case carries a risk of deportation. The Court's decision significantly expands the reach of the traditional Sixth Amendment constitutional protection afforded criminal defendants via the long-established rule of *Strickland v. Washington*,[2] and, concomitantly, significantly alters the landscape of what courts will consider to be adequate representation in criminal proceedings. The precise contours of the right, thus expanded, will be left to the vagaries of the common law in both state and federal court to map out. This short article will discuss *Padilla* and some of its forebears and foreshadowings. As will be seen, the Supreme Court has again left prosecutors, defense counsel, and judges with a somewhat muddy decision that leaves the hard work for later, and for others.

Padilla involved a defendant who was a native of Honduras, and who had for forty years been a lawful, permanent resident of the United States before he pleaded guilty in the Commonwealth of Kentucky to transporting marijuana in his tractor-trailer.[3] Resolving the case short of trial and with the assistance of his attorney, Padilla pleaded guilty to some charges, the government agreed to forego the remaining charge, and the court sentenced Padilla to five years incarceration and five years of probation.[4] Facing deportation, Padilla several years later filed a motion for post-conviction relief, alleging that his attorney failed to advise him of the possibility of his deportation, and in fact even went so far as to tell Padilla that he "did not have to worry about immigration status since he had been in the country so long."[5] The Supreme Court of Kentucky refused to grant Padilla relief. Even assuming that Padilla's allegations were true, the court held that incorrect advice on consequences *collateral* to a criminal prosecution, or the failure to give advice at all, simply did not fall within the ambit of the Sixth Amendment's guarantee of the effective assistance of counsel. Specifically, the Kentucky court held, citing its own controlling precedent, that "collateral consequences are outside the scope of representation required by the Sixth Amendment and that failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel."[6]

The United States Supreme Court, after granting certiorari, disagreed. The majority began with a short history of recent developments in immigration law:

> While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The drastic measure of deportation or removal . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes.[7]

The Court discussed the Immigration and Naturalization Act of 1917 and its abundance of provisions for the deportation of noncitizens for various forms of disapproved conduct committed on our shores.

Importantly for the Court, however, the laws of the time provided for a judicial safety valve of sorts, a type of fail-safe mechanism that the majority, not surprisingly, found laudable. The 1917 Act

> included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation "that such alien shall not be deported." This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was "consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation."[8]

With this safety net secure, the Supreme Court saw no need to pass on whether, or how, advice concerning immigration consequences fell under *Washington*'s[9] purview.

In time, however, attitudes changed and power shifted, as the majority took care to note. Congress greatly limited the ambit of the JRAD procedure in 1952, and then, in 1996, eliminated it root and branch.[10] The Court laid this out plainly in its opinion:

> Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.[11]

Uncomfortable with what it labeled the "practically inevitable," the Court proceeded to carve out of the immigration law landscape a criminal law escape hatch. The escape hatch is accessed through the Sixth Amendment's guarantee of effective counsel.

Observing that the Supreme Court of Kentucky rebuffed Padilla's attempt to withdraw his plea where his claim rested solely on his attorney's profoundly erroneous advice regarding

---

** Joseph M. Ditkoff is an Assistant District Attorney with the Suffolk County District Attorney's Office in Boston, Massachusetts. The views expressed in this article are his and are not necessarily those of the Suffolk County District Attorney's Office.* *Mr. Ditkoff thanks Dean Mazzone for his invaluable assistance in writing this article.*

the immigration consequences that would result, the Court explained that a defendant's deportation from the country, triggered by a criminal conviction, is not necessarily a consequence completely collateral to the criminal prosecution. Although not strictly punishment, that is, a criminal sanction, deportation is, in the Court's view, a penalty nonetheless, and a consequence inextricably intertwined with the criminal proceeding. The Court noted that there was and had been a great degree of judicial difference of opinion,[12] but, in the end, it made plain that it was coming down on the side of the criminally-accused noncitizen. The Court stated:

> 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. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.[13]

With the analytic structure thus deployed, and the issue so framed, the Court did not find it difficult to conclude that Padilla's lawyer's advice that Padilla "did not have to worry about immigration status since he had been in the country so long" fell below the *Washington* standard of basic "reasonableness" of counsel's representation in a criminal prosecution. The Court looked to a wide range of professional performance guidelines and standards of effective representation to evaluate and measure the performance of Padilla's counsel.[14] From this canvassing, the Court determined that the vast majority of the relevant authorities "'require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients . . . .'"[15]

Turning back to Padilla's predicament, the Court quoted the relevant statute,[16] and proceeded to evaluate counsel's performance in light of the circumstances. The Court's judgment was not particularly favorable:

> Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial . . . . Instead, Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.[17]

On its own terms, though, the majority underestimated the complexity of immigration law. Even where there can be no question that a conviction will subject one to deportation, this is of little moment unless the defendant is not *already deportable* for some other reason. Putting aside the possibility of another conviction (often under a different name),[18] a defendant might be deportable if he is on welfare within five years of entering the United States,[19] if he votes,[20] if he fails to update his address within ten days of moving,[21] or simply if he was inadmissible when he entered the United States.[22] Indeed, if Padilla himself was a drug addict at any time after his entry into the United States, he is deportable regardless of his conviction.[23] If a criminal defense attorney advised a defendant that he would be deported if he pled guilty to a crime, causing his client to eschew a favorable sentence, the defendant would no doubt challenge a conviction after trial on the ground that his attorney should have advised him that he was deportable in any event. All of these statutes are "succinct, clear, and explicit in defining the removal consequences,"[24] but the application of them to any particular defendant is anything but, even if a state criminal defense attorney should be expected to be familiar with such obscure (to a non-immigration specialist) provisions of the federal code.

Furthermore, the majority simply assumed that legally-mandated immigration consequences actually happen. In fact, it was not until 2008 and the tenure of Julie L. Myers as head of Immigration and Customs Enforcement (ICE) that ICE first formulated a plan to integrate state prisons and county jails into federal databases that would identify deportable aliens. In practice, ICE lacks the resources to remove every deportable alien. There are literally millions of deportable aliens in the United States who, though deportable by the terms of "succinct, clear, and explicit" statutes, are in no danger of deportation. What "a reasonably competent attorney" would do when faced with a client who technically could be deported but likely would not be deported is left to the imagination.[25]

Even where the attorney is well-versed in immigration law, things are not simple. In 1999, my office filed a brief in the Massachusetts Supreme Judicial Court in an operating-under-the-influence case.[26] At that time, the state of federal law was that such a conviction was deportable, and my office so conceded.[27] Five years later, the United States Supreme unanimously decided that the answer was the opposite.[28]

Of course, these concerns did not escape the Court's attention entirely. In a comprehensive concurrence, Justice Alito took the majority to task for its expansion of Sixth Amendment requirements, and its effective redefinition of the meaning of the effective assistance of counsel. While concurring in the bottom-line judgment of the Court—that is, agreeing that if an attorney affirmatively misleads a client who is not a citizen of the deportation consequences of a criminal conviction, he has provided ineffective assistance as a matter of law—Justice Alito was adamant in his fundamental disagreement with the majority's central, broader holding.[29] In Justice Alito's view, a competent attorney must not provide wholly-incorrect advice, but should instead tell his client that, if the client has concerns about the conviction's effect on his immigration status, he should talk to a specialist in the immigration law field.[30] The Sixth Amendment, however, does not command that an attorney, retained in a criminal case, must try his or her best to explain to the client what those consequences could possibly be.[31] This is the domain of the immigration specialist, not the run-of-the-mine criminal defense attorney. The freshly minted *Padilla* rule, said Justice Alito, amounts to a "vague, halfway test [that] will lead to much confusion and needless litigation."[32]

And, indeed, it is hard to argue with Justice Alito's main point. Immigration law *is* complex, exceedingly so, as Justice

Alito demonstrated.[33] The majority admitted this, to its credit.[34] Criminal defense attorneys may be less than expert in the field, if not entirely ignorant. Again, the majority conceded this. But the majority proceeded to hold the following:

> When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.[35]

The unclear case, then, will have to wait.

But, after the clarity recedes, the forecasted storms are not hard to envision, and Justice Alito did so:

> How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer?[36]

Or, perhaps, what is required is not quite a cursory examination, but one a little more comprehensive, though not by too much? It is difficult to see an end to these potential problems.

Indeed, the expansiveness of the new doctrine should weigh heavy on current counsel and extant convictions. Criminal defense attorneys will have to apprise themselves of statutory and case law, new and old, all in the unrelated field of immigration law, in order to provide constitutionally-effective assistance *in the context of a criminal prosecution*. As noted, the majority engaged in an extended discussion as to just why what has in the past, and by other reviewing courts, been considered an indirect consequence of a criminal conviction has now become the stuff of the Sixth Amendment. The majority's reasoning, as quoted above, is simple enough by the Court's own lights, and the average defense attorney's responsibilities have become a lot more complicated.

In the end, and as it has done in the past, in order to fashion a just result in a nondescript case with a sympathetic petitioner, the Court created a constitutional requirement whose precise contours must await another day to be limned. The Court observed that states themselves have taken the lead over the years to ensure that defendants within their respective jurisdictions would not find themselves in Padilla's unfortunate situation by requiring trial judges to inform criminal defendants of the possibility that their convictions might well have uncertain, and unwanted, immigration consequences.[37] Nonetheless, the majority could not resist the opportunity to do its best to ensure that no noncitizen should find himself in Padilla's position again.

In his stinging dissent, Justice Scalia reiterated what for him had been a jurisprudential crusade of longstanding:

> In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.[38]

A criminal defense attorney's constitutional obligations to his client should extend only to matters occurring in the circumscribed context of the criminal case alone; otherwise, as Justice Scalia noted, there is no terminus to those obligations whose outlines can fairly be discerned by even the most scrupulous lawyer.[39] Indeed, Justice Scalia quoted Justice Alito's concurrence:

> "[A] criminal convictio[n] can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed forces, and loss of business or professional licenses. . . . All of those consequences are 'serious,' . . . ."[40]

And so, in the end, will be the consequences of the majority's rule in *Padilla*. The Sixth Amendment, thus construed, now imposes expansive obligations on attorneys whose customary expertise is criminal law, not immigration law, and now exposes countless guilty pleas to post-conviction attack based on alleged infirmities and missteps in those newly-minted obligations. "My lawyer told me not to worry." Or he told me nothing at all. The Sixth Amendment ought not be stretched so far because, at some point, it is sure to snap.

Endnotes

1 Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

2 Strickland v. Washington, 466 U.S. 668 (1984).

3 *Padilla*, 130 S. Ct. at 1477.

4 Commonwealth v. Padilla, 253 S.W.2d 482, 483 (Ky. 2008).

5 *Id.*

6 *Id.* at 484.

7 *Padilla*, 130 S. Ct. at 1478 (internal quotation marks omitted).

8 *Id*. at 1479 (citation omitted) (ellipsis in the original) (quoting Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986)).

9 The Supreme Court repeatedly short cited *Strickland v. Washington* as *Strickland*, *see, e.g.*, *Padilla*, 130 S. Ct. at 1481, 1482, 1484, as if Strickland were the criminal defendant and Washington referred to the State of Washington. *Id.* In fact, David Leroy Washington was the criminal defendant, and Charles E. Strickland was the Superintendent of the Florida State Prison.

10 104 Stat. 1550 (1996).

11 *Padilla*, 130 S. Ct. at 1480.

12 *Id*. at 1481 & n.8.

13 *Id*. at 1482.

14 *Id*. at 1482-83.

15 *Id*. at 1482 (quoting Brief for Legal Ethics, Criminal Procedure, and Criminal Professors as Amicus Curiae at 12-14).

16 8 U.S.C. § 1227(a)(2)(B)(i) ("[A]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country related to a controlled substance . . ., other than a single offense involving possession for

one's own use of 30 grams or less of marijuana, is deportable.").

17 *Padilla*, 130 S. Ct. at 1483.

18 In fact, Padilla himself may be independently deportable for receiving stolen property in California. *See* Brief of the United States at 2, Padilla v. Kentucky, 130 S. Ct. 1473 (2010).

19 8 U.S.C. § 1227(a)(5).

20 *Id.* § 1227(a)(6)(A).

21 *Id.* § 1227(a)(1)(A).

22 *Id.* § 1227(a)(1)(A).

23 *Id.* § 1227(a)(2)(B)(ii).

24 Padilla v. Kentucky, 130 S. Ct. 1473, 1483 (2010).

25 Strickland v. Washington, 466 U.S. 668, 687 (1984) (internal quotation marks omitted).

26 Commonwealth v. Rzepphiewski, 725 N.E.2d 210 (Mass. 2000).

27 *See* Duan v. Attorney General, 196 F.3d 1352 (11th Cir. 1999); Matter of Puente-Salazar, 22 I. & N. Dec. 1006, 1012-13 (BIA 1999) (en banc). Why that mattered in a state criminal case is a complicated question of Massachusetts law, and it would serve little purpose to explain it here.

28 Leocal v. Ashcroft, 543 U.S. 1 (2004).

29 *Padilla*, 130 S. Ct. at 1487 (Alito, J., concurring).

30 *Id*. at 1487, 1494.

31 *Id.* at 1491-92.

32 *Id*. at 1487.

33 *Id.* at 1489-90.

34 *Id*. at 1483 (majority opinion).

35 *Id*.

36 *Id*. at 1490 (Alito, J., concurring).

37 The Court cited the following statutes: Alaska R. Crim. P. 11(c)(3)(C) (2009-10); Cal. Penal Code Ann. § 1016.5 (West 2008); Conn. Gen. Stat. § 54-lj (2009); D.C. Code § 16-713 (2001); Fla. R. Crim. Proc. 3.172(c)(8) (Supp. 2010); Ga. Code Ann. § 17-7-93(c) (1997); Haw. Rev. Stat. Ann. § 802E-2 (2007); Iowa R. Crim. P. 2.8(2)(b)(3) (Supp. 2009); Md. R. 4-242 (Lexis 2009); Mass. Gen. Laws ch. 278, § 29D (2009); Minn. R. Crim. P. 15.01 (2009); Mont. Code Ann. § 46-12-210 (2009); N.M. R. Crim. Form 9-406 (2009); N.Y. Crim. Proc. Law Ann. § 220.50(7) (West Supp.2009); N.C. Gen. Stat. Ann. § 15A-1022 (Lexis 2007); Ohio Rev. Code Ann. § 2943.031 (West 2006); Ore. Rev. Stat. § 135.385 (2007); R.I. Gen. Laws § 12-12-22 (Lexis Supp.2008); Tex. Code Ann. Crim. Proc. Art. 26.13(a)(4) (Vernon Supp.2009); Vt. Stat. Ann. Tit. 13, § 6565(c)(1) (Supp.2009); Wash. Rev. Code § 10.40.200 (2008); Wis. Stat. § 971.08 (2005-06).

38 *Padilla*, 130 S. Ct. at 1494 (Scalia, J., dissenting).

39 *Id*. at 1495.

40 *Id*. at 1496 (quoting *id.* at 1488 (Alito, J., concurring)).