



By Jeffrey P. Lewis

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# Advising a Client of the Potential for Deportation

Under case law, the majority view had been that an attorney who advised a legal alien client to plead guilty but failed to warn that the conviction could prompt deportation was not constitutionally ineffective. See, e.g., *United States v. Del Rosario*, 902 F.2d 55 (D.C.Cir. 1990) (federal law) and *Commonwealth v. Frometa*, 555 A.2d 92 (Pa. 1989) (state law). This is relevant here because ineffectiveness of counsel equates to breach of the duty of care for purposes of a client's malpractice claim, which, under the current case law, is likely to be limited to a claim sounding in contract for disgorgement of fees. In *Rogers v. Williams*, 616 A.2d 1031 (Pa.Super. 1992), for example, the Superior Court rejects a legal malpractice claim based upon the lawyer's alleged failure to give such advice because such failure does not constitute ineffective assistance of counsel under the Sixth Amendment right to counsel. But recently the U.S. Supreme Court has upended this area of Sixth Amendment law.

In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), Jose Padilla, a Honduran native and a lawful permanent resident of the United States, pled guilty in Kentucky to transportation of a large amount of marijuana. The resulting conviction qualified as a mandatory deportable offense under federal law. Padilla alleged that his counsel had never warned him about that fact before he decided to plead guilty. Moreover, he contended that his lawyer had actually told him just the opposite (that he did not have to worry about his immigration status) and that he had relied upon this erroneous advice. He argued that his counsel's conduct in this regard constitutes ineffectiveness of counsel and is a basis for him to withdraw his guilty plea.

The Supreme Court of Kentucky denied Padilla's petition for post-conviction relief, without benefit of an evidentiary hearing, based upon the premise that deportation presents an issue that is collateral to the criminal prosecution; that is, it is one of "those matters not within the sentencing authority of the state trial court." As such, the court reasoned that criminal defense counsel owes no constitutional duty to advise his or her client of this consequence of the guilty plea, just as counsel has no duty to advise of any other collateral consequence such as loss of

voting privileges. In its view, advice concerning collateral consequences is "outside the scope of representation required by the Sixth Amendment" and therefore failure to advise or to misadvise on such issues "is not cognizable as a claim for ineffective assistance of counsel."

In one of his last opinions before retiring, Justice John Paul Stevens wrote for the majority of the court, which voted to reverse and remand, holding that counsel must advise that the conviction may have adverse immigration consequences when it is not clear under federal law whether there will be such consequences. The court further holds that when it is clear under federal law that there will be consequences, counsel must advise of those consequences.

The majority opinion emphasizes the proposition that immigration reforms over the years "have greatly expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation." Before 1996, a sentencing judge, regardless of whether in state or federal court, could make a recommendation, called a judicial recommendation against deportation (JRAD), which had a binding effect on the federal government. Therefore a sentencing judge effectively had control of whether deportation would occur. As the court notes, however, "[u]nder contemporary law, if a noncitizen has committed a removable offense ... his removal is practically inevitable but for the possible exercise of limited equitable discretion vested in the Attorney General. ..." These changes in the immigration law, in the majority's view, "have dramatically raised the stakes of a noncitizen's criminal conviction." This increases the importance of accurate legal advice because "as a matter of federal law, deportation is an integral part — indeed, sometimes the most important part — of the penalty" that a guilty plea will impose. The majority refused to make the "direct" or "collateral" distinction "because of the unique nature of deportation" and because under the present state of immigration law, it has become "a consequence of a criminal conviction. ..."

The court rejected the argument that only affirmative misadvice, not the failure to advise, with respect to deportation should be deemed ineffective. In this context, the court would not distinguish "between an act of commission and an act of omission" because otherwise it would incentivize counsel to remain silent on this issue and it would deny "the most rudimentary advice on deportation even when it is readily available."

Justice Samuel Alito wrote an opinion, which Chief Justice John Roberts joined, concurring in the judgment while disagreeing with the majority holding that "a criminal defense attorney must provide advice in this specialized area in those cases in which the law is 'succinct and

straightforward' — but not, perhaps, in other situations." Alito considers this a "vague, halfway test," which "will lead to much confusion and needless litigation." Instead, in his view, counsel must refrain from giving incorrect advice and should advise the alien client that the criminal conviction may have adverse immigration consequences and that consideration should be given to obtaining advice from an immigration lawyer.

The concurring opinion gives several examples of where the consequences of a guilty plea are unclear or uncertain, even to those who have expertise in immigration law. Part of the problem is that the Immigration and Nationality Act, the applicable law, does not specify which crimes will affect immigration but rather states broad categories of crimes ("such as crimes involving moral turpitude or aggravated felonies"), which can evade precise definition. According to the concurring opinion, it's sometimes not even clear "whether a client is an alien" or, if an alien, is not removable but is excludable (meaning that return to the United States can be blocked should he or she leave).

Justice Antonin Scalia wrote a dissenting opinion, in which Justice Clarence Thomas joined, which would not extend Sixth Amendment protection for failure to give sound advice about the conviction's collateral consequences, even with respect to misstatements. The dissent agrees with the concurring opinion that statutory provisions such as a requirement that the defendant must be told on the record at the guilty plea colloquy that the conviction may render him removable or excludable would provide a better remedy.

Criminal defense lawyers now have a new area of concern: failure to adhere to the requirement to give the "Padilla warning," an expression coined by the dissent.