Implications of *Padilla v. Kentucky* for California Defense Counsel

By Norton Tooby[1]

"[A]ccurate legal advice for noncitizens accused
of crimes has never been more important."
Padilla v. Kentucky (USSC March 31, 2010).

Introduction

On March 31, 2010, the United States Supreme Court held, 7-2, that because deportation is an integral part of the penalty that may be imposed on defendants who plead guilty to specified crimes, defense counsel must accurately inform a defendant when his plea carries a risk of deportation. Justice Stevens, writing for the five-member majority, held that defense counsel's failure to do so constitutes constitutionally deficient performance in violation of the right to effective assistance of counsel protected by the Sixth Amendment to the United States Constitution. The question whether Padilla was entitled to reversal of the conviction depends on whether he has been prejudiced, i.e., whether a decision to reject the plea bargain would have been rational under the circumstances, a matter remanded for decision by the Kentucky courts in the first instance. *Padilla v. Kentucky*, ___ U.S. ___, 2010 WL 1222274 (2010).

This article will discuss the implications of this decision for California criminal defense counsel. There is one important issue the Supreme Court did *not* discuss: the fact that immigration consequences can derail the most carefully constructed purely criminal disposition. The defendant may be eligible for, and benefit from, any number of rehabilitative programs, such as alcohol or drug rehabilitation programs, probation or parole supervision, job training programs, boot camp, hospital treatment programs, out-patient programs, English as a Second Language courses, school of various kinds, work and school furlough, half-way houses, community correctional centers, other forms of minimal supervision custody arrangements, home detention or electronic monitoring programs, and the like. An immigration hold, however, can derail them because the defendant cannot get out of custody to participate in them. Criminal counsel must anticipate this problem and try to solve it in advance by obtaining a disposition that does not trigger deportation. We therefore need to research the immigration consequences of a

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disposition, not only to protect the client's immigration status, but also in order to do our core job of minimizing the crime, and minimizing the time.

Impact on Existing California Law

Padilla did not work much change on the California law on this subject did not change much, because in California, since 1987, the First District Court of Appeals has held it is ineffective assistance of counsel to fail to investigate the federal immigration consequences of a disposition and to *fail to advise* a foreign national defendant of them before plea. *People v. Soriano*, 194 Cal.App.3d 1470, 240 Cal.Rptr. 328 (1987)(ineffective assistance of counsel for failure to investigate the immigration consequences and advise a noncitizen of them prior to plea). Our Supreme Court has previously held it to be ineffective assistance of counsel to give affirmative misadvice to a noncitizen concerning the immigration consequences of a plea. *In re Resendiz*, 25 Cal.4th 230, 105 Cal.Rptr. 2d 431 (2001). The Sixth District Court of Appeals has also held it to be ineffective assistance of counsel to fail to seek a non-deportable plea to a greater offense. *People v. Bautista*, 115 Cal.App.4th 229, 8 Cal.Rptr.3d 862 (2004). And the court of appeal has also held it to be ineffective assistance to fail to request a non-deportable sentence. *People v. Barocio*, 216 Cal.App.3d 99 (1989). The holding of *Padilla*, therefore, does not significantly change California law concerning effective assistance to noncitizen defendants in advising them of (helping them avoid) disastrous immigration consequences of criminal convictions.

Padilla's major effect on California law is that the California Supreme Court must now recognize that a failure to advise a defendant can constitute ineffective assistance of counsel, an issue on which it was as yet unpersuaded in 2001 when it decided *Resendiz*.[2]

The United States Supreme Court's decision in *Padilla* underscores our responsibility to try to protect our noncitizen clients in these ways, and will hopefully increase the attention paid to existing California law on the subject and the resources devoted to helping defendants avoid immigration damage. In addition, it also emphasizes that a number of easy answers – without actually learning the specific immigration consequences for the client -- do not discharge counsel's obligation:

(1) It is not good enough just to say deportation "might" happen, and refer the client to an immigration lawyer. The United States Supreme Court held that when the deportation consequences are clear, defense counsel must themselves give the specific advice directly to the client.

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[2] "We are not persuaded that the Sixth Amendment imposes a blanket obligation on defense counsel, when advising pleading defendants, to investigate immigration consequences or research immigration law. In any event, petitioner in this case does not allege a mere failure to investigate, so the question is not squarely presented." (*Id.* at 249-250.)

The example of when these consequences are clear was a controlled substances conviction. The Supreme Court held that defense counsel must advise the defendant of the removal consequences of any conviction relating to a controlled substance, because "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." (*Id.* at ___.)[3] The court continued: "Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." (*Ibid.*)[4]

The controlled substance ground of deportation is similar in structure and ease of interpretation to most conviction-based grounds of deportation. Of the 52 different conviction-based grounds of deportation, most are no more complex or difficult to decipher. See N. TOOBY & J. ROLLIN, CRIMINAL DEFENSE OF IMMIGRANTS, APPENDIX A, GROUNDS OF DEPORTATION (2007). There are several which are arguably more difficult to interpret, such as the crime of moral turpitude ground, INA § 237(a)(2)(A) (i)(I), 8 U.S.C. § 1227(a)(2)(A)(i)(I), the aggravated felony miscellaneous firearms conviction ground, INA § 101(a)(43)(E), 8 U.S.C. § 1101(a)(43)(E), and the aggravated felony crime of violence ground. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F). Even those grounds, however, have been elaborated by practice aids that make it relatively easy to tell when a conviction falls within the ground of removal. Once defense counsel has assumed the obligation to research the actual immigration effects of a conviction, it is an easy matter to inform the defendant. If the answer is clear, so is the advice. If the answer is obscure, the attorney merely needs to communicate that to the client as well. If the client wants more information, it is easily available from more research or expert consultation by telephone or in person.

The Supreme Court also recognized that it may sometimes be difficult to determine the immigration consequences of a conviction:

> 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. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios

[3] See 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 ..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable").

[4] The court also stated: " Padilla's crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i)." (*Id.* at ___, n.1.)

> posited by JUSTICE ALITO), 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. FN10 But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

(*Id.* at ___.) In a footnote, the court commented: "Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel's advice." (*Id.* at ___, n.10.)

(2) In addition, the Supreme Court suggests that even correct advice is not necessarily enough. Counsel should attempt to avoid the adverse consequences:

Moreover, the court wrote with approval of including the avoidance of immigration consequences in the plea bargaining process:

> Finally, informed 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 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.

(*Id.* at ___.) This strongly implies that defense counsel would not stop at merely giving advice concerning the adverse immigration consequences of a plea: counsel must go further, and try to avoid those consequences, "as by avoiding a conviction for an offense that automatically triggers the removal consequence." (*Ibid.*)

A failure to do this may thus constitute a "failure to defend" variation of immigration-related ineffective assistance of counsel. See, e.g., *People v. Bautista*, 115 Cal.App.4th 229, 8 Cal.Rptr.3d 862 (2004).

In addition, this language should be useful in countering the bogus argument offered by prosecutors in opposition to negotiating an immigration-harmless disposition: that it is somehow an equal protection violation of the rights of U.S. citizen defendants to do so.

Required Advice

In summary, the Supreme Court held that defense counsel must advise their clients on a number of important immigration consequences of a conviction: whether the conviction makes the client eligible for deportation, removal, inadmissibility, exclusion, or relief from removal. In addition, defense counsel must describe the degree of risk: whether removal is automatic, virtually inevitable, or merely possible. The concurring opinion's suggestion that all counsel need do is inform the defendant there is some risk of removal or other, and suggest that the client call an immigration lawyer, was rejected by the majority opinion. Defense counsel must learn of the nature and degree of these risks, and inform the client prior to plea, to render effective assistance of counsel. Defense counsel must attempt to protect the client against these risks, by avoiding if possible a conviction that subjects the client to possible removal, or disqualifies the client from eligibility for relief from removal. The attorney can try to protect the client against these risks by engaging in plea bargaining with these goals in view, or by taking a case to trial in an effort to avoid immigration consequences when they are sufficiently great to justify the risk – in the client's eyes – of penal consequences.

(1) *Risk of Deportation*. The Supreme Court concluded: "The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." (*Id.* at ___.) The "risk of deportation" means not only that counsel must inform the client that there exists some risk or other of deportation, but must inform the client of the *degree* of the risk of deportation. The Supreme Court repeatedly referred to different levels of risk. Sometimes, it referred to situations in which deportation is "virtually invitable."[5] Other times, it referred to "automatic deportation." (*Id.* at ___.)

(2) *Automatic Deportation*. The Court held that "constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation." (*Id.* at ___.)

(3) *Removal*. The Court repeatedly referred both to deportation and removal. (E.g., *id.* at ___ ["In its view, neither counsel's failure to advise petitioner about the possibility of removal, nor counsel's incorrect advice, could provide a basis for relief."]; ___ ["Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses."].) The Court specifically referred to the change in the name of deportation proceedings from "deportation" to "removal," in which removal proceedings now include both the

[5] "The 'drastic measure' of deportation or removal, *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes." (*Id.* at ___.)

former deportation proceedings, and former inadmissibility or exclusion proceedings.[6] Inadmissibility also results in "removal," so counsel must therefore inform the client of the level of risk of inadmissibility or exclusion, as well as deportation.

(4) *Eligibility for and Bars to Relief*. The Court has previously recognized, and repeated in *Padilla*, its view of the importance of reaching a disposition in a criminal case that allowed the noncitizen to remain eligible to apply in immigration court for a waiver of deportation or other relief from removal:

> Likewise, we have recognized that “preserving the possibility of” discretionary relief from deportation under § 212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, “would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.” *St. Cyr,* 533 U.S., at 323. We expected that counsel who were unaware of the discretionary relief measures would “follo[w] the advice of numerous practice guides” to advise themselves of the importance of this particular form of discretionary relief. *Ibid.,* n. 50.

(*Id.* at ___.) Defense counsel must advise the client of the risk that the disposition of the criminal case will disqualify the client from eligibility to apply for relief from removal.

(5) *Deportability*. Even if the plea does not make deportation "virtually invitable,"[7] the fact that the client is subject to deportation is a drastic immigration consequences of which counsel must make the client aware. This is made clear by the Court's reference to the ground of deportability based upon a controlled substances conviction. The Supreme Court held that defense counsel must advise the defendant of the removal consequences of any conviction relating to a controlled substance, because "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla's conviction." (*Id.* at ___.)[8] The court continued: "Padilla's counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses." (*Ibid.*) This ground of deportation, like all conviction-based grounds of deportation except aggravated

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[6] "The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term 'removal' rather than 'deportation.' See *Calcano-Martinez v. INS,* 533 U.S. 348, 350, n. 1, 121 S.Ct. 2268, 150 L.Ed.2d 392 (2001)." (*Id.* at ___, n.6.)

[7] "The 'drastic measure' of deportation or removal, *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes." (*Id.* at ___.)

[8] See 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 ..., other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable”).

felonies, makes the client "eligible for deportation" but does *not* disqualify him or her from eligibility for discretionary cancellation of removal. INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). The Supreme Court, in essence, held that defense counsel must inform the client when a plea will make him or her deportable, even if it does not disqualify the client from eligibility for discretionary relief from removal, as in the case of a simple controlled substances conviction, even if it is not a drug-trafficking conviction. Padilla himself was convicted of possession of marijuana, which made him eligible for removal on the basis of a controlled substances conviction, but did not disqualify him from eligibility for discretionary relief from removal. Counsel for years have been expected to do this under existing standards of practice. (*Id.* at ___.) All it takes is a phone call to an immigration lawyer experienced in criminal issues, and to read the text of the statute.

Basic Procedure

The basic approach to protecting clients' immigration status is quite simple:

A. **Investigate.** Obtain exact information on the client's immigration situation. Use a form like the Intake Form, attached. Get client's complete criminal history, including elements of each offense of conviction and details of each sentence imposed. Once the information is obtained, counsel can develop a strategy for the defense of a criminal case involving a noncitizen defendant by creating a "chronology" of the critical immigration and criminal history dates on which important events occurred. The importance of preparing this chronology cannot be overstated. It can be kept up to date with each change in the law, and will provide an important tool for the ongoing development of the strategy.

B. **Consult an immigration expert** to determine realistic criminal goals that can minimize immigration consequences. This expert can be:

1. An in-house immigration expert.

2. A consultation service such as that provided by the Immigrant Legal Resource Center. See IV, Resources, below.

3. A specific immigration lawyer experienced in criminal immigration issues.

Continue to consult with an immigration attorney since additional immigration questions frequently arise during the course of the case.

C. **Balance Immigration and Criminal Goals**. Determine with the client how important the immigration goals are, as opposed to traditional criminal defense goals, if they conflict.

D. **Formulate a strategy** that balances the adverse immigration consequences with the direct penal consequences of the criminal case, in light of the desires of the client. Working together, defense counsel and

the immigration expert can go over the chronology, analyze the client's immigration situation at each point in time, discover the immigration damage caused by each significant criminal event, discover a solution to each problem, and evaluate the chances of success in obtaining each solution.

For a quick checklist of immigration consequences of specific offenses, go to www.ilrc.org, choose "Info on Immigration Law," choose Criminal and Immigration Law, and download the *California Quick Reference Guide to California Convictions*, organized by Penal Code section. For more in-depth information, see K. Brady, DEFENDING IMMIGRANTS (2009), or N. Tooby & J. Rollin, SAFE HAVENS: HOW TO IDENTIFY AND CONSTRUCT NON-DEPORTABLE CONVICTIONS (2005).

E. **Try to Obtain An Immigration-Safe Disposition.** Use standard criminal defense techniques to try to achieve the client's goals.

R. **Final Advice to Client**. At the conclusion of the case, we should inform the client of the immigration consequences of the final disposition and arm him or her with information on how to confront immigration authorities.

This same approach is applicable no matter what procedural stage the criminal case has reached: the beginning of the case, during plea bargaining, during litigation, during sentencing, during probation violation proceedings, during juvenile proceedings, as well as during appeal and other post-conviction proceedings.

Relationship of State Criminal Law to Federal Immigration Law

Immigration laws governing the deportation process are federal in nature, passed by Congress. Most aspects of immigration law are uniform national federal rules. See N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS § 16.35 (2007). The immigration authorities are in general not governed by the idiosyncracies of the laws of the 50 states. This can lead to serious problems. For example, if a state court withholds a judgment of conviction, so that no conviction exists under state law, defense counsel may assure a noncitizen defendant that no conviction exists. This may be true under state law, but it is false under federal immigration law.[9] Federal law may also clash with state law concerning the circumstances in which a conviction is later erased. Many states have state rehabilitative statutes that allow a defendant to withdraw a plea and have the charge dismissed as a reward for successful completion of probation. Under state law, the defendant no longer has a conviction. Under federal immigration law, however, the conviction still exists, and may trigger deportation.[10] Defense counsel must become aware of the federal immigration law on these subjects, and not mislead the client by advice concerning inapplicable state laws.

[9] *Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998).
[10] *Matter of Pickering*, 23 I. & N. Dec. 621 (BIA 2003).

State law becomes important, however, when analyzing whether a state conviction triggers a ground of removal. The law of the state in which the conviction was prosecuted must be considered in determining (A) the elements of the offense, (B) whether the offense is considered a felony or a misdemeanor, (C) the sentence imposed, and (D) the maximum sentence. See CRIMINAL DEFENSE OF IMMIGRANTS § 16.35.

Resources

A. Seminars

June 12, 2010	4-Hour Berkeley Seminar on Post-Conviction Relief for Immigrants After *Padilla* from 9:00 a.m.-1:00 p.m.
October 16, 2010	Day-Long San Francisco Seminar for Criminal Lawyers, presented by Immigrant Legal Resource Center and Law Offices of Norton Tooby
October 30, 2010	Day-Long Los Angeles Seminar for Criminal Lawyers, presented by Immigrant Legal Resource Center and Law Offices of Norton Tooby

B. Practice Manuals

Marks, Mehr, & Tooby, *Representing the Noncitizen Criminal Defendant*, Chap. 52, C.E.B., CALIFORNIA CRIMINAL LAW PROCEDURE AND PRACTICE (2009).

K. Brady, et al., DEFENDING IMMIGRANTS IN THE NINTH CIRCUIT: IMPACT OF CRIMES UNDER CALIFORNIA AND OTHER STATE LAWS (2009).

N. Tooby, CALIFORNIA POST-CONVICTION RELIEF FOR IMMIGRANTS (2d ed. 2009).

N. Tooby, TOOBY'S GUIDE TO CRIMINAL IMMIGRATION LAW (2008) (download available free at www.NortonTooby.com).

N. Tooby & J. Rollin, CRIMINAL DEFENSE OF IMMIGRANTS (2007)

C. Web Sites

www.ilrc.org
www.NortonTooby.com
www.DefendingImmigrants.org

D. Consultation

Attorney of the Day Immigrant Legal Resource Center (statewide) www.ilrc.org/aod (415) 255-9499 x 789