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Legal Sidebar

The Sixth Amendment's Right to Assistance of Counsel and the Risk of Denaturalization: Federal Circuit Courts Are Split

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Until the Supreme Court decided *Padilla v. Kentucky* in 2010, immigration consequences of guilty pleas were generally treated by reviewing courts as exempted from the Sixth Amendment's requirement to provide effective assistance of counsel. In *Padilla*, the Court held that the Sixth Amendment requires a criminal defense attorney to advise an alien client as to whether pleading guilty to a particular offense carries a risk of being placed in removal proceedings. The majority reasoned that removal is a severe penalty; that historically, removal had been closely associated with criminal prosecutions; and that it was difficult to separate "the penalty from the conviction" because changes to immigration law had raised the stakes of criminal convictions for criminal alien defendants.

Both before and following *Padilla*, in ineffective assistance of counsel claims where a defendant argues that a plea was not valid, lower courts have determined that defendants must be made aware of any direct consequences of the plea—such as the punishment that can be imposed—and that criminal defense attorneys have no duty to advise defendants of the collateral consequences of the plea. The Supreme Court has yet to endorse or reject this framework. The lower courts have often treated *Padilla* as recognizing a "narrow deportation exception to the otherwise 'chink-free wall between direct and collateral consequences.'" Recently, a split has emerged among federal appeals courts as to whether a similar exception exists when a criminal naturalized defendant faces a risk of denaturalization when pleading guilty to a criminal offense. In 2024, the U.S. Court of Appeals for the Second Circuit (Second Circuit) held that, because the risk of denaturalization is similar to the risk of removal that the Supreme Court identified in *Padilla*, a criminal defense attorney must advise the naturalized client of the risk of denaturalization. Conversely, in 2026, the Sixth Circuit held that because the risk of denaturalization is a collateral—and not a direct—consequence of a guilty plea, and denaturalization is distinct from the limited deportation exception recognized in *Padilla*, a criminal defense attorney is not required to advise a naturalized client about the risk of denaturalization in the event of a guilty plea.

This Legal Sidebar first provides an overview of the Sixth Amendment's right to effective assistance of counsel, the distinction between direct and collateral consequences recognized by many lower courts, and the interconnectedness between criminal proceedings and immigration consequences. Then, it discusses the Supreme Court's holding in *Padilla v. Kentucky*, briefly outlines the denaturalization process, and summarizes the current circuit split. Lastly, this Sidebar identifies several considerations for Congress.

The Sixth Amendment and Immigration Consequences

The Sixth Amendment's Right to Effective Assistance of Counsel

The Sixth Amendment to the U.S. Constitution guarantees that in "all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." In *McMann v. Richardson*, the Supreme Court held that "the right to counsel is the right to the effective assistance of counsel." Generally, lower courts have held that before a criminal defendant accepts a guilty plea, for it to be valid, the defendant's attorney must advise on any direct consequences—such as the punishment that can be imposed. The attorney, however, is not required to advise his or her client on any collateral consequences—such as "loss of the right to vote," loss of business, or civil forfeiture—that may stem from the plea deal. In his concurring opinion in *Padilla*, Justice Alito offered one rationale for not requiring such advice: Criminal defense attorneys are not expected to be experts in other areas of law and are not expected to advise their clients "on matters that lie outside their area of training and expertise." Yet, the Supreme Court has not squarely endorsed the direct versus collateral framework employed by many lower courts. The Supreme Court in *Padilla* determined that the risk of removal was unique enough in nature that the direct versus collateral framework lower courts had applied was inapplicable and held that criminal defense attorneys have a duty to advise alien clients about the risk of removal from the United States, which is discussed in detail below.

If a criminal defense attorney fails to properly advise a client before a guilty plea is entered, and the client later brings a Sixth Amendment challenge on the grounds that the attorney provided ineffective assistance of counsel, a court will apply the Supreme Court's two-pronged test established in *Strickland v. Washington*: (1) Did the criminal defense attorney's representation fall "below an objective standard of reasonableness" (i.e., was there a constitutional deficiency); and (2) is there a reasonable probability that, if not for the attorney's errors, the criminal proceeding would have had a different result (i.e., was the defendant prejudiced)? If a defendant satisfies this two-pronged test, the deficient representation violates his or her constitutional right to effective assistance of counsel.

Criminal Proceedings and Immigration Consequences

Under the Immigration and Nationality Act (INA), aliens may be ineligible to remain in the United States and be subject to removal proceedings if, among other things, they commit certain criminal offenses. The INA lists the criminal-related grounds on which an alien may be removed from the United States, and these provisions largely, but not exclusively, require an alien to have been convicted of certain specified or categories of offenses. Therefore, criminal proceedings that involve aliens may carry additional consequences for them beyond the criminal sanction, including potential removal from the country.

Removal proceedings are civil, not criminal, so aliens in removal proceedings have no Sixth Amendment right to effective assistance of counsel to assist them during such proceedings. However, as is the case with all criminal defendants, aliens who have pending criminal charges in federal or state court have a constitutional right to effective assistance of counsel with respect to those criminal charges under the Sixth Amendment, and this right applies throughout all critical stages of criminal proceedings, including pretrial stages when a defendant might have to decide whether to plead guilty to a certain offense. In addition, for criminal alien defendants, the Supreme Court described their constitutional right to effective assistance of counsel in *Padilla v. Kentucky*, discussed below.

Padilla v. Kentucky

Jose Padilla was a lawful permanent resident (LPR) who pled guilty to transporting "a large amount of marijuana in his tractor-trailer," and was later placed in removal proceedings. He then filed a petition in Kentucky state court alleging ineffective assistance of counsel, arguing that his attorney failed to advise him of the potential immigration consequences of his guilty plea and instead told him that he "did not have to worry about [his] immigration status since he had been in the country for so long." The case was appealed to the Supreme Court, where the question before the Court was whether Padilla's attorney, "as a matter of federal law," had an obligation to advise him that his guilty plea could result in his removal from the United States. In 2010, Justice Stevens wrote the majority opinion for the Court, joined by Justices Kennedy, Ginsburg, Breyer, and Sotomayor. The Court held that an attorney who was abiding by the Sixth Amendment's requirement to provide effective assistance of counsel would have advised Padilla that his conviction subjected him to removal proceedings. The Court first determined that the risk of removal from the United States was "uniquely difficult to classify as either a direct or a collateral consequence" because removal is a severe penalty, there is a long history of removal being closely associated with criminal prosecutions, and it is difficult "to divorce the penalty from the conviction" in the removal context. The Court did not endorse the direct versus collateral consequence distinction that lower courts had been applying. The Court concluded that "advice regarding [removal] is not categorically removed from the ambit of the Sixth Amendment right to counsel" and that it is the Court's "responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the mercies of incompetent counsel."

Having concluded this, the Court then held that its 1984 ruling in *Strickland v. Washington,* which established a two-prong test for determining if counsel provided ineffective assistance, was applicable. The Court determined that the first prong of the *Strickland* test—whether the criminal defense attorney's representation fell "below an objective standard of reasonableness"—was established in this case. The Court looked to several authorities, including the American Bar Association and various practice manuals, to conclude that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." The Court then grappled with what immigration expertise is required of criminal defense attorneys and, according to the majority, when immigration law is "succinct, clear, and explicit in defining the removal consequence" of a conviction for a specific offense, the criminal defense attorney must correctly advise on the likelihood of removal before the defendant pleads guilty to that offense. When the removal consequences are uncertain or unclear, like when the consequences cannot be easily determined from reading the relevant removability statute, however, "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."

Justice Alito, in an opinion joined by Chief Justice Roberts, concurred in the judgment. Justice Alito argued that criminal defense attorneys should be required to only advise a client that a conviction could have immigration consequences and recommend that the client speak with an immigration law expert if he or she "wants advice on that subject" because of the complexity of immigration law and because criminal defense attorneys are not expected to be experts in other areas of law. Justice Alito argued the majority's "halfway test," in which the scope of a criminal defense attorney's advice would depend on the difficulty of determining removability consequences, would "lead to much confusion and needless litigation" and would impose a severe burden on criminal defense attorneys; as a result, affirmative misadvice could then constitute ineffective assistance of counsel.

Justice Scalia, joined by Justice Thomas, dissented, arguing that nothing in the Sixth Amendment requires "advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand" and that an attorney's professional responsibility, based on prevailing norms of practice, does not automatically become a constitutional command. The dissent further argued that state and federal legislatures could establish nonconstitutional rules and remedies for failing to advise on the risk of removal.

Three years later in *Chaidez v. United States*, the Supreme Court held that *Padilla* is not retroactive and again reiterated that it was not delineating "the world of collateral consequences" or endorsing the direct versus collateral consequences framework.

The Denaturalization Process

Denaturalization is the process by which an individual's previously granted naturalization status is revoked. This may generally occur any time after naturalization has been granted, with few exceptions. To initiate the denaturalization process for an individual, the Department of Homeland Security (DHS) recommends to the Department of Justice (DOJ) that it should institute either civil revocation or criminal prosecution proceedings in federal district court against the identified individual. For civil revocation, a DOJ attorney files a complaint with an affidavit showing good cause in the judicial district where the naturalized citizen lives. Most cases are litigated as civil proceedings, where there is no statute of limitations or right to a court-appointed attorney and the government's burden of proof is "clear, unequivocal, and convincing and [must] not leave the issue in doubt."

In civil denaturalization proceedings under 8 U.S.C. § 1451(a), individuals can have their naturalization status revoked if a court determines that the naturalization certificate and citizenship order were either "illegally procured or were procured by concealment of a material fact or by willful misrepresentation." Under regulations, if it appears to DHS that an individual who is subject to denaturalization should face federal criminal penalties because of evidence that the individual obtained his or her naturalization unlawfully, DHS is to refer the matter to DOJ for federal criminal prosecution, and if convicted, the court shall issue an order revoking the individual's naturalization under § 1451(e).

Once naturalization is revoked, an individual reverts to his or her status before naturalization, which is typically LPR status. The individual, no longer a U.S. citizen, is now subject to the grounds of deportability and could be placed in removal proceedings. The information used to denaturalize an individual can be used in a subsequent removal proceeding (for example, if an individual used fraudulent documents to become a U.S. citizen and was later denaturalized for it, then that information could later place the individual in removal proceedings for document fraud). According to one DOJ publication, "the government does not expend resources on civil denaturalization actions unless the ultimate goal is the removal of the [individual] from the United States." For more information on the denaturalization process, see this CRS Legal Sidebar.

The Circuit Split

Since 2024, two federal courts of appeals have examined whether, under the Sixth Amendment, a criminal defense attorney must advise a naturalized citizen defendant of the risk of denaturalization when pleading guilty to an offense in criminal court. One court has held that, because the risk of denaturalization is similar to the risk of removal that the Supreme Court identified in *Padilla*, a criminal defense attorney must advise the defendant of the risk of denaturalization. Another court held that, because the risk of denaturalization is a collateral consequence of the guilty plea, a criminal defense attorney is not required to advise a defendant of the risk of denaturalization. Both cases are described in detail below.

Second Circuit

In 2024, in *Farhane v. United States*, a divided Second Circuit panel held that the Sixth Amendment requires criminal defense attorneys to advise their naturalized citizen clients about the potential risk of denaturalization when entering a guilty plea. There, the defendant was a naturalized citizen who pled guilty to certain federal crimes in 2006 for conduct that dated back to 2001. The defendant became a U.S.

citizen in 2002, after denying in his citizenship application that he had ever committed a crime for which he had not been arrested. A year after he completed his sentence, the federal government used his 2006 guilty plea assertions to initiate civil denaturalization proceedings against the defendant, claiming that he had unlawfully obtained his naturalization by failing to disclose crimes that predated his naturalization. That same year, the defendant filed a petition with the court arguing that his 2006 plea was invalid because his attorney "never alerted him to the possibility of denaturalization and deportation raised by his plea or advised him with respect to that risk." A federal district court denied the defendant's petition, and a divided Second Circuit panel affirmed that decision on appeal.

After rehearing the case en banc, the Second Circuit considered whether the Sixth Amendment requires attorneys to advise their naturalized clients of potential denaturalization and removal. The divided en banc court held that a straightforward application of *Padilla* applies because a guilty plea to an offense that exposes defendants to denaturalization "necessarily exposes [them] to the risk of deportation." The court relied on the defendant's particular situation to show how a guilty plea with a risk of denaturalization also risks removal: The federal government used the defendant's 2006 guilty plea to prepare its denaturalization complaint against him; once denaturalized, the defendant's particular conviction made him almost certainly deportable. According to the court, even though the risk of removal is one step removed for naturalized citizens, the risk still exists and the Sixth Amendment requires the defendant to receive advice from the criminal defense attorney. The court rejected the government's argument that *Padilla*'s holding was limited to cases where removal was certain or would immediately follow a conviction. Instead, the court held that *Padilla* applies to any case where a guilty plea could place a defendant at risk of removal and not just cases where removal is certain. The court remanded the case to allow the district court to complete a *Strickland* analysis. The case remains pending with the district court.

Sixth Circuit

In 2026, a divided Sixth Circuit in *United States v. Singh* disagreed with the Second Circuit and held that the Sixth Amendment does not require criminal defense attorneys to advise naturalized citizen clients that accepting a guilty plea could lead to denaturalization. There, the defendant was a naturalized citizen who had pled guilty to using a fraudulently obtained U.S. passport. According to the court, the defendant had lied on a previous immigration application that eventually allowed him to become a naturalized citizen. A few years after pleading guilty, the federal government initiated civil denaturalization proceedings against the defendant, using the factual basis of the plea to substantiate its claim that he illegally procured his U.S. citizenship because, among other things, he lied on his naturalization application. The defendant then separately submitted a petition in district court claiming that he received ineffective assistance of counsel when pleading guilty years prior because his attorney "incorrectly advised him that the plea agreement would protect his citizenship—unless he commit[ted] another crime."

On review, the Sixth Circuit first considered whether denaturalization was a direct or collateral consequence when analyzing the defendant's claim of ineffective assistance of counsel. The court held that "[c]ivil denaturalization is a separate proceeding" that is "beyond the control and responsibility of the district court" where a naturalized citizen is convicted and therefore is a collateral consequence not bound by the Sixth Amendment. The defendant had relied on the Second Circuit's holding in *Farhane* to argue that the court should add the risk of denaturalization as a new exception—like the Supreme Court did in *Padilla*—to the direct versus collateral consequence ineffective assistance of counsel analysis. The panel majority described denaturalization as being like deportation in that both actions carry severe consequences for the affected individual. The court stated that just because a consequence is severe does not necessarily implicate the Sixth Amendment. The court distinguished denaturalization from removal, stating that removal "is a nearly automatic consequence of many criminal convictions," whereas the federal government has discretion in choosing whether to initiate denaturalization proceedings, making removal following denaturalization not an automatic consequence of many criminal convictions. After providing various examples, the court ultimately decided that denaturalization is not enmeshed with a criminal conviction in the same way removal from the United States is. Further, the court pointed out that the federal government, when initiating denaturalization proceedings against the defendant, did not rely on whether he was convicted years prior and instead relied on his conduct leading up to when he became a U.S. citizen. In conclusion, according to the court, a criminal defense attorney is not required to advise his or her client that accepting a guilty plea could lead to denaturalization. A petition for a rehearing en banc was denied in July 2026.

Considerations for Congress

As it stands now, naturalized citizens who live in the Second and Sixth Circuits might be advised differently on the risk of denaturalization when they accept guilty pleas. In determining whether the Sixth Amendment requires a criminal defense attorney to advise a naturalized client about the risk of denaturalization when pleading guilty to an offense, the issue before the courts has been whether denaturalization is akin to the risk of removal, as described in *Padilla*. Two courts of appeals have directly addressed this issue thus far, and the issue has been raised in other courts. In 2024, one federal district court in Pennsylvania ruled in an unpublished case that the attorney had a duty to advise the client of the risk of denaturalization. In 2025, the Fourth Circuit reviewed the claim de novo but declined to address the issue on appeal because an ineffective assistance of counsel claim is "not ordinarily cognizable on direct appeal" except in the case where "the record conclusively shows ineffective assistance of counsel," and here the claim had not shown this.

Given the potential for further judicial disagreement about the scope of the Sixth Amendment's protections with respect to plea agreements that could result in denaturalization, Congress has options to address this issue. For example, in his dissent in *Padilla*, Justice Scalia posited that federal immigration law could be amended to provide that the risk of removal that flows from certain criminal convictions would not apply if a criminal defense attorney misadvised a client on the risk of removal when the client accepted a guilty plea. Similarly, here, Congress could amend federal immigration law to provide that the federal government cannot rely on statements a naturalized citizen made in a plea agreement to initiate denaturalization proceedings if the naturalized citizen was not properly advised by the criminal defense attorney of the risk of denaturalization before accepting a guilty plea. Congress could also more broadly—to help lessen the possibility of Sixth Amendment violation claims—amend Rule 11 of the Federal Rules of Criminal Procedure (FRCP) to require federal judges to warn naturalized citizen defendants of the risk of denaturalization before they accept their guilty pleas.

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