

ADVISING CRIMINAL DEFENDANTS AFTER *PADILLA (UPDATE)*

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SUPREME COURT

***Padilla v. Kentucky*, 559 U.S. _____ *6 (2010).**

Information from USSC website:

www.supremecourt.gov/Search.aspx?FileName=/doctcketfiles/08-651.htm

SUPREME COURT

[Recent] changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

***Padilla v. Kentucky*, 559 U.S. _____ *6 (2010).**

SUPREME COURT

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. [In cases where the law is not succinct and straightforward, the duty of the private practitioner...is more limited]. [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.□

***Padilla v. Kentucky*, 559 U.S. _____ *11-12 (2010).**

SUPREME COURT

But when the deportation consequence is truly clear, as it was in [*Padilla's* case], the duty to give correct advice is equally clear.

***Padilla v. Kentucky*, 559 U.S. _____ *12 (2010).**

SUPREME COURT UNRESOLVED ISSUE:

Whether [*Padilla*] is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

***Padilla v. Kentucky*, 559 U.S. _____ *2,12 (2010).**

FIFTH CIRCUIT REVERSAL:

Five days after *Padilla*, the Supreme Court reversed a judgment that had reaffirmed the 5th Circuit's position that counsel did not have a duty to warn about immigration consequences to a non-citizen client in connection with a plea of guilty.

See *United States v. Santos-Sanchez*, 548 F.3d 327 (5th Cir. 2008)(reversed and remanded by *United States v. Santos-Sanchez*, 2010 U.S. LEXIS 3004 (April 5, 2010).

www.supremecourt.gov/Search.aspx?FileName=/doctcketfiles/08-9888.htm

FIFTH CIRCUIT REVERSAL:

On June 15, 2010, the Fifth Circuit recognized that the Supreme Court had abrogated its earlier opinion, and remanded Mr. Santos-Sanchez' case to the district court in Laredo, Texas for reconsideration of its denial of his petition for writ of *coram nobis* in light of *Padilla*.

See *United States v. Santos-Sanchez*, No. 07-40145 (5th Cir. – June 15, 2010)(unpublished).

www.ca5.uscourts.gov/opinions/unpub/07/07-40145.0.wpd.pdf

Recently, the district court again denied relief, but only on the issue of prejudice, and the case is again on appeal. See No.

SIMPLE REFERRAL NO LONGER SUFFICIENT

- ❖ “I am not an immigration attorney, so you need to consult with one regarding your status in connection with your plea.”
- ❖ No longer sufficient **on its own** to discharge *Padilla* duty, but...
- ❖ **IT’S A GOOD STARTING POINT.**

PADILLA’S PRACTICE RECOMMENDATIONS

- ❖ Speak to a **REPUTED**, or **BOARD CERTIFIED** immigration lawyer **who handles removal litigation**, about meeting with client; **AND** request a memorandum of law for client’s case; **OR**
- ❖ Learn the provisions and their effect on your client’s case from the immigration lawyer, **well-enough to explain them during plea hearing.**
- ❖ **DO NOT RELY ON “CHEAT” SHEETS, OR “EXPRESS” OVER-THE-PHONE ADVISE FROM IMMIGRATION COUNSEL.** A deportation analysis is very fact intensive, and includes family ties, criminal background (and date and disposition of offense(s)), frequency and length of stays out of the U.S., manner of entry, prior deportations/voluntary removals, false citizenship representations, number of years residing in the U.S., etc.

PRACTICAL EFFECT ON CURRENT PRACTICE

- ❖ May force a lawyer to proceed to trial in the particular case, which;
- ❖ May influence the prosecutor to make alternative plea offer, once it is clear that the client has no choice but to proceed to trial to have any chance of retaining their immigration status.

PADILLA'S COMMENT ON PLEA-BARGAINING

By bringing deportation consequences into th[e plea bargaining] process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties... Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

Padilla, at *16

COURT-APPOINTED IMMIGRATION EXPERT?

- ❖ The Supreme Court recognizes that due process requires access to the raw materials integral to the building of an effective defense.
- ❖ While the State need not “purchase for an indigent defendant all the assistance that his wealthier counterparts might buy,” **it must provide him the basic tools to present his defense within our adversarial system.**

***Rey v. State*, 897 S.W.2d 333, 337 (Tex. Crim. App. 1995)(citing *Ake v. Oklahoma*, 470 U.S. 68 at 77 (1985)).**

COURT-APPOINTED IMMIGRATION EXPERT?

***Ake* is not limited to psychiatric experts; but the type of expert requested is relevant to the determination of whether the trial was fundamentally unfair without the expert's assistance. The nature of an expert's field and the importance and complexity of the issue will bear directly upon whether the appointment of an expert will be helpful.**

***Rey v. State*, 897 S.W.2d 333, 337 (Tex. Crim. App. 1995). See *Ake v. Oklahoma*, 470 U.S. 68 at 77 (1985).**

RIGHT TO EXPERT IN BOTH APPOINTED AND RETAINED CASES:

If any reasonable attorney **appointed to represent an indigent defendant** would be expected to investigate and request expert assistance to determine a deceased infant's cause of death, **a privately retained attorney should be held to no lower standard.** As the Supreme Court has explained, "The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection. . . **We see no basis for drawing a distinction between retained and appointed counsel that would deny equal justice to defendants who must choose their own lawyers."**

Ex Parte Briggs, 187 S.W.3d 458, 469 (Tex. Crim. App. 2005).

DUTY BY ALL COURTS TO ENSURE THE VOLUNTARINESS OF A PLEA OF GUILTY

- ⦿ The obligation of all Courts is to ensure that a defendant understand that by pleading guilty, one waives:
- ⦿ The right to a jury trial;
- ⦿ The right to confront (cross-examine) one's accusers at trial;
- ⦿ The privilege against compelled self-incrimination (right to remain silent); and to ensure
- ⦿ That the plea is not induced by "terror (i.e. coercion)."

See Gardner v. State, 164 S.W.3d 393, 398-399 (Tex. Crim. App. 2005)(citing *Boykin v. Alabama*, 89 S. Ct. 1709 (1969)).

FEDERAL COURT'S STATUTORY OBLIGATION:

- ❖ Rule 11 Fed. R. Crim. Pro.;
- ❖ Does not contain any admonishment about deportation consequences.

TEXAS COURT'S STATUTORY OBLIGATION:

- ❖ Art. 26.13(a)(4) Tex. Code Crim. Pro. warning by Court during felony plea:
- ❖ "...if the defendant is not a citizen of the United States of America, a plea of guilty or *nolo contendere* for the offense charged may result in deportation, the exclusion from admission to this country or the denial of naturalization under federal law."

TRIAL COURT'S NEW ADMONISHMENT?

- ❖ Technically none under *Padilla's* holding, however:
- ❖ Whether a trial court has complied with Article 26.13 and whether it has complied with *Boykin* are **two separate issues**. See *Gardner* at 398.

ART. 26.13 DOES NOT SATISFY PADILLA

“...reviewing the written admonition did not satisfy trial counsel’s duty under these circumstances. Because the deportation consequence was truly clear, trial counsel had a duty to inform Romero of the specific consequences of his plea. *Ex Parte Romero*, No. 04-11-00175, * 5 (Ct. App. – San Antonio)(August 3, 2011)) See *Ex parte Tanklevskaya*, No. 01-10-00627-CR, 2011 WL 2132722, at *8 (Tex. App.—Houston [1st Dist.] May 26, 2011, no pet. h.).

PADILLA IS RETROACTIVE:

1. *Ex parte Tanklevskaya*, 2011 Tex. App. LEXIS 4034 (Ct. App. Houston [1st Dist.] (May 26, 2011)(Writ of Habeas Corpus for misd. Possession of Marijuana granted).
2. *State v. Golding*, 2011 Tex. App. LEXIS 3616 (May 12, 2011)(same appellate court, same result).

OTHER FAVORABLE PADILLA DECISIONS:

1. *Salazar v. State*, 2011 Tex. App. LEXIS 7229, *9-10 (Ct. App. Eastland (August 31, 2011));
2. *Ex parte De Los Reyes*, 2011 Tex. App. LEXIS 7166 (Ct. App. El Paso (August 31, 2011)).

PREJUDICE ANALYSIS:

Inquiry is not whether there was sufficient evidence of guilt to convict by jury.

Test:

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

TRIAL COURT’S NEW ADMONISHMENT?

Now that immigration advice is a requirement of effective assistance, the Court is probably obligated to ask about a lawyer’s advice on the immigration consequence, in order to ensure the **voluntariness** of a plea.

SUGGESTED ATTORNEY MEASURE:

1. If concerned about divulging attorney client communications that may be relayed to immigration authorities:
2. Submit memorandum on subject of client's immigration consequences with the court, ***EX PARTE***, and **UNDER SEAL**.

EX PARTE ROMERO:

1. Implied finding that *Padilla* is retroactively applied;
2. Section 26.13(a)(4) admonishments insufficient to address "truly clear" consequences;
3. Prejudice based on decision to plead after proper immigration advise (but-for analysis).

CIRCUIT SPLIT ON RETROACTIVITY:

PADILLA **IS** RETROACTIVE:

United States v. Orocio, No. 10-1231 (3rd Cir. (June 29, 2011)).

PADILLA IS **NOT** RETROACTIVE:

United States v. Chaidez, No. 10-3623 (7th Cir. (Aug. 23, 2011));

United States v. Hong, No. 10-6294 (10th Cir. (Aug. 30, 2011)).

FIFTH CIRCUIT IS SO FAR UNDECIDED.

APPELLATE/POST-CONVICTION RELIEF GENERAL CHECKLIST:

1. Always speak to the plea lawyer(s) & request affidavit;
2. Obtain plea documents AND plea & sentencing transcripts (note in your writ your attempts to obtain what may not be available, including unsuccessful efforts at reaching plea lawyer);
3. Obtain an Affidavit from immigration expert in removal practice (preferably board certified);
4. Order granting/recommending writ relief by Court can omit language of ineffectiveness, and rely on finding that plea is involuntary on 5th/14th Amendment grounds for immigration purposes.

CONCLUSION:

With *Padilla*, the Supreme Court has now recognized a non-citizen defendant's right to be advised by their attorney of the immigration consequences of a plea of guilty.

A diligent effort by the attorney and a watchful and proactive role by an attentive judge will ensure that the client can make an informed decision when pleading, and that the matter does not return to Court in a post-conviction proceeding.