



Ineffective Assistance of Counsel: Deportation Consequences of Guilty Pleas

name redacted

Specialist in American Public Law

April 12, 2010

Congressional Research Service

7-....

www.crs.gov

R41190

Summary

The Sixth Amendment entitles an accused in a criminal prosecution to “Assistance of Counsel for his defense.” This right to counsel implies a right to “effective assistance.” Effective assistance has dimensions of both breadth and depth: breadth in the sense of what considerations beyond those immediately at issue in the prosecution should be taken into account, so-called collateral consequences; depth in the sense of what professional standards pertain. In *Padilla v. Kentucky*, the Supreme Court held that “ineffective assistance” standards require informing a noncitizen defendant on possible deportation when advising on whether to accept a guilty plea. Forced removal through deportation is a civil proceeding separate and apart from criminal prosecution.

The test for deficient representation for Sixth Amendment purposes is two-pronged. First, was the attorney’s performance reasonable under prevailing professional norms? Second, was the defendant prejudiced by the attorney’s shortcomings? As to the first prong, the *Padilla* Court emphasized the unique nature of deportation. Criminal courts do not decide whether to deport a noncitizen defendant; rather, federal immigration authorities do. Nevertheless, the Court recognized that deportation can have enormous repercussions for a noncitizen and the noncitizen’s family. The Court further observed that Congress curtailed the historic, though indirect, ability of criminal judges to forestall a convict’s deportation, at the same time it dramatically expanded the range of crimes that can lead to deportation.

The Court cited the hardship of deportation and its increasingly automatic application in prelude to discussing whether Padilla’s attorney fell short of prevailing practice. The lawyer had volunteered that Padilla did not have to worry about deportation in considering whether to plead guilty to marijuana trafficking because he had legally resided in the United States for over 40 years. Yet it was not the volunteering of mistaken advice that was critical to the Court. According to the Court, silence was not an adequate option. Instead, professional norms, as reflected in standards of the American Bar Association, criminal defense organizations, and the like, pointed to an affirmative duty to inform on the risk of deportation.

How far must an attorney go in advising a defendant? The five-Justice majority found immigration law to be “succinct, clear, and explicit” in Padilla’s case, and held that in this circumstance defense counsel must correctly advise on the high likelihood of deportation. In less straightforward cases, the majority opined, it might suffice to advise that the pending charges carried a risk of deportation. The two concurring Justices found immigration law to be so complex that defense counsel need only warn of a general risk of deportation in all cases and suggest that the defendant see a specialist for further advice.

Deportation is commonly a risk for noncitizen criminal defendants, but there are other possible immigration consequences of a criminal conviction. Also, all defendants can face other collateral consequences, from loss of a business license to loss of the right to vote to loss of certain public benefits. A number of factors might bear on a defendant’s decision to plead guilty, but the *Padilla* Court carefully limited its holding to advice on deportation. Also left open by *Padilla* is guidance on when failing to advise on deportation is sufficiently prejudicial to a defendant to warrant nullifying a guilty plea. The Court remanded this issue to lower courts for further consideration.

Contents

Noncitizens and Guilty Pleas.....	1
The Case of Jose Padilla.....	2
Constitutional Setting.....	3
Supreme Court’s Decision in <i>Padilla v. Kentucky</i>	5
Outstanding Issues	8
Prejudice to the Defendant	8
Applicability of the “Direct Consequences” Limitation	9
Role of the Legislatures and the Courts	10

Contacts

Author Contact Information	11
----------------------------------	----

Imposing criminal punishment is the province of the criminal justice system, but how cases are resolved within that system inevitably can affect rights and benefits beyond it. Congress and state legislatures often attach additional legal consequences to criminal activity. At times, these consequences may be at least as significant as a potential fine or incarceration. Deportation of a noncitizen (a term synonymous with “alien”) under federal immigration law is a case in point.¹ Nevertheless, a noncitizen charged with a crime may not be fully aware of what is at stake before going to trial or deciding to plead guilty to a particular offense.

This report discusses the extent of deportation-related advice a noncitizen defendant is constitutionally owed in deciding whether to plead guilty to a particular crime. Two possible doctrinal bases for a right to be advised are the Due Process requirement that a guilty plea be voluntary and the Sixth Amendment right to effective assistance of counsel. The Supreme Court had not found that either basis required advising noncitizen defendants on deportation, however, and a distinction in the Court’s jurisprudence between direct and collateral consequences of criminal conviction potentially precluded finding any constitutional right. Then, in *Padilla v. Kentucky*,² the Court found a right to be advised of possible deportation grounded in the Sixth Amendment right to effective assistance of counsel. The holding in *Padilla* is discussed below, as are its possible implications. Also mentioned are steps that have been taken by courts and legislatures, constitutional requirements aside, to integrate consideration of immigration consequences into the criminal process.

Noncitizens and Guilty Pleas

When an accused is a noncitizen, one especially momentous result of prosecution is possible deportation.³ For decades now, Congress has placed priority on the removal of criminal aliens from the United States. One result of this effort has been a significant statutory expansion of the list of felonies and other offenses (especially those types of federal and state crimes categorized as *aggravated felonies* under the Immigration and Nationality Act of 1952 (INA), as amended)⁴ that lead to swift and increasingly certain deportation following criminal imprisonment. If a noncitizen accused of a serious crime is to avert deportation, therefore, the primary legal arena for attention has become the criminal justice system rather than the immigration adjudication system, even though the latter formally adjudicates and issues removal orders.

Two things should be kept in mind in this context. First, the United States has a large noncitizen population. Roughly 25.5 million people residing in the United States in 2008, or around 8½% of

¹ *Deportation* is the expulsion of a noncitizen from within the United States. Congress establishes grounds for deportation and the administrative procedures for implementing them in the Immigration and Nationality Act of 1952 (INA), as amended. 8 U.S.C. §§ 1101 et seq. Under a 1996 amendment, *deportation* under the INA is now a subcategory of *removal*. In this report the two terms are used synonymously.

² 559 U.S. ___, No. 08-651, slip op. (March 31, 2010).

³ The Supreme Court often has described deportation in dire terms. For example, in *Ng Fung Ho v. White*, the Court stated that deportation risked potential “loss of both property and life, or of all that makes life worth living.” 259 U.S. 276, 284 (1922). Another case calls deportation “the equivalent of banishment.” *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948). Other cases are to similar effect.

⁴ 8 U.S.C. §§ 1101 et seq. The INA sets out broad, overlapping categories of potentially deportable offenses and additionally designates specific crimes as potentially deportable. INA § 237(a)(2), 8 U.S.C. § 1227(a)(2). Applying this detailed array is further complicated by the INA’s use of terms, “crime involving moral turpitude,” for example, that do not precisely correspond to terms used in federal or state criminal law.

the population, were noncitizens, according to one leading authority.⁵ The exact number of noncitizens who are charged with a crime is not known, but it would appear that many thousand noncitizens pass through criminal courts each year. During FY2008, over 97,000 criminal aliens were removed from the United States, over one-third of these for drug-related offenses.⁶ During the same period, the Criminal Alien Program, a cooperative federal-state law enforcement effort, issued 221,085 charging documents, the first step in removal proceedings, against criminal aliens incarcerated in federal, state, or local facilities.⁷

The second observation concerns how criminal cases are in fact resolved. The criminal grounds for removal are premised on a “conviction,” and in the United States convictions most commonly take the form of guilty pleas. Guilty pleas are the mainstay of the American criminal justice system. In 2004, they comprised 95% of state felony convictions, 96% of state felony drug convictions. In federal courts, 96% of the defendants whose cases were resolved through conviction in the year beginning June 2007 pleaded guilty.⁸ Thus, one commentator has observed the following about the modern role of a criminal defense lawyer:

The most important service that criminal defense lawyers perform for their clients is not dramatic cross-examination of prosecution witnesses or persuasive closing arguments to the jury; it is advising clients whether to plead guilty and on what terms. More than ninety percent of dispositions on the merits of criminal prosecutions are convictions, and more than ninety percent of convictions result from guilty pleas. Accordingly, the accuracy and fairness of the criminal justice system depend principally on the actions of defense lawyers, prosecutors, and judges at the guilty plea stage. In *Hill v. Lockhart*,⁹ the Supreme Court recognized the significance of counsel at the pleading stage, holding that the Sixth Amendment grants clients the right to effective assistance of counsel when pleading guilty.¹⁰

The Case of Jose Padilla

Jose Padilla had been a legal permanent resident of the United States when he was pulled over by Kentucky authorities at a weigh station for failing to have a weight and distance number on his truck. A subsequent search of the truck revealed approximately 1,000 pounds of marijuana, and Padilla was charged with drug trafficking. He pleaded guilty to three charges, trafficking in more than five pounds of marijuana among them.

Two years later, in August 2004, Padilla filed a petition with the Kentucky courts alleging ineffective assistance of counsel. He asserted that his attorney had failed to adequately investigate and advise him on the possible immigration consequences of his guilty plea, but instead,

⁵ Jeffrey S. Passel & D'Vera Cohn, *A Portrait of Unauthorized Immigrants in the United States* (Pew Hispanic Center April 14, 2009).

⁶ Department of Homeland Security, Office of Immigration Statistics, Annual Report, *Immigration Enforcement Actions: 2008* at Table 4 (July 2009).

⁷ *Id.* at 4.

⁸ Brief of Amici Curiae States of Louisiana, et al. at 9, *Padilla v. Kentucky*, No. 08-651 (U.S. Supreme Ct.) and authorities cited therein. This brief was submitted by twenty-seven states and the National District Attorneys Association.

⁹ 474 U.S. 52 (1985).

¹⁰ Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 698 (2002).

according to Padilla, said that Padilla “did not have to worry about [his] immigration status since he had been in the country so long.” Padilla further claimed that he would not have pleaded guilty as he did, had he known of the possibility of deportation.

The Hardin County Circuit Court ruled against Padilla, holding that advice (or failure to advise) on deportation cannot give rise to a claim of ineffective assistance of counsel in a criminal case. The Kentucky Court of Appeals reversed, finding further proceedings were warranted by the allegation that affirmative misadvice had been given. The Kentucky Supreme Court reversed the Court of Appeals, concluding that neither a failure to advise nor misadvice on deportation could support an ineffective assistance of counsel claim. Padilla submitted a petition for a writ of certiorari to the United States Supreme Court, which granted the writ and heard oral argument October 13, 2009.

Constitutional Setting

It was evident in the pleadings and oral argument that the Court’s decision in *Padilla* depended on what it conceived to be the reach of defense counsel’s obligations under the Constitution. Must defense counsel ever advise a client about matters not immediately before the criminal court as a predicate to the client pleading guilty? If so, what breadth of expertise is expected? Is there a distinction between failing to advise a client and misinforming a client?

The Sixth Amendment includes an express right to counsel among other procedural protections it confers to criminal defendants:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the *Assistance of Counsel for his defense*. (emphasis added)

The Court has long held that “Assistance of Counsel” meant effective assistance of counsel,¹¹ but it had not explored what “defense” entailed. The text of the Sixth Amendment suggests the assistance due under it is discrete in scope. The Amendment pertains in a “criminal prosecution,” the process by which the government moves against a person before a court of law for specified criminal acts. Certainly, other rights afforded an accused in the Amendment—speedy trial, jury trial, knowledge of the accusation, confrontation of witnesses, compulsory process—all address the fairness and integrity of this adversarial effort to convict and impose punishment.

¹¹ The lineage of this principle began with *Powell v. Alabama*, 287 U.S. 45 (1932).

Though the Supreme Court had not set a clear precedent,¹² the prevailing test for “ineffective assistance of counsel” in plea cases appeared to many to be bound by a tight focus on criminal jeopardy alone.¹³ The critical distinction was between “direct” and “collateral” consequences of prosecution. In the context of guilty pleas, the most apparent direct consequence is the punishment that can be imposed, but even here, it may be uncertain how far the duty to advise extends beyond potential maximum sentences, and possibly mandatory minimums, to more nuanced matters involving possible parole and probation.¹⁴ Collateral consequences, by contrast, are more diverse, and can include, in addition to possible conditions on how sentences may be served, such eventualities as loss of the right to vote, loss of a passport, loss of the right to possess firearms, loss of public employment or public benefits, loss of professional or business licenses, possible civil liability, possible enhanced punishment for future crimes, and an obligation to register as an offender.¹⁵ Immigration consequences of a conviction, including deportation, also were regarded as collateral, because they were not immediately imposed as punishment by a convicting court.

The direct versus collateral consequence distinction made in many “ineffective assistance” cases under the Sixth Amendment would appear to have migrated from case law on the requirement of a court to inquire into whether a guilty plea is voluntary for purposes of meeting a defendant’s due process rights under the Fifth and Fourteenth Amendments.¹⁶ Those cases drew a line past which the court was not obligated to inquire into a defendant’s motives for pleading guilty or the defendant’s expectations on how a sentence would be carried out. Absent improper coercion or deceit, a knowing “plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitment made to him by the court, prosecutor or his own counsel, must stand....”¹⁷

Though “ineffective assistance” analysis in plea cases might have appeared to have become tethered to the voluntariness test applied in due process cases, the Court did develop distinct

¹² The leading Supreme Court decision on ineffective assistance and guilty pleas is *Hill v. Lockhart*, 474 U.S. 52 (1985). *Hill* plausibly may be read as eschewing a direct v. collateral consequence test for Sixth Amendment claims. See 474 U.S. at 56, where the Court describes parole eligibility, the basis for the ineffective assistance claim in the case, as being collateral—“We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant’s plea of guilty to be voluntary....” —yet proceeds to analyze the claim under the separate *Strickland* standard, described below. At minimum, *Hill* would not appear to have expressly adopted a “direct v. collateral” test. See Transcript of Oral Argument Before the Supreme Court at 42, 50, *Padilla v. Kentucky*, No. 08-651 (Oct. 13, 2009).

¹³ This view was dispositive in the opinion of the Supreme Court of Kentucky in *Padilla*’s case (*Commonwealth v. Padilla*, 253 S.W. 3d 482 (Ky. 2008)), and the U.S. Supreme Court’s opinion in *Padilla* observed that the “Kentucky high court is far from alone in this view.” *Padilla v. Kentucky*, 559 U.S. ___, No. 08-651, slip op. at 7 & n. 9 (March 31, 2010). See also *Fuatao v. Commonwealth*, 170 S.W. 3d 384 (Ky. 2005). A leading commentary that argued for a broad interpretation of counsel’s constitutional responsibilities in a plea setting nevertheless observed: “[A]ll courts that have considered the issue have held that defense lawyers must explain the direct consequences of a plea, such as length of imprisonment and amount of fine, but need not explain ‘collateral consequences,’ such as revocation of probation or parole, that sentences may be served consecutively rather than concurrently, or that the plea may result in deportation.” Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 703 (2002).

¹⁴ Wayne R. LaFave et al., *Criminal Procedure* § 21.4(d) (3d ed. 2007).

¹⁵ *Id.*

¹⁶ See Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 703-708 (2002).

¹⁷ *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F. 2d 571, 572 n.2 (5th Cir. 1957)).

standards for Sixth Amendment challenges. The seminal case is *Strickland v. Washington*.¹⁸ The *Strickland* Court began its analysis with an observation reminiscent of due process cases. “The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” The Court then continued to speak of defense counsel’s role in the adversarial process, but in doing so began to relate adequacy of counsel to prevailing standards of representation instead of exclusively to fairness of result.

[T]he proper standard for attorney performance is that of reasonably effective assistance.... More specific guidelines are not appropriate....

Representation of a criminal defendant entails certain basic duties.... From counsel’s function as assistant to the defendant derive the overarching duty to advocate the defendant’s cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.

... In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in the American Bar Association standards and the like ... are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.¹⁹

Broad leeway is to be given to defense counsel in fashioning defense strategies, and reasonable professional assistance can comprehend a wide range of options. The purpose of the Sixth Amendment, according to *Strickland*, is limited to setting a baseline for acceptable attorney conduct to preserve the integrity of the criminal justice system. “[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.”²⁰

The test for relief under *Strickland* is two-pronged. Even if representation is constitutionally deficient, a defendant still must show that the deficiency was prejudicial to the outcome of the case. The Supreme Court did not address this second prong in its *Padilla* decision. As discussed below, application of the prejudice requirement can be both difficult and strict.

Supreme Court’s Decision in *Padilla v. Kentucky*

The Supreme Court issued its decision in *Padilla v. Kentucky* on March 31, 2010.²¹ Seven of the nine Justices agreed that the Sixth Amendment right to effective assistance requires that a defense lawyer, at a minimum, raise the possibility of deportation in advising a noncitizen in a criminal case. Writing the five-Justice majority opinion, Justice Stevens acknowledged the prevalence of

¹⁸ 466 U.S. 668 (1984).

¹⁹ 466 U.S. at 687, 688-689.

²⁰ 466 U.S. at 689.

²¹ 559 U.S. ___, No. 08-651, slip op. (March 31, 2010).

the *direct versus collateral consequences* test in effective assistance jurisprudence. Nevertheless, he eschewed applying that test in Padilla's case "because of the unique nature of deportation."²²

Justice Stevens raises several considerations that together make deportation different. First, the impact of deportation is profound. Though recognizing that removal proceedings are civil in nature and that deportation is not strictly a criminal sanction, Justice Stevens characterizes deportation as a "particularly severe 'penalty.'" Second, it is "most difficult" to divorce the penalty [of removal] from conviction in the deportation context." Though he states that he is reserving the question of whether a *direct versus collateral consequences* test is ever appropriate in an effective assistance case, Justice Stevens emphasizes that changes in immigration law now make deportation a "nearly automatic result" for many noncitizen offenders. Third, deportation has long been closely associated with criminal prosecutions. For example, Justice Stevens observes that, from 1917 to 1990, Congress had given both state and federal sentencing judges discretion to make a "judicial recommendation against deportation" (JRAD) in individual criminal cases in which a noncitizen offender would otherwise be vulnerable to removal, and immigration authorities had honored these recommendations. The majority further notes that the United States Court of Appeals for the Second Circuit had held that, before Congress repealed authority for them, JRAD requests were part of criminal sentencing, and not of deportation proceedings, and failure of defense counsel to be aware of, advise on, and pursue JRAD relief during sentencing could be the basis of a Sixth Amendment ineffective assistance claim.²³

After holding that "advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel,"²⁴ Justice Stevens turns to whether the level of representation provided to Padilla by his counsel was reasonable under prevailing professional norms. In quick order, the majority opinion holds that it was not. In doing so, Justice Stevens in one paragraph marshals the American Bar Association Standards for Criminal Justice and 15 other authorities, from bar guides to practice manuals to a Department of Justice compendium of standards for defending indigents to scholarly treatises and articles. Echoing *Strickland* in calling these authorities valuable guides, the majority finds that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."²⁵

Simply requiring defense counsel to mention a possibility of deportation provides minimal guidance. Immigration law can be complicated and each plea negotiation presents its own challenges. Unless the duty to advise is never to extend beyond a general warning that plea bargains might implicate deportation, courts will inevitably be called upon to determine what assistance is reasonable in particular circumstances. There may be several facets to an inquiry into effective assistance. For example, at what stage must an attorney discern the prospect of deportation attendant to possible plea offers that might arise during plea negotiations and discuss them with the defendant? Also, when is consultation with an immigration law expert required? (And at whose expense—noncitizens do not have a right to an attorney at government expense in removal proceedings?)

²² Slip op. at 8.

²³ Slip op. at 5, citing *Janvier v. United States*, 793 F.2d 449 (2d Cir. 1986).

²⁴ Slip op. at 9.

²⁵ Slip op. at 9. Justice Stevens quotes from an *amicus* brief: "[A]uthorities of every stripe ... universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients...." Slip op. at 10, quoting Brief for Legal Ethics, Criminal Procedure, and Criminal Law Professors, as Amici Curiae in Support of Petitioner at 12-14, *Padilla v. Kentucky*, No. 08-651.

On this issue of what immigration expertise is required of defense counsel, the five-Justice majority opinion and the two-Justice concurrence part ways. The majority has some expectation that defense counsel will personally look into, though not necessarily become an expert on, the deportation risks attending a potential guilty plea. According to the majority, when immigration law is “succinct, clear, and explicit in defining the removal consequence” of a conviction for a specified crime, an attorney must correctly advise on the very high likelihood of deportation before the accused pleads guilty to the offense. On the other hand, if the prospect of deportation due to a particular plea appears less certain, the lawyer’s obligation is more general. In less straightforward cases, “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.”²⁶ Silence, however, is never an option.²⁷

Ultimately, silence, or at least willful silence, is not an option for concurring Justices Alito and Roberts either. Beyond avoiding affirmative misadvice, they would require that “[w]hen a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that criminal conviction may have adverse immigration consequences under immigration laws and that the client should consult an immigration specialist if the client wants advice on the subject.”²⁸ The concurrence’s preference for a “warn and refer” standard rests largely with its view of immigration law. Immigration law is complicated; courts of appeals disagree on the criminal alien provisions; what appears to be clear may not be; and, therefore, requiring criminal defense lawyers to assess and advise on immigration consequences carries with it the risk that the advice may be incomplete, misleading, or mistaken. Better, in the concurrence’s view, to limit defense counsel’s responsibilities to matters germane to guilt and criminal punishment and leave responsibility for giving advice on immigration consequences to immigration experts or, possibly to a lesser extent, the courts.

In dissent, Justice Scalia, joined by Justice Thomas, finds “no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction.”²⁹ In the dissent’s view, even if a defense lawyer should look into possible immigration issues under prevailing norms of practice, not “all professional responsibilities of counsel ... become constitutional commands.” Rather than being a Sixth Amendment issue of effective assistance of counsel in a criminal prosecution, the dissent finds the heart of the controversy in *Padilla* to lie closer to notions of ensuring the fairness and voluntariness of guilty pleas. This is a due process obligation of the court, not counsel, and even though there may not be a constitutional remedy in

²⁶ Slip op. at 12.

²⁷ One much discussed issue in *Padilla*’s case that turned out not to be prominent in the Court’s analysis was the significance of mistaken advice. The Solicitor General and the initial appellate decision by the Kentucky courts, for example, would have drawn the line on ineffective assistance in a criminal case between not advising on the “collateral consequence” of deportation and wrongly volunteering to a defendant that deportation was not a possible consequence of a guilty plea. The majority, however, concluded that “[a] holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available.... Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available.” Slip op. at 13. The concurrence agreed that simply refraining from giving wrong advice on deportation was insufficient to meet Sixth Amendment requirements.

²⁸ *Padilla v. Kentucky*, 559 U.S. ___, No. 08-651, slip op. at 14 (March 31, 2010) (Alito, J., joined by Roberts, C.J., concurring).

²⁹ *Padilla v. Kentucky*, 559 U.S. ___, No. 08-651, slip op. at 3 (March 31, 2010) (Scalia, J., joined by Thomas, J., dissenting).

a case like *Padilla*'s—the dissent observes that the matter had not been presented to the lower courts and, remember, that the distinction between direct and collateral consequences was drawn in due process plea decisions—legislatures and the courts could establish (and to a degree have established) nonconstitutional rules and remedies for failing to advise, or for misadvising, on deportation.

Outstanding Issues

Prejudice to the Defendant

The *Padilla* Court did not decide whether *Padilla* was entitled to relief because the courts below had never reached the “prejudice” prong of the *Strickland* test. Again, a failure to provide reasonable professional assistance can fall short of Sixth Amendment expectations but still not warrant setting a plea aside. For that, a defendant must have been “prejudiced” by the error. As articulated in *Strickland*: “It is not enough for the defendant to show that the errors had some conceivable effect on the outcome.... On the other hand, we believe that a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.... The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”³⁰ When a defendant seeks to set aside a guilty plea for ineffective assistance reasons, “in order to satisfy the ‘prejudice’ requirement, the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”³¹

Determining what a defendant would have done had counsel met Sixth Amendment standards is necessarily predictive. Also, when effective counsel would have consisted of telling a defendant that a particular plea would result in deportation, it may be especially difficult in many cases to safely conclude that a reasonable defendant nevertheless would have accepted the plea instead of going to trial or continuing plea negotiations. Why not “roll the dice” when exile is the alternative?

Still, courts have been willing to rigorously explore what the counterfactual would have been. As to *Padilla*, it may be argued that the case against him was so overwhelming that conviction of some deportable offense was certain and going to trial would have exposed him to a much longer term of imprisonment.³² The rub is that without a trial record, it is difficult to assess the strength of the government’s case or the accused’s defense. It thus appears that assessing prejudice could entail holding an evidentiary hearing to determine whether the defendant had a triable case with some reasonable chance of acquittal or conviction of a lesser, non-deportable offense.³³ But even this type of process may not adequately get to whether “there is a reasonable probability that, but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” When deportation is certain, it may be especially difficult to conclude that trial is not a reasonable alternative without also taking into account such broader considerations as the

³⁰ 466 U.S. at 693, 694.

³¹ *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

³² See Brief for the United States, as Amicus Curiae Supporting Affirmance at 29-32, *Padilla v. Kentucky*, No. 08-651.

³³ See Transcript of Oral Argument Before the Supreme Court at 18-19, *Padilla v. Kentucky*, No. 08-651 (Oct. 13, 2009).

defendant's family ties in the United States and the conditions he would face in his home country if deported there.³⁴

Applicability of the “Direct Consequences” Limitation

The majority in *Padilla* based its analysis on the purported uniqueness of deportation. Also, because the majority found deportation to be unique, resolving *Padilla* did not, according to the majority, require consideration of whether to apply a distinction between direct and collateral consequences to define the scope of constitutionally compelled legal representation under the Sixth Amendment.

After *Padilla*, it seems inevitable that a variety of offenders will allege they were not advised on some matter not directly germane to guilt and criminal punishment and that the failure to be advised caused them to enter a guilty plea they otherwise would have rejected. Will the courts hold the line at deportation, or will they engage in an extended exploration of what consequences “count” (e.g., because of their harshness and immediacy, or for some other reason) and what consequences “do not count”? Justice Scalia, among others, sees the floodgates opening: “[The concurring opinion’s] suggestion that counsel must warn defendants of removal consequences ... cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act. We could expect years of elaboration upon these issues in the lower courts, prompted by the defense bar’s devising of ever-expanding categories of plea-invalidating misadvice and failures to warn—not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.”³⁵

Even if the courts were to consider “effective assistance” claims in additional contexts, some do not see the implications of considering “collateral” consequences to be overwhelming. One commentator envisions that the great majority of collateral consequences would flow from three circumstances: Is the client an alien? Does the client have a criminal history or other pending charges? Does the client hold government licenses, hold a government job, or collect public benefits? Further considerations might pertain to drug or sex crimes. Exploring these issues, it is claimed, is “a manageable amount of basic spadework.”³⁶

Also, judicial delineation of what consequences merit “effective assistance of counsel” during the course of a prosecution may not be as “prolonged” or “arbitrary” as Justice Scalia may suggest. For one thing, there may be a range of consequences that are so relatively inconsequential that they rarely will be found to have prejudiced a defendant’s calculus in deciding whether to plead guilty. Will failure to be informed of possibly losing the right to vote, for example, ever be found to have unreasonably prejudiced the decision of a defendant to plead guilty instead of risking many more years of imprisonment or capital punishment? Further, though not directly at issue before the trying court, some consequences might be seen as fitting more naturally into the inner

³⁴ See Transcript of Oral Argument Before the Supreme Court at 35-36, *Padilla v. Kentucky*, No. 08-651 (Oct. 13, 2009).

³⁵ *Padilla v. Kentucky*, 559 U.S. ___, No. 08-651, slip op. at 4 (March 31, 2010) (Scalia, J., joined by Thomas, J., dissenting).

³⁶ Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 738 (2002).

orbit surrounding “direct consequences” and thus meriting advice of counsel. In addition to deportation, for example, there are the possible and easily identifiable consequences for defendants within the criminal justice system itself—for example, eligibility for parole and heightened penalties for future convictions. Finally, there may be policy and legal limits on legislatures in establishing incidental effects of criminal convictions.

Role of the Legislatures and the Courts

Though the Constitution does not require trial courts to inform noncitizen defendants of possible deportation consequences of guilty pleas—due process requirements for knowledgeable and voluntary pleas cover only “direct” criminal consequences—many jurisdictions do. According to one amicus brief in *Padilla*, 28 states, the District of Columbia, and Puerto Rico have a statute, court rule, or standard plea form requiring an advisement on immigration consequences.³⁷

The requirements vary. For example, the District of Columbia Code requires that a court give the following advisement on the record prior to accepting a plea of guilty or nolo contendere: “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.”³⁸ Additionally, the court is directed to allow a defendant additional time to consider a plea upon request of the defendant after the advisement.³⁹ Moreover, if a court fails to give the required advisement and the plea may have one of the consequences included in the advisement, the defendant can have the judgment vacated and enter a plea of not guilty in its stead.⁴⁰ Some states require a more general warning that a plea can have immigration consequences.⁴¹ Other variations require that the court direct a defendant to defense counsel for advice,⁴² or even that the court ascertain whether a defendant’s attorney has discussed possible deportation consequences with the accused.⁴³ Not all of the statutes and rules call for automatic vacation of a plea for failure to meet pertinent requirements.

Constitutionalizing a defense counsel obligation to advise on possible deportation does not foreclose this type of legislation or rules, nor necessarily make existing statutes and rules superfluous. Rather, statutes and rules could still have an important complementary or supplementary role. For example, a requirement that a court inform a defendant of the possibility of deportation consequences, along with an opportunity to consult with defense counsel further, presumably could lessen the possibility of a Sixth Amendment violation for failure of defense counsel to advise. Also, allowing a defendant to have a plea vacated upon showing, for example, that the court failed to warn of possible deportation on the record, or give additional time to consult counsel on this point, could provide for a statutory remedy through a much easier process than might be required to show a constitutional violation. A statutory case could be made simply

³⁷ Brief of the National Association of Criminal Defense Lawyers, et al. as Amici Curiae in Support of the Petitioner at 20-21, App. 11a, *Padilla v. Kentucky*, No. 08-651.

³⁸ D.C. Code Ann. § 16-713 (a) (2010).

³⁹ D.C. Code Ann. § 16-713 (b) (2010).

⁴⁰ *Id.*

⁴¹ E.g., Tex. Code Crim. Proc. art. 26.13 (2010).

⁴² Md. Rule 4-242(e) (2010).

⁴³ N.M. Dist. Ct. R.Cr.P. 5-303(F)(5) (2010).

by consulting the court record, whereas a constitutional case might necessitate difficult inquiries into prejudice and what defense counsel told, or failed to tell, the defendant and when.

Author Contact Information

(name redacted)
Specialist in American Public Law
[redacted]@crs.loc.gov, 7-....

EveryCRSReport.com

The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.