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Implications of *Padilla v. Kentucky* for the Duties of State Court Criminal Judges and Court Administrators¹

By Steven Weller and John A. Martin

In this article, we discuss an emerging issue that is increasingly challenging state criminal court judges and administrators across the country. For a long time now, federal immigration law has contained a wide range of crimes for which conviction can put a lawful permanent resident

at risk of deportation and affect other important immigration rights.² Yet only recently, a U.S. Supreme Court decision, *Padilla v. Kentucky*, 559 U.S. ____, 130 S. Ct. 1473 (2010), has held that failure of a defendant's attorney to advise him about the potential immigration consequences of pleading guilty to a

deportable criminal offense constitutes ineffective assistance of counsel. Here we discuss the potential implications of that decision for state criminal court judges and court administrators.

As the law is just emerging, the purpose of the article is to raise questions rather than provide definitive

answers. In fact there are as yet no definitive answers to most of the questions we raise. We can, however, speculate based on what we have heard from state court judges and administrators around the country as they struggle to decide how to address these issues.

This article summarizes the *Padilla* case and then addresses the following issues likely to be faced by state criminal court judges and administrators under the *Padilla* ruling: (1) assuring that defendants are advised regarding potential immigration consequences of a guilty plea; (2) providing effective appointed counsel for indigent defendants; (3) providing assistance for unrepresented defendants; and (4) becoming familiar with federal immigration law.

Summary of Facts and Decision of *Padilla v. Kentucky*

Jose Padilla was arrested driving a tractor-trailer truck containing more than 1,000 pounds of marijuana. He was charged in state court with two drug possession misdemeanors, felony drug trafficking, and a tax-related crime. He entered a guilty plea in return for a sentence of five years, as opposed to the 10 years he might have received had he been convicted at trial. Padilla was a native of Honduras who had been living in the United States as a lawful permanent resident for more than 40 years. He had served in the U.S. armed forces honorably in Vietnam. Due to his immigrant status, Padilla asked his counsel before accepting the plea if the conviction carried any adverse immigration consequences and was advised that it did not, given his length of residence in the United

States. That advice was incorrect, as it is clear under federal immigration law that the conviction was for a removable offense. Padilla subsequently sought post-conviction relief to have his plea set aside for ineffective representation of counsel.

The U.S. Supreme Court's decision in *Padilla v. Kentucky*, announced on March 31, 2010, held that advice of counsel regarding deportation risks of a criminal conviction falls within the scope of the Sixth Amendment's right to counsel, so that failure to advise a defendant that a guilty plea might carry a risk of deportation deprives the defendant of effective representation under the Sixth Amendment. The court determined that "deportation is an integral part of the penalty that could be imposed on non-citizen defendants who plead guilty to specified crimes." The court rejected the respondent's argument that deportation is a collateral consequence that does not fall within the defense attorney's scope of representation. Further, the court held that the defective representation went beyond the affirmative misadvice provided to Padilla and applied to failure to advise as well.

The court went on to say that to be eligible for relief, the defendant must also show prejudice, that is, show that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In the context of a guilty plea, this means that there must be a reasonable probability that the defendant would have entered a different plea had he or she known of the risk of deportation. The court remanded the case to the Kentucky Supreme Court to make that determination.

It is clear that *Padilla* will affect the practice of criminal defense attorneys in

cases involving immigrant defendants, particularly since all non-citizens, including lawful permanent residents, face the risk of deportation for a wide range of criminal convictions. It is not clear from the *Padilla* decision, however, how state criminal court judges and managers will be affected by the decision. The potential impact of *Padilla* on state criminal court judges and managers is the subject of this article.

Assuring That Defendants Are Advised Regarding Potential Immigration Consequences of a Guilty Plea

The U.S. Supreme Court was silent on the issue of whether state criminal court judges have a duty to assure that immigrant defendants have been advised of the immigration consequences of a guilty plea, despite the fact that the issue was raised in the oral argument of the case. Still, a growing number of states now require, either through statute, court rule, or plea acceptance form, that judges investigate whether non-citizen criminal defendants have been advised of the potential immigration consequences of a guilty plea.

The following table provides examples of the range of requirements that different states have placed on judges with regard to advising defendants of the immigration consequences of guilty pleas. The examples below are presented in order from the least to the greatest required intervention by the judge. Note that the examples below address all potential immigration consequences of a guilty plea and not just the risk of deportation.

Examples of Advising Defendants of the Immigration Consequences of Guilty Pleas

California	<p>The court shall administer the following advisement on the record to the defendant: “If you are not a citizen, you are hereby 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.”</p>
Washington D.C.	<p>(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime, the court shall administer the following advisement on the record to the defendant: “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.”</p> <p>(b) Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement. If the court fails to advise the defendant as required by subsection (a) and the defendant shows that conviction of the offense to which the defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant’s motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. Absent a record that the court provided the advisement required by subsection (a), the defendant shall be presumed not to have received the required advisement.</p>
Massachusetts	<p>The court shall not accept a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts from any defendant in any criminal proceeding unless the court advises such defendant of the following: “If you are not a citizen of the United States, you are hereby advised that the acceptance by this court of your plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization, pursuant to the laws of the United States.” The court shall advise such defendant during every plea colloquy at which the defendant is proffering a plea of guilty, a plea of nolo contendere, or an admission to sufficient facts. The defendant shall not be required at the time of the plea to disclose to the court his legal status in the United States.</p> <p>If the court fails so to advise the defendant, and he later at any time shows that his plea and conviction may have or has had one of the enumerated consequences, even if the defendant has already been deported from the United States, the court, on the defendant’s motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty, plea of nolo contendere, or admission of sufficient facts, and enter a plea of not guilty. Absent an official record or a contemporaneously written record kept in the court file that the court provided the advisement as prescribed in this section, including but not limited to a docket sheet that accurately reflects that the warning was given as required by this section, the defendant shall be presumed not to have received advisement. An advisement previously or subsequently provided</p>

	<p>the defendant during another plea colloquy shall not satisfy the advisement required by this section, nor shall it be used to presume the defendant understood the plea of guilty, or admission to sufficient facts he seeks to vacate would have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization.</p>
Minnesota	<p>Before accepting a plea in a felony, gross misdemeanor, or misdemeanor case, the judge must ensure that defense counsel has told the defendant and the defendant understands: “If the defendant is not a citizen of the United States, a guilty plea may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.”</p>
Connecticut	<p>(a) The court shall not accept a plea of guilty or nolo contendere from any defendant in any criminal proceeding unless the court first addresses the defendant personally and determines that the defendant fully understands that if the defendant is not a citizen of the United States, conviction of the offense for which the defendant has been charged may have the consequences of deportation or removal from the United States, exclusion from readmission to the United States or denial of naturalization, pursuant to the laws of the United States. If the defendant has not discussed these possible consequences with the defendant’s attorney, the court shall permit the defendant to do so prior to accepting the defendant’s plea.</p> <p>(b) The defendant shall not be required at the time of the plea to disclose the defendant’s legal status in the United States to the court.</p> <p>(c) If the court fails to address the defendant personally and determine that the defendant fully understands the possible consequences of the defendant’s plea, as required in subsection (a) of this section, and the defendant not later than three years after the acceptance of the plea shows that the defendant’s plea and conviction may have one of the enumerated consequences, the court, on the defendant’s motion, shall vacate the judgment, and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.</p>

In addition, some states either have or are considering including language regarding advisement of the possible immigration consequences of a conviction in the plea acceptance form that must be signed by a defendant. The examples we have seen assert that the defendant understands that entering a guilty plea may have immigration consequences and generally track the advisement language contained in the above statutes.

Some states are struggling with efforts to develop appropriate requirements, either by statute or court rule, for judges in advising defendants. For example, one state is considering the following two very different alternatives for a court rule on plea advisements regarding immigration consequences of a guilty plea:

- Alternative A: If the defendant is not a citizen of the United States, ask the defendant’s lawyer and

the defendant whether they have discussed the possible risk of deportation that may be caused by the conviction. If it appears to the court that no such discussion has occurred, the court may not accept the defendant’s plea until the deficiency is corrected.

- Alternative B: Advise the defendant who offers a plea of guilty or nolo contendere that such a plea by a non-citizen may result

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in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement.

Note that alternative A requires that the judge inquire whether the defendant is a non-citizen, while alternative B is given to all defendants and thus does not require the judge to inquire about the defendant's immigration status. Also, alternative A requires the judge to explore what the defendant and his or her attorney have discussed, while alternative B does not.

Even without a specific state requirement or court rule that the judge assure that a defendant has been advised of immigration consequences of a guilty plea before accepting the plea, after *Padilla* it is likely that many judges will feel they have an ethical duty to do so to assure fundamental fairness for immigrant defendants. If a defendant indicates in court that he or she has not been advised of the possible immigration consequences of a guilty plea, the judge may consider refusing to accept the plea until the defendant has been properly advised. Judges may also find that defense attorneys representing immigrants may request time to

investigate the potential immigration consequences before advising a client to enter a guilty plea, in order to meet the requirements for effective representation set forth in *Padilla*.

Providing Effective Appointed Counsel for Indigent Defendants

There may be circumstances where a criminal court judge plays a role in appointing counsel for a defendant. This role may arise in a variety of contexts, including the following:

- The judge may share a responsibility for selecting attorneys to be included in the indigent criminal defense pool;
- The judge may select and appoint private counsel to serve as counsel for indigent criminal defendants, paid by the court; or
- The judge may select and appoint private counsel to represent indigent criminal defendants pro bono in individual cases.

In any of these circumstances, judges in cases involving immigrant defendants may find themselves faced with some of the following questions:

- In what circumstances, if any, should expertise in immigration law be a factor in selecting an

attorney to represent an indigent defendant?

- How can a judge determine an attorney's level of expertise in immigration law?
- In what circumstances, if any, should a judge consider appointing an immigration attorney as co-counsel?

As a corollary to the above, in answering those questions judges must also consider what steps they might or should take to determine if a defendant is an immigrant, if the court does not already have information on the defendant's immigration status.

There may be circumstances where a trial court administrator plays a role in appointing counsel for a defendant. This role may arise in a variety of contexts, including the following:

- The court administrator may be responsible for selecting attorneys to be included in the indigent criminal defense pool;
- The court administrator may be responsible for assuring adequate funding to pay for private counsel appointed by a judge to serve as counsel for indigent criminal defendants; or
- The court administrator may be responsible for creating the list of private counsel willing to represent

indigent criminal defendants pro bono in individual cases.

In any of these circumstances, court administrators may find themselves faced with some of the following questions:

- Should expertise in immigration law be a factor in selecting attorneys for the indigent defense pool?
- How can the court determine an attorney's level of expertise in immigration law?
- Should the court consider paying for an appointed immigration attorney as co-counsel?

Providing Assistance for Unrepresented Defendants

There may be cases where an immigrant offender charged with a misdemeanor may be unrepresented and not have a right to appointed counsel, but conviction of the misdemeanor may still carry a risk of deportation. For example, certain misdemeanors that are considered minor under state law may qualify as crimes involving moral turpitude if an individual is convicted of two crimes not arising out of the same circumstances. These are crimes involving fraud or immoral behavior, such as theft, fraud, perjury, and prostitution.

There are no clear answers as to what the judge should do in cases involving unrepresented immigrant defendants, but some possibilities might include the following:

- Appoint counsel in any case involving a crime that may carry a risk of deportation.

- Appoint counsel in any case where the defendant indicates that he or she has not been advised of the deportation risks of the case.
- Offer the defendant an opportunity to request appointed counsel as part of the advisement that some crimes carry a risk of deportation.
- Take other steps to assist the defendant.

If the judge chooses to appoint counsel, the considerations discussed in the previous section of this article regarding considerations in appointing counsel come into play.

Court administrators, in conjunction with their judges, may want to consider what assistance, if any, they might provide to unrepresented defendants charged with crimes that may carry the risk of deportation. There are obviously no clear answers, as this is uncharted territory, but some possibilities might include the following:

- Flagging cases for the judge involving a crime that may carry a risk of deportation, without regard to defendant's immigration status.
- Flagging cases for the judge involving a crime that may carry a risk of deportation, where the defendant is known to be an immigrant.
- Flagging cases for the judge regardless of the crime, where the defendant is known to be an immigrant.
- Advising the immigrant defendant that some crimes carry a risk of deportation and he or she may want to seek the advice of counsel.

In addition, some courts are investigating the feasibility of providing

self-help materials for non-U.S. citizen criminal defendants on the potential immigration consequences of a criminal conviction. Federal immigration law is exceedingly complex and technical. As a result, it will be a challenge to develop materials that are understandable by an immigrant defendant but still complete enough to provide the defendant notice that he or she may be risking deportation and should seek expert advice.

Becoming Familiar With Federal Immigration Law

State court judges and administrators across the country are divided as to how much they need to be aware of or take into account the ways in which the outcome of a criminal case could affect the defendant's immigration status. It is becoming increasingly difficult, however, to take the position that state court personnel do not need to know anything about federal immigration law, as it is clear that state court decisions can have a major impact on an individual's immigration status and, conversely, federal immigration law can serve to limit or undermine the criminal sanctions imposed on an immigrant defendant.

There is a lengthy list of criminal charges for which conviction carries potential immigration consequences. As noted above, some of those charges may be classified as misdemeanors under state laws and thus on their face may not appear to be important for immigration purposes.

For some crimes, the immigration consequences depend on the length of the potential sentence or the actual sentence imposed. Federal immigration law defines what is considered a

conviction and a sentence for the purpose of determining immigration rights.

- A conviction encompasses any decision that involves a finding or admission of guilt and the imposition of a punishment, including diversion and deferred adjudication.
- A sentence includes a suspended sentence or a sentence of probation if accompanied by a suspended jail sentence.

Thus, for example, a sentence to drug court accompanied by a suspended jail sentence is treated as a conviction of a crime related to controlled substance, with a sentence equal to the amount of the suspended sentence.

The *Padilla* case involved a claim concerning the defendant's lack of knowledge of the effect of a criminal conviction on deportation. A criminal conviction, however, can affect a defendant's immigration status in a variety of ways, including:

- Making the defendant removable;
- Making the defendant inadmissible, including preventing the defendant from reentry if the defendant leaves the country;
- Making the defendant ineligible for cancellation of a removal order; and
- Preventing the defendant from attaining citizenship.

It is not practical for state court judges and administrators to become

experts in all of the details and technical language of federal immigration law. To assure that state criminal laws and sanctions are applied effectively in cases involving immigrant defendants, however, state criminal court judges and administrators may want to know enough about immigration law to be able to: (1) identify criminal cases where a defendant's immigration rights may be affected and (2) identify defendants who may need legal advice on how a plea agreement may impact their immigration status.³

Conclusion

We expect the questions raised in this article to be the subject of considerable debate. Some courts believe that the issue of adequacy of representation should be left to the appellate courts. Other courts believe they need to take an active role to assure that immigrant defendants have received competent legal advice regarding the potential immigration consequences of a conviction. Others want to find a middle ground that seeks to make defendants aware of the risks without having to inquire into a defendant's immigration status or the quality of the advice the defendant received. None of these approaches can be characterized as right or wrong. What is important as the debate unfolds is that policy makers understand how each alternative affects federal regulation of immigration, the effectiveness of state and local justice systems, and fairness to individual defendants and their families.

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NOTES

1. This article was developed under the multi-year Immigration and the State Courts Initiative, conducted by the Center for Public Policy Studies (CPPS) in partnership with the State Justice Institute (SJI). The Immigration and the State Courts Initiative is focused on four strategic priorities:

- increasing understanding and awareness about the impacts of immigration in the state courts;
- developing and testing state and local approaches for assessing and addressing the impact of immigration in the state courts;
- enhancing state and local court capacity to improve court services affected by immigration; and
- building effective national, state, and local partnerships for addressing the impact of immigration in the state courts.

2. For earlier discussions of these issues, see our two previous *Court Manager* articles: "Addressing Immigration in the State Courts," Volume 24, Issue 1 (Spring 2009) and "Immigration and the State Courts Assessment Framework," Volume 25, Issue 2 (Summer 2010).

3. One resource that is presently available is a *Bench Guide for State Trial Court Judges on the Immigration Consequences of State Court Criminal Actions*, prepared by the Center for Public Policy Studies (CPPS) under a grant from the State Justice Institute (SJI). The guide may be downloaded in PDF format either from the SJI website or from the CPPS website <http://www.centerforpublicpolicy.org/>.