***PADILLA V. KENTUCKY*: NOW WHAT?**

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On March 31, 2010, the United States Supreme Court issued a landmark 6th Amendment decision. In ***Padilla v. Kentucky***, the Supreme Court held that non-U.S. citizen criminal defendants have a 6th Amendment right to be advised about potential immigration consequences of guilty pleas. This article gives some background regarding the ineffective assistance of counsel (IAOC) issue in the immigration context, and briefly reviews some of the more recent case-related developments in this area.

The Constitutional Basis For An IAOC Claim

In ***Strickland v. Washington***, 466 U.S. 668 (1984), the U.S. Supreme Court delineated standards and factors courts must apply to determine whether a criminal defendant has received the level of effective assistance of counsel required by the Sixth Amendment. The Court imposed a two-pronged test: first, courts must consider whether trial counsel's performance was deficient; and second, courts must decide, in the event the performance was deficient, whether such deficient performance prejudiced the defendant and therefore deprived him of a fair trial. If a defendant can prove up on both elements, he states an IAOC claim that opens up post-conviction remedies.

Nebraska Developments

The Nebraska Supreme Court has had many occasions to apply the ***Strickland*** test. But in 2002, the Court issued two opinions that have particular relevance to IAOC claims in an immigration context. In ***State v.*** Schneider, 263 Neb. 318 (2002), the Court held that a trial court does not have a constitutional obligation to inform criminal defendants of collateral consequences to their entry of guilty pleas (in that case, the collateral consequence was that the defendant had to register as a sex offender as a result of pleading guilty to two counts of attempted sexual contact with a child). In ***State v. Zarate***, 264 Neb. 690 (2002), the Court held that possible immigration consequences of a guilty plea are "collateral" and that, as a result, a lawyer's failure to advise her client of the potential immigration consequences of a guilty plea could not constitute ineffective assistance of counsel under the ***Strickland*** analysis.

Also in 2002, the Nebraska Legislature enacted LB 82, which is codified, ***inter alia***, at Neb. Rev. Stat. § 29-1819.02. The statue requires courts to advise criminal defendants, prior to

taking guilty pleas, that conviction "may have the consequences of removal from the United States or denial of naturalization pursuant to the laws of the United States" in the event the defendants are not U.S. citizens. There have been two cases applying that statute. The first, ***State v. Rodriguez-Torres***, 275 Neb. 363 (2008), held that a defendant cannot use § 29-1819.02 to vacate a guilty plea that was entered before the effective date of the statute (July 20, 2002) once the defendant has completed the sentence imposed in the criminal proceeding. There is an implication in ***Rodriguez-Torres*** that the same is true where a conviction is final, even if the defendant has not completed the sentence. ***Id.*** at 366-367.

The second case, ***State v. Yos-Chiguil***, 278 Neb. 591 (2009), is more complex. In that case, the defendant entered a guilty plea to second degree murder in 2008. The trial court accepted the guilty plea and sentenced the defendant. After the judgment was final, but before the defendant had completed his sentence, he filed a motion requesting that the court vacate his guilty plea pursuant to Neb. Rev. Stat. § 29-1819.02. He argued that, although the trial court gave him a general advisal regarding immigration consequences at the time he pled guilty, the advisal did not strictly comply with the statutory language. The State argued, pointing to language in ***Rodriguez-Torres***, that since the judgment was final, statutory vacatur under § 29-1819.02 was not available to the defendant. In effect, the State argued that the statutory vacatur procedure is only available to a defendant on direct appeal. The Nebraska Supreme Court held "that there is no language in the statute which would support such a limited construction." As a result, the Court held that the trial court had jurisdiction to consider a statutory vacatur motion raised by a defendant to whom the statute applies (i.e., one whose plea is entered on or after July 20, 2002) and who has not yet completed his sentence. The Court also held that it was not enough for the defendant to assert that the advisal failed to comply strictly with the statutory language. Rather, the defendant must show that there is a more than theoretical chance that he faces adverse immigration consequences. That requirement was fatal to the defendant's claim in this case, the Court held, because he produced no evidence showing that he actually faced adverse immigration consequences; he only argued that the advisal was not in strict compliance with the statute.

The issues the Court did not decide in ***Yos-Chiguil*** are, in some ways, even more intriguing than those it did decide. Some of those questions include the following:

● Is the vacatur procedure under § 29-1819.02 available to defendants who have completed their sentences? The Court took great pains to distinguish the facts in ***Rodriguez-Torres*** from those in ***Yos-Chiguil***. In ***Rodriguez***, the defendant sought to use the statutory vacatur process to allow him to withdraw a guilty plea that had been entered in 1997, long before the effective date of § 29-1819.02. But in ***Yos-Chiguil***, the statute clearly applied to the defendant, whose guilty plea was entered in 2008. The Court suggested this might make a difference in the analysis:

> We . . . need not decide whether the remedy created by [Neb. Rev. Stat. § 29-1819.02] would extend to a defendant who had completed his or her sentence.

Id. at 597.

● If a defendant demonstrates that the adverse immigration consequences he faces are more than merely hypothetical, does a non-complying advisal (i.e., one that does not convey the exact information required by the statute) require vacatur of a guilty plea? In ***Yos-Chiguil***, the trial court's advisal was: "If you are not a citizen of the United States, and if you are convicted of a crime, that conviction could adversely affect your ability to remain or work in this country." Compare that to the statutory language: "If you are not a United States citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of removal from the United States, or denial of naturalization pursuant to the laws of the United States." At least from this immigration lawyer's point of view, those are very different advisals. The trial court's advisal in ***Yos-Chiguil*** mentioned nothing about naturalization. That is a significant omission. But because the Court held that the defendant had not proven that he might actually face adverse immigration consequences, it did not decide whether the trial court's advisal was so different from the statute as to be problematic.

● Finally, the Court stated that, because the issue had never been presented to it, it has never decided whether a defendant such as the one in ***Rodriguez-Torres*** (i.e., a defendant who entered a guilty plea before July 20, 2002) might be able to use a common law remedy to vacate a guilty plea if he had not been advised that the plea could result

> in negative immigration consequences. There are common law remedies, such as writs of error ***coram nobis***, that could provide relief to such a defendant. Generally speaking, the purpose of a writ error ***coram nobis*** is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented. ***State v. Lotter***, 266 Neb. 245, 270 (2003). Although the availability of this remedy has never been applied by a Nebraska court in an immigration context, it has been applied in that context by other state courts. ***See, e.g., Skok v. State***, 371 Md. 52, 760 A.2d 647 (2000).

Joshua Weir, who practices with Stu Dornan's office in Omaha, had success with a vacatur motion in the Douglas County District Court. Josh filed a vacatur motion on behalf of a client who entered a guilty plea in 2007 but was not given the statutory advisal required by § 29-1819.02. Josh argued two legal theories in support of his vacatur motion: (1) ***coram nobis*** and (2) statutory vacatur under § 29-1819.02. In February 2010 Judge Caniglia granted Josh's motion, although he did not specify which of the legal theories he found persuasive. But this ruling should give hope to clients who are seeking a way to vacate a guilty plea due to negative immigration consequences of which they were unaware.

Until late January 2010, the Nebraska Supreme Court had another case on its docket that raised IAOC issues in an immigration context. ***State v. Merheb*** (A09-669) involved a contention by a defendant that he received ineffective assistance of counsel because he was given legally incorrect advice regarding the possible immigration consequences of entering a guilty plea, thus rendering his plea involuntary. He sought to set aside he plea pursuant to Neb. Rev. Stat. §§ 29-3001, et seq. The trial court denied his request, relying on ***State v. Zarate, supra***.

On appeal, the defendant argued that the trial court mis-interpreted the holding in ***Zarate***. The defendant contended that ***Zarate*** only held that failure to advise of potential immigration consequences was collateral where no advice was given one way or the other. However, in ***Merheb***, the defendant alleged he was given affirmative, albeit incorrect, advice and that, as such, ***Zarate*** did not control. There certainly is support for that reading. ("We observe that the circumstances of the instant

case are distinguishable from situations in which a defendant has been offered affirmative misadvice or misstatements regarding the immigration consequences of a guilty plea. Federal and state courts have recognized that counsel's affirmative misadvice or misstatements regarding deportation or other collateral consequences of a plea may, under certain circumstances, constitute ineffective assistance of counsel." ***Zarate, supra.*** at 698-699.)

Unfortunately, the Supreme Court never considered the merits of Merheb's appeal. It dismissed the case as moot due to the fact that the defendant had been released from parole and therefore was no longer in "custody under sentence" for purposes of being eligible for post-conviction relief.

Padilla v. Kentucky

The Supreme Court dropped a bombshell on us as the result of the ***Padilla*** decision rendered on March 31. It is helpful when thinking about the decision to review both the facts and the issues on which the Supreme Court granted certiorari.

Mr. Padilla, the petitioner, a nearly 40-year lawful permanent resident of the United States and Vietnam veteran, was charged with transporting around 1000 pounds of marijuana in a commercial truck. After some skirmishing about whether Padilla had validly consented to a search of the truck, he pled guilty to three state crimes, the most serious of which was a drug trafficking offense, a felony under Kentucky law. Padilla was sentenced to five years' imprisonment followed by five years' probation. Nearly two years after sentencing, Padilla filed a ***pro se*** collateral attack on his conviction, alleging that his trial counsel was ineffective because counsel had failed to investigate and advise him of the potential immigration consequences of his guilty pleas. Padilla alleged that trial counsel had told him that he did not need to worry about any immigration consequences of the guilty pleas, because of the length of time he had been in the U.S. He also alleged that, had he known of the potential immigration consequences of the guilty pleas, he would not have pled guilty.

The advice given to Padilla by his criminal defense counsel was clearly wrong. Not only does a drug trafficking conviction have an effect on a non-citizen's legal status, it has one of the most detrimental effects possible. In fact, a drug trafficking offense such as the one to which Padilla pled guilty is an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). That not only made Padilla deportable, it barred him from qualifying for nearly every type of relief from removal that might

otherwise be available to him. So the affirmative advice offered by criminal defense counsel was about as incorrect as it could be. Nevertheless, a majority of the Kentucky Supreme Court held that, because immigration consequences are "collateral" to criminal proceedings, Padilla could not prevail on his ***Strickland*** challenge. In so ruling, the Kentucky Supreme Court held that there was no constitutional defect in trial counsel's advice on a collateral matter even when that advice was legally incorrect.

The Supreme Court granted certiorari on two questions:

> 1. Whether defense counsel, in order to provide the effective assistance guaranteed by the Sixth Amendment, has a duty to investigate and advise a non-citizen defendant whether the offense to which the defendant is pleading guilty will result in removal.
>
> 2. Whether petitioner's counsel provided ineffective assistance of counsel by affirmatively misadvising petition concerning the likelihood of removal upon the entry of his guilty plea.

Justice Stevens wrote the majority opinion for the Court, in which Justices Kennedy, Ginsburg, Breyer and Sotomayor joined. Justices Alito and Roberts concurred in the judgment, while Justices Scalia and Thomas dissented.

The Court held that the 6th Amendment requires criminal defense counsel to inform his or her non-U.S. citizen client whether or not a contemplated guilty plea carries a risk of deportation. The Court also held that constitutionally competent counsel would have advised Padilla that his drug conviction made him subject to automatic deportation. Finally, the Court remanded the case to the Kentucky Supreme Court so it could determine whether Padilla could demonstrate prejudice under ***Stickland's*** second prong.

In reaching its holding, the Court made several points:

> ● The Court held that it need not determine whether or not deportation consequences are "collateral," since it found that deportation is an integral part of the **penalty** imposed on non-citizen defendants. This is so, the Court held, because of various amendments to the Immigration and Nationality Act since the early 1990's that have restricted nearly every form of relief from deportation that was once available to non-citizens facing removal from the U.S. So it is now beyond dispute that immigration consequences are

not "collateral" consequences and the rule to the contrary articulated by, ***inter alia***, the Nebraska Supreme Court in cases such as ***Zarate, supra.***, is no longer good law.

- Second, the majority rejected a rule, which the concurrence would have adopted, that would hold only affirmative mis-advice can serve as the basis for an ineffective assistance of counsel claim. The Court reasoned that such a rule would "give counsel an incentive to remain silent on matters of great importance, even when answers are readily available," and "would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available."

- Third, the Court dismissed any concerns that its new rule would open the floodgates to collateral attacks of convictions in which defendants were not advised of potential immigration consequences of guilty pleas. The Court wrote that it had confronted a similar argument in ***Strickland*** itself but "[a] flood did not follow in that decision's wake." In addition, the Court pointed out, in order to prevail on ***Strickland's*** prejudice prong, a defendant must convince a court that a decision to reject the plea bargain would have been rational under the circumstances, not an easy hurdle to clear. Finally, the Court wrote, "It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty."

This last point is significant for at least two reasons. First, as the Court later expands upon in the opinion, the "professional norms" it refers to are likely to be the template for counsel in deciding what type of immigration-related advice they will need to give to their non-citizen clients contemplating guilty pleas. Second, the Court hints that its opinion applies retroactively.

How Detailed Must The Immigration Advice Be?

The Court adopted a sliding scale. At a minimum, counsel must advise his or her client that a pending criminal charge may carry a risk of adverse immigration consequences. However, in

"obvious" cases such as Padilla's, counsel must advise the client that a guilty plea would make him deportable. This, of course, begs the question of how detailed immigration advice must be in those cases that fall between "difficult" and "easy." How is counsel to figure this out?

Part of the answer comes from the Court's discussion and review of "prevailing norms of practice." The Court states that such norms are guides to determining whether counsel's advice is competent in any given case. And, the Court points out, the weight of these norms is to advise the client "regarding the risk of deportation," which goes much farther than simply advising a client that there may be adverse immigration consequences to a guilty plea. This interpretation is bolstered by the concurrence, whose rule would have only required counsel to advise a client that there could be adverse immigration consequences to a guilty plea, something akin to the advisal required to be given by courts under Neb. Rev. Stat. § 29-1819.02. The concurrence laments that the majority goes too far in what it requires. That lament signals that what the majority requires is something more than just "you might be in trouble with Immigration if you plead guilty."

A look at some of the "professional norms" mentioned by the Court further supports this reading. For example, the ABA Standards for Criminal Justice, Pleas of Guilty, § 14-3.2(f), states:

> To the extent possible, defense counsel should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea.

The commentary to this section is even more explicit in its exhortation:

> For example, depending on the jurisdiction, it may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of a conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.

What does this mean in practice? The jury is still out, but I would recommend that defense counsel needs to know at least the following and advise the client accordingly:

- The immigration status of the client. This is information that should be obtained at the initial interview. And it is not be enough to know simply "citizen" vs. "non-citizen." To the extent possible, counsel should try to find out precisely what the immigration status of the client.

- The potential inadmissibility consequences of the contemplated plea.

- The potential deportability consequences of the contemplated plea.

- Whether or not the crime with which the client is charged is an aggravated felony.

It would also be the best practice to know the following, and such knowledge may even be required under ***Padilla***:

- Whether or not the conviction would result in mandatory detention of the client by Immigration and Customs Enforcement (ICE).

- Whether or not the conviction would preclude the client from demonstrating "good moral character."

What Do You Do Now?

One of the inescapable results of ***Padilla*** is that criminal defense counsel representing non-citizens must have some working knowledge of immigration law. Since March 31, no one can contend that possible immigration consequences to guilty pleas are "collateral" to criminal proceedings.

There are many resources currently available to help defense counsel pierce this new area of law, and inevitably more will be developed in the wake of the ***Padilla*** decision. But here are a few suggestions as to resources:

- In 2008, I published ***The Nebraska Criminal Law Practitioner's Guide To Representing Non-Citizens In State Court Proceedings***. I updated the Guide substantially in 2010 after ***Padilla*** was decided. In the Guide, I set forth

some general information about immigration law and proceedings. But the bulk of my Guide is devoted to analyzing certain immigration consequences of crimes in Nebraska. The appendix of my Guide consists of my individual analyses of selected Nebraska criminal statutes. For example, if you would like my thoughts on the potential immigration consequences of a non-citizen being convicted of third degree assault under Neb. Rev. Stat. § 28-310, you would turn to my analysis of that statute in the appendix of the Guide. There, you will find my analysis of how a conviction under this statute would bear on the immigration consequences of inadmissibility, deportability, whether the offense is an aggravated felony, whether a conviction under the statute would cause the client problems of demonstrating "good moral character," whether or not the crime is a "particularly serious crime," and whether or not conviction would result in mandatory detention of the client by Immigration and Customs Enforcement (ICE). This Guide, which costs $75, can be ordered by contacting Marcy Tintera at the Law College, either by e-mailing mtintera@unlnotes.unl.edu, or by calling her at (402) 472-1258.

- For those of you who practice in federal court, I would suggest getting a copy of ***Immigration Consequences of Criminal Activity***, by Mary E. Kramer. Ms. Kramer is an immigration and criminal defense attorney practicing in Miami and has worked and written in this area for years. I have heard her present at national conferences and she knows her stuff. Her book is published by the American Immigration Lawyers Association (AILA), and was last updated in 2009 (4th edition). The current price of the book is $149 for non-AILA members and $99 for AILA members.
- Norton Tooby is a California practitioner who has also practiced and written extensively in this area for a number of years. He has several publications, some oriented to California law and some oriented to federal law. You can access those publication on his web site, http://criminalandimmigrationlaw.com/~crimwcom/index.php

- Finally, there are a number of organizations who have developed practice advisories on the ***Padilla*** decision and who generally have resources available to help criminal defense lawyers in this area. Some of those organizations are:

Immigrant Defense Project
www.immigrantdefenseproject.org

Immigrant Legal Resource Center
www.ilrc.org

National Immigration Project of the National Lawyers Guild
www.nationalimmigrationproject.org

Where Do We Go From Here?

That is an excellent question. One of the immediate issues that will present itself is whether or not the ***Padilla*** decision applies retroactively; that is, whether or not clients whose defense counsel did not advise them of potential immigration consequences of guilty pleas can file post-conviction claims asserting a 6th Amendment violation. My tentative answer is that ***Padilla*** does indeed apply retroactively.

First, the Court suggests as much when it says "It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains." That phraseology suggests to me that, although there might not be a "significant" effect on already-obtained convictions, there will be some effect. Second, if one looks at the cases of ***Teague v. Lane***, 489 U.S. 288 (1989) and ***Williams v. Taylor***, 529 U.S. 362 (2000), there is an excellent argument that the 6th Amendment right to effective counsel was "well-settled" under ***Strickland*** and that ***Padilla*** simply represents the latest manifestation of that well-settled rule. If that analysis prevails, it is difficult to see why ***Padilla*** would not apply retroactively.

Finally, I hope one place we go from here is to have both prosecutors and criminal defense counsel talk about potential immigration consequences during plea negotiations. Although ***Padilla*** framed this issue as a 6th Amendment issue, it strikes me that prosecutors ought to be thinking about this as well. Consider this language from ***Padilla***:

> [I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal

> episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. 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 reduces 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.

Although I have never practiced criminal law, I am told by a number of criminal defense lawyers that, when they inform prosecutors of potential immigration consequences of a charge that might be ameliorated or even avoided by an amendment of those charges, prosecutors are often willing to amend the charges. That would be one salutary effect of the ***Padilla*** case.

The End?

There will undoubtedly be a number of developments related to the ***Padilla*** decision in the upcoming months. I urge you to keep abreast of those developments by staying connected to one or more of the resources mentioned in this article. Keep up the good work.