

Implications of *Padilla v. Kentucky* on the Duties of State Court Criminal Judges¹

By Steven Weller and John A. Martin²
Center for Public Policy Studies (<http://www.centerforpublicpolicy.org/>)
Contact: sweller@indra.com

The purpose of this note is to discuss an emerging issue that is increasingly coming to the attention of state criminal court judges across the country. Under Federal immigration law, conviction of a wide range of crimes can put a lawful permanent resident at risk of deportation and affect other important immigration rights. A recent U.S. Supreme Court decision, *Padilla v. Kentucky*, 559 U.S. ____ (2010), has held that failure of a defendant's attorney to advise him about the potential immigration consequences of pleading guilty to a deportable criminal offense constitutes ineffective assistance of counsel. This note discusses the potential implications of that decision for state criminal court judges in: (1) taking a guilty plea; (2) appointing counsel for indigent defendants; (3) assuring fairness for unrepresented defendants; and (4) becoming familiar with Federal immigration law.

As the law is just emerging, the purpose of the note is to raise questions rather than provide definitive answers. In fact there are as yet no definitive answers to most of the questions we raise. We do, however, provide information on what states and judges around the country are considering as they struggle to decide how to address these issues.

Summary of Facts and Decision of *Padilla v. Kentucky*

Jose Padilla was arrested driving a tractor-trailer truck containing over 1,000 pounds of marijuana. He was charged in state court with two drug possession misdemeanors, felony drug trafficking, and a tax related crime. He entered a guilty plea in return for a sentence of five years, as opposed to the ten years he might have received had he been convicted at trial. Padilla was a native of Honduras who had been living in the U.S. as a lawful permanent resident for over 40 years. He had served in the U.S. armed forces honorably in Vietnam. Due to his immigrant status, Padilla asked his counsel before accepting the plea if the conviction carried any adverse immigration consequences and was advised that it did not, given his length of residence in the U.S.

¹ A version of this article has been submitted to *The Judges' Journal*.

² **Steven Weller, J.D., Ph.D.**, is a senior consultant on the CPPS Immigration and the State Courts Initiative. He has more than 35 years of experience working with state courts and other justice system institutions in the United States and internationally. In the United States he has served as principal investigator or consultant on a variety of national, state, and local research and strategic planning projects aimed at improving different aspects of the justice system and developing responses to public policy problems.

John A. Martin, Ph.D. is the Director of the CPPS Immigration and the State Courts Initiative. Dr. Martin, a planning, policy, and management consultant, is recognized as an innovator in planning, management, performance measurement, and institutional development for justice and human service organizations. Over the past 36 years, he has worked with courts, justice, and human service agencies of all types.

That advice was incorrect, as it is clear under Federal immigration law that the conviction was for a removable offense. Padilla subsequently sought post-conviction relief to have his plea set aside for ineffective representation of counsel.

The U.S. Supreme Court's decision in *Padilla v. Kentucky*, announced on March 31, 2010, held that advice of counsel regarding deportation risks of a criminal conviction falls within the scope of the Sixth Amendment's right to counsel, so that failure to advise a defendant that a guilty plea might carry a risk of deportation deprives the defendant of effective representation under the Sixth Amendment. The Court determined that "deportation is an integral part of the penalty that could be imposed on non-citizen defendants who plead guilty to specified crimes." The Court rejected respondent's argument that deportation is a collateral consequence that does not fall within the defense attorney's scope of representation. Further, the Court held that the defective representation went beyond the affirmative misadvice provided to Padilla and applied to failure to advise as well.

The Court went on to say that to be eligible for relief, the defendant must also show prejudice, that is, show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In the context of a guilty plea, this means that there must be a reasonable probability that the defendant would have entered a different plea had he or she known of the risk of deportation. The Court remanded the case to the Kentucky Supreme 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.

Duties of the Judge in Accepting a Guilty Plea

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. Note that the examples below provide that judges address all potential immigration consequences of a guilty plea and not just the risk of deportation.

- 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 and 15.02 (2010) requires that, before accepting a plea in a felony, gross misdemeanor, or misdemeanor case, the judge must ensure that defense counsel has told the defendant and the defendant understands:

If the defendant is not a citizen of the United States, a guilty plea 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.

Other states are struggling with efforts to develop appropriate requirements, either by statute or court rule. For example, one state is considering the following two very different alternatives for a court rule on plea advisements regarding immigration consequences of a guilty plea:

- Alternative A: If the defendant is not a citizen of the United States, ask the defendant's lawyer and the defendant whether they have discussed the possible risk of deportation that may be caused by the conviction. If it appears to the court that no such discussion has occurred, the court may not accept the defendant's plea until the deficiency is corrected.
- Alternative B: Advise the defendant who offers a plea of guilty or nolo contendere that such a plea by a non-citizen may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. 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.

Note that alternative A requires that the judge inquire whether the defendant is a non-citizen, while alternative B is given to all defendants and thus does not require the judge to inquire about the defendant's immigration status. Also, alternative A requires the judge to explore what the defendant and his or her attorney have discussed, while alternative B does not.

Even without a specific state requirement or court rule 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. 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 may 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*.

Duties in Appointing Counsel

There may be circumstances where a criminal court judge plays a role in appointing counsel for a defendant. This role may arise in a variety of contexts, including the following:

- The judge may share a responsibility for selecting attorneys to be included in the indigent criminal defense pool;
- The judge may select and appoint private counsel to serve as counsel for indigent criminal defendants, paid by the court; or
- The judge may select and appoint private counsel to represent indigent criminal defendants pro bono in individual cases.

In any of these circumstances, judges in cases involving immigrant defendants may find themselves faced with some of the following questions:

- Should expertise in immigration law be a factor in selecting an attorney to represent an indigent defendant that the judge is aware is an immigrant?
- How can a judge determine an attorney's level of expertise in immigration law?
- Should a judge consider appointing an immigration attorney as co-counsel?

As a corollary to the above, in answering those questions judges must also consider what steps they might or should take to determine if a defendant is an immigrant, if the court does not already have information on the defendant's immigration status.

Duties Regarding Unrepresented Defendants

There may be cases where an immigrant offender charged with a misdemeanor may be unrepresented and not have a right to appointed counsel, but conviction of the misdemeanor may still carry a risk of deportation. For example, certain misdemeanors may qualify as crimes involving moral turpitude, if an individual is convicted of two crimes not arising out of the same circumstances. These are crimes involving fraud or immoral behavior, such as theft, fraud, perjury, and prostitution.

There are no clear answers as to what the judge should do in cases involving unrepresented immigrant defendants, but some possibilities might include the following:

- Appoint counsel in any case involving a crime that may carry a risk of deportation without regard to defendant's immigration status.
- Appoint counsel in any case involving a crime that may carry a risk of deportation where the defendant is an immigrant.
- Appoint counsel in any case regardless of the crime where the defendant is an immigrant and has not been advised of the deportation risks of his case.
- Advise the immigrant defendant that some crimes carry a risk of deportation and allow the defendant an opportunity to seek the advice of counsel.

If the judge chooses to appoint counsel, the considerations discussed in the previous section of this note regarding considerations in appointing counsel come into play.

What Do State Court Judges Need to Know About Immigration Law?

State court judges across the country are divided as to how much they should be aware of or take into account the ways in which the outcome of a criminal case could affect the defendant's immigration status. It is becoming increasingly difficult, however, to take the position that state court judges do not need to know anything about Federal immigration law, as it is clear that state court decisions can have a major impact on an individual's immigration status and, conversely, Federal immigration law can serve to limit or undermine the criminal sanctions imposed on an immigrant defendant.

There is a lengthy list of criminal charges for which conviction carries potential immigration consequences. As noted above, some of those charges may be classified as misdemeanors under state laws and thus on their face may not appear to be important for immigration purposes. For some crimes the immigration consequences depend on the length of the potential sentence or the actual sentence imposed.

Federal immigration law defines what is considered a conviction and a sentence for the purpose of determining immigration rights.

- A conviction encompasses any decision that involves a finding or admission of guilt and the imposition of a punishment, including diversion and deferred adjudication.
- A sentence includes a suspended sentence or a sentence of probation if accompanied by a suspended jail sentence.

Thus for example, a sentence to drug court accompanied by a suspended jail sentence is treated as a conviction of a crime related to controlled substance with a sentence equal to the amount of the suspended sentence.

The *Padilla* case involved a claim concerning the defendant's lack of knowledge of the effect of a criminal conviction on deportation. A criminal conviction, however, can affect a defendant's immigration status in a variety of ways, including:

- Making the defendant removable;
- Making the defendant inadmissible, including preventing the defendant from reentry if the defendant leaves the country;
- Making the defendant ineligible for cancellation of a removal order; and
- Preventing the defendant from attaining citizenship.

It is not practical for state court judges to become experts in all of the details and technical language of Federal immigration law. To assure that state criminal laws and sanctions are applied effectively in cases involving immigrant defendants, however, state criminal court judges may want to 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 legal advice on how a plea agreement may impact their immigration status.³

Conclusion

We expect the questions raised in this note to be the subject of considerable debate. Some judges with whom we have talked believe that the trial judge should leave the issue of adequacy of representation to the appellate courts and are concerned that going further would be overstepping their role as a judge. Other judges believe that they need to take an active role to assure that immigrant defendants have received competent legal advice regarding the potential immigration consequences of a conviction. Others want to find a middle ground that seeks to make defendants aware of the risks without having to inquire into a defendant's immigration status or the quality of the advice that the defendant received. None of these approaches can be characterized as right or wrong. What is important as the debate unfolds is that policy makers understand how each alternative affects federal regulation of immigration, the effectiveness of state and local justice systems, and fairness to individual defendants and their families.

³ One resource that is presently available is a *Bench Guide for State Trial Court Judges on the Immigration Consequences of State Court Criminal Actions*, prepared by the Center for Public Policy Studies (CPPS) under a grant from the State Justice Institute (SJI). The *Guide* may be downloaded in PDF format either from the SJI website or from the CPPS website <http://www.centerforpublicpolicy.org/>.