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UPDATE Express is published by the
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July 2010
Number 1

National Center for Prosecution of Child Abuse


Padilla v. Kentucky, Criminal Pleas,
Immigration and Deportable Offenses

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,
which district shall have been previously ascertained by law; and to be informed of the
nature and cause of the accusation; to be confronted with the witnesses against him; to have compuls-
ory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his
defence.

Sixth Amendment—Right to Effective Assistance of Counsel. Ratified 12/15/1791

by Angela A. Downes

In Padilla v. Kentucky, the Supreme Court of the United States held that the peti-
tioner’s counsel had an obli-
gation to advise him that the offense to
which he was pleading guilty would re-
sult in his removal from this country.

The failure of counsel to properly ad-
vise the client rose to the level of inef-
fective assistance of counsel.

Immigration consequences of a plea
are integral to the criminal penalty.

Petitioner Jose Padilla, a native of Hon-
duras, was a permanent resident of the
United States for over 40 years. He faced de-
portation after pleading guilty to the trans-
portation of a large amount of marijuana in the
Commonwealth of Kentucky.2 Padilla’s crime was a deportable offense under 8
U.S.C. § 1227(a)(2)(B)(i).3 Padilla claimed that his counsel not only failed to advise him
of this consequence prior to his entering the plea, but also told him that he “did not have
to worry about immigration status since he had been in the country so long.”4 Padilla
relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges
that made his deportation virtually manda-
tory. Padilla argued that he would have in-
sisted on going to trial had he not received
incorrect advice from his attorney.5

The Supreme Court of Kentucky held
that that the Sixth Amendment’s guarantee
of effective assistance of counsel does not
protect a criminal defendant from erroneous
advice about deportation because it is merely
a “collateral” consequence of his convic-
tion.6 The Kentucky Court reasoned that
neither counsel’s failure to advise the peti-
tioner about the possibility of removal, nor
counsel’s incorrect advice, could provide a
basis for relief.7

According to the Sixth Amendment, a de-
fendant is entitled to “effective assistance of competent counsel” before deciding
whether to plead guilty to a charge.8 The
Supreme Court of Kentucky rejected
Padilla’s ineffectiveness claim on the ground
that the advice he sought about the risk of
deporation concerned only collateral mat-
ters, i.e. matters not within the sentencing
authority of the state trial court.9 For the
Supreme Court of Kentucky, collateral con-
sequences are outside the scope of represen-
tation required by the Sixth Amendment,
and therefore the failure of defense counsel
to advise the defendant of possible deporta-
tion consequences should not be the basis
for an ineffective assistance of counsel claim.10

The U.S. Supreme Court reversed that
decision but did not decide the issue of
whether Padilla had been prejudiced and en-
titled to relief. The Supreme Court deter-
mined that it is the duty of defense counsel
to provide accurate information to the crim-
inal client who may possibly face deporta-
tion. The Court acknowledged that
immigration is a complex body of law.
However, because the stakes of deportation are so
high for the defendants, the criminal defense
lawyer has a duty to give correct advice
when the deportation consequence is truly clear.11 These are cases where the depar-
tation is distinct, clear and explicit. The Court
reasoned that in situations in which the de-
portation consequences of a particular plea are uncertain or unclear, the duty of the pri-
vate practitioner is limited.12 When the law is
not succinct and straightforward, a criminal
defense attorney only has to advise a non-
citizen that pending criminal charges may carry a risk of adverse immigration consequences.\textsuperscript{13} The Supreme Court held that Padilla’s counsel, as a matter of federal law, had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from the country.\textsuperscript{13} Counsel must inform a client whether his plea carries a risk of deportation; the Court found that Padilla had sufficiently alleged that his counsel was constitutionally deficient.\textsuperscript{14}

The Court’s decision in Padilla dramatically raises the stakes of a non-citizens’ criminal conviction. The importance of accurate legal advice for noncitizens’ accused of crimes has never been more important.\textsuperscript{15} According to the Court, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.\textsuperscript{16} Deportation is intimately related to the criminal process.\textsuperscript{17}

The concurring opinion agreed that any competent criminal defense counsel should reasonably advise the client of immigration status for a plea. A non citizen defendant’s Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on the subject.\textsuperscript{18}

The dissenting opinion sought both a limitation on the constitutional obligation to provide advice and to clarify the consequences of bad advice. Reasoning that the Sixth Amendment had no application because the subject of the petition was the erroneous advice by counsel and not the prosecution for which Padilla was convicted, he was not entitled to ineffective assistance of counsel.\textsuperscript{19} The dissent reasoned that this issue could be addressed by statute or legislation without expanding the scope of the Sixth Amendment.

\textsuperscript{1} Angela A. Downes is a Senior Attorney with the National Center for the Prosecution of Child Abuse, a program of the NDAA.
\textsuperscript{2} Padilla v. Kentucky, 559 U.S. _____ (2010).
\textsuperscript{3} 8 U.S.C. § 1227 (a)(2)(b)(i). Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in § 802 of title 21), other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.
\textsuperscript{4} Padilla v. Kentucky, 253 S.W. 3d 482, 483 (Ky.2008).
\textsuperscript{5} Id at 484, 485.
\textsuperscript{6} Id. at 485.
\textsuperscript{8} Padilla v. Kentucky, 253 S.W. 3d, at 483-484 (citing Commonwealth v. Fauntale, 170 S.W.3d 384 (2005))
\textsuperscript{9} Id at 483.
\textsuperscript{10} Padilla v. Kentucky, 559 U.S. _____(2010)
\textsuperscript{11} Id.
\textsuperscript{12} Id.
\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id.