

## **Padilla v. Kentucky and the Duties of the State Court Criminal Judge in Accepting Guilty Pleas**

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The U.S. Supreme Court's decision in *Padilla v. Kentucky*, announced on March 31, 2010, held that a criminal defendant who was not advised by counsel that a guilty plea might carry a risk of deportation could claim that his representation was constitutionally deficient. The Court determined that the immigration consequences of a guilty plea are an integral part of the punishment that could result from a criminal conviction and thus are within the scope of the Sixth Amendment's right to counsel.

The Court went on to say that to be eligible for relief, the defendant must also show prejudice, that is, show that if the defendant had known of the risk of deportation, it would have been rational for him to reject the plea bargain. The Court remanded the case to the state court to make that determination.

It is clear that *Padilla* will affect the practice of criminal defense attorneys in cases involving immigrant defendants, particularly since all non-citizens, including lawful permanent residents, face the risk of deportation for a wide range of criminal convictions. It is not clear from the *Padilla* decision, however, how state criminal court judges will be affected by the decision. The potential impact of *Padilla* on state criminal court judges is the subject of this note.

The Supreme Court was silent on the issue of whether state criminal court judges have a duty to assure that immigrant defendants have been advised of the immigration consequences of a guilty plea, despite the fact that the issue was raised in the oral argument of the case. Still, a growing number of states now require, either through statute, court rule, or plea acceptance form, that judges investigate whether non-citizen criminal defendants have been advised of the potential immigration consequences of a guilty plea.

The following are examples of the range of requirements that different states have placed on judges with regard to non-citizen criminal defendants, ranging from a simple advisement to a more detailed investigation of the advice that a defendant has received.

- California, Penal Code Ann. § 1016.5 (West 1985) requires a general advisement. This is the most common approach taken by those states that deal with the issue.

*The court shall administer the following advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.*

- D. C., Code Ann. §16-713 (1997) adds a provision that the defendant may request additional time to reconsider the plea.

*(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime, the court shall administer the following advisement on the record to the defendant: "If you are not a citizen of the United States, you are advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."*

*(b) Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement. If the court fails to advise the defendant as required by subsection (a) and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by subsection (a), the defendant shall be presumed not to have received the required advisement.*

- Massachusetts, Gen. Laws § 278:29D (1996 Supp.) requires a more specific advisement, including that admission of facts may have immigration consequences, and provides for a remedy if the advisement is not given.

*The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: "If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States." The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States.*

*If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court*

*provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.*

- Minnesota, Rule Crim. Proc. 15.01 (2000) requires that, before accepting a plea, the judge must question both the defendant and the defendant's counsel as to:

*10. Whether defense counsel has told the defendant and the defendant understands: ...*

*d. That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.*

- Connecticut, Gen. Stat. § 54-1j (2001) goes the furthest and puts a burden on the court to determine if the defendant understands the possible immigration consequences of a guilty plea.

*(a) The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from readmission to the United States or denial of naturalization, pursuant to the laws of the United States. If the defendant has not discussed these possible consequences with the defendant's attorney, the court shall permit the defendant to do so prior to accepting the defendant's plea.*

*(b) The defendant shall not be required at the time of the plea to disclose the defendant's legal status in the United States to the court.*

*(c) If the court fails to address the defendant personally and determine that the defendant fully understands the possible consequences of the defendant's plea, as required in subsection (a) of this section, and the defendant not later than three years after the acceptance of the plea shows that the defendant's plea and conviction may have one of the enumerated consequences, the court, on the defendant's motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.*

Even without a specific state requirement that the judge assure that a defendant has been advised of immigration consequences of a guilty plea before accepting the plea, after *Padilla* it is likely that many judges will feel that they have an ethical duty to do so to assure fundamental fairness for immigrant defendants. Some defendants may still choose to plead guilty, even knowing the risk of deportation, particularly given the Immigration and Customs Enforcement's present practice of waiting until after a defendant has served a state sentence to initiate removal proceedings. Those defendants with rational reasons for refusing to plead guilty, however, may be spared the disruption to themselves and their families that is inevitably caused by being caught up in a removal proceeding.

If a defendant indicates in court that he or she has not been advised of the possible immigration consequences of a guilty plea, the judge could consider refusing to accept the plea until the defendant has been properly advised. Judges may also find that defense attorneys representing immigrants may request time to investigate the potential immigration consequences before advising a client to enter a guilty plea, in order to meet the requirements for effective representation set forth in *Padilla*.

Given the need to assure fundamental fairness, it is important that state criminal court judges recognize situations where the potential outcome of a criminal case could affect the defendant's immigration status. There is a lengthy list of criminal charges for which conviction carries a risk of removal. Some of those charges may be classified as minor crimes under state laws. Further, the risk of removal may depend on the length of the potential sentence or, for some crimes, the actual sentence imposed.

While it is not practical that state court judges become experts in immigration law, it is important that state court judges know enough about immigration law to be able to:

- (1) identify criminal cases where a defendant's immigration rights may be affected; and
- (2) identify defendants who may need information on how a plea agreement may impact their immigration status.

This State Justice Institute web site has materials, including a bench guide for state criminal court judges, to assist judges on obtaining that knowledge.