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"Not So Fast in Arizona": Supreme Court Puts the Brakes on Deportations

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Immigration Controversy

The recent and controversial Arizona immigration statute was drafted, in large part proponents say, to deal with increasing crime committed by illegal immigrants. There are over 460,000 illegals residing in Arizona by some estimates and while only a small percentage have criminal records or are engaged in drug smuggling or crimes of violence, it has been their actions that has motivated legislators to act. The general attitude is that the federal government is not doing enough to enforce the borders and deport those residing in Arizona illegally.

Thus, the state statute targets aliens with criminal records or those committing offenses and arrested by the police. By requiring foreign looking persons to produce identification documents and proof of legal status in the United States when stopped by a law enforcement officer, Arizona legislators hoped to increase the rate at which illegal aliens, including those with convictions, would be deported. America may be the land of immigrants but it need not hold out the welcome mat for those breaking criminal statutes. Some would say, so far so good!

However, the Supreme Court by a 7-2 vote (Justices Scalia and Thomas dissenting) issued a landmark decision on March 31st in *Padilla v. Kentucky*, 559 U.S. 2010 BL 70791 (2010) that may halt the mass deportations that Arizona hoped would occur. This is yet another example of our governments' "checks and balances" between the judicial and legislative branches.

In *Padilla v. Kentucky*, the Supreme Court ruled that defense counsel must inform her client whether her guilty plea will result in deportation. In the majority opinion, Justice Stevens noted that the Sixth Amendment right to "effective assistance of competent counsel … the seriousness of an immigration consequence of a criminal plea, and concomitant impact of deportation on families living lawfully in this country demand no less." This sweeping holding settled the long-running debate and split in the Circuits over whether the Sixth Amendment applied to advice on removal (deportation) which is a civil proceeding arising out of a guilty plea by a non U.S. citizen and is often classified as merely a "collateral consequence" of criminal proceedings.

The Supreme Court specifically found this classification unhelpful in analyzing the scope of Sixth Amendment claims. In its decision, the majority noted:

> Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel.

Mr. Padilla had resided in the United States for forty years and was a legal permanent resident ("Green Card" holder) when he pled guilty to drug-distribution charges. He sought post-conviction relief claiming that his lawyer not only failed to advise him of the immigration consequences of his plea "but also told him to not to worry about deportation since he had lived in the United States so long." He alleged he would have gone to trial had he not received this incorrect advice.

The Court rejected the argument that only affirmative misadvice regarding immigration consequences of guilty please triggers the protections of *Strickland v. Washington*, 466 U.S. 668, under the Sixth Amendment. The majority feared that such a rule would "invite two absurd results." First, counsel would be motivated to stay silent on the issue for fear of misadvising his client. Second, it would deny "a class of clients least able to represent themselves the most rudimentary advice on deportation."

Accordingly, the Supreme Court will now require defense counsel to jump through a number of hoops to provide effective assistance of counsel as mandated by the Constitution:

> When the law is not succinct and straightforward (as it is in many of the scenarios posited by *Justice Alito* [in his concurring opinion]), 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. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

What rankled the majority in *Padilla* was counsel's inability to advise Mr. Padilla that a plea to the drug charge would result in removal. All the defense attorney had to do was open the United States Code, find the section on "aggravated felonies" and see that the statute was "succinct, clear, and explicit" in requiring removal of his alleged drug dealing Green Card client. Further, the Supreme Court advises that if counsel has questions about the immigration consequences, the attorney can always consult any of the "numerous practice guides" on immigration law to help decide whether to accept a plea offer or instead go to trial.

The Supreme Court did not hesitate to order that that Mr. Padilla be given a second chance because of the bad advice he received. As a result, Mr. Padilla can halt his deportation and instead proceed to state court to show that there would have been a

different outcome in his criminal case if he had not listened to his lawyer and instead gone to trial.

Unfortunately, the Supreme Court's general advice to counsel just to pick up the Code or a treatise will be difficult to follow in cases not as extreme or clear cut as that of Mr. Padilla. Except for a select number of crimes considered "aggravated felonies" under the immigration laws, there are few other examples of "truly clear" criminal immigration consequences when pleading a client guilty. Confusion abounds. For example, some drug misdemeanors can be classified as immigration aggravated felonies (IAFs) while other drug felonies under state law may not. A misdemeanor as simple as shoplifting may or may not have removal consequences depending upon the length of the sentence, when the alien was first admitted in the United States, the alien's status, regardless whether all or part of the sentence imposed is suspended. Immigrants whose prior convictions have been expunged or vacated may or may not still be considered convicted for immigration purposes depending upon the language used in the Court's Order. As the majority opinion acknowledged, "[I]mmigration law can be complex, and it is a legal specialty of its own. *Some members of the bar who represent clients facing criminal charges … may not be well versed in it*" (emphasis added). That is probably the understatement of the year when describing the criminal defense bar in general.

Padilla's Implications

The likely result will overwhelm the floodgates as the volume of litigation reaches Hurricane Katrina proportions on the heels of the *Padilla* decision. Those now in jail awaiting deportation or in prison completing their criminal sentences will begin to file thousands of post-conviction petitions for relief claiming that they were misled by their criminal defense counsel when they pled guilty to the charges against them. Consider the typical shoplifter, sentenced to twelve (12) months suspended on the misdemeanor charge, told by her attorney that this is an excellent result only to find out that she committed an IAF and will face automatic deportation. Better to have gone to trial and argued that she did not know the jewelry was in her purse and that it was put there by her friend who was the real culprit. These stories will be repeated time and again in the *habeas corpus* petitions to be filed under the holding in *Padilla*.

Justice Alito, in his concurring opinion, correctly and cogently provides a litany of examples where consulting a guidebook will only lead defense counsel astray and result in the wrong answers. Defining an IAF that inevitably results in removal is often unclear, despite the plain language in the statute. Consider two classic examples. The felony of structuring a currency transaction is not an aggravated felony. Domestic assault is a removal offense in some jurisdictions but not in others. There is a special exception to removal for possession of marijuana if convicted only of one such offense but not if convicted of two such offenses and the quantity is less than 30 grams. Determining whether a particular crime is one involving moral turpitude which can result in removal (subject to certain defenses in immigration court) offers even more bewildering examples and uncertainties, varying from state to state and federal circuit to federal circuit. Yet defense counsel will be required under the majority opinion to distinguish the "truly clear" cases from the "uncertain" and offer correct advice in the latter with every guilty plea.

These thousands of *habeas corpus* petitions for post-conviction relief under *Padilla* will inevitably clog and jam the wheels of justice. The Sixth Amendment is implicated and courts will carefully review claims that guilty pleas were constitutionally infirm because defense counsel did not advise or did not correctly advise the immigrants of the immigration consequences of their plea bargains and guilty pleas. In turn, Immigration and Customs Enforcement (ICE) will be delayed in initiating removal proceedings until the state and federal courts decide whether the convictions were proper to begin with. The result: more and more aliens with criminal records will avoid deportation.

Arizona's efforts to arrest more aliens will pack the jails but will not lead to the aliens' removal. The state's efforts to round up illegal immigrants with criminal convictions will run right into the Constitution, namely the Sixth Amendment right to the "effective" assistance of counsel. Doubts about whether these immigrants had been misinformed or not informed at all about the immigration consequences of their guilty pleas will tie up the courts for years.

As the controversy over Arizona's new immigration law continues, we can be reminded of Justice Alito's admonition in his concurring opinion in *Padilla* that "nothing is ever simple with immigration law."

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